



2002-2003 LAT

Decisions

(released January 1, 2002 to March 31, 2003)

**LICENCE
APPEAL
TRIBUNAL**

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LICENCE APPEAL TRIBUNAL

2002-2003 LAT DECISIONS
(released January 1, 2002 to March 31, 2003)

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- Contains full decisions and reasons given

Made available pursuant to the

Licence Appeal Tribunal Act, 1999,

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

and the

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

INDICES

CEMETERIES ACT

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

SECTION CODES:

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

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

APPEAL/DECISION CODES

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

Type	Code	Description
MEDICAL	ADJ	Adjournment
	ALCL	Alcohol
	ANEU	Aneurysm
	CARD	Cardiac
	DOWN	Downgrade of Licence
	DRUG	Drugs/Medication
	EPIL	Epileptic
	MDIS	Mental Disorder
	MINF	Myocardial Infection
	MTR	Motor Dysfunction
	NOMC	No Medical Condition
	PERC	Perceptual Problems
	SEIZ	Seizure
	SIGHT	Sight
	TUM	Tumor

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

LICENCE APPEAL TRIBUNAL

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2002-2003 LAT DECISIONS

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

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

CEMETERIES ACT

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/RULING	FINAL OUTCOME
CA	<i>Ontario Historical Society</i>	Close a Cemetery	March 22, 2002	Order	
CA	<i>Ontario Historical Society</i>	Close a Cemetery	April 8, 2002	Order	
CA	<i>Ontario Historical Society</i>	Close a Cemetery	March 5, 2003		Successful

CHILD AND FAMILY SERVICES ACT

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/RULING	FINAL OUTCOME
CFSA	<i>BFC Residential Services</i>	Refusal to Renew Licence	November 12, 2002	Order	
CFSA	<i>Warren Family Homes Inc.</i>	Refusal to Renew Licence	November 25, 2002	Order	

COLLECTION AGENCIES ACT

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/RULING	FINAL OUTCOME
CAA	ROOTENBERG	Proposal	August 28, 2002	Order	Unsuccessful

DAY NURSERIES ACT

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
DNA	<i>Rainbow Day Care Centre</i>	Notices of Intention and Direction	August 1, 2002	Order	
DNA	<i>Rainbow Day Care Centre</i>	Notices of Intention and Direction	August 21, 2002	Order	

FUNERAL DIRECTORS AND ESTABLISHMENTS ACT

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
FDEA	<i>BRIDGES</i>	Complaint	May 13, 2002	Order	
FDEA	<i>GIBSON</i>	Complaint	February 17, 2002		Unsuccessful
FDEA	<i>McGINLEY</i>	Complaint	September 20, 2002	Order	
FDEA	<i>Scenna Funeral Homes Ltd.</i>	Revoke Registration	May 15, 2002	Dismissal Order	Unsuccessful
FDEA	<i>SCENNA, John M.</i>	Suspend; Refuse to Renew	May 15, 2002	Dismissal Order	Unsuccessful
FDEA	<i>THRASHER</i>	Complaint	March 27, 2002		Unsuccessful

HIGHWAY TRAFFIC ACT

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

TYPE OF APPEAL	APPLICANT(S) NAME Or CODE	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
ADLS	<i>J.M.M.</i>	Dismiss	January 8, 2002	Dismissal Order	Unsuccessful
ADLS	<i>899 – NOMC</i>	No Medical Condition	January 8, 2002		Unsuccessful
ADLS	<i>910- NOMC</i>	No Medical Condition	January 11, 2002		Unsuccessful
ADLS	<i>0920 NOMC</i>	No Medical Condition	January 25, 2002		Unsuccessful
ADLS	<i>0939 NOMC</i>	No Medical Condition	January 28, 2002		Unsuccessful
ADLS	<i>0932 NOMC</i>	No Medical Condition	February 4, 2002		Unsuccessful
ADLS	<i>0948 ANX</i>	Anxiety Attack	February 22, 2002		Unsuccessful
ADLS	<i>1008 NOMC</i>	No Medical Condition	March 15, 2002		Unsuccessful
ADLS	<i>1033 NOMC</i>	No Medical Condition	March 25, 2002		Unsuccessful
ADLS	<i>1058 NOMC</i>	No Medical Condition	May 15, 2002		Unsuccessful
ADLS	<i>1079 RESP</i>	Respiratory Problem	May 8, 2002		Unsuccessful
ADLS	<i>1086 SEIZ</i>	Seizures	June 4, 2002		Unsuccessful
ADLS	<i>1090 NOMC</i>	No Medical Condition	May 22, 2002		Unsuccessful
ADLS	<i>1094 COUGH</i>	Coughing and Breathing	May 23, 2002		Unsuccessful
ADLS	<i>1106 ASTHMA</i>	Asthma	June 4, 2002		Unsuccessful
ADLS	<i>1134 NOMC</i>	No Medical Condition	July 4, 2002		Unsuccessful
ADLS	<i>1210 - PAND</i>	Panic Disorder	August 20, 2002	Order	
ADLS	<i>1211 ASTHMA</i>	Asthma	August 16, 2002		Unsuccessful
ADLS	<i>1227- NOMC</i>	No Medical Condition	September 26, 2002		Unsuccessful
ADLS	<i>1232 - ORDER</i>		August 28, 2002	Order	
ADLS	<i>1233 - PULD</i>	Pulmonary Disorder	September 10, 2002		Unsuccessful
ADLS	<i>1236 - ANX</i>	Anxiety Attack	September 11, 2002		Unsuccessful
ADLS	<i>1241 - PAND</i>	Panic Disorder	September 9, 2002		Unsuccessful
ADLS	<i>1258 - NOMC</i>	No Medical Condition	September 17, 2002		Unsuccessful
ADLS	<i>1308 - RESP</i>	Respiratory Problem	October 28, 2002		Successful
ADLS	<i>1340 – PULD</i>	Pulmonary Disorder	November 7, 2002		Successful
ADLS	<i>1396 - NOMC</i>	No Medical Condition	December 5, 2002		Unsuccessful

TYPE OF APPEAL	APPLICANT(S) NAME Or CODE	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
ADLS	1406 - <i>MISTAKE</i>	Mistaken Identity	December 12, 2002		Unsuccessful
ADLS	1420 - <i>RESP</i>	Respiratory Problem	December 19, 2002		Unsuccessful
ADLS	1426 - <i>ASTHMA</i>	Asthma	January 10, 2003		Unsuccessful
ADLS	1430 - <i>ASTHMA</i>	Asthma	January 13, 2003		Unsuccessful
ADLS	1441 - <i>NOMC</i>	No Medical Condition	January 16, 2003		Unsuccessful
ADLS	1442 - <i>MISTAKE</i>	Mistaken Identity	January 16, 2003		Unsuccessful
ADLS	1460 - <i>ANX</i>	Anxiety Attack	January 22, 2003		Successful
ADLS	1461 - <i>NOMC</i>	No Medical Condition	January 28, 2003		Unsuccessful
ADLS	1462 - <i>RESP</i>	Respiratory Problem	February 11, 2003		Unsuccessful
ADLS	1463 - <i>PULD</i>	Pulmonary Disorder	January 29, 2003		Unsuccessful
ADLS	1473 - <i>PULD</i>	Pulmonary Disorder	February 18, 2003		Unsuccessful
ADLS	1482 - <i>NOMC</i>	No Medical Condition	March 12, 2003		Unsuccessful
ADLS	1485 - <i>RESP</i>	Respiratory Problem	February 26, 2003		Successful
ADLS	1494 - <i>ASTHMA</i>	Asthma	February 12, 2003		Unsuccessful
ADLS	1501- <i>ASTHMA</i>	Asthma	March 5, 2003		Unsuccessful
ADLS	1517 - <i>NOMC</i>	No Medical Condition	March 10, 2003		Unsuccessful
ADLS	1535 - <i>ASTHMA</i>	Asthma	March 14, 2003		Unsuccessful
ADLS	1541 - <i>RESP</i>	Respiratory Problem	March 17, 2003		Successful

Highway Traffic Act – Commercial Vehicle Operator's Registration

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
CVOR	619086 Ontario Ltd., 1041800 Ontario Inc., Peel Waste Management Inc. 1025647	Suspension & Seizure	December 16, 2002	Order	
CVOR	1461925 Ontario Ltd.	Suspension & Seizure	January 30, 2003	Order	Unsuccessful
CVOR	Bel-Co Express Haulage Inc.	Refuse to Issue CVOR	December 16, 2002	Order	
CVOR	Brander Trucking Ltd. and Sam Bisignami	Suspension & Seizure	November 21, 2002	Order	
CVOR	Brander Trucking Ltd. and Sam Bisignami	Suspension & Seizure	January 22, 2003		Unsuccessful
CVOR	Garcha Transport Inc.	Refusal to Issue Operating Licence	February 18, 2003		Unsuccessful
CVOR	Gomes and Sons Transport Inc.	Suspension & Seizure	September 18, 2002		Unsuccessful
CVOR	IBL Transport Co. Ltd.	Suspension & Seizure	March 28, 2002	Order	
CVOR	IBL Transport Co. Ltd.	Suspension & Seizure	July 26, 2002		Unsuccessful
CVOR	National Fibres Ltd. and P.S. Sandhus & Associates Ltd.	Suspension & Seizure	June 28, 2002	Order	
CVOR	National Fibres Ltd. and P.S. Sandhus & Associates Ltd.	Suspension & Seizure	October 22, 2002		Unsuccessful
CVOR	R & S Transportation, 590029 B.C. Ltd., and Harj-Min Express Carriers Inc.	Cancellation & Seizure	April 26, 2002	Order	
CVOR	R & S Transportation, 590029 B.C. Ltd., and Harj-Min Express Carriers Inc.	Cancellation & Seizure	August 1, 2002		Unsuccessful
CVOR	Reliable Service Transport Inc.	Cancellation & Seizure	February 24, 2003		Unsuccessful
CVOR	RTS Enterprises Ltd.	Refuse to Issue CVOR	December 12, 2002	Order	Unsuccessful
CVOR	RTS Transport Ltd.	Suspension & Seizure	March 15, 2002	Order	
CVOR	RTS Transport Ltd.	Suspension & Seizure	July 5, 2002		Unsuccessful
CVOR	Sisters Moving System Inc.	Refuse to Issue CVOR	March 21, 2002	Order	
CVOR	Sisters Moving System Inc.	Refuse to Issue CVOR	June 26, 2002		Unsuccessful
CVOR	Star Van Systems Inc, and Van-Es, Andries	Suspension & Seizure	September 10, 2002	Order	
CVOR	Star Van Systems Inc, and Van-Es, Andries	Motion	October 3, 2002	Adjournment	

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
CVOR	<i>Star Van Systems Inc, and Van-Es, Andries</i>	Motion	October 9, 2002		Unsuccessful
CVOR	<i>Star Van Systems Inc, and Van-Es, Andries</i>	Suspension & Seizure	December 23, 2002		Successful
CVOR	<i>Stik-Man Logistics Inc.</i>	Suspension & Seizure	July 16, 2002		Successful in part
CVOR	<i>Tilbar Leasing Limited</i>	Suspension & Seizure	March 26, 2003	Order	

Highway Traffic Act – Commercial Vehicle/Trailer Impoundment and Suspension

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
CVIS	<i>All Lift Ltd.</i>	Impound and Suspend	October 24, 2002		Unsuccessful

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

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
GAR	<i>Amzad A. Khan dba Khan Auto Repairs and Amzad A. Khan</i>	Revoke	February 6, 2002	Order	
GAR	<i>Amzad A. Khan dba Khan Auto Repairs and Amzad A. Khan</i>	Revoke	May 2, 2002	Order	
GAR	<i>Amzad A. Khan dba Khan Auto Repairs and Amzad A. Khan</i>	Revoke	July 26, 2002	Order	
GAR	<i>Don Fournier Service Centre Inc. and Donald Fournier</i>	Revoke	January 18, 2002		Unsuccessful
GAR	<i>Easy 2000 Auto Repairs and Roques Fernandes</i>	Refuse	November 26, 2002	Order	
GAR	<i>Peterborough Equipment Trailers Ltd. and Joseph Hommer</i>	Refuse	September 18, 2002		Unsuccessful
GAR	<i>Radcliffe Reid dba Rad Car Care</i>	Revoke	January 14, 2002	Order	
GAR	<i>T & R Auto Service Centre Inc. and Naaseem Jamil</i>	Revoke	April 2, 2002	Order	
GAR	<i>T & R Auto Service Centre Inc. and Naaseem Jamil</i>	Revoke	November 6, 2002		Unsuccessful

Highway Traffic Act – Medical Suspension or Downgrade (MEDICAL)

TYPE OF APPEAL	APPLICANT(S) NAME Or CODE	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
MED	0882- ALCL	Alcohol	January 4, 2002		Unsuccessful
MED	0893- DOWN	Downgrade, Seizures	January 10, 2002		Unsuccessful
MED	0909-ADJ		January 17, 2002	Adjournment	
MED	0917- ADJ		January 16, 2002	Adjournment	
MED	0917- ADJ		February 5, 2002	Adjournment	
MED	0917- ADJ		March 19, 2002	Adjournment	
MED	0917- CARD	Cardiac	May 27, 2002		Successful
MED	0919 - DRUG		February 28, 2002		Unsuccessful
MED	0921-ALCL	Alcohol	January 30, 2002		Unsuccessful
MED	0940 - DOWN	Diabetes, Downgrade	March 22, 2002		Successful
MED	0940- ADJ		February 21, 2002	Adjournment	
MED	0954 - ADJ		April 10, 2002	Order	
MED	0956-ALCL	Alcohol	May 1, 2002		Successful
MED	0959 - SEIZ	Seizures	March 5, 2002		Successful
MED	0999 - SEIZ	Seizures	April 3, 2002		Successful
MED	1011 - DOWN	Downgrade, Cardiac	March 28, 2002		Successful
MED	1016 - ADJ		April 5, 2002	Adjournment	
MED	1029 - CARD	Cardiac	April 3, 2002		Successful
MED	1038 - ADJ	Motion	March 28, 2002	Adjournment	
MED	1042 - CARD	Cardiac	May 23, 2002		Unsuccessful
MED	1054 - PRE	Pre-hearing	April 8, 2002	Order	
MED	1054 - ADJ		May 9, 2002	Adjournment	
MED	1054 - TUM	Tumour	July 16, 2002		Unsuccessful
MED	1086 - SEIZ	Seizures	June 11, 2002		Unsuccessful
MED	1105 - CARD	Cardiac	June 13, 2002		Unsuccessful
MED	1130 - SEIZ	Seizures	July 11, 2002		Successful
MED	1114 - ALCL	Alcohol	June 25, 2002		Successful
MED	1159 - MOTION	Motion for Costs	September 18, 2002		Successful
MED	1168 - CARD	Downgrade, Cardiac	August 21, 2002		Unsuccessful

TYPE OF APPEAL	APPLICANT(S) NAME Or CODE	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
MED	1170- ALCL	Alcohol	August 1, 2002		Unsuccessful
MED	1183 - CARD	Cardiac	August 20, 2002		Successful
MED	1184 - CARD	Cardiac	August 13, 2002		Unsuccessful
MED	1192 - MDIA	Mental Disorder	August 21, 2002		Unsuccessful
MED	1200 - SEIZ	Seizures	August 28, 2002		Unsuccessful
MED	1201 -NOMC	No Medical Condition	August 28, 2002		Successful
MED	1221 - ADJ		September 20, 2002	Adjournment	
MED	1220 - ALCL	Alcohol	September 4, 2002		Successful
MED	1220 - CARD	Cardiac	September 12, 2002		Successful
MED	1243 - NOMC	No Medical Condition	September 24, 2002		Successful
MED	1247 - ADJ		September 30, 2002	Adjournment	
MED	1266 - ALCL	Alcohol	October 15, 2002		Unsuccessful
MED	1311 - ADJ		October 30, 2002	Adjournment	
MED	1318 - ADJ		October 30, 2002	Adjournment	
MED	1318 - ALCL	Alcohol	December 10, 2002		Unsuccessful
MED	1335 - SEIZ	Seizures	December 4, 2002		Successful
MED	1363 - MTR	Motor Dysfunction	December 6, 2002		Unsuccessful
MED	1364 - ALCL	Alcohol	December 23, 2002		Successful
MED	1414 - DISM	Dismissal	January 13, 2003	Dismissal Order	Unsuccessful
MED	1423 - SEIZ	Seizures	January 9, 2003		Successful
MED	1436 - ALCL	Alcohol	January 24, 2003		Successful
MED	1449 - CARD	Cardiac	January 28, 2003		Unsuccessful
MED	1428 - DRUG	Drugs/Medication	February 11, 2003		Successful
MED	1432 - DOWN	Downgrade	January 17, 2003		Successful
MED	1455 - DOWN	Downgrade, Cardiac	February 10, 2003		Unsuccessful
MED	1488 - DOWN	Downgrade, Cardiac	February 27, 2003		Unsuccessful
MED	1500 - ALCL	Alcohol	March 5, 2003		Unsuccessful
MED	1502 - DOWN	Downgrade, Cardiac	March 4, 2003		Unsuccessful
MED	1505 - ALCL	Alcohol	March 12, 2003		Unsuccessful
MED	1533 - ALCL	Alcohol	March 19, 2003		Successful

TYPE OF APPEAL	APPLICANT(S) NAME Or CODE	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
MED	<i>1538 – ADJ</i>		March 18, 2003	Adjournment	
MED	<i>R.S.</i>		February 19, 2002	Dismissal Order	Unsuccessful

Highway Traffic Act – Motor Vehicle Impoundment Order (MVIA)

TYPE OF APPEAL	APPLICANT(S) NAME Or CODE	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
MVIA	1129 - EXHP	Exceptional Hardship	June 25, 2002		Unsuccessful
MVIA	597370 Ontario Ltd. o/a Peter Bulk Greenhouse Ltd.	Exceptional Hardship	December 6, 2002		Unsuccessful
MVIA	1208242 Ontario Inc. o/a Cheap Wheels 4 Rent	Exceptional Hardship	March 10, 2003		Unsuccessful
MVIA	1342630 Ontario Ltd.	Exceptional Hardship	March 25, 2002		Unsuccessful
MVIA	445227 Ontario Ltd.	Exceptional Hardship	January 3, 2002		Unsuccessful
MVIA	ABEL	Stolen	March 18, 2003		Unsuccessful
MVIA	AIVALIOTOU	Exceptional Hardship	February 18, 2003		Unsuccessful
MVIA	Andex Xpress Inc.	Due Diligence	February 7, 2003	Consent	Successful
MVIA	ARCHAMBAULT	Exceptional Hardship	January 10, 2003		Unsuccessful
MVIA	Brabant Construction and Management	Exceptional Hardship	October 21, 2002		Successful
MVIA	BAHRAMI	Exceptional Hardship	April 16, 2002		Unsuccessful
MVIA	BAIRD	Exceptional Hardship	January 15, 2003		Unsuccessful
MVIA	BALTZER	Exceptional Hardship	March 5, 2002		Adjournment
MVIA	BALTZER	Exceptional Hardship	March 19, 2002		Unsuccessful
MVIA	BARKLEY		January 29, 2002	Consent	Successful
MVIA	BARTLETT	Exceptional Hardship	December 9, 2002	Consent	Successful
MVIA	BERTRAND	Due Diligence	October 23, 2002		Unsuccessful
MVIA	BHAGOO	Exceptional Hardship	October 22, 2002		Unsuccessful
MVIA	Bondi Produce Co. Ltd.	Not Under Suspension & Due Diligence	March 4, 2002		Unsuccessful
MVIA	BOWMAN	Exceptional Hardship	October 2, 2002		Unsuccessful
MVIA	BRAUNOEHLER	Exceptional Hardship	March 6, 2003		Unsuccessful
MVIA	BRICKER	Motion to Extend Time to File	August 7, 2002		Successful
MVIA	BRICKER	Exceptional Hardship	August 22, 2002		Unsuccessful
MVIA	Canada Cartage System Ltd.	Due Diligence	March 4, 2003	Consent	Successful
MVIA	CARRILLO	Exceptional Hardship	February 24, 2003		Successful
MVIA	Carrus Investments Inc.	Not Under Suspension	October 1, 2002		Unsuccessful

TYPE OF APPEAL	APPLICANT(S) NAME Or CODE	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
MVIA	CHAUHAN	Exceptional Hardship	October 17, 2002		Unsuccessful
MVIA	CHRISTIANSEN	Due Diligence & Exceptional Hardship	January 10, 2002		Unsuccessful
MVIA	CLARK	Exceptional Hardship	February 24, 2003		Unsuccessful
MVIA	CLAVERO	Stolen	June 27, 2002	Consent	Successful
MVIA	CLYKE	Exceptional Hardship	January 28, 2002		Unsuccessful
MVIA	D'ANGELO	Exceptional Hardship & Due Diligence	February 19, 2002		Unsuccessful
MVIA	DA CAMARA	Exceptional Hardship & Due Diligence	April 8, 2002		Unsuccessful
MVIA	DAY	Exceptional Hardship	October 1, 2002		Unsuccessful
MVIA	DELANEY	Exceptional Hardship	September 13, 2002	Order	Unsuccessful
MVIA	DELANEY	Exceptional Hardship	March 27, 2003	Order, Reasons	Unsuccessful
MVIA	EVERSON	Exceptional Hardship & Due Diligence	February 20, 2002		Unsuccessful
MVIA	Erin Motorway Investments Ltd. – Mississauga Honda	Stolen	March 14, 2003	Consent	Successful
MVIA	Exec Distribution Inc.	Exceptional Hardship & Due Diligence	December 24, 2002		Unsuccessful
MVIA	FALZON	Stolen	July 30, 2002		Unsuccessful
MVIA	FISHER	Due Diligence	March 13, 2003	Order	Unsuccessful
MVIA	FRANKLIN	Exceptional Hardship	January 18, 2002		Successful
MVIA	FRENETTE	Due Diligence	October 4, 2002		Unsuccessful
MVIA	Fujitec Canada Inc.	Exceptional Hardship & Due Diligence	October 1, 2002		Unsuccessful
MVIA	Galt Chrysler Dodge Ltd.	Exceptional Hardship	February 6, 2003		Unsuccessful
MVIA	GARLICK	Exceptional Hardship	October 29, 2002		Unsuccessful
MVIA	GIOIA	Exceptional Hardship & Due Diligence	October 3, 2002		Unsuccessful
MVIA	GOODBRAND	Stolen	November 8, 2002	Consent	Successful
MVIA	HAAS	Stolen & Due Diligence	January 11, 2002		Unsuccessful
MVIA	HENRY	Exceptional Hardship & Due Diligence	September 10, 2002		Unsuccessful
MVIA	HETU	Exceptional Hardship	March 19, 2002		Unsuccessful

TYPE OF APPEAL	APPLICANT(S) NAME Or CODE	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
MVIA	JONES	Exceptional Hardship	January 10, 2003		Unsuccessful
MVIA	JULES	Exceptional Hardship	October 30, 2002		Unsuccessful
MVIA	KEENAN	Exceptional Hardship	March 20, 2003		Unsuccessful
MVIA	KELLY, M.	Exceptional Hardship	January 3, 2002		Unsuccessful
MVIA	KELLY, M.M.	Exceptional Hardship	June 25, 2002		Unsuccessful
MVIA	KIANI	Stolen & Exceptional Hardship	February 21, 2002		Unsuccessful
MVIA	KOZAK	Stolen & Exceptional Hardship	January 17, 2002		Unsuccessful
MVIA	LAI	Exceptional Hardship	March 10, 2003		Unsuccessful
MVIA	LARMOUR	Due Diligence	September 27, 2002	Consent	Successful
MVIA	LAZAROV	Exceptional Hardship	December 6, 2002		Unsuccessful
MVIA	LINDSAY	Stolen	March 20, 2003	Consent	Successful
MVIA	MacLEAN	Exceptional Hardship	December 24, 2002		Unsuccessful
MVIA	MATHAI	Exceptional Hardship	July 16, 2002		Successful
MVIA	McCOY	Exceptional Hardship	July 16, 2002		Unsuccessful
MVIA	McINNES	Exceptional Hardship	December 12, 2002		Successful
MVIA	McKAY	Exceptional Hardship	January 22, 2003		Unsuccessful
MVIA	McMILLAN	Exceptional Hardship	July 25, 2002		Successful
MVIA	MEGAN	Exceptional Hardship	March 26, 2002		Unsuccessful
MVIA	Mel Hall Transport Limited	Not Under Suspension	April 16, 2002		Unsuccessful
MVIA	MERLO	Not Under Suspension and Exceptional Hardship	January 17, 2002		Successful
MVIA	MORGAN	Due Diligence and Exceptional Hardship	August 27, 2002		Unsuccessful
MVIA	MOUNCE	Exceptional Hardship	December 17, 2002		Unsuccessful
MVIA	Muskoka Insurance Brokers Ltd	Exceptional Hardship	December 23, 2002		Unsuccessful
MVIA	National Childrens Burn Society	Exceptional Hardship	February 12, 2002	Consent	Successful
MVIA	NAULT	Exceptional Hardship	March 6, 2003		Unsuccessful
MVIA	NORTON and MARACLE	Exceptional Hardship	September 13, 2002	Order	Unsuccessful

TYPE OF APPEAL	APPLICANT(S) NAME Or CODE	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
MVIA	PAYTLER	Exceptional Hardship	September 27, 2002		Unsuccessful
MVIA	PHILPOTTS	Exceptional Hardship	October 22, 2002		Unsuccessful
MVIA	PORKOLAB	Exceptional Hardship	March 19, 2002		Successful
MVIA	Power Land and Cattle Development Corp.	Exceptional Hardship	February 27, 2002		Successful
MVIA	RAMESAR	Exceptional Hardship	January 28, 2003		Unsuccessful
MVIA	REJAK	Due Diligence	March 14, 2002		Unsuccessful
MVIA	RESURRECCION	Exceptional Hardship	August 27, 2002		Unsuccessful
MVIA	REAUME	Exceptional Hardship	October 3, 2002	Consent	Successful
MVIA	RITCHIE	Motion to Extend Time to File	October 18, 2002		Successful
MVIA	RITCHIE	Due Diligence	November 6, 2002		Unsuccessful
MVIA	ROBINSON	Exceptional Hardship	December 19, 2002	Order	Unsuccessful
MVIA	SAMI	Due Diligence	September 26, 2002		Unsuccessful
MVIA	SAMKO	Exceptional Hardship	February 11, 2003		Unsuccessful
MVIA	SAKHIZADAH	Exceptional Hardship	September 10, 2002		Unsuccessful
MVIA	SCRIMSHAW	Exceptional Hardship	October 1, 2002		Unsuccessful
MVIA	SELIN	Exceptional Hardship	October 29, 2002		Unsuccessful
MVIA	SHEPHARD	Exceptional Hardship	February 12, 2002		Unsuccessful
MVIA	SHUBA	Exceptional Hardship	March 11, 2003		Unsuccessful
MVIA	SOKK	Due Diligence and Exceptional Hardship	December 24, 2002		Unsuccessful
MVIA	STEELE		October 9, 2002	Adjournment	
MVIA	STEELE	Exceptional Hardship	October 16, 2002		Unsuccessful
MVIA	STEWART	Exceptional Hardship	November 8, 2002		Unsuccessful
MVIA	STRATI	Exceptional Hardship	January 31, 2003		Unsuccessful
MVIA	TAKERAM	Exceptional Hardship	October 3, 2002		Unsuccessful
MVIA	Target Auto Sales	Exceptional Hardship	November 14, 2002		Unsuccessful
MVIA	Telecommunications Sans Fil (TSF) Inc.	Exceptional Hardship	March 21, 2002		Unsuccessful
MVIA	THORNE	Exceptional Hardship	March 25, 2002		Unsuccessful
MVIA	Transportation Lease Systems Inc.	Exceptional Hardship	December 12, 2002		Unsuccessful

TYPE OF APPEAL	APPLICANT(S) NAME Or CODE	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
MVIA	<i>Transport Madigan Trucking Inc.</i>	Not Under Suspension	January 4, 2002		Unsuccessful
MVIA	<i>TRUDEAU</i>	Due Diligence	November 26, 2002		Unsuccessful
MVIA	<i>TRUDEAU</i>	Due Diligence	November 21, 2002		Unsuccessful
MVIA	<i>TWEEDLE</i>	Not Under Suspension and Exceptional Hardship	August 13, 2002		Successful
MVIA	<i>Vince M. Chaisson/ Lunenburg Auto Sales</i>	Due Diligence and Exceptional Hardship	February 1, 2002		Unsuccessful
MVIA	<i>VISCONTI</i>	Due Diligence	March 1, 2002		Unsuccessful
MVIA	<i>WILLAR</i>	Due Diligence and Exceptional Hardship	August 12, 2002	Adjournment	
MVIA	<i>WILLAR</i>	Due Diligence and Exceptional Hardship	August 15, 2002		Unsuccessful
MVIA	<i>WRIGHT</i>	Stolen and Exceptional Hardship	February 14, 2003	Order	
MVIA	<i>WRIGHT</i>	Stolen and Exceptional Hardship	February 26, 2003		Unsuccessful

MOTOR VEHICLE DEALERS ACT

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
MVDA	468 Auto Sales Inc.	Refuse Registration	October 15, 2002	Order	Unsuccessful
MVDA	620773 Ontario Ltd. o/a Classic Caddies Cars	Revoke Registration	March 11, 2002	Consent	Successful
MVDA	919810 Ontario Inc. o/a All Service Auto Centre and Zoltan Hegedus	Revoke Registrations	May 1, 2002		Unsuccessful
MVDA	1030017 Ontario Inc. o/a Bank Street Metro Sales and Peter Kosch	Revoke Registrations	June 5, 2002	Adjournment	
MVDA	1030017 Ontario Inc. o/a Bank Street Metro Sales and Peter Kosch	Revoke Registrations	September 4, 2002	Consent	Successful
MVDA	1085091 Ontario Limited o/a Embassy Auto Sales Services and Mohamad Mansoor	Revoke Registrations	October 3, 2002		Unsuccessful
MVDA	1190467 Ontario Ltd. o/a A1 Car Sales, 1296945 Ontario Inc. and Ade Taitlbaum	Revoke Registrations	May 22, 2002	Order	
MVDA	1190467 Ontario Ltd. o/a A1 Car Sales, 1296945 Ontario Inc. and Ade Taitlbaum	Revoke Registrations	August 13, 2002	Order	
MVDA	1190467 Ontario Ltd. o/a A1 Car Sales, 1296945 Ontario Inc. and Ade Taitlbaum	Revoke Registrations	November 07, 2002	Order	Successful in Part
MVDA	1269791 Ontario Inc. o/a K&K Auto Sales and Kenneth Mabee	Revoke Registrations	June 20, 2002	Adjournment	
MVDA	1269791 Ontario Inc. o/a K&K Auto Sales and Kenneth Mabee	Revoke Registrations	September 18, 2002		Successful in Part
MVDA	1302406 Ontario Ltd. o/a Colson Motor Cars and Efstaratios (Steve) Coliviras	Revoke Registrations	July 26, 2002		Unsuccessful
MVDA	1445398 Ontario Inc. & Amin Mohamed Lalani o/a Canadian Auto Wholesalers	Revoke Registrations	January 8, 2003	Consent	Successful
MVDA	1381357 Ontario Ltd. o/a Liana Car Sales and Eman S. Shihab and Mazen A. Shihab	Refuse Registrations	February 12, 2003		Unsuccessful
MVDA	ADIYAMAN	Refuse Registration	February 13, 2002		Successful
MVDA	AKINNIYI	Refuse Registration	June 25, 2002	Consent	Successful

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
MVDA	<i>Alandy Auto Sales Ltd. & Andy Abbott</i>	Revoke Registrations	April 2, 2002		Successful in Part
MVDA	<i>ALMAWI</i>	Refuse Registration	December 5, 2002		Unsuccessful
MVDA	<i>AMERATO, Pietro, Pietro Wholesale Auto Ltd. and North York Auto Auctions Inc.</i>	Revoke Registrations and Refuse Registration	September 5, 2002	Consent	Successful
MVDA	<i>ANDERSON</i>	Revoke Registration	April 9, 2002	Consent	Successful
MVDA	<i>ANDREWS</i>	Refuse Registration	April 24, 2002	Consent	Successful
MVDA	<i>APOSTOLIDIS</i>	Refuse Registration	November 19, 2002	Consent	Successful
MVDA	<i>ASHLEY</i>	Refuse Registration	October 15, 2002	Consent	Successful
MVDA	<i>ASSENZA</i>	Claim	December 12, 2002	Order	
MVDA	<i>ASSENZA</i>	Claim	January 31, 2003	Order	
MVDA	<i>Auto Mart Sudbury Ltd. and Rick Toulouse</i>	Revoke Registrations	March 11, 2002	Adjournment	
MVDA	<i>Auto Mart Sudbury Ltd. and Rick Toulouse</i>	Revoke Registrations	October 2, 2002	Order	
MVDA	<i>Auto Mart Sudbury Ltd. and Rick Toulouse</i>	Revoke Registrations	March 27, 2003	Order	
MVDA	<i>AWODAMOLA, Samson and 134 Ontario Inc. o/a Kadara Motors</i>	Revoke Registrations	June 11, 2002		Unsuccessful
MVDA	<i>BACK</i>	Refuse Registration	April 12, 2002		Unsuccessful
MVDA	<i>BAHRAMI</i>	Refuse Registration	February 1, 2002	Consent	Successful
MVDA	<i>BANKI</i>	Refuse Registration	October 11, 2002		Successful
MVDA	<i>BANKI</i>	Motion to Stay	December 17, 2002		Unsuccessful
MVDA	<i>BARAKAT</i>	Refuse Registration	January 2, 2002	Consent	Successful
MVDA	<i>BARIZ</i>	Refuse Registration	February 5, 2003	Consent	Successful
MVDA	<i>BEDELL</i>	Revoke Registration	November 5, 2002	Adjournment	
MVDA	<i>BEDELL</i>	Revoke Registration	November 21, 2002	Consent	Successful
MVDA	<i>BELFRUTTO</i>	Refuse Registration	March 28, 2003		Unsuccessful
MVDA	<i>BORG</i>	Refuse Registration	February 28, 2002	Adjournment	
MVDA	<i>BORG</i>	Refuse Registration	July 5, 2002		Unsuccessful
MVDA	<i>BRIDLEWOOD</i>	Refuse Registration	November 19, 2002		Unsuccessful
MVDA	<i>BULLEN</i>	Refuse Registration	January 8, 2002	Adjournment	
MVDA	<i>BULLEN</i>	Refuse Registration	June 21, 2002		Successful

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
MVDA	<i>C & D Motors and Dumitrel Tofan</i>	Revoke Registrations	May 6, 2002		Unsuccessful
MVDA	<i>CAMIRE</i>	Refuse Registration	June 28, 2002	Consent	Successful
MVDA	<i>Canus Auto Traders and Simon Van Duffelen</i>	Suspend Registrations	May 23, 2002		Unsuccessful
MVDA	<i>CHINENYE</i>	Claim	March 22, 2002		Successful
MVDA	<i>Civic Autos Inc. and Rashid Dasoo</i>	Revoke Registrations	February 25, 2003		Unsuccessful
MVDA	<i>CLERMONT</i>	Refuse Registration	August 19, 2002		Unsuccessful
MVDA	<i>Continental Leasing Services Inc. and Peter Carl Verbeek</i>	Revoke Registrations	March 15, 2002	Adjournment	
MVDA	<i>DALDIN</i>	Refuse Registration	June 25, 2002	Order	
MVDA	<i>DELORME</i>	Refuse Registration	May 7, 2002	Consent	Successful
MVDA	<i>Delta Mini Van & Cars and Carlo Vera</i>	Revoke Registrations	May 13, 2002		Unsuccessful
MVDA	<i>Delta Mini Van & Cars and Carlo Vera</i>	Motion for Stay	January 9, 2003		Unsuccessful
MVDA	<i>Arthur Diamond</i>	Refuse Registration	May 22, 2002	Consent	Successful
MVDA	<i>EASTERBROOK, Bradin Wayne and 1306609 Ontario Inc. o/a Auto Wholesale</i>	Extension of time to file	January 7, 2002	Ruling	Successful
MVDA	<i>EASTERBROOK, Bradin Wayne and 1306609 Ontario Inc. o/a Auto Wholesale</i>	Revoke Registrations	May 1, 2002		Unsuccessful
MVDA	<i>EDMONDS, Kenneth G. o/a Shelby Motor Car Company</i>	Extension of time to file	April 29, 2002	Ruling	Unsuccessful
MVDA	<i>ELLIOTT</i>	Refuse Registration	March 31, 2003		Unsuccessful
MVDA	<i>ELSTER</i>	Refuse Registration	October 7, 2002	Order	
MVDA	<i>Exclusively Yours Leasing Inc., Exclusive Auto Marketing Inc. and Jeffrey Geller</i>		March 18, 2002	Dismissal	Unsuccessful
MVDA	<i>FEHER</i>	Refuse Registration	January 30, 2002	Consent	Successful
MVDA	<i>FORSYTHE</i>	Revoke Registration	September 25, 2002		Unsuccessful
MVDA	<i>GARDINER</i>	Refuse Registration	February 21, 2002	Consent	Successful
MVDA	<i>GHANDOUR</i>	Refuse Registration	January 9, 2002	Adjournment	
MVDA	<i>GHANDOUR</i>	Refuse Registration	March 27, 2002		Unsuccessful
MVDA	<i>GOODARZI</i>	Refuse Registration	February 22, 2002		Unsuccessful

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
MVDA	GRANT	Refuse Registration	January 24, 2002	Consent	Successful
MVDA	GRATTA	Refuse Registration	January 29, 2003		Successful
MVDA	HALBOUNI	Refuse Registration	July 11, 2002	Consent	Successful
MVDA	HAYWOOD	Revoke Registration	October 8, 2002	Consent	Successful
MVDA	HOBBS	Refuse Registration	July 24, 2002		Unsuccessful
MVDA	HOUKAYEM	Refuse Registration	March 26, 2003		Unsuccessful
MVDA	HUGHES	Refuse Registration	December 13, 2002	Consent	Successful
MVDA	HUNT	Refuse Registration	January 17, 2002	Adjournment	
MVDA	HUNT	Refuse Registration	July 30, 2002		Unsuccessful
MVDA	IANNIZZI	Refuse Registration	October 3, 2002	Consent	Successful
MVDA	ILIEV	Refuse Registration	August 7, 2002		Unsuccessful
MVDA	IYAMU, George o/a Carera Auto Sales	Refuse Registration	January 28, 2003		Unsuccessful
MVDA	Joseph Fine Car Sales Ltd. & Jirjis, Riadh	Revoke Registrations	December 17, 2002		Unsuccessful
MVDA	Joseph Fine Car Sales Ltd. & Jirjis, Riadh	Refuse Registrations	February 13, 2003	Consent	Successful
MVDA	JOZO PRALJAK and ANTE VRKLJAN o/a 468 AUTO SALES	Revoke Registration	October 15, 2002	Order	Unsuccessful
MVDA	KAAFARANI	Refuse Registration	February 26, 2002		Unsuccessful
MVDA	KHAN	Refuse Registration	December 12, 2002	Consent	Successful
MVDA	KIELTY	Refuse Registration	March 19, 2003	Consent	Successful
MVDA	KIM	Refuse Registration	April 22, 2002		Unsuccessful
MVDA	LADD, Cheryl Grace o/a Chers A1 Auto Sale and Michael Kenny	Revoke Registrations	June 12, 2002	Adjournment	
MVDA	LARIVIERE	Revoke Registration	May 6, 2002	Consent	Successful
MVDA	LEE	Refuse Registration	January 3, 2002	Adjournment	
MVDA	LEE	Refuse Registration	February 13, 2002	Consent	Successful
MVDA	LEGERMAN	Revoke Registration	September 10, 2002	Adjournment	
MVDA	LEGERMAN	Revoke Registration	October 28, 2002	Consent	Successful
MVDA	LEUNG	Refuse Registration	March 18, 2003	Consent	Successful
MVDA	LIEW	Refuse Registration	July 24, 2002	Consent	Successful

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
MVDA	LIVINGSTON	Refuse Registration	July 24, 2002	Order	Unsuccessful
MVDA	LOBLIN	Refuse Registration	January 22, 2003	Consent	Successful
MVDA	LONG	Refuse Registration	August 16, 2002		Unsuccessful
MVDA	LUONG	Refuse Registration	June 25, 2002		Unsuccessful
MVDA	MacDONALD, Leanne and 2001530 Ontario Inc. o/a Mac Motors	Refuse Registrations	February 27, 2002	Adjournment	
MVDA	MacVINNIE	Refuse Registration	February 6, 2002	Consent	Successful
MVDA	MALAEKEH	Revoke Registration	December 3, 2002	Consent	Successful
MVDA	MALHOTRA	Claim	October 29, 2002	Order	
MVDA	McCONNELL & FINCH	Claim	February 28, 2002	Order	
MVDA	McCONNELL & FINCH	Claim	June 19, 2002		Successful
MVDA	McMULLEN	Claim	February 28, 2002		Unsuccessful
MVDA	MENARD	Refuse Registration	June 14, 2002	Consent	Successful
MVDA	MENDELL	Revoke Registration	March 21, 2002	Order	
MVDA	MENDELL	Revoke Registration	March 27, 2002	Consent	Successful
MVDA	MOJARRAB, Moheballi o/a Uptown Used Cars	Revoke Registration	June 11, 2002	Adjournment	
MVDA	MOJARRAB, Moheballi o/a Uptown Used Cars	Revoke Registration	July 3, 2002	Order	
MVDA	MOJARRAB, Moheballi o/a Uptown Used Cars	Revoke Registration	August 16, 2002		Unsuccessful
MVDA	MONZON	Refuse Registration	July 19, 2002		Unsuccessful
MVDA	MULTANI, Rajwant K. o/a Nanco Motors	Revoke Registration	March 6, 2003		Unsuccessful
MVDA	NOEL	Refuse Registration	October 17, 2002		Unsuccessful
MVDA	NORBERT ST DENIS	Refuse Registration	November 6, 2002		Unsuccessful
MVDA	NSAFAH, Maxwell o/a K&K Fine Cars	Refuse Registration	November 25, 2002		Unsuccessful
MVDA	PACIONE, Luciano, 1290100 Ontario Inc. o/a Carrera Motor Car Company and Heimrath Performance Cars	Revoke Registrations	July 11, 2002	Consent	Successful
MVDA	PACIONE	Refuse Registration	November 28, 2002	Consent	Successful
MVDA	PANARESE	Refuse Registration	January 22, 2002	Consent	Successful
MVDA	PAVELIC	Refuse Registration	October 15, 2002	Consent	Successful

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
MVDA	PENTO	Claim	February 20, 2002		Unsuccessful
MVDA	PRALJAK	Refuse Registration	October 15, 2002	Consent	Successful
MVDA	REEVES	Revoke Registration	July 3, 2002	Consent	Successful
MVDA	RICKSNEUWOEHNER	Claim	February 11, 2003		Unsuccessful
MVDA	ROBERT	Refuse Registration	April 4, 2002	Consent	Successful
MVDA	SAAD	Refuse Registration	January 22, 2003	Consent	
MVDA	SAEED	Claim	July 4, 2002	Order	
MVDA	Sahar Automotive Inc. And Hassan Sadeghi	Refuse Registrations	September 19, 2002	Consent	Successful
MVDA	SAMULIAN	Refuse Registration	August 30, 2002		Unsuccessful
MVDA	SCANLAN	Motion to Extend Time to File	August 1, 2002		Successful
MVDA	SCANLAN	Refuse Registration	November 26, 2002		Successful in Part
MVDA	SCHMIDT	Revoke Registration	November 25, 2002	Order	
MVDA	SCOTT	Refuse Registration	November 1, 2002	Order	
MVDA	SCOTT	Refuse Registration	January 16, 2003	Order	
MVDA	SEABORN	Refuse Registration	September 20, 2002	Consent	Successful
MVDA	SHAH, Nasir Mohammed o/a Shah Auto Service and Used Parts	Refuse Registration	February 26, 2002	Consent	Successful
MVDA	SHAHIDI, Taghi Vahid o/a GTA Auto	Revoke Registration	September 19, 2002		Unsuccessful
MVDA	SINGH, Gurnek and Sarwan Auto Sales	Motion for Stay	March 28, 2002		Unsuccessful
MVDA	SINGH, Gurnek o/a Sarwan Auto Sales	Stay	February 28, 2002	Order	
MVDA	SOURIAL	Claim	January 17, 2002	Adjournment	
MVDA	SOURIAL	Claim	April 29, 2002		Unsuccessful
MVDA	SOUSA	Refuse Registration	September 9, 2002	Consent	Successful
MVDA	STEWART	Refuse Registration	February 20, 2002	Consent	Successful
MVDA	TAILLBAUM	Stay of Decision	December 11, 2002		Successful
MVDA	1012265 Ontario Inc. o/a Tri-Star Sales and Leasing, Vasilios and Parthenia Mitropoulos	Revoke Registrations	June 12, 2002		Unsuccessful
MVDA	1012265 Ontario Inc. o/a Tri-Star Sales and Leasing, Vasilios and Parthenia Mitropoulos	Stay of Decision	July 16, 2002		Successful

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
MVDA	TRUONG	Refuse Registration	March 4, 2003		Successful
MVDA	TRUONG	Motion to Extend Time to File	January 9, 2003	Order	
MVDA	Moheballi Mojarrab o/a Uptown Used Cars	Revoke Registration	July 2, 2002	Order	
MVDA	VALLERIANI, Robert J & 1145082 Ontario Ltd.	Revoke Registrations	August 29, 2002	Adjournment	
MVDA	VALLERIANI	Revoke Registration	January 2, 2003	Consent	Successful
MVDA	VORKAPIC, Verdjinia o/a Gina's Auto Sales	Refuse Registration	March 5, 2002	Consent	Successful
MVDA	VRKLJAN	Refuse Registration	October 15, 2002	Consent	Successful
MVDA	WANG	Refuse Registration	September 13, 2002	Settlement	Successful
MVDA	WEATHERBEE	Refuse Registration	January 15, 2003	Consent	Successful
MVDA	WEATHERBEE	Refuse Registration	January 30, 2002		Unsuccessful
MVDA	Welcome to Kennedy Sales and Leasing Limited, and Ronald Kennedy	Revoke Registration	March 4, 2002		Unsuccessful
MVDA	WHITTEN	Refuse Registration	December 19, 2002		Unsuccessful
MVDA	Wholesale Auto Centre and Avi Waichenberg	Revoke Registration	November 18, 2002	Adjournment	
MVDA	Wholesale Auto Centre and Avi Waichenberg	Revoke Registrations	February 24, 2003	Adjournment	
MVDA	WOODS	Refuse Registration	July 30, 2002	Order	
MVDA	WOODS	Refuse Registration	August 30, 2002		Unsuccessful
MVDA	X L Kars Inc. and Charles Peter Twigg	Revoke Registrations	October 15, 2002	Adjournment	
MVDA	X L Kars Inc. and Charles Peter Twigg	Revoke Registration	November 8, 2002	Consent	Successful
MVDA	YAGUDAYEV	Refuse Registration	August 19, 2002	Consent	Successful
MVDA	YOUNIS, Younis Sabah o/a Eagle Car Sales	Refuse Registration	September 3, 2002	Adjournment	
MVDA	YOUNIS, Younis Sabah o/a Eagle Car Sales	Refuse Registration	March 19, 2003		Unsuccessful

ONTARIO NEW HOME WARRANTIES PLAN ACT

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
ONHWP	<i>711371 Ontario Corp. o/a Oxford Estates</i>	Refuse to Renew Registration	January 29, 2003	Order	
ONHWP	<i>711371 Ontario Corp. o/a Oxford Estates</i>	Motion to Grant Adjournment	February 24, 2003		Successful
ONHWP	<i>724471 Ontario Limited</i>	Suspend Registration	February 25, 2002	Order	
ONHWP	<i>749459 Ontario Limited o/a Katmic Construction</i>	Suspend Registration	March 25, 2002	Order	
ONHWP	<i>753367 Ontario Limited o/a South Shore Homes</i>	Refuse to Renew Registration	February 5, 2002	Order	
ONHWP	<i>933891 Ontario Limited o/a Classic Country Homes</i>	Revoke Registration	January 25, 2002	Order	
ONHWP	<i>933891 Ontario Limited o/a Classic Country Homes</i>	Revoke Registration	June 18, 2002		Unsuccessful
ONHWP	<i>1288918 Ontario Inc.</i>	Revoke Registration	February 14, 2003		Unsuccessful
ONHWP	<i>1224441 Ontario Ltd. o/a Mayberry-Homes by Design</i>	Refuse to Renew Registration	January 16, 2003	Order	Successful
ONHWP	<i>1369450 Ontario Limited o/a Romance Homes</i>	Refuse Registration	May 9, 2002	Consent	Successful
ONHWP	<i>1382614 Ontario Ltd. o/a Concord Homes</i>	Refuse to Renew Registration	January 24, 2003	Order	
ONHWP	<i>1441660 Ontario Inc. c.o.b. Sunrise Homes</i>	Revoke Registration	March 14, 2003	Order	
ONHWP	<i>1475141 Ontario Limited o/a Eaglebay Estates</i>	Revoke Registration	November 19, 2002	Consent	Successful
ONHWP	<i>AGOSTINO</i>	Claim	July 24, 2002		Unsuccessful
ONHWP	<i>Albert Homes Ltd.</i>	Refuse to Renew Registration	May 30, 2002	Order	
ONHWP	<i>Allison Homes Inc.</i>	Revoke Registration	March 13, 2003	Order	Unsuccessful
ONHWP	<i>BAN</i>	Claim	July 17, 2002		Unsuccessful
ONHWP	<i>BELFRUTTO and PIRES</i>	Motion to Extend Time to File	August 21, 2002		Unsuccessful
ONHWP	<i>BERTA</i>	Claim	March 7, 2003		Unsuccessful
ONHWP	<i>RACHIELE</i>	Claim	January 24, 2003	Order	

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
ONHWP	<i>Bridle Lane Homes Inc., Castlemark Developments Inc., Siper Construction Ltd., Fairmount Homes Ltd.</i>	Refuse to Renew Registrations	February 20, 2002		Successful, in part
ONHWP	<i>Britain's Gate Residences Limited</i>	Revoke Registration	June 26, 2002	Order	
ONHWP	CAERS	Claim	February 10, 2003	Order	
ONHWP	CAERS	Claim	March 28, 2003	Order	
ONHWP	CAIN and CAIN-LEWIS	Claim	August 22, 2002		Unsuccessful
ONHWP	CALLWOOD	Claim	June 20, 2002	Dismissal Order	Unsuccessful
ONHWP	CAVALERI	Claim	December 18, 2002		Unsuccessful
ONHWP	<i>Celestial Homes Inc.</i>	Refuse to Renew Registration	February 21, 2002		Unsuccessful
ONHWP	CHAN	Claim	June 11, 2002		Unsuccessful
ONHWP	CHRISTO	Claim	March 7, 2002	Order	
ONHWP	COORE	Claim	December 4, 2002		Unsuccessful
ONHWP	COSTANTINO	Claim	June 18, 2002		Unsuccessful
ONHWP	COUSE and PLUMPTON	Claim	July 10, 2002	Order	
ONHWP	COUSE and PLUMPTON	Claim	October 9, 2002	Order	Successful
ONHWP	<i>DaCosta Developments Inc</i>	Refuse Registration	March 31, 2003		Unsuccessful
ONHWP	DAGENAIS	Claim	February 25, 2002	Order	
ONHWP	DAGENAIS	Claim	June 20, 2002		Successful
ONHWP	DAROS	Claim	March 15, 2002	Adjournment	
ONHWP	DEVLIN	Claim	April 25, 2002		Unsuccessful
ONHWP	<i>Devonian Homes Ltd</i>	Suspend Registration	February 6, 2002	Order	
ONHWP	DIKS and McALLISTER-DIKS	Claim	May 24, 2002	Adjournment	
ONHWP	DIKS and McALLISTER-DIKS	Claim	June 4, 2002	Order	
ONHWP	DIKS and McALLISTER-DIKS	Claim	October 15, 2002	Order	
ONHWP	DIONNE and MILROY	Claim	February 19, 2002	Adjournment	
ONHWP	<i>Donald F. Roughley and Associates Inc.</i>	Refuse to Renew Registration	December 16, 2002	Order	
ONHWP	DOOLAN	Claim	December 5, 2002	Order	
ONHWP	DRIZEN	Claim	April 17, 2002		Unsuccessful

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
ONHWP	<i>DURANTE, M</i>	Claim	June 19, 2002	Adjournment	
ONHWP	<i>DURANTE, M</i>	Claim	July 26, 2002	Order	
ONHWP	<i>DURANTE, M</i>	Claim	August 20, 2002	Order	
ONHWP	<i>DURANTE, T & R</i>	Claim	June 5, 2002	Adjournment	
ONHWP	<i>DURANTE, T & R</i>	Claim	July 26, 2002	Order	
ONHWP	<i>DURANTE, T & R</i>	Claim	October 22, 2002		Successful in part
ONHWP	<i>ERLAND</i>	Claim	May 1, 2002		Unsuccessful
ONHWP	<i>FAWZI</i>	Extension of time to file	January 25, 2002	Ruling	Successful
ONHWP	<i>FAWZI</i>	Claim	April 29, 2002	Adjournment	
ONHWP	<i>FRASER</i>	Claim	July 18, 2002	Order	
ONHWP	<i>FULLER and SWICK</i>	Claim	February 25, 2002		Successful
ONHWP	<i>GALLO</i>	Claim	January 31, 2002		Unsuccessful
ONHWP	<i>GIUSTIZIA</i>	Claim	January 31, 2003		Unsuccessful
ONHWP	<i>GONCALVES</i>	Claim	August 2, 2002	Order	
ONHWP	<i>Grand Metropolitan Homes Inc.</i>	Revoke Registration	June 26, 2002	Order	
ONHWP	<i>GRIFFIN</i>	Claim	August 6, 2002	Order	
ONHWP	<i>GROH</i>	Claim	January 14, 2003	Dismissal Order	Unsuccessful
ONHWP	<i>GUY and ARBOUR</i>	Claim	May 8, 2002	Order	
ONHWP	<i>GUY and ARBOUR</i>	Claim	October 2, 2002		Successful in part
ONHWP	<i>HAMBLIN, BOWKER and Ottawa Carleton Condominium Corporation No. 619</i>	Claims	October 29, 2002	Order	
ONHWP	<i>Hans and Jo Construction Ltd.</i>	Suspend Registration	February 25, 2002	Order	
ONHWP	<i>Hans and Jo Construction Ltd.</i>	Suspend Registration	May 27, 2002	Settlement	Successful
ONHWP	<i>HARDCASTLE</i>	Claim	March 12, 2002		Unsuccessful
ONHWP	<i>HILTS</i>	Claim	August 27, 2002	Order	
ONHWP	<i>HOUSMAN</i>	Claim	January 28, 2003	Order	
ONHWP	<i>IOZZO</i>	Claim	November 6, 2002	Settlement	Successful
ONHWP	<i>J.R. Diamond Homes Inc.</i>	Refuse to Renew Registration	February , 2002		Unsuccessful
ONHWP	<i>JANKOVIC</i>	Claim	February 28, 2002		Successful in part
ONHWP	<i>JARVINEN and STEWART</i>	Claim	July 23, 2002	Order	

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
ONHWP	JARVINEN and STEWART	Claim	October 9, 2002	Order	
ONHWP	John Gerber Construction Limited	Suspend Registration	March 22, 2002	Order	
ONHWP	John Gerber Construction Limited	Suspend Registration	April 4, 2002	Order	
ONHWP	John L. Cowan Limited	Revoke Registration	January 25, 2002	Order	
ONHWP	JOHNSTONE	Claim	March 15, 2002	Order	
ONHWP	KILLU	Claim	December 19, 2002		Unsuccessful
ONHWP	KRZYK	Claim	July 10, 2002	Order	
ONHWP	KRZYK	Claim	September 10, 2002		Unsuccessful
ONHWP	L.J. Kernaghan Construction Limited	Revoke Registration	February 6, 2002	Order	
ONHWP	L.J. Kernaghan Construction Limited	Revoke Registration	February 14, 2002	Order	
ONHWP	LIPTON	Claim	April 30, 2002		Successful in part
ONHWP	LONGO	Claim	February 28, 2002	Adjournment	
ONHWP	LONGO	Claim	April 29, 2002	Order	
ONHWP	LONGO	Claim	October 8, 2002	Order	
ONHWP	Lurkan Homes Inc.	Refuse to Renew Registration	October 17, 2002	Order	
ONHWP	Makkinga Construction Incorporated	Suspend Registration	February 6, 2002	Order	
ONHWP	Mandev Developments Ltd.	Refuse Registration	October 11, 2002		Unsuccessful
ONHWP	MANN	Claim	July 26, 2002	Adjournment	
ONHWP	MANN	Claim	August 13, 2002	Order	
ONHWP	MARTIN	Claim	August 23, 2002	Adjournment	
ONHWP	MARTIN	Claim	November 26, 2002		Unsuccessful
ONHWP	MCLAREN	Claim	January 11, 2002	Ruling	Unsuccessful
ONHWP	McLAREN	Claim	February 25, 2002	Order, Reasons	
ONHWP	MOHAMED	Motion to Extend Time to File	August 19, 2002		Unsuccessful
ONHWP	MORELLI	Claim	March 17, 2003	Adjournment	
ONHWP	MORRIS	Claim	May 27, 2002	Order	
ONHWP	MORRIS	Claim	June 21, 2002	Adjournment	
ONHWP	MORRIS	Claim	October 28, 2002	Order	
ONHWP	MORRIS	Claim	November 18, 2002	Order	Withdrawn

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
ONHWP	MORRISON	Claim	October 9, 2002		Unsuccessful
ONHWP	M.T.C.C. #1101 and M.T.C.C. #1120	Claim	June 19, 2002	Order	
ONHWP	M.T.C.C. #1101 and M.T.C.C. #1120	Claim	November 28, 2002		Unsuccessful
ONHWP	M.T.C.C. #1101 and M.T.C.C. #1120	Claim	August 20, 2002	Order	
ONHWP	M.T.C.C. #1244	Claim	September 20, 2002	Order	
ONHWP	M.T.C.C. #1244	Claim	October 18, 2002	Order	
ONHWP	NICOLAU	Claim	July 17, 2002		Successful in part
ONHWP	NOEL PARE	Claim	January 15, 2002	Adjournment	
ONHWP	NOEL PARE	Claim	July 31, 2002		Unsuccessful
ONHWP	NORMAN	Claim	September 9, 2002		Unsuccessful
ONHWP	O.O.F. Limited o/a Bradstone's Construction	Refuse Registration	January 7, 2002	Order	
ONHWP	O'LEARY and KELLY	Claim	January 7, 2002		Successful in part
ONHWP	O.C.C.C. #581	Claim	January 9, 2003	Order	
ONHWP	PARE	Claim	March 20, 2002	Adjournment	
ONHWP	PASIC	Claim	March 18, 2003		Unsuccessful
ONHWP	Peel Condominium Corporation No. 498	Claim	February 21, 2002	Adjournment	
ONHWP	PERGUNAS	Claim	January 18, 2002	Adjournment	
ONHWP	PERGUNAS	Claim	August 16, 2002		Unsuccessful
ONHWP	PLACKO	Claim	October 24, 2002		Unsuccessful
ONHWP	Polaris Restorations Inc.	Refuse to Renew Registration	June 20, 2002	Settlement	Successful
ONHWP	POSTE and BOND	Claim	January 16, 2002	Order	Successful
ONHWP	PSUTKA	Claim	November 8, 2002	Adjournment	
ONHWP	PSUTKA	Claim	February 10, 2003	Order	
ONHWP	PUCHTA 1251	Claim	December 19, 2002	Adjournment	
ONHWP	PUCHTA 1251	Claim	February 17, 2003		Unsuccessful
ONHWP	PUCHTA 1269	Claim	December 23, 2002		Unsuccessful
ONHWP	QUATELA	Claim	March 12, 2003	Order	
ONHWP	RAM	Claim	February 28, 2002		Successful in part
ONHWP	Redpark Homes Ltd.	Refuse to Renew Registration	February 7, 2002	Order	

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
ONHWP	<i>Redpark Homes Ltd.</i>	Refuse to Renew Registration	February 22, 2002	Order	Successful
ONHWP	<i>Renaud Homes Inc.</i>	Refuse to Renew Registration	March 10, 2003	Order	
ONHWP	<i>Richard McPhee and Company Limited</i>	Revoke Registration	February 19, 2002	Order	
ONHWP	<i>RIOUX</i>	Claim	June 18, 2002		Successful in part
ONHWP	<i>RIZZO</i>	Claim	March 20, 2002		Unsuccessful
ONHWP	<i>Roncone Construction Limited</i>	Suspend Registration	March 22, 2002	Order	
ONHWP	<i>Roncone Construction Limited</i>	Suspend Registration	April 4, 2002	Order	
ONHWP	<i>SALHANY and GARDINER</i>	Extend Time to File	July 23, 2002	Adjournment	
ONHWP	<i>SALHANY and GARDINER</i>	Extend Time to File	September 10, 2002		Successful
ONHWP	<i>SALHANY and GARDINER</i>	Claim	December 24, 2002		Unsuccessful
ONHWP	<i>SAMUEL</i>	Claim	March 7, 2002	Order	
ONHWP	<i>SAMUEL</i>	Claim	May 3, 2002		Successful in part
ONHWP	<i>Saugeen Valley Homes Inc.</i>	Refuse to Renew Registration	October 22, 2002	Order	
ONHWP	<i>SAVESCU</i>	Claim	February 21, 2003		Successful
ONHWP	<i>SEATON</i>	Claim	October 24, 2002	Order	
ONHWP	<i>SEYMOUR</i>	Claim	March 31, 2003	Order	
ONHWP	<i>Silverland Homes & Development Inc.</i>	Revoke Registration	October 8, 2002	Order	
ONHWP	<i>SIRBU</i>	Claim	March 14, 2003		Unsuccessful
ONHWP	<i>SKINNER</i>	Claim	May 21, 2002	Adjournment	
ONHWP	<i>SKINNER</i>	Claim	July 16, 2002	Adjournment	
ONHWP	<i>SKINNER</i>	Claim	October 18, 2002		Successful in part
ONHWP	<i>SOMANATHAN</i>	Claim	July 19, 2002		Unsuccessful
ONHWP	<i>SWERBRICK and MACINTYRE</i>	Claim	January 10, 2002	Order	
ONHWP	<i>TANKOVITZ</i>	Claim	March 4, 2003		Successful in part
ONHWP	<i>Tigelaar Construction Ltd.</i>	Suspend Registration	May 17, 2002	Order	
ONHWP	<i>TOROK</i>	Claim	October 4, 2002		Successful in part
ONHWP	<i>TRIPODO</i>	Extend Time to File	July 10, 2002		Unsuccessful
ONHWP	<i>VALIANT</i>	Claim	March 8, 2002		Successful

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
ONHWP	<i>WILSON</i>	Claim	January 29, 2003		Successful in part
ONHWP	<i>YANG</i>	Claim	May 13, 2002		Successful in part
ONHWP	<i>ZIMMER</i>	Claim	September 24, 2002	Order	
ONHWP	<i>ZIMMER</i>	Claim	March 7, 2003	Order	
ONHWP	<i>ZIMMER</i>	Claim	March 26, 2003	Order	

PRIVATE CAREER COLLEGES ACT

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
PCCA	<i>Toronto Institute of Technology Inc</i>	Refuse Registration	November 18, 2002	Order	
PCCA	<i>Toronto Institute of Technology Inc</i>	Refuse Registration	December 23, 2002		Unsuccessful

REAL ESTATE AND BUSINESS BROKERS ACT

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
REBBA	<i>ARTENOSI</i>	Revoke Registration	July 15, 2002	Adjournment	
REBBA	<i>ARTENOSI</i>	Revoke Registration	September 24, 2002	Order	
REBBA	<i>BRESSI</i>	Refuse Registration	April 23, 2002	Order	
REBBA	<i>BRESSI</i>	Refuse Registration	May 3, 2002	Order	
REBBA	<i>BRESSI</i>	Refuse Registration	August 7, 2002		Unsuccessful
REBBA	<i>BUCKMAN</i>	Refuse to Grant Registration	January 25, 2002	Order	
REBBA	<i>Di PAOLA</i>	Revoke Registration	May 27, 2002	Order	
REBBA	<i>Di PAOLA</i>	Revoke Registration	December 20, 2002		Successful
REBBA	<i>HAYWOOD</i>	Revoke Registration	July 18, 2002	Adjournment	
REBBA	<i>HAYWOOD</i>	Revoke Registration	August 28, 2002	Order	
REBBA	<i>JANISSE</i>	Refuse Registration	August 6, 2002	Order	
REBBA	<i>JANISSE</i>	Refuse Registration	September 26, 2002		Successful in Part
REBBA	<i>JESSIMAN</i>	Revoke Registration	February 5, 2003	Adjournment	
REBBA	<i>JESSIMAN</i>	Revoke Registration	February 24, 2003	Order	

TRAVEL INDUSTRY ACT

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
TIA	995391 Ontario Inc. o/a Air Links International	Revoke Registration	May 31, 2002	Consent	Successful
TIA	1091873 Ontario Inc. o/a One Step Travel	Revoke Registration	March 24, 2003	Consent	Successful
TIA	1195798 Ontario Inc. o/a Sonali's Travel	Revoke Registration	September 4, 2002	Consent	Successful
TIA	1241757 Ontario Ltd. o/a Marlin Travel	Revoke Registration	February 14, 2002	Consent	Successful
TIA	1392045 Ontario Inc. o/a Adventures in Travel	Revoke Registration	September 19, 2002	Consent	Successful
TIA	1407847 Ontario Inc. o/a New Century Travel Consulting	Revoke Registration	May 24, 2002	Consent	Successful
TIA	Astra Travel and Services Inc.	Revoke Registration	December 3, 2002		Unsuccessful
TIA	Baldwin Travel & Tours Ltd.	Revoke Registration	February 12, 2002	Consent	Successful
TIA	Canex Canada Inc. o/a Canadian Travel Service	Revoke Registration	April 30, 2002	Consent	Successful
TIA	Casino Bus Service Inc.	Revoke Registration	May 9, 2002	Consent	Successful
TIA	Cedar Holidays	Revoke Registration	November 5, 2002	Order	
TIA	Cruise Connoisseurs	Revoke Registration	November 1, 2002	Adjournment	
TIA	Cruise Connoisseurs	Revoke Registration	December 11, 2002	Consent	Successful
TIA	ELWOOD	Claim	June 13, 2002		Unsuccessful
TIA	FARRELL	Claim	June 13, 2002		Unsuccessful
TIA	First Class Travel	Revoke Registration	May 14, 2002	Consent	Successful
TIA	Global Travel Centre Advantage	Claim	October 1, 2002	Adjournment	
TIA	Global Travel Centre Advantage	Claim	October 17, 2002	Order	
TIA	Global Travel Centre Advantage	Claim	November 21, 2002	Adjournment	
TIA	Global Travel Centre Advantage	Claim	February 14, 2003	Adjournment	
TIA	Island Breeze Travel	Revoke Registration	February 21, 2002	Order	
TIA	J.A.B. International Ltd.	Revoke Registration	January 9, 2002	Consent	Successful
TIA	KIRBY	Claim	January 13, 2003	Order	

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
TIA	<i>Lama Tours</i>	Claim	November 12, 2002		Unsuccessful
TIA	<i>LUQUEZ, Magdalena o/a Inti Tours Travel Agency</i>	Revoke Registration	March 19, 2003	Consent	Successful
TIA	<i>MALKANI</i>	Claim	January 23, 2002	Dismissal Order	Unsuccessful
TIA	<i>McDonell Travel Ltd. o/a Thomas Cook Travel</i>	Revoke Registration	March 7, 2003	Consent	Successful
TIA	<i>McGLYNN</i>	Claim	January 9, 2002		Unsuccessful
TIA	<i>Millenium Travel Canada Inc.</i>	Claim	January 28, 2003	Order	
TIA	<i>Millenium Travel Canada Inc.</i>	Claim	February 24, 2003		Unsuccessful
TIA	<i>Nicorr Investments Inc. o/a All World Travel</i>	Revoke Registration	February 26, 2002	Consent	Successful
TIA	<i>Ocean Access Travel Connection</i>	Revoke Registration	May 10, 2002		Unsuccessful
TIA	<i>Olympic Holidays Ltd.</i>	Revoke Registration	March 22, 2002	Order	
TIA	<i>Olympic Holidays Ltd.</i>	Revoke Registration	July 4, 2002	Consent	Successful
TIA	<i>Olympic Travel Canada Inc.</i>	Revoke Registration	February 15, 2002	Adjournment	
TIA	<i>Parwaz Travel & Tourism Inc.</i>	Revoke Registration	April 9, 2002	Consent	Successful
TIA	<i>Questours Inc.</i>	Revoke Registration	March 4, 2003	Consent	Successful
TIA	<i>RIES, Aida and Ana Ries o/a Alliance Travel Agency</i>	Revoke Registration	June 10, 2002	Adjournment	
TIA	<i>RIES, Aida and Ana Ries o/a Alliance Travel Agency</i>	Revoke Registration	August 8, 2002	Consent	Successful
TIA	<i>Russell Hockey Equipment Ltd.</i>	Revoke Registration	February 14, 2002	Consent	Successful
TIA	<i>1075361 Ontario Ltd o/a Solarex Travel</i>	Revoke Registration	May 14, 2002	Consent	Successful
TIA	<i>SCHMIDT</i>	Claim	August 6, 2002	Adjournment	
TIA	<i>SCHMIDT</i>	Claim	August 27, 2002	Order	
TIA	<i>SCHMIDT</i>	Claim	September 13, 2002		Successful
TIA	<i>Scuba International Inc. o/a Ultimate Holidays</i>	Revoke Registration	February 25, 2003	Consent	Successful
TIA	<i>SHAATH</i>	Claim	March 10, 2003	Order	
TIA	<i>Sunbeam Travel Ltd.</i>	Revoke Registration	September 6, 2002	Consent	Successful
TIA	<i>STEPHANEK</i>	Unperfected – Claim	January 2, 2002	Dismissal Order	Unsuccessful
TIA	<i>TAKAMI, Hiroyuki</i>	Claim	June 11, 2002		Unsuccessful

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
TIA	<i>Value Vacations Limited</i>	Revoke Registration	August 23, 2002	Order	
TIA	<i>Value Vacations Limited</i>	Revoke Registration	March 18, 2003		Unsuccessful
TIA	<i>VELTMAN</i>	Claim	May 8, 2002		Unsuccessful

KELLY

MICHAEL KELLY

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

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

TRIBUNAL: MALCOLM FEALING,
Presiding member

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

MICHAEL KELLY, Applicant
MICHAEL FAIR, Counsel for Applicant

DATE OF HEARING: December 27, 2001

DECISION RELEASED: January 3, 2002

By Teleconference

REASONS FOR DECISION

A hearing was held on December 27, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

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

BACKGROUND:

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

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

Owner:	Michael Kelly (the "Applicant")
Motor Vehicle:	1994 Pontiac SLE, plate no. 682 THX (the "vehicle")
Date of Appeal:	December 10, 2001

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

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

This matter came before this Tribunal on December 27, 2001 and proceeded as an electronic hearing.

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

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

ISSUE:

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

To:

Licence appeal tribunal

RE: Michael Kelly-vehicle impoundment

The continued impoundment of my only motor vehicle currently licenced and insured is an economic hardship to me, as I have no opportunity for employment, except to arrange for transportation by another driver using my car. I have current work available as a tree removal worker, provided that I can obtain the release of my vehicle.

Mr. Michael Fair the Applicant's counsel advised that he did not have anything to add to the Applicant's submission. Mr. Kelly acknowledged his guilt, but wished to have his car back in order to apply for a job as a tree removal worker.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

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

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

suspension until June 13, 2007.

The Respondent did not have any questions to put to Mr. Fair.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

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

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

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

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

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases

where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

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

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

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

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

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

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

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

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

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

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

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

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

- 22 (1) In determining whether exceptional hardship will result from an order to

impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,

- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.

(2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,

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

(3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,

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

(4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

Section 22(3)(d)(i) of Regulation 632/98 amending Regulation 574 of R.R.O. 1990 limits the

grounds of appeal under section 50.2 of the *Highway Traffic Act*. Section 22(3)(d)(i) excludes economic or employment loss as a ground of appeal if such loss is that of the driver of the impounded vehicle whose driver's licence was under suspension which resulted in the vehicle's impoundment. Here, the economic and employment loss raised by the Applicant is his own. However, the Applicant is also the driver whose driver's licence was under suspension, which resulted in the vehicle's impoundment. This type of loss cannot be considered by the Tribunal as exceptional hardship under section 50.2(3)(d) of the *Highway Traffic Act*.

No evidence of any other type of loss was raised by the Applicant. Accordingly, the Applicant has not established the exceptional hardship ground of appeal under section 50.2 of the *Highway Traffic Act*.

DECISION:

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

LICENCE APPEAL TRIBUNAL

Malcolm Fealing, Presiding Member

RELEASED: January 3, 2002

FILE NAME: 0101.mvia.Kelly

McLAREN

DAVID LARRY McLAREN

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

TO DISALLOW A CLAIM

TRIBUNAL: BRIAN K. MAROTTA, Vice-Chair

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

DATES OF
HEARING: March 19 and 20, 2001 Sudbury

RULING

WHEREAS the Applicant had appealed to the Licence Appeal Tribunal from a written Decision of the Respondent dated August 8, 2000 and supplementary Decision letter dated September 28, 2000;

AND WHEREAS the matter was heard in Sudbury, Ontario, on March 19 and March 20, 2001;

AND WHEREAS at the conclusion of the hearing, the Respondent brought a Motion to dismiss the Applicant's appeal on the basis that the warranty period had expired prior to the Applicant making a claim on the Respondent;

AND WHEREAS the Respondent's Motion was allowed;

AND WHEREAS the Honourable Justice R. G. S. Delfrate made an Order on November 8, 2001 that the matter be returned to the Licence Appeal Tribunal for determination as to:

- (a) whether the deficiencies forming the subject matter of the Applicant's claim under Section 14 of the *Ontario New Home Warranties Plan Act* made June 29, 1999, constitute a continuation of the major structural defect reported in writing to the Respondent on August 23, 1995, and;
- (b) the quantum of compensation to which the Applicant is entitled, if any.

AND WHEREAS the Tribunal has reviewed the oral and documentary evidence provided by the parties at the hearing, the Tribunal on the basis of that evidence finds as follows:

- (a) the deficiencies forming the subject matter of the Applicant's claim under Section 14 of the *Ontario New Home Warranties Plan Act* made June 29, 1999, constitute a continuation of the major structural defect reported in writing to the Respondent on August 23, 1995; and
- (b) had there been a decision in favour of the Applicant, the quantum of compensation to which the Applicant would have been entitled would have been \$88,438.80, plus applicable taxes.

LICENCE APPEAL TRIBUNAL

Brian K. Marotta, Vice-Chair

Released: January 11, 2002

DON FOURNIER SERVICE CENTRE INC. AND DONALD FOURNIER

DON FOURNIER SERVICE CENTRE INC. AND DONALD FOURNIER

IN THE MATTER OF the *Highway Traffic Act*,
R.S.O. 1990 Chapter H.8 as amended

AND IN THE MATTER OF an Application by Don Fournier Service Centre Inc. and Donald Fournier dated April 9, 2001 for a hearing before the Licence Appeal Tribunal pursuant to Section 95 of the *Highway Traffic Act* appealing the Notice of the Director of Vehicle Inspection Standards dated January 3, 2001;

AND IN THE MATTER OF Motor Vehicle Inspection Station Licence Number 42-42288 in the name of Don Fournier Service Centre Inc.;

AND IN THE MATTER OF the registration of Motor Vehicle Inspection Mechanic, Donald Fournier holding Trade Certificate Number 310T217060.

TRIBUNAL: JOHANNE N. MORISSETTE, Presiding Member

APPEARANCES: PATRICK MOORE, Counsel for the Director of Vehicle Inspection Standards

DONALD FOURNIER, Applicant
RONALD G. GUERTIN, Counsel for the Applicant

DATES OF HEARING: June 25, 26 and 27, 2001 and September 10, 2001 and
December 3, 4, 5 and 6, 2001 Ottawa

DECISION AND REASONS

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal by the licensee Don Fournier Service Centre Inc. and the registrant Donald Fournier (the "Applicant") respecting a proposal by the Director of Vehicle Inspection Standards to revoke:

- a) Motor Vehicle Inspection Station Licence No. 42-42288 issued to Don Fournier Service Centre Inc., and
- b) the registration of Motor Vehicle Inspection Mechanic, Donald Fournier who holds a Trade Certificate No. 310T217060.

PRELIMINARY MATTERS:

The hearing scheduled on September 10, and 11, 2001 was to be the continuation of the hearing which commenced on June 25, 26, and 27, 2001, but due to the Applicant's brother's illness he requested an adjournment, which was on consent and was granted.

As well, on September 10, 2001, the Tribunal also issued a certificate of non attendance for the failure of Mr. David Hair to attend the hearing to give evidence to this Tribunal, although served with a Summons to attend issued by this Tribunal on September 4, 2001 under the authority of the *Statutory Powers and Procedure Act*.

FACTS:

The Director's Grounds for Revocation:

By Notice dated January 3, 2001, the Director of Vehicle Inspection Standards revoked pursuant to subsection 91(8)(a)(c) and (e) and section 93(c) of the *Highway Traffic Act* R.S.O. 1990, Chap. H8 as amended (the "Act"):

- (a) Motor Vehicle Inspection Station Licence No. 42-42288 issued to Don Fournier Service Centre Inc., and;
- (b) the registration of Motor Vehicle Inspection Mechanic, Donald Fournier who holds a Trade Certificate No. 310T217060.

on the grounds that the licensee and registrant have made false statements and failed to comply with the Act and regulations in the issuance of safety standards certificate as follows:

1. Certificate Number 1253544 dated on or about July 19, 2000 concerning a 1993 Chevrolet, hereinafter referred to as the "Lascelle vehicle";

2. Certificate Number 1360025 dated on or about August 18, 2000 concerning a 1995 Ford, hereinafter referred to as the "Nagy vehicle";
3. Certificate Number 1360070 dated on or about August 29, 2000 concerning a 1986 GMC, hereinafter referred to as the "Hair vehicle";
4. Certificate Number 1360023 dated on or about August 18, 2000 concerning a 1986 Pontiac, hereinafter referred to as the "Marsolais vehicle";
5. Certificate Number 1308246 dated on or about August 8, 2000 concerning an 1984 Pontiac, hereinafter referred to as the "Lauzon vehicle";
6. Certificate Number 1308245 dated on or about August 4, 2000 concerning a 1985 GMC, hereinafter referred to as the "Proulx vehicle";
7. Certificate Number 1360060 dated on or about August 24, 2000 concerning a 1987 Chevrolet, hereinafter referred to as the "Tracey vehicle";
8. Certificate Number 1308244 dated on or about August 15, 2000 concerning a 1987 Chevrolet, hereinafter referred to as the "Poulin vehicle";

And further on the grounds that the licensee failed to comply with the Act and regulations by the sale of safety standards certificates as follows:

9. Certificate Number 1253544 dated on or about July 19, 2000 concerning a 1983 Chevrolet, hereinafter referred to as the "Lascelle vehicle";
10. Certificate Number 1360070 dated on or about August 29, 2000 concerning a 1986 GMC, hereinafter referred to as the "Hair vehicle".

And further on grounds that the said licensee failed to maintain records of safety standard certificates issued by the licensee as required under Regulation 601 of the *Highway Traffic Act*.

And further on the grounds that the said licensee failed to meet the conditions in the equipment of the motor vehicle inspection station in accordance with Regulation 601 made under the *Highway Traffic Act*.

The Director presented 9 witnesses, who were: Mr. Walter Nagy, Mr. Robert Poulin, Ms. Pamela Marsolais, Officer Brian Jahn, Officer John Bell, Mr. Micheal Lauzon, Ms. Shirley Lascelle, Mr. David Hair, and Officer Robert Riddell.

The Applicant presented 4 witnesses, who were: The Applicant himself, Mr. Dan Mitchell, Mr. Roger Bélair, and Mr. Gordon Lacroix.

The evidence of each witness was as follows:

Walter Nagy:

He bought his vehicle for \$500 in the “as is” condition. The car needed work. He worked on it to get it ready for a safety check. He changed some brake lines and some brake hoses, fixed the trunk and reinforced the frame on the front passenger's side. He then talked to a friend of his, Aaron Dennehy who runs a garage. Nagy took his car to Dennehy's garage and talked for about one half hour to Dennehy about the work Nagy did. Dennehy did not look at the car. Mr. Nagy left the registration of the car with Dennehy, and drove away with the car. Two to three days later, Dennehy provided Nagy with a safety certificate from a garage station known as “Don Fournier Service Centre Inc.”

Robert Poulin:

He bought his vehicle for \$600 in the “as is” condition. His original statement provided to Officer Riddell was to the effect that he attended the Fournier garage without the vehicle in question and obtained a safety certificate for the price of \$150.00. At the hearing, he changed his story and said that he had given his vehicle to a Roger Bélair who said he could get him a safety certificate.

The Tribunal found that the evidence of this witness lacked credibility. He had no valid explanation for why he changed his story. As a result, the Tribunal has given his evidence little weight.

Pamela Marsolais:

She bought her vehicle from a friend of the family for \$400. The vehicle was already certified. When Officer Riddell came to examine her vehicle, he found a lot of problems with the vehicle, and she decided to scrap the vehicle instead of trying to fix it. She sold it to Debbie's Delivery for parts.

Officer Brian Jahn:

Officer Jahn is an officer with the Ministry of Transportation and an inspector under the *Highway Traffic Act* in Renfrew and Lanark Counties. His duties are to inspect vehicles. He has been a licensed mechanic since 1965. He was qualified by the Tribunal as an expert witness with respect to the field of automotive mechanics.

Officer Jahn received the initial complaint made by Ms. Lascelle on August 4, 2000. He met with Ms. Lascelle and inspected the vehicle in question on August 10, 2000. He noted numerous defects with the vehicle, which included:

- i) left front 8 wheel fasteners loose;
- ii) left front brake hose cracked at caliper end exposing inner fabric;
- iii) left outer tie rod end excessively loose;
- iv) left upper control arm retaining bolts loose, allowing arm to move in and out;
- v) right front brake hose cracked at caliper end exposing inner fabric;
- vi) right front brake caliper lower retaining bolt missing;
- vii) right rear axle seal leaking, contaminating brakes;
- viii) right side shoulder lap belt assembly laying on front seat not attached;
- ix) numerous small holes in right side floor pan;
- x) left side sun visor loose, retained by one screw;
- xi) defroster lever broken;
- xii) two wheel fastening missing, right rear wheel;
- xiii) one wheel fastener missing, left rear wheel;
- xiv) headlights out of adjustment;
- xv) windshield washers inoperative; and
- xvi) windshield glass loose in mounting.

Of the sixteen defects, he testified that 5 of them, in his opinion, had to be present at the time of the safety inspection, namely defects ii, iii, iv, vii, and ix. As to others, he expressed caution, and he could not be absolutely sure of their presence at the time of the safety inspection. Officer Jahn took the plates off the Lascelle vehicle and inscribed the registration of the vehicle as unfit.

Officer John Bell:

Officer Bell is an officer of the Ministry of Transport and an inspector under the *Highway Traffic Act* for Renfrew County, since 1984. He has been a licensed mechanic since 1989. He was qualified by the Tribunal as an expert witness respecting the field of automotive mechanics.

Officer Bell investigated certain vehicles that had been certified by the Applicant. One of those was the Tracey vehicle which he inspected on September 25, 2000. The lapse between the time of the Applicant's safety inspection and Officer Bell's inspection was 32 days and 2312 km travelled. Officer Bell found a number of defects which include:

- i) front left frame rail perforated by corrosion;
- ii) a metal patch applied over one side with the spot weld pulling away and with a large hole at the patch;
- iii) the gas tank may possibly have been leaking, but he could not say for sure;

- iv) brake fluid levels were low;
- v) right rear tire with only one thirty-second of an inch of tread remaining;
- vi) right rear window cracked; and
- vii) high beam lights inoperative.

Of the 7 defects, items i and ii were, in his opinion, definitely present at time of the Applicant's safety check. As to the remaining 5 items, he could not express an absolute opinion. The basis for Officer Bell's opinion respecting the perforation, item ii, was based on his experience as a mechanic. He said the mileage did not affect his opinion. In his opinion, the perforations caused by corrosion were definitely present at the time of the safety inspection certificate's date since there was no apparent fatigue or recent damage.

Mr. Micheal Lauzon:

Mr. Lauzon bought this vehicle for \$1.00 in the "as is" condition. He wanted to do some work on the vehicle before it could be given a safety certificate. He was sitting in the "Do drop Inn" Bar close to Cornwall, and he mentioned that he needed a safety check. Somebody, he could not remember the name, told him that he could get Mr. Lauzon a safety certificate for \$100. The vehicle was at Mr. Lauzon's home, and it never was brought to any garage. Mr. Lauzon received the safety certificate from that same individual in early August. The Safety certificate came from the Applicant's establishment.

Ms. Shirley Lascelle:

Ms. Lascelle's former husband, Blake Dennehy bought the vehicle, a truck, in question and asked her to take care of getting a safety certificate. The vehicle was delivered to her house on a flat bed truck by the vendor, on July 5, 2000. She took the vehicle to Tire Craft for a pre-safety to ascertain what work had to be done. Tire Craft advised her that there was going to be \$1,200 in parts plus labour at \$80 per hour. She was shocked. She went to a relative across the street from Tire Craft where she met Dan Mitchell. He advised her that he did safeties and he could do the work for her for half-price. He said he was a mechanic. The agreement was that Mitchell would do the work and then it would go back to Tire Craft for the safety certificate, but Mitchell advised, after 10 days had lapsed and \$1,200 had been paid to him, that Tire Craft did not have time that day. He advised her that he could get a safety certificate from somewhere else, in Ottawa. Mitchell picked her up to go to Ottawa. He wanted \$150. He said that we did not need the vehicle to obtain the safety certificate. She testified that they drove to Ottawa to the Applicant's garage. She stayed outside the Applicant's garage, and Mitchell came back with her safety certificate and other similar papers which he put in a basket. She said she was sure at the time that the document looked like

other safety certificates she had seen. However, on cross-examination, she said she could no longer be certain of this.

Soon after the truck was registered, it broke down. She tried to charge Mitchell but, in filing a complaint with the Ministry, she got the investigation started against the Applicant.

Mr. David Hair:

Mr. Hair was brought to this hearing by the police to testify. He was very reluctant and certainly not cooperative. He advised that he had received a threatening phone call the night before the hearing in June, advising him not to attend or he could end up in hospital. He did not know who had called him.

He testified that he bought an uncertified vehicle for \$1,500. The condition of the truck was that it needed minor body work, which he started to do before he got a safety certificate. He talked to Chuck Collins, a friend of his, who said he knew someone who could get him the safety certificate. He said he wanted a place where they would overlook a few things since he had not finished the body work, and he paid \$150. He drove the vehicle to Collin's house. A couple of days later, the certificate from the Applicant was left at a neighbour's house, and he knew it was a false safety. He said that, if he would have wanted a regular safety certificate, he would have gone to Warner's garage, which is a friend of his father's. However, he knew that there would have been much more work required on the vehicle to obtain a regular safety certificate, and he wanted the vehicle right away for his work. On cross-examination, he said that he did not know Roger Bélair.

Mr. Hair's evidence, although somewhat reluctantly provided, was in the Tribunal's opinion, frank and credible as to what occurred in this case.

Officer Robert Riddell:

The leading inspector and investigator in this case, Officer Riddell, has been with the Ministry of Transportation since 1976 and a licensed mechanic since 1977. He became a Ministry Officer in 1981. His expert opinion was based on his experience considering the following factors: time lapsed, lapsed kilometers, age of vehicle, and types of defects.

Officer Riddell testified that the initial investigation centred on the records of the licensee, Don Fournier Service Centre Inc. The Officer testified that during the following periods, the following number of safety certificates had been issued by the Applicant:

December 21 st , 1998 to December 31 st , 1999:	560 certificates;
January 1 st , 2000 to December 31 st , 2000:	1000 certificates;
January 1 st , 20001 to June 15 th , 2001:	500 certificates;

In his opinion, this was a very large number of certificates for the size of the garage, with only two licensed mechanics. He said the average in the industry would be between 60 to 80 per year. However, if the licensee is involved with a used car dealer, then he would have a lot more clients and that could bring the average up to 200 to 240 certificates per year.

His investigation led him to attend at the Applicant's premises on August 30, 2000 with Officer Jahn. They checked the licensee's records. They specifically asked to see the repair records of the Lascelle vehicle. It was not produced. They took away 20 books of safety certificates issued between mid June 2000 and late August 2000, which are listed at page 69 of Exhibit 3 to this hearing. They further asked for all of the repair records of those 20 books of certificates in their possession.

They interviewed Dan Mitchell, who admitted that he had obtained the safety certificate for the Lascelle vehicle from the Applicant, without providing the vehicle in question to the Applicant for inspection.

Officer Riddell personally inspected the following five vehicles.

Nagy vehicle:

Officer Riddell inspected the vehicle on September 7, 2000. 20 days had elapsed since the certificate had been issued and 745 km travelled. The following defects were found:

- along the driver's side the frame member had cracked just to the rear of the wheel well; and
- the bottom flange was corroded and cracked. The corroded area was three inches by four inches.

In his opinion, the crack in the flange was worrisome when the frame stretches. His opinion was that the corroded area was definitely present 20 days prior to his inspection and that the crack came from that corroded area. He said that the crack also was most probably there when the safety certificate was issued, but he could not say this was a certainty.

Hair vehicle:

Officer Riddell inspected the Hair vehicle on September 13, 2000. 15 days had passed since the certificate had been issued and 1949 km travelled. The following defects were found:

- big rust perforations in the vehicle's underbody; and
- tie rod ends and the flex hose problems.

He testified that in his opinion, the big rusted perforations were definitely there 15 days prior to his investigation. However, on cross-examination, he conceded he could not be definite this was the situation, and he agreed that he could not see whether the body was sealed off or not.

He testified that the tie rod ends had 1/16" play which was excessive play, and in his opinion, not certifiable. His opinion was that play had to have been present at the time the safety certificate was issued. Extensive cross-examination was conducted on his opinion of how he conducted his inspection of the tie rod ends. In re-direct examination, he explained that he conducted his inspection of the tie rod ends in a way less likely to show play in the tie rod ends than another acceptable method and that the inspection method did not prejudice the Applicant but, in fact, helped him. Nonetheless, excessive play was found.

Regarding the flex hose, Officer Riddell's evidence and opinion was that the crack in the flex hose was so extensive that it had to have been there 15 days prior to his inspection.

Marsolais vehicle:

Officer Riddell inspected the Marsolais vehicle on September 13, 2000. 26 days had elapsed since the safety certificate had been issued and 54,161 km less than was indicated on the safety certificate. The officer presumed that an error must have been made on the certificate. As to the defects, he found that he could stick his finger through the underbody in the driver's floor pan area and the floor pan adjacent to the driver's side. The perforation was six inches by one inch. He said that this defect would have been there when the safety certificate was issued, except for the 3/8 inch hole in the passenger floor pan which, on cross-examination, he said could have occurred in the 26 days following the date of the safety certificate. He said he could not give his opinion on the front exhaust, the manifold area, or the brakes fluid level.

Proulx vehicle:

Officer Riddell inspected this vehicle on September 19, 2000. 46 days had elapsed since the safety inspection, and 155,811 km less than indicated on the certificate. Mr. Proulx advised the officer that he had, since the inspection, changed the motor and had changed the odometer. The following defects were found.

- there was a hole in the floor. The underbody was perforated by rust between the seats in driver-passenger compartment, twenty-one inches long by a quarter inch in width. He found a bird's nest on the spring hanger, and he did not believe that the bird's nest could actually sit there while the vehicle was being driven. His opinion was that the vehicle had just sat there. As a result, his opinion was that the perforation was present 46 days before his inspection.
- the exhaust system was not present.

- the parking brake cable had seized. He could not be sure that it had been seized 46 days prior to his inspection, but in his opinion, such a seizure is usually due to lack of use.
- there was excessive play in a tie rod end. In his opinion, this would have been present at the time the safety certificate was issued.

Lauzon vehicle:

Officer Riddell inspected the Lauzon vehicle on September 19, 2000. 42 days had passed since the safety inspection and 862 km travelled. Officer Riddell found an exhaust leak, but he could not be sure that this leak would have been present at the time of the safety inspection and therefore gave no opinion respecting this vehicle.

Finally, Officer Riddell testified that the Applicant's record keeping was poor, if not non-existent. He also testified that the Applicant had a prior conviction in 1997 with regard to his poor record keeping. Further, he testified that the Applicant failed to produce repair records of vehicles inspected. He produced 53 repair orders for 231 certificates issued between mid June 2000 and late August 2000. Officer Riddell testified that he did not receive any work orders for the 8 vehicles he investigated.

Mr. Donald Fournier:

The Applicant testified that he has been in business for 12 years and was licensed in 1987. He is the choice mechanic for Blossom Park Auto Sales, and for them alone he does approximately 100 safety inspections per year. He works long hours and 5 to 6 days per week. His clientele comes from far and wide. He testified that he takes approximately 15 to 20 minutes to do a safety inspection and that it does not take a "rocket scientist" to do them. He is always helped by someone else while he conducts the inspections.

He advised that he moved his garage location and that was part of the reason why he was not able to produce the records as requested, as many of the records had been placed at his manager's residence due to the move. He testified at length on his knowledge of mechanics and advised that he understood what it took to certify a vehicle.

He admitted to having certified the Lascelle vehicle without seeing the vehicle. He says, that was a mistake and that it was the only one.

He had little recollection of the certification of the vehicles in question. However, he acknowledged his signature on the certificates and therefore testified that he had done the safety inspections. He testified that he knew that the Hair and Poulin vehicles were brought in by Mr. Bélair, because Roger told him this the day after the August 30th meeting with the Ministry.

His opinion on the various defects of the vehicles in question was to the effect that, notwithstanding his lack of recollection of the inspections, the defects in question would not have been present at the time of inspection, since he certified those vehicles.

Specifically regarding the Proulx vehicle, he testified that he saw the exhaust system in the back of the vehicle, when he attended to see the vehicle during the investigation. He said it had to have been removed by the owner after the inspection. Mr. Fournier is convinced that the perforation would have occurred only after his safety inspection. He agreed with Officer Riddell that any play at all in a tie rod end is excessive, but he did not agree that there was play at the time of his inspection.

In cross-examination, the Applicant explained that his lack of record keeping was mostly due to the move of his establishment. He could not explain why he had not filled out the back of the certificates, except to say that it was his manager's job to do that. When going through the 231 certificates issued in the summer of 2000, he acknowledged that 87% of his certificates are on 1990 or older cars, which he explained was his type of clientele.

Mr. Dan Mitchell:

Mr. Mitchell identified himself as an apprentice, which is beyond an exaggeration for someone who was an apprentice four years ago for eight months and has not been an apprentice since that time.

He had a number of complaints about the way that mechanics in Cornwall were doing their work and he felt that, basically, he had no trust in any of them. He felt he knew better than most mechanics. He trusted the Applicant implicitly.

He testified that Ms. Lascelle was not with him when he went to the Applicant's garage for the safety. He also testified that he has never brought any other vehicle for a safety without bringing it to the Applicant.

Mr. Roger Bélair:

Mr. Bélair does automotive repairs at his aunt's house and is paid by his clients to do so. He is not a licensed mechanic. He testified that he brought the Poulin vehicle and Hair vehicle to the Applicant. He knew of Mr. Chuck Collins through a friend.

He met Mr. Hair through Mr. Collins. He was surprised that Mr. Hair did not know him, since he had done the work on the Hair vehicle and brought it to the Applicant.

In cross-examination, he denied having ever talked to the Applicant the day after August 30th or any other time, except for the day before the hearing where it was necessary for him to come and testify.

He indicated to the Tribunal, on a number of occasions, that he was telling the truth, by swearing on the life of his children. This did not impress the Tribunal, as to the truth of his testimony.

Mr. Gordon Lacroix:

Mr. Lacroix is a good friend of the Applicant. He advised the investigating officer that he himself had done the muffler job on a vehicle, and as a result Officer Riddell accepted that explanation and did not include that vehicle in the charges against the Applicants.

THE TRIBUNAL FINDS THE FOLLOWING FACTS TO BE PROVEN ON THE EVIDENCE:

- 1) The Lascelle vehicle was not inspected by the Applicant. The Applicant issued a safety standards certificate for the vehicle.
- 2) The Nagy vehicle was not inspected by the Applicant. The Applicant issued a safety standards certificate for the vehicle. The Tribunal accepts the evidence that Walter Nagy did not leave his vehicle with Aaron Dennehy or the Applicant and that its safety certificate from the Applicant was sold to Mr. Nagy.
- 3) The Hair vehicle had the following defects which, on the balance of probabilities, were present at the date of the safety inspection by the Applicant: rust perforation, loose tie rod ends and cracked flex hose.
- 4) The Marsolais vehicle had the following defects which, on the balance of probabilities, were present at the date of the safety inspection by the Applicant: rust perforation.
- 5) The Proulx vehicle had the following defects which, on the balance of probabilities, were present at the date of the safety inspection by the Applicant: rust perforation, and loose tie rod ends. The Tribunal accepts the evidence that the owner had taken off the exhaust system, that the vehicle had been stationary over the 46 days following the date of the safety certificate and that the vehicle's safety certificate was obtained either without inspecting the vehicle or with an incompetent inspection.
- 6) The Tracey vehicle had the following defects which, on the balance of probabilities, were present at the date of the safety inspection by the Applicant: rust perforation.
- 7) The Lascelle vehicle was not inspected by the Applicant. The Applicant issued a safety standards certificate for the vehicle.

- 8) The Applicant failed to comply with the statutory obligation to keep records. This failure is aggravated by the fact that Mr. Fournier should have known quite well about this obligation having been convicted a few years previous, in 1997, of not keeping the required records on the premises. The fact that Mr. Fournier moved his establishment in early 1999 had no significant effect on Mr. Fournier's ability to keep accurate records of the safety certificates for the summer of 2000.

ISSUES:

The issues in this case may be summarized as follows:

Should the decision of the Director of Vehicle Inspection Standards to revoke the Motor Vehicle Inspection Station licence be carried out?

Should the decision of the Director of Vehicle Inspection Standards to revoke the Motor Vehicle Inspection Mechanic licence be carried out?

LAW:

The *Highway Traffic Act*, R.S.O. 1990 Chap H.8 as amended, provides as follows:

Motor Vehicle Inspection Station Licence:

- 91(1) No person shall establish, operate or maintain a motor vehicle inspection station except under the authority of a licence issued by the Director under this Act and the Director may issue a licence for a motor vehicle inspection station subject to the conditions that the Director may specify in the licence.
- 91(2) Subject to subsection (3), any person who applies in accordance with this Act and the regulations for a licence to establish, operate or maintain a motor vehicle inspection station and who meets the requirements of this Act and the regulations and who pays the prescribed fee is entitled to be issued the licence

Revocation of a Licence

- 91(8) The Director may revoke or refuse to renew a motor vehicle inspection station licence where,

- (a) any person has made a false statement in the application for the licence or a renewal thereof or in any safety standards certificate signed by the licensee or a person authorized in writing by the licensee or in any report, document or other information required to be furnished by this Act or the regulations or any other Act or regulation that applies to the motor vehicle inspection station;
- (b) any inspection authorized by the licence is incompetently performed;
- (c) the licensee or any motor vehicle inspection mechanic employed in the motor vehicle inspection station has misrepresented the condition of a vehicle with respect to the standards of equipment and performance prescribed by the regulations upon an inspection of the vehicle in the station for the purpose of determining whether or not to issue a safety standards certificate, sign a vehicle inspection record or affix a vehicle inspection sticker;
- (d) there is a breach of condition of the licence;
- (e) the licensee does not comply with this Act or the regulations;
- (f) the inspections that can be performed by the motor vehicle inspection station are misrepresented; or
- (i) a change in the officers or directors of any corporation that is a licensee would afford grounds for refusing to issue a motor vehicle inspection station licence under clause (3)(a)

Motor Vehicle Inspection Mechanic:

92(1) No person shall sign a vehicle inspection record as mechanic or certify in a safety standards certificate that a vehicle complies with the standards of equipment and performance prescribed by the regulations unless the person is registered by the Director as a motor vehicle inspection mechanic in a motor vehicle inspection station and the Director may so register any person for whom application is made under subsection (2).

- (2) Where a licensee or an applicant for a motor vehicle inspection station applies for the registration as a motor vehicle inspection mechanic in the motor vehicle inspection station of the licensee or in the proposed motor vehicle inspection station of the applicant for a licence, as the case may be, of any person who meets the requirements of this Act and the regulations, the person is entitled to be registered as a motor vehicle inspection mechanic in the motor vehicle inspection station.

93 The Director may revoke the registration of a motor vehicle inspection mechanic where,

- (a) the registrant or the licensee has made a false statement in the application for registration of the registrant or in a safety standards certificate or in any report, document or other information required to be furnished by this Act or the regulations or any other Act or regulation that applies to the registrant;
- (b) any inspection performed under the authority of the mechanic's registration is incompetently performed by the registrant; or
- (c) the registrant does not comply with this Act or the regulation.

Appeal before the Licence Appeal Tribunal:

95(1) Where the Director proposes,

- (a) to refuse to issue or renew a licence;
- (b) to refuse to make a registration; or
- (c) to revoke a licence or registration,

the Director shall serve notice of his or her proposal, together with written reasons therefor,

- (d) in the case of a proposal to refuse to issue a licence, upon the applicant;
- (e) in the case of a proposal to revoke or to refuse to renew a licence, upon the licensee;
- (f) in the case of a proposal to refuse to make a registration, upon the applicant or licensee and upon the proposed registrant; and
- (j) in the case of a proposal to revoke a registration, upon the registrant and the licensee of the motor vehicle inspection station in which the registrant is employed.

(2) A notice under subsection (1) shall inform the person who is the applicant, licensee, registrant or proposed registrant, as the case may be, that the person is entitled to a hearing by the [Tribunal] if the person mails or delivers, within fifteen days after receiving service of the notice under subsection (1), notice in writing to the Director and the [Tribunal] requiring a hearing by the [Tribunal] and the person may so require the hearing.

(4) Where the applicant, licensee, registrant or proposed registrant requires a hearing by the [Tribunal] in accordance with subsection (2), the [Tribunal] shall appoint a time for and shall hold the hearing and may by order direct the Director to carry out his or her proposal and to take the action that the [Tribunal] considers the Director ought to take in accordance with this Act and the regulations, and for such purposes the [Tribunal] may substitute its opinion for that of the Director.

APPLICATION OF LAW TO FACTS:

Under the Act, the relevant sections dealing with revocation state:

91 (8) The Director may revoke or refuse to renew a motor vehicle inspection station licence where,

- (a) any person has made a false statement in the application for the licence or a renewal thereof or in any safety standards certificate signed by the licensee or a person authorized in writing by the licensee or in any report, document or other information required to be furnished by this Act or the regulations or any other Act or regulation that applies to the motor vehicle inspection station;

5. any inspection authorized by the licence is incompetently performed;

- (e) the licensee does not comply with this Act or the regulations;

93. The Director may revoke the registration of a motor vehicle inspection mechanic where,

- (a) the registrant or the licensee has made a false statement in the application for registration of the registrant or in a safety standards certificate or in any report, document or other information required to be furnished by this Act or the regulations or any other Act or regulation that applies to the registrant;

- (b) any inspection performed under the authority of the mechanic's registration is incompetently performed by the registrant; or
- (c) the registrant does not comply with this act or the regulations.

36 day life of certificate

The Applicant's counsel argued that a safety certificate has a shelf life of 36 days and that all of the evidence with respect to certificates that are 36 days and older, such as the Proulx and Lauzon vehicle, cannot form part of the evidence on which the Tribunal will determine whether or not the Applicant has performed safety inspections competently. Counsel argued that the legislation allowing the certificate to be valid for 36 days is there to protect the mechanic. He elaborated his argument by submitting that legislation has provided for a mechanic's lien period of 37 days and therefore there must have been a link between that legislation and the *Highway Traffic Act*. He does not provide the Tribunal with any jurisprudence on this issue.

Counsel for the Director argued that the *Highway Traffic Act* is consumer protection legislation and the 36 day provides a reasonable amount of time for dealings to take place between vendors and purchasers for the transfer of vehicles. Recognizing that the vendor may be the one to get the safety standards certificate, the time period provides time after that happens for the vehicle to be transferred, but it is not determinative of what evidence may be admitted at this hearing.

The Tribunal finds that the 36 day life of a certificate is not a limitation period which would impose a restriction on the evidence to be adduced in this type of proceeding.

Expert Opinion

Counsel for the Applicant also objected to the Tribunal considering the opinion evidence provided by Officer Riddell, Officer Jahn and Officer Bell as worthy of weight. Counsel for the Applicant argued that the Officers:

- 1) cannot provide independent expert opinion, since they are the investigating officers and therefore have a vested interest in the outcome of the case;
- 2) although licenced mechanics, they have no scientific knowledge of the subject matter they are testifying to; and
- 3) not being in the field "getting their hands dirty", their expertise is less worthy than working mechanics.

Counsel for the Director submitted the Rice v. Sockett case on this issue and argued that this case stands for the following general statement:

"expert", refers to a person:

"...entitled according to the law and practice to give opinion evidence."

and in looking at whether mechanics, artisans and workmen are experts, the Tribunal should accept the following quotation as the general rule:

"The derivation of the term 'expert' implies that he is one who by experience has acquired special or peculiar knowledge of the subject of which he undertakes to testify, and it does not matter whether such knowledge has been acquired by study of scientific works or by practical observation; and one who is an old hunter, and has thus had much experience in the use of firearms, may be as well qualified to testify as to the appearance which a gun recently fired would present as a highly educated and skilled gunsmith."

Are the Officers persons who by experience have acquired special or peculiar knowledge of the subject of their testimony? All three Officers are licensed mechanics for many years. They also have lengthy specialized experience in the inspection of the matters contained in their testimony: perforations by rust, play in tie rod ends, and damage to flex hoses. Their duties are to inspect vehicles for these defects day in and day out.

The Tribunal found that Officers Riddell, Jahn and Bell have the qualifications necessary for the Tribunal to qualify them as experts and ruled that they were qualified to testify as experts with respect to the field of automotive mechanics.

Further, the Tribunal found that Officers Riddell, Jahn and Bill gave their evidence in a balance, forthright manner. They were cautious in the delivery of their opinion testimony, and the Tribunal does not accept the argument of counsel for the Applicant that they had a malicious intent or vested interest in this case.

Counsel for the Applicants submitted that on the allegation that the licensee failed to maintain records of safety standard certificates as required by Regulation 601 of the *Highway Traffic Act*, such failure was not because Mr. Fournier is an irresponsible person, but rather because he is a person who is very busy and not a very good record keeper. Mr. Guertin suggested that the Tribunal should not confirm the order of the Director because the Applicant has now learned his lesson and will keep proper records. On the evidence, however, the Tribunal finds no support for this argument, particularly in light of the prior 1997 conviction. The evidence has established that the Applicant has no respect for his obligations under his licence and is not willing to keep the records required by Regulation 601.

As to the revocation of the motor vehicle inspection licence and the revocation of the registration of Donald Fournier as a motor vehicle inspection mechanic, in this case the evidence has established that the Applicants signed and issued safety certificates for vehicles for which no inspections were actually performed. False statements were made on those certificates and they were sold. These facts give the Director the necessary grounds for the revocation of the Applicants' licence and registration under sections 91(8)(a) and 93 (a) and (c) of the *Highway Traffic Act*.

Further, the evidence has established that inspections and the issuance of certificates were performed incompletely by the Applicants for safety certificates for vehicles for which uncerifiable defects were present at the time of inspection. This gives the Director the necessary grounds for the revocation of the Applicants' licence and registration under sections 91(8)(b) and 93 (b) and (c) of the *Highway Traffic Act*.

DECISION:

The Tribunal finds that the Director has proven that the Applicants signed and issued a significant volume of inaccurate safety certificates and acted in a manner that defeats the integrity of the MVIS system and misled the public. This compromised the very essence of the system for which the Applicants were licenced and registered.

Counsel for the Applicant asked the Tribunal to use its discretion to impose as conditions of licence and registration that the Applicants be subject to periodic surveillance by the Ministry. This surveillance is already part of the duties of the Director's office. Considering the conduct of the Applicants, such a condition would not be appropriate in this case. It would be inappropriate for the public purse to continually monitor Applicants who have already demonstrated a total lack of respect for the obligations imposed by law on a licensee and a registrant. The evidence in this case of numerous false safety certificates being sold supports the Registrar's decision.

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 95(4) of the *Highway Traffic Act* to confirm the Order of the Director to revoke the Motor Vehicle Inspection Station Licence issued to Don Fournier Service Centre Inc., and to revoke the registration of Donald Fournier as a Motor Vehicle Inspection Mechanic.

LICENCE APPEAL TRIBUNAL

Johanne N. Morissette, Presiding Member

RELEASED: January 18, 2002

SWERBRICK and MACINTYRE

PREHEARING

DOUGLAS SWERBRICK AND JENNIFER MACINTYRE

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

TO DISALLOW A CLAIM

TRIBUNAL: MARJORIE L. HILEY, Vice-Chair

APPEARANCES:

JEHUDA J. KAMINER, Counsel representing the Applicants
SEAN KELLY, Counsel, representing the Ontario New Home Warranty
Program (the "Respondent")
WAYNE C. GAY, Counsel, representing C.H. O'Dette Construction Ltd.
(the "Added Party")

DATE OF
PREHEARING: January 7, 2002

Toronto

ORDER

FOLLOWING attendances on January 7, 2002 at a prehearing by teleconference before the Tribunal of Jehuda J. Kaminer, Counsel on behalf of Douglas Swerbrick and Jennifer MacIntyre, (the "Applicants"), and Sean Kelly, Counsel on behalf of the Ontario New Home Warranty Program (the "Program"), Phil Mayhew, Warranty Representative and Wayne C. Gay, Counsel on behalf of C.H. O'Dette Construction Ltd. (the "Added Party");

The Tribunal makes the following Order:

1. The Parties to the hearing are the Applicants, the Program and the Added Party.
2. It is agreed by the parties that the following are the issues before the Tribunal at the continuation of the hearing:

- a) repair of the garage floor – it is a warranty issue but the dispute is over who will do the repairs.
 - b) lintel failure.
 - c) repair of south and west (the rear) of garage.
3. It was agreed by the parties that the repairs at upper level near garage are a warranted issue, the amount of repairs as stated on the invoice provided by the Applicant has been accepted by the Program. The builder is to pay the amount to the Applicant.
4. There are a number of engineering reports that have been disclosed to all parties. The Applicant has or will disclose all three reports (August 8, 2001, August 9, 2001 and December 11, 2001) to all of the parties. The Added Party has or will disclose all five reports (2 dated November 21, 2001, December 14, 2001, December 19, 2001 and supplemental report received January 7, 2002) to all parties. Any further reports will be disclosed in accordance with the disclosure provisions of the Tribunal's Rules of Practice.
5. The parties have provided their tentative list of witnesses. The Program has one witness, Mr. Mayhew. The Added Party had two witnesses, Mr. O'Dette and an engineer. The Applicants have three engineers and Mr. Swerbrick. The parties agree to inform each other of any further witnesses prior to the hearing in accordance with the disclosure provisions of the Tribunal's Rules of Practice.
6. The original Notice of Appeal and the Amended Notice of Appeal are consolidated into one hearing. No further filing of application fees are required.
7. The Parties agree that this matter will continue before Mr. Douglas C. Mackintosh, Vice-Chair. The hearing will continue on Tuesday, May 14, 2002 and continue if necessary on Thursday, May 16, 2002 and Friday, May 17, 2002 at 9:30 a.m. at the Frontenac Reporting Services, 308 Wellington Street, 1st Floor, Kingston, Ontario .

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley, Vice-Chair

RELEASED: January 10, 2002

PERGUNAS

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

IN THE MATTER OF a CLAIM by
MARGARET PERGUNAS

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

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

MARGARET PERGUNAS

Applicant

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

1160773 ONTARIO LIMITED

Added Party

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter on
October 4 and 5, 2001;

AND WHEREAS, upon consent of the parties, the hearing was adjourned to December 11
and 12, 2001;

AND WHEREAS, upon consent of the parties, the hearing was further adjourned to January 21
and 22, 2002;

TAKE NOTICE, upon consent of the parties, the Tribunal further adjourns the hearing to commence at the Frontenac Reporting Services, 308 Wellington Street, 1st Floor, Kingston, Ontario, at 9:30 a.m., on Monday, May 6, 2002 and to continue May 7, 2002, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: January 18, 2002

Noel Pare

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

IN THE MATTER OF a CLAIM by
ANASTASIA NOEL PARE

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

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

ANASTASIA NOEL PARE

Applicant

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

DENIS CAMPEAU CONSTRUCTION INC.

Added Party

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a hearing on January 28-30, 2002 at 9:30 a.m. in Ottawa, Ontario;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicant* to commence at 9:30 a.m. at the Gillespie Reporting Services, 130 Slater Street, Suite 200, Ottawa, Ontario, on Tuesday, March 26, 2002 and to continue March 27 and 28, 2002, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: January 15, 2002

SOURIAL

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

IN THE MATTER of
ADEL SOURIAL

AND IN THE MATTER of a decision of the
Board of Trustees, Ontario Motor Vehicle Dealers Compensation Fund

TO DISALLOW A CLAIM
- Decision dated: June 6, 2001

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

ADEL SOURIAL

Applicant

- and -

BOARD OF TRUSTEES
ONTARIO MOTOR VEHICLE DEALERS COMPENSATION FUND

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on October 24, 2001;

AND WHEREAS, upon consent of the parties the matter was adjourned to January 21, 2002;

TAKE NOTICE, upon consent of the parties, the Tribunal further adjourns the hearing *peremptory against the Applicant* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto, Ontario, at 9:30 a.m., on Friday, April 19, 2002.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: January 17, 2002

O'LEARY AND KELLY

JOHN O'LEARY AND SEAN KELLY

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

TO DISALLOW A CLAIM

TRIBUNAL: JOHN ORT, Member

APPEARANCES: JOHN O'LEARY, representing himself and
Sean Kelly
KAREN SPECTOR, Counsel, representing
the Ontario New Home Warranty Program
CHARLES B. KATES, Counsel, representing
the Added Party, Presview Development Inc.

DATE OF
HEARING: December 3, 2001 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

The Applicants have made claims under the *Ontario New Home Warranties Plan Act* (the "Act"). The Applicants gave written notice of their claims to the Ontario New Home Warranty Program (the "Program"). Their claim respecting substitution of a hot water tank was made November 5, 2000 and their claims respecting a damaged floor and absent toe nosing was made March 22, 2001. This is an appeal to the Licence Appeal Tribunal (the "Tribunal") by John O'Leary and Sean Kelly (the "Applicants") from a decision of the Program set out in a written decision dated July 16, 2001 denying the Applicants' claims.

The Applicants' appeal relates to three complaints which are:

1. Hot water tank (50 gallon power vent tank) substituted by Luna 24 Fi boiler;
2. Damaged hardwood floor; and

3. Toe nosing absent on part of kitchen stairs.

The Applicants' appeal is based upon Section 14(1)(b) of the *Ontario New Home Warranties Plan Act*.

ISSUE:

Should the Tribunal set aside, confirm, or modify the decision of the Program to disallow the Applicants' claim for compensation under section 14(1)(b) of the *Ontario New Home Warranties Plan Act* (the "Act")?

THE FACTS:

The evidence presented by the Applicants consisted of the testimony of John O'Leary and Robert Rosset as well as documentary evidence introduced through them.

TESTIMONY OF JOHN O'LEARY:

1. Hot Water Tank Substituted by Luna 24 Fi Boiler

Mr. O'Leary referred to clause 18 of the Agreement of Purchase and Sale, set out at page 4 of tab 2 of exhibit 4, which states in part: "THE PURCHASER acknowledges that the hot water heater tank may be on rental...". Mr. O'Leary then pointed out on page 2 of Schedule "C" of that Agreement of Purchase and Sale, set out under the heading "Laundry, Electrical & Lighting", the following: "Energy-saving hydronic forced air space heating system". Mr. O'Leary stated that the Applicants expected the home to contain a hot water tank.

Mr. O'Leary then testified that there is no hot water heater tank. He referred to page 6 of tab 2 of exhibit 5, the second paragraph of the Conciliation Inspection Report, stating: "This home contains a hydronic heating system comprised of a boiler unit (Luna Ocean Boiler brand) that is on a lease agreement from Union Energy. The boiler unit supplies hot water to a heat transfer coil contained in an air-handling module. the boiler also supplies domestic hot water on demand (i.e. there is no hot water storage tank)...".

Mr. O'Leary also pointed out the start of page 2 of letter from Presview Development Inc. dated November 27, 2000 which states: "An alternative way to heat up a home is to use a regular gas furnace. Typically for any newly-built homes, a 'power vent hot water tank' will be installed with the gas furnace. The monthly rental for a power vent tank is about \$17.95 per month...Under the Lease-to-Own Program from Union Energy, you are paying a fixed monthly fee of \$34.99.". Mr. O'Leary also referred to Consumer Lease Agreement stamped May 23, 2000, set out at pages 3 and 4 of tab 7 of exhibit 5, stating: "Lessee hereby agrees to lease

the Equipment for a term of 132 months...with...monthly lease payments...in the amount of \$34.99 (plus applicable taxes)...Lessee shall, when not in default...upon six months prior written notice to Lessor, have the option to purchase all but not less than all of the Equipment on the option date(s) and for the option price(s) referred to below...(a) \$425 together with the 120 lease Payments due hereunder; or (b) On the last day of the Term at the Fair Market Value...The fair Market Value of the Equipment for the purpose of determining an option price shall be as may be reasonably estimated by the Lessor.". The option dates are not specified. Consumer Lease Agreement set out at the last page of tab 7 of exhibit 5, as pointed out by Mr. O'Leary, states: "Lessee hereby agrees to lease the Equipment for a term of 144 months ... with...monthly lease payments...in the amount of \$34.99...". Mr. O'Leary testified that there is a difference between \$17.95 per month to be paid for a hot water tank and \$34.99 payable for the Luna boiler.

Mr. O'Leary complained that there is an exhaust fan that runs all the time. It vents the drier to the back of the house. Mr. O'Leary testified that the fan is noisy and can be heard upstairs in the house. However, upon cross-examination by Ms. Spector, Mr. O'Leary admitted that he does not know if the fan would run continuously if there were a hot water tank installed instead of the Luna boiler.

Mr. O'Leary testified that he lost storage space. He pointed to page 3 of tab 3 of exhibit 3, which sets out the original location of the hydronic heating system and hot water tank in a furnace room in the lower level and sets out the relocated hydronic heating system in a storage area shown on south elevation of house. On the other hand, Mr. O'Leary admitted that the Luna boiler takes up less space in the basement than the removed furnace room would have required.

Upon cross-examination by Ms. Spector, Mr. O'Leary stated that the Luna boiler does provide adequate amounts of hot water. He also said that there is a delay of 2-3 minutes before hot water starts to flow out of the shower. He said that very hot water then comes out and the shower must be adjusted. Afterwards, he stated, the water temperature is fine.

2. Damaged Hardwood Floor

Mr. O'Leary referred to the last page of the Certificate of Completion and Possession, set out at tab 7 of exhibit 4, which states: "There are 7 dents/gouges out of the hardwood floor in the living room." He testified that the Applicants properly entered that notation on the Certificate of Completion and Possession before closing, not after the final inspection meeting. Mr. O'Leary further testified that the Applicants did not get a copy of the Certificate of Completion and Possession after it was completed, because there was no photocopier on the site. Mr. O'Leary stated that the builder took the original Certificate of Completion and Possession with him.

Upon cross-examination by Ms. Spector, Mr. O'Leary added that the builder sent two people to examine the damage to the hardwood floors. The people said that they would take out and replace the damaged flooring. When the workmen came to do the repair they did not have the proper width of hardwood with them. All the workmen did was to apply putty with a crayon on the affected areas. Mr. O'Leary testified that the putty was gone at the time of the conciliation report. He referred to item 2 under the heading "Items Not Covered Under Warranty" in the Conciliation Inspection Report, set out at tab 2 of exhibit 5, which states: "Approximately 2 to 4 surface scratches (scuffs), roughly 6" to 8" in length were observed in the finish under the coffee table."

3. Toe Nosing

Mr. O'Leary referred to page 2 of Revised Upgrades & Revisions, set out at tab 4 of exhibit 3, which states in part: "Vendor to install oak nosing to be stained chestnut on staircase to second level (14r) and on staircase between kitchen/dining room stairs (7r). Alternate plan kitchen at front (7r to be stained also chestnut nosing)."

Next, Mr. O'Leary referred to the last page of the Certificate of Completion and Possession, set out at tab 7, exhibit 4, which states: "stair rail next to cabinet (kitchen) still needs nosing". Mr. O'Leary testified that the notation was properly entered before closing and not after the final inspection meeting.

Mr. O'Leary stated that the nosing is still missing.

The evidence presented by the Program consisted of the testimony of Robert Rosset as well as documentary evidence introduced through him.

TESTIMONY OF ROBERT ROSSET:

Mr. Rosset stated that he is a warranty representative at the Ontario New Home Warranty Program and that he has worked there for thirteen years. He also stated that he is certified by HRAI to make residential calculations of heat loss, heat gain and ventilation, as well as to design heating and air conditioning systems.

1. Hot Water Tank Substituted by Luna 24 Fi Boiler

Mr. Rosset distinguished a hot water tank from a hot water boiler by stating that burners in a boiler come on only when there is demand for hot water, and that a boiler does not retain any sufficient quantity of water. After distinguishing the two items, Mr. Rosset also stated that in his opinion "hot water tank" is a generic term that includes "hot water boiler". He did not state that this opinion comes from the dictionary meaning of the words, and he did not state that such

opinion was general usage in the trade.

With respect to the "energy-saving hydronic forced air space heating system", mentioned on page 2 of schedule "C" to the Agreement of Purchase and Sale, set out at tab 2 of exhibit 3, Mr. Rosset stated that such a heating system may include either a hot water tank or a hot water boiler.

Mr. Rosset also said that a hot water tank could be added to the installed heating system, but that it is not advisable to do so in his opinion.

With respect to the letter from Marathon Industries concerning annual heat loss analysis of residential water heaters, set out at tab 14, exhibit 4, in response to a request by the Tribunal for clarification, Mr. Rosset stated that no comparable heat loss analysis of a hot water boiler heating system was presented as evidence.

In response to a request by the Tribunal for assistance, Mr. Rosset was unable to explain the difference between the "domestic" and "space heating" columns on the Combo-Systems Energy Savings Analysis, set out at tab 15, exhibit 4. Mr. Rosset also could not explain the n/a notation for the Luna 24 Fi under the "domestic" column of that analysis. Further, Mr. Rosset was unable to explain how the monthly savings figures of 47.17% and \$30.99 for the Luna 24 Fi boiler vs. a power-vented hot water tank were calculated from the information set out above in the analysis. Mr. Rosset pointed out that the size of the home and the number of people living in the home would affect the calculation of monthly savings. No sensitivity analysis was provided.

2. Damaged Hardwood Floor

Mr. Rosset testified that he denied the Applicants' claim because he could not determine when the damage was done, and the complaint does not appear on the Certificate of Completion and Possession. Upon cross-examination by Mr. O'Leary, Mr. Rosset admitted that a notation concerning dents/gouges on the hardwood floor in the living room does appear on the last page of the Certificate of Completion and Possession, set out at tab 7 of exhibit 4.

3. Toe Nosing

Mr. Rosset said that he denied the Applicants' claim, because the Agreement of Purchase and Sale is mute on the exact location of the toe nosing. He testified that toe nosing is capable of being installed on the other side of the staircase where it is missing.

THE LAW:

Section 14(1) of the *Ontario New Home Warranties Plan Act* (the "Act") to May 4, 2001 stated in part:

"Where...(b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty;...the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations."

On or after May 5, 2001, the relevant part of section 14 stated:

(3) Subject to the regulations, an owner of a home is entitled to receive payment out of the guarantee fund for the cost of the remedial work required to correct a breach of warranty if,

- (a) the person became the owner of the home through receiving a transfer of title to it from a vendor or through the substantial performance by a builder of a contract to construct the home on land owned by the person; and
- (b) the person has a cause of action against the vendor or the builder, as the case may be, for damages resulting from the breach of warranty.

.....

Section 13(1) of the Act partly states:

"Every vendor of a home warrants to the owner,

- (a) that the home,
 - (i) is constructed in a workmanlike manner and is free from defects in material,...
- (c) such other warranties as are prescribed by regulations."

Section 19 of Regulation 892 to the Act (the "Regulation") adds:

"Every vendor of a new home warrants to the purchaser that, where the vendor makes a substitution with respect to an item that is referred to in the purchase agreement that is not an item that is to be selected by the purchaser, the item will be of equal or better quality than the item referred to in the purchase agreement."

FINDINGS OF FACT:

The Tribunal finds that:

1. The vendor Presview Development Inc. made a substitution with respect to an item that is referred to in the purchase agreement that is not an item that is to be selected by the purchaser, substituting a Luna 24 Fi boiler for a hot water tank.
2. The substitution of the Luna 24 Fi boiler for a hot water tank was substitution of an item of equal or better quality than the item referred to in the purchase agreement. The Combo-Systems Energy Savings Analysis states that there are savings of \$30.99 per month with the Luna 24 Fi boiler vs. a power-vented hot water tank. No contrary evidence was presented. The analysis may depend on the size of the house and the number of people that live in the house, but no evidence about the effect of such factors on the monthly dollar savings was presented. The monthly savings due to higher efficiency of the Luna 24 Fi boiler are greater than the increased monthly rental cost of \$34.99 for the boiler compared to \$17.95 for a hot water tank. No dollar figure for damages due to loss of storage space was presented.
3. The damage to the hardwood floor was done prior to closing. This finding is supported by Mr. O'Leary's uncontradicted testimony that the builder sent workmen to take out and replace the damaged flooring. Further, the flooring was not constructed in a workmanlike manner, free from defects in material.
4. The staircase was not constructed in a workmanlike manner. It is reasonable to expect both sides of a staircase to be built the same. The omission of toe nosing on one side of a staircase is a defect. Also, there is no clear language in the agreement of purchase and sale stating that toe nosing should be provided only on one side of the staircase.

APPLICATION OF LAW TO FACTS:

Section 19 of Regulation 892 to the Act requires that a substitution be of equal or better quality which has been established in this case respecting the substitution of a Luna 24 Fi boiler for a hot water tank. Accordingly, as to that matter the Tribunal finds that the decision of the Program was not in error in denying the Applicants' warranty claim.

Section 13(1)(a)(i) of the Act requires that a home be constructed in a workmanlike manner. On the facts as found, the Tribunal finds that the decision of the Program was in error in denying the warranty claims of the Applicants regarding damaged hardwood floor and toe nosing. Contrary to the warranty of the vendor Presview Development Inc. to the Applicants

set out in section 13(1)(a)(i), the hardwood floor was not constructed in a workmanlike manner, free of defects in material. Similarly, the omission of toe nosing is a breach of the warranty, set out in section 13(1)(a), that the home is constructed in a workmanlike manner.

DECISION:

Accordingly, the Tribunal makes the following order:

- 1) By virtue of the authority vested in it under section 16(3) of the *Ontario New Home Warranties Plan Act*, the Tribunal directs the Ontario New Home Warranty Program:
 - (a) to disallow the Applicants' claim concerning substitution of a Luna 24 Fi boiler for a hot water tank.
 - (b) to allow the Applicants' claims concerning damaged hardwood floor and absent toe nosing by repairing the damaged hardwood floor and installing the absent toe molding within six months of the release of this decision, provided that the Program and its authorized agents shall give reasonable notice to the Applicants of the time or times needed to effect the repair and installation for which the Applicants shall provide the Program and its authorized agents with reasonable access to the Applicants' home.
- 2) Pursuant to Rule 7 of the Rules of Practice of the Licence Appeal Tribunal, the Tribunal orders that:
 - (a) the document, set out at tab 2 of exhibit 4 to these proceedings and containing Social Insurance Numbers of the Applicants, not be accessible to the public; and
 - (b) the Registrar of the Tribunal shall separate such documents from the Tribunal's records and keep it confidential unless and until otherwise ordered.

LICENCE APPEAL TRIBUNAL

John Ort, Member

RELEASED: January 7, 2002

BULLEN

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

IN THE MATTER OF
DAVID BULLEN

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: September 12, 2001

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

DAVID BULLEN

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on January 17, 2002;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicant* to commence at the Gillespie Reporting Services, 130 Slater Street, Suite 200, Ottawa, Ontario, at 9:30 a.m., on Wednesday, May 22, 2002.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: January 8, 2002

LEE

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

IN THE MATTER OF
DONALD P. LEE

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: September 25, 2001

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

DONALD P. LEE

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on January 3, 2002;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Respondent* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Wednesday, April 10, 2002.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: January 3, 2002

HUNT

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

IN THE MATTER OF
DONNA M. HUNT

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: July 30, 2001

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

DONNA M. HUNT

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on February 5, 2002;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicant* to commence at the Holiday Inn Sudbury, Suite 134, 50 Brady Street, Sudbury, Ontario, at 9:30 a.m., on Tuesday, April 23, 2002.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: January 17, 2002

McGLYNN

PENELOPE J. McGLYNN

APPEAL FROM A DECISION OF THE BOARD OF
DIRECTORS OF THE ONTARIO TRAVEL
INDUSTRY COMPENSATION FUND CORPORATION
UNDER THE *TRAVEL INDUSTRY ACT*

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

PENELOPE J. McGLYNN, appearing on her own behalf
TREVOR BRANION, Counsel representing the Travel Industry Council
of Ontario

DATE OF
HEARING: January 7, 2002 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal by Penelope J. McGlynn (the "Applicant") to the Licence Appeal Tribunal from a written decision dated October 3, 2001 of the Board of Directors of the Ontario Travel Industry Compensation Fund Corporation (the "Fund") to deny the Applicant's claim for compensation in the amount of \$926.10 (U.S.).

The Applicant bases her claim on Section 50(1) of Regulation 806/93 (the "Regulation") made under the *Travel Industry Act* (the "Act").

THE EVIDENCE:

The evidence was both oral and documentary. Oral testimony was given by the Applicant and Dorian Werda on behalf of the Fund.

The Applicant testified that on or about February 13, 2000 she booked an expedition cruise through Marine Expeditions. This cruise, to Greenland, was to take place in the summer of 2000. At the time of booking the cruise she paid Marine Expeditions the sum of \$926.10 (U.S.) by way of a credit card. On conversion to Canadian funds the amount of \$926.10 (U.S.) was \$1,341.45 (Canadian).

On August 18, 2000 shortly prior to the date of departure, the Applicant was informed by Marine Expeditions that the cruise had been cancelled due to mechanical problems with the engines of the cruise ship. At the time of cancellation the Applicant was given a "Marine Expeditions Travel Certificate" for \$1,100.00 (U.S.) which she could utilize for future travel, departing between August 1, 2000 and July 1, 2003. The difference between the sum of \$926.10 (U.S.) and the \$1,100.00 (U.S.) travel certificate represented compensation for inconvenience the Applicant had suffered due to cancellation of the cruise.

In or about April 2001, the Applicant booked a similar expedition cruise departing in the summer of 2001. The Applicant utilized the travel certificate when paying for the 2001 cruise. When acknowledging receipt of the Applicants' booking, Marine Expeditions wrote to her on April 24, 2001 as follows:

I'd like to thank you for booking your June 21st Summer Solstice voyage through Marine Expeditions.

I'm pleased to advise you that we have arranged for all bookings to be handled through Marine Expeditions Travel, a registered travel agency in the Province of Ontario (Retail No. 50009128, Wholesale No. 50009132).

Your deposits to Marine Expeditions Travel are subject to the very strict consumer protection legislation, administered by the Travel Industry Council of Ontario (T.I.C.O.) and the industry-financed Ontario Travel Industry Compensation Fund.

Please feel free to call me at any time, should you have any questions about your upcoming trip.

In June 2001, prior to the departure of the 2001 cruise, the Applicant was informed that the cruise had been cancelled and Marine Expeditions Travel was no longer in existence.

The Applicant made a claim to the fund for reimbursement of the amount she had paid for the 2001 summer cruise but this claim was rejected by the Fund. The basis for the rejection was set forth in the closing paragraphs of the Fund's letter of October 3, 2001 which states:

It appears that you have dealt directly with Marine Expeditions Inc. (cruise line), which was a separate company operating as an end-supplier of travel services, and was therefore, not required to be registered with the Travel Industry Council of Ontario. In addition, Marine Expeditions Inc. (cruise line) provided you with Travel Certificates, which you, in turn, used to offset the cost of your new voyage. Section 50(3)6 states, in part, that a customer is not entitled to be reimbursed if the customer used a voucher, certificate, coupon or other similar document to obtain the travel services.

Notwithstanding the above, Section 62 of the Regulation and subsequent subsections thereto, entitle you to a hearing by the Licence Appeal Tribunal with respect to the ineligible amount. To file such an appeal, you must mail or deliver a written request within 15 days of receipt of this notice.

The evidence introduced by the Fund consisted of documentary evidence and the oral testimony of Dorian Werda who is employed by the Travel Industry Council of Ontario (TICO) which administers the Fund and is empowered to determine the eligibility of claims made against the Fund.

Ms. Werda testified that Marine Expeditions Inc. which operated as Marine Expeditions was at no stage registered as a travel agent under the Act but operated as a cruise line. She contended that in contracting with Marine Expeditions the Applicant was not dealing with a registered travel agent, and accordingly the Applicant was not covered by the Fund.

Ms. Werda went on to state that Marine Expeditions was placed in bankruptcy on September 12, 2000. The travel certificate issued by Marine Expeditions was sent to the Applicant in August, 2000.

This travel certificate was sent by the Applicant to Marine Expeditions on April of 2001 in payment of the summer 2001 cruise. The travel certificate was then passed to and accepted as payment for the 2001 summer cruise by Canadian Venture Travel Ltd. trading as Marine Expeditions Travel which was registered as a travel agent under the Act on February 20, 2001. The address of Marine Expeditions was 890 Yonge Street, Toronto, and the address of Canadian Venture Travel Ltd. was also 890 Yonge Street, Toronto.

Furthermore, Ms. Werda stated that a customer, such as the Applicant, is not entitled to be reimbursed by the Fund if that customer used a voucher or gift certificate which is what the Applicant in fact did when contracting with Marine Expeditions for its 2001 cruise.

FACTS FOUND PROVEN:

The following are the facts to have been proven.

1. Neither Marine Expeditions nor Marine Expeditions Inc. were at all relevant times registered with the Fund as either travel agent or travel wholesaler.
2. In or about February 2000, the Applicant booked a cruise through Marine Expeditions, which cruise was to depart in the summer of 2000.
3. The Applicant paid Marine Expeditions by way of a credit card for the cruise due to depart in the summer of 2000. The amount paid by the Applicant was the sum of \$926.10 (U.S.) equivalent to \$1,341.45 (Canadian).
4. The summer 2000 cruise for which the Applicant had paid Marine Expeditions the sum of \$1,341.45 was cancelled due to the cruise ship developing mechanical problems.
5. Reimbursement of the amount of \$1,341.45 was not made to the Applicant. On August 18, 2000 Applicant was provided with a travel voucher by Marine Expeditions for \$1,100.00 (U.S.) which voucher could be used by the Applicant towards the future cost of travel.
6. In September 2000 Marine Expeditions was placed in bankruptcy.
7. In or about April 2001, the Applicant forwarded to Marine Expeditions the aforesaid travel certificate with the request that it be used as payment for a cruise the Applicant wished to take in the summer of 2001.
8. The travel certificate of Marine Expeditions was passed to Marine Expeditions Travel, a registered travel agent, which accepted same in respect of the cost of the 2001 summer cruise.
9. Marine Expeditions Travel ceased to operate as a travel agent on June 6, 2001 and the 2001 cruise was cancelled prior to its departure. The Applicant has not received reimbursement of any amounts paid by her to Marine Expeditions by means of her credit card or by Marine Expeditions Travel in respect of the travel voucher accepted by Marine Expeditions Travel.

THE ISSUE:

Does the Applicant's claim fall within the terms of Regulation 806/93 to the Act?

THE LAW:

The relevant portions of Regulation 806/93 to the Act that are applicable to these proceedings are:

50.(1) A customer is entitled to be reimbursed for travel services paid for but not provided if,

- (a) the customer made payment for the travel services directly to or through a registered travel agent;
- (b) the customer had made a demand for payment from the registered travel agent or the appropriate registered wholesaler; and
- (c) the customer has not been reimbursed by,
 - (i) the registrant because the registrant is unable to pay by reason of bankruptcy or insolvency,
 - (ii) any other person who has received the customer's money, or
 - (iii) any other person who may be legally obliged to reimburse or compensate the customer, including a person obliged under a contract for insurance.

Section 50(3), which reads as follows:

(3) A customer is not entitled to be reimbursed for the following or in the following circumstances:

1. For a claim arising out of the failure of an end supplier to provide the travel services.
2. For losses or damages incurred by a customer as a result of a failure of an end supplier to provide the travel services.

.....

6. If the customer used a voucher, certificate, coupon or other similar document to obtain the travel services or did not pay for the travel services with cash or by cheque, credit card or other similar cash payment method.

Section 59.(1), which reads as follows:

59.(1) A customer or registrant is not entitled to be reimbursed if the failure to provide travel services is due to the failure of an end supplier and not to the bankruptcy or insolvency of a registrant.

Section 62.(1), (2) and (6) which respectively read as follows:

62.(1) If the board of directors of the Council determines that a claim, or any part thereof made under section 50, 51 or 52 is not eligible for reimbursement, the Council shall immediately serve notice of the decision on the claimant.

(2) A person who receives notice under subsection (1) is entitled to a hearing before the Tribunal if, within 15 days after notice is served, the person mails or delivers a written request for a hearing to the Registrar, the Council and the Tribunal.

.....

62.(6) The Tribunal may,

- (a) allow the claim, in whole or in part, and direct the Council to pay the amount allowed out of the Compensation Fund; or
- (b) refuse to allow the claim in whole or in part.

APPLICATION OF LAW TO FACTS:

The Applicant in her written claim directed to the Travel Industry Council of Ontario claimed reimbursement from the Fund in respect of the summer 2001 cruise which had been cancelled.

2001 Summer Cruise

The travel services, namely the arrangements for the 2001 summer cruise, were provided by Marine Expeditions Travel. The Applicant used a travel voucher, issued to her by Marine Expeditions, to pay for that cruise. Section 50.(3)6 of Regulation 806/93 states that a customer is not entitled to be reimbursed where the customer "used a voucher, certificate, coupon or other similar document to obtain travel services and did not pay for the travel services with cash or by cheque, credit card or other similar cash payment method". Payment having been made by the Applicant by way of a travel certificate disentitles her to reimbursement from the Fund when Marine Expeditions Travel went out of business and the cruise was cancelled.

2000 Summer Cruise

The cancellation of the 2000 summer cruise led to Marine Expeditions handing the Applicant a travel voucher. Marine Expeditions was not a registered travel agent. Had the Applicant based her claim for reimbursement in respect of that cancelled 2000 summer cruise, her claim for reimbursement from the Fund would also have failed as Section 50.(1)(a) of Regulation 806/93 requires that payment for travel services be paid "directly or through a registered travel agent". The Applicant's payment to Marine Expeditions, not a registered travel agent, was not made in compliance with the Regulation, and the Applicant would not be entitled to reimbursement from the Fund for the 2000 summer cruise.

DECISION:

Accordingly, pursuant to the authority vested in it by the Travel Industry Act and Regulations thereunder, the Tribunal upholds the decision of the Board of Trustees of the Travel Industry Council of Ontario to refuse the Applicant's claim.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair,

RELEASED: January 9, 2002

RADCLIFFE REID DBA RAD CAR CARE

PREHEARING

RADCLIFFE REID DBA RAD CAR CARE

APPEAL FROM A NOTICE OF THE DIRECTOR OF VEHICLE INSPECTION STANDARDS ISSUED PURSUANT TO CLAUSES 91(8)(a), (b) and (e) AND CLAUSES 93(a), (b) and (c) OF THE *HIGHWAY TRAFFIC ACT* R.S.O. 1990, CHAPTER H.8 AS AMENDED

TO REVOKE RADCLIFFE REID DBA RAD CAR CARE'S LICENCE AS A MOTOR VEHICLE INSPECTION STATION AND RADCLIFFE REID'S REGISTRATION AS A MOTOR VEHICLE INSPECTION MECHANIC

TRIBUNAL: STUART CORK, Member

APPEARANCES: GEORGE KOSTYK, Agent, representing the Applicants

PATRICK MOORE, Counsel, representing the Director of Vehicle Inspection Standards

DATE OF
PRE-HEARING: January 9, 2002 Toronto

ORDER

Following attendances on January 9, 2002, at a pre-hearing before this Tribunal of George Kostyk, Agent on behalf of Radcliffe Reid dba Rad Car Care (the "Applicants") and Patrick Moore, Counsel, on behalf of the Director of Vehicle Inspection Standards ("the Director");

The Tribunal makes the following Order respecting the hearing scheduled to commence at the Tribunal's Chambers, 1 St. Clair, Avenue West, 12th Floor, Toronto, Ontario at 9:30 a.m., on Friday, February 15, 2002, and to continue if necessary on Tuesday, February 19, 2002 at 9:30 a.m.

1. The Parties to the hearing are
 - (a) Radcliffe Reid dba Rad Car Care;
 - (b) Radcliffe Reid; and
 - (c) The Director of Vehicle Inspection Standards
2. Mr. Kostyk, the Agent for the Applicant, informed the Tribunal at this Prehearing that he did not expect to continue to represent the Applicant in this matter. He indicated to the Tribunal that he was authorized to represent the Applicant at this Prehearing, but he would not be representing the Applicant subsequently at the hearing. He requested that all further correspondence be sent directly to the Applicant's address.
3. It was determined that the filing dates with the Tribunal of submissions and documents to be used in the hearing by both parties would occur **on or before Friday, February 8, 2002.**

Both parties will file five copies with the Tribunal and deliver one copy to all parties. It was confirmed that the Tribunal requires full disclosure 10 days prior to the hearing.

4. The Respondent will present testimony and evidence from three witnesses, all of whom are MTO Inspectors: Officer Mark Horton, Officer Larry Grimaldi, and Officer Gordon Waldron. The witnesses will give evidence and testimony relating to the background and prior history of convictions and interventions by the MTO since the early 1980's, as well as proceedings before the Licence Suspension Appeal Board in 1987.

Each witness for the Respondent will also testify as experts to give information supporting the facts for convictions against the Applicant. The witnesses will give evidence regarding vehicle safety standards, vehicle inspections, and facility inspections that led to those convictions against the Applicant. Among the materials the Respondent's witness will rely upon will be notes, Field Inspection Reports, and MTO records from the Ministry computerized data base.

5. The Applicant will call several witnesses, including Mr. Radcliffe Reid the owner of Rad Care Care, two mechanics apprentices, the Shop Manager, and as many as ten of the Applicant's past and current customers. The Applicants' witnesses will testify that the circumstances of this case are not appropriate for either the revocation of Rad Car Care's licences as a motor vehicle inspection station or the revocation of the registration of Radcliffe Reid as a motor vehicle inspection mechanic.
6. The Applicant agreed to provide the Respondent and the Tribunal with a complete witness list ten days prior to the commencement of the hearing. It was noted that should the Applicant call any witnesses to testify as experts, the Tribunals Rules of Practice,

Section 6.4, provides specific criteria that the parties must follow regarding expert witnesses at a hearing before the Tribunal.

7. At issue for the Applicants is whether there could be some middle ground in the approach taken by the MTO in the form of some measure of probation, and the Respondents position is that the body of evidence is sufficient for revocation.

The parties present at the pre hearing recorded that there was no resolution of the issues between them.

8. It was confirmed at the Prehearing Conference that the Director has issued a Notice to Revoke Radcliffe Reid d/b/a Rad Car Care licence as a Motor Vehicle Inspection Station pursuant to clause 91(8)(a), (b) and (e) of the *Highway Traffic Act* (the "Act") and Radcliff Reid's registration as a Motor Vehicle Inspection Mechanic pursuant to clauses 93(a), (b) and (c) of the *Highway Traffic Act*, with the Notice to Revoke being dated September 13, 2001.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Member

RELEASED: January 14, 2002

O.O.F. LIMITED O/A BRADSTONE'S CONSTRUCTION

PREHEARING

O.O.F. LIMITED O/A BRADSTONE'S CONSTRUCTION

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

TO REFUSE REGISTRATION

TRIBUNAL: MARJORIE L. HILEY, Vice-Chair

APPEARANCES:

DOUGLAS E. SNIDER, Counsel, representing the Applicant
NETANUS RUTHERFORD, Counsel, representing the Registrar,
Ontario New Home Warranty Program ("ONHWP")
PAT VARCOE, Vice-President, Licensing and Underwriting, ONHWP

DATE OF

PRE-HEARING: January 4, 2002

By Teleconference

ORDER

Following attendances on January 4, 2002 at a prehearing by teleconference before the Licence Appeal Tribunal of Douglas E. Snider, Counsel representing O.O.F. Limited o/a Bradstone's Construction (the "Applicant"), and Netanus Rutherford, in person, Counsel representing the Registrar, Ontario New Home Warranty Program (the "Respondent") and Pat Varcoe, in person, Vice-President, Licensing and Underwriting, ONHWP;

The Tribunal makes the following Order:

- 1) The prehearing by teleconference is adjourned on consent of the parties to Friday, January 11, 2002 at 1:30 p.m.
- 2) Mr. Snider will seek instructions as to the facts to be agreed to in this matter.
- 3) Mr. Snider will have Mr. Freeman in attendance for the continuation of the

prehearing on January 11, 2002.

- 4) Mr. Varcoe will fax a copy of the risk assessment done by the Program on the Applicant to Mr. Snider's office prior to January 11, 2002.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley, Vice-Chair

RELEASED: January 7, 2002

J.A.B. INTERNATIONAL LTD.

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

IN THE MATTER of the REGISTRATION of
J.A.B. INTERNATIONAL LTD.
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: October 11, 2001

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

J.A.B. INTERNATIONAL LTD.

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Applicant

Respondent

CONSENT ORDER

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

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

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

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: January 9, 2002

LICENCE APPEAL TRIBUNAL

BETWEEN:

J.A.B. INTERNATIONAL LTD.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

WAIVER AND CONSENT

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

AGREED STATEMENT OF FACTS

1. The Registrant is registered as a travel agent and travel wholesaler (Registration Nos. 4258588/R & 50007109/W).
2. Maintenance of a "*Travel Industry Act Trust Account*" is one of the Terms and Conditions of registration, signed on April 7, 1994.
3. The registrant was visited by one of TICO's Inspectors on November 7, 2000. It was noted during the visit that the "*Travel Industry Act Trust Account*" was not handled properly in that the account had been consistently overdrawn on several occasions.
4. The registrant was requested by TICO, by letter dated March 23, 2001, to submit a customer deposit reconciliation for the month of February 28, 2001 due by April 6, 2001. The reconciliation was to be accompanied by a copy of the "*Travel Industry Act Trust Account*" bank statement for the same period.

5. By letter dated April 12, 2001, the Registrant was issued a final due date of April 30, 2001 by TICO, to file the required customer deposit reconciliation.
6. On May 1, 2001 the Registrant telephoned TICO and advised Pamela Stout, Financial Inspections Co-ordinator for TICO, that the information was with the accountant, but that the Registrant would have the reconciliation submitted by May 7, 2001.
7. By fax dated May 30, 2001, the Registrant was advised by TICO that the required trust account reconciliation, which was due by April 30, 2001 had not been received. The Registrant was also reminded in the fax dated May 30, 2001 that the financial statements, for the fiscal year ended March 31, 2001, which were due by June 30, 2001 must also disclose the customer deposit position, pursuant to section 24 (5) of the Act.
8. By letter dated July 20, 2001, the Registrant was advised by the Registrar that TICO was unable to determine its customer deposit position due to the absence of the requested trust account reconciliations, and given a further final due date of August 31, 2001 to submit the required customer deposit reconciliation certified by a Licensed Public Accountant, by August 31, 2001.
9. The Registrar's July 20, 2001 letter was re-sent to the Registrant on September 21, 2001.
10. By October 11, 2001, the Registrant had failed to provide the requested customer deposit reconciliations. On that date, the Registrar issued a Proposal to Revoke the Registrant's registration.
11. On November 30, 2001, the Registrant submitted customer deposit reconciliations for the months of September, October and November 2001. The reconciliations, as submitted, indicated that the Registrant had sufficient funds in its trust account to cover its customer obligations.
12. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

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

1. the Registrar refrain from carrying out the Proposal to Revoke Registration dated October 11, 2001;
2. the Registrant's registration is to be subject to the following terms and conditions:
 - a. The Registrant shall at all times maintain sufficient funds to cover its customer obligations. Such funds shall be maintained in a properly designated "Travel Industry Act Trust Account" and in accordance with the trust accounting requirements as stipulated in section 36 of the Regulation or such subsequent provision as may be in force from time to time; and
 - b. The Registrant shall submit a monthly trust account reconciliation with corresponding bank statements to the Registrar beginning with the month of December, 2001, no later than 30 days after the end of each calendar month, for so long as the Registrar shall so require.
3. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) and (b) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.
4. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

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

DATED at Mississauga this ____ day of December, 2001

Mr. Ponniah Jeenathan
J.A.B. International Ltd.
I have authority to bind the corporation

Mr. Michael Pepper
Registrar, *Travel Industry Act*

POSTE AND BOND

PREHEARING

DAVID M. POSTE AND DAINA L. BOND

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

TO DISALLOW A CLAIM

TRIBUNAL: G. KENT McCLURE, Q.C., CHAIR

APPEARANCES:

LORNE C. POSTE, Agent, representing David M. Poste and Daina L. Bond (the
"Applicants"), with David M. Poste
NETANUS RUTHERFORD, Counsel, representing the Ontario New Home
Warranty Program (the "Respondent")
No one appearing for 1236059 Ontario Inc. (the "Added Party")

DATE OF
PREHEARING: January 14, 2002

Toronto

ORDER

Following the attendances before the Licence Appeal Tribunal (the "Tribunal") on January 14, 2002 at a prehearing of Lorne C. Poste, Agent for David M. Poste and Daina L. Bond (the "Applicants") with David M. Poste, Netanus Rutherford, Counsel for the Ontario New Home Warranty Program, (the "Program") with Michael Cote and Wendy Skyba, Employees of the Program and no one appearing for 1236059 Ontario Inc. (the "Added Party");

The Tribunal makes the following Order:

- 1) The parties present at the prehearing recorded that there was a resolution of the issues in this matter and the parties have executed minutes of settlement.
- 2) The matter before the Tribunal is therefore concluded.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C., Chair

Released: January 16, 2002

GHANDOUR

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

IN THE MATTER OF
ALI MOHAMAD GHANDOUR

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

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

ALI MOHAMAD GHANDOUR

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on March 7 and 8, 2002;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Respondent* to commence at the Gillespie Reporting Services, 130 Slater Street, Suite 200, Ottawa, Ontario, at 9:30 a.m., on Thursday, March 14, 2002 and to continue March 15, 2002, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: January 9, 2002

0882 – MED - ALCOHOL

0882 – MED - ALCOHOL

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

TO APPEAL A SUSPENDED LICENCE

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

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

Applicant
By written submissions

DATE OF
HEARING: January 2, 2001

Written

DECISION AND REASONS

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

EXHIBITS:

Exhibit # 1 - Letter Dated November 27, 2001, issued by The Registrar, Ministry of Transportation.

Exhibit # 2 - Notice of Appeal Form Received at the Tribunal November 16, 2001, filed by the Applicant.

FACTS:

The Applicant, a 76 year old semi-retired general practitioner, had his driver's licence suspended March 16, 1998, under Section 47(1) of *The Highway Traffic Act*, following receipt of a Medical Report, dated February 18, 1998, from Physician # 1. The report stated that the Applicant had a condition likely to significantly interfere with driving and the condition was alcohol abuse.

The Applicant has a long history of excessive alcohol use since 1981, when he developed cirrhosis of the liver. He was also treated for ascites in 1996. His problem came to light when he collapsed on February 18, 1998 and was taken to the North York General Emergency. Following this episode, the Applicant consulted a cardiologist, Physician # 2, who diagnosed orthostatic hypotension and syncope.

In a letter dated April 23, 1998, Physician # 2 provided the following information leading up to the collapse on February 18, 1998. He stated the Applicant had experienced spells of lightheadedness and found his blood pressure to be 100/60 to 70. Around that time he was taking 6 - 8 oz. of alcohol daily, in the belief that it might raise his pressure somewhat.

The Applicant collapsed in the apartment hallway outside his front door. His wife heard him and went to the door. Apparently there were no signs of epilepsy and no evidence of any heart problems. At the time he was taking Aldactone 25 mg. per day, which is an anti-hypertensive. He was removed to the hospital by ambulance, treated for four hours and released. With the exception of an elevated Bilirubin, a test for liver function, all of the other blood tests were normal.

Physician # 2 concluded that the syncope was due to hypotension, possibly as a result of a combination of Aldactone and excessive alcohol intake, which probably caused vaso dilatation and fainting.

The Applicant consulted Physician # 3, an addiction specialist, on October 1, 1998, at the request of the Medical Advisory Committee. Physician # 3 saw the Applicant on three occasions, the last being November 25, 1998. He related that the Applicant claimed he had stopped drinking liquor after the February 18, 1998, episode, but was drinking a maximum of two glasses of wine per week.

Blood tests revealed the Applicant's GGT was elevated to 123 and his MCV was 103, both consistent with alcohol damage. Physician # 3 stated that it was unlikely that two glasses of wine per week would produce these lab results. He added that a possible explanation is that the liver tests were significantly elevated in February and had been gradually declining since then.

A liver ultrasound revealed signs of cirrhosis and ascites, which would also be inconsistent with drinking two glasses of wine weekly for nine months.

Physician # 3 recommended that the Applicant receive extra support from AA or another treatment program, but the Applicant refused because he said he had stopped consuming alcohol and did not feel the need for any further treatment.

The Ministry of Transportation notified the Applicant on February 1, 1999, that his file had been reviewed and his driving privilege would remain under suspension. The Ministry wanted another assessment by an addiction specialist and confirmation of a successful completion of a treatment program and a one-year period of abstinence from alcohol supported by lab tests.

Physician # 3's letter of December 2, 1998 is the last piece of information in the Applicant's file. The Applicant apparently did not feel it was necessary either to follow Physician # 3's recommendations or to respond to the Ministry's letter of February 1, 1999 before filing an appeal.

ISSUES:

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

LAW:

Regulation 340/94, Section 14 states:

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

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

Section 47(1) states:

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

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

on the grounds of,

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

Section 50 of the Act states:

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

APPLICATION OF THE LAW TO FACTS:

In suspending the Applicant's driver's licence the Registrar acted in accordance with governing legislation and regulations. Section 14(b) of Regulation 340/94 and Section 47(1)(f) of the *Highway Traffic Act* apply.

The medical evidence available is clear and uncontradicted. The Applicant has not put forth any new or recent evidence for the past three years, so the Tribunal must deal with the information received.

Physician # 1 initially reported the Applicant to the Ministry following a "fainting spell", which was diagnosed later, as orthostatic hypotension, by Physician # 2, a cardiologist. Physician # 2 elicited a past history of cirrhosis and later, ascites and the fact that the Applicant had been drinking excessive alcohol prior to his collapse on February 18, 1998. The Applicant also admitted to Physician # 2 that he was still drinking about 2 glasses of wine per week.

The fact that the Applicant, a physician, has continued to drink alcohol despite it causing severe medical problems in the past, including cirrhosis, causes great concern.

"Determining medical fitness to drive" published by the Canadian Medical

Association states in Section 3.2, "the major medical criteria for the diagnosis of alcohol dependence, are loss of control and compulsive behaviour related to alcohol ingestion and continued use despite the presence of the clinical consequences of alcohol abuse."

In the fall of 1998, the Applicant consulted Physician # 3, an addiction specialist, on three occasions. He determined the Applicant's MCV and GGT blood tests were both elevated, consistent with alcohol damage and unlikely the result of two glasses of wine per week. He also found evidence of cirrhosis and ascites, also inconsistent with that amount of wine over a nine-month period. These inconsistencies suggest that the Applicant is not being forthright with Physician # 3 regarding his consumption of alcohol.

Physician # 3 recommended that the Applicant seek extra support for the treatment of alcohol abuse, including AA or a treatment program, but as yet there is no evidence that he has made this effort. There is also no evidence presented to the Tribunal to contradict any of the medical evidence presented or to demonstrate that the Applicant has abstained from alcohol for any length of time.

The Registrar has acted in accordance with the appropriate governing legislation and regulations and has applied the appropriate medical standards that have not been refuted. The medical evidence is clear and uncontradicted and supports the Registrar's conclusion that the Applicant is addicted to the use of alcohol to an extent likely to significantly interfere with the Applicant's ability to drive a motor vehicle safely. Accordingly, the Tribunal finds that the Registrar has acted within the authority granted under the *Highway Traffic Act* to suspend the Applicant's driver's licence.

DECISION:

Upon the application by the Applicant to appeal the decision dated April 6, 1998 of the Registrar of Motor Vehicles to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act*, and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

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

LICENCE APPEAL TRIBUNAL

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

RELEASED: January 4, 2002

MED – 893 - DOWNGRADE

Appeal under section 50(1) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Minister pursuant to section 32(12)(b)(i) of that Act.

**TO CHANGE THE CLASS OR CLASSES OF
MOTOR VEHICLE IN RESPECT OF WHICH
THE LICENCE WAS ISSUED**

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

APPEARANCES: KIM BEINTEMA, Respondent
Representative for the Minister

Applicant,
unrepresented

DATE OF
HEARING: January 4, 2002

By Teleconference

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Minister (the "Respondent") pursuant to section 32(12)(b)(i) of the *Highway Traffic Act* (Ontario).

EXHIBITS:

- 1) Notice of Appeal from the Applicant received at the Tribunal and dated May 16, 2001.
- 2) Notice from the Registrar, June 29, 2001 advising the Applicant that his driving privileges have been downgraded.
- 3) Case summary from the Ministry received at the Tribunal December 22, 2001.

THE FACTS:

The Applicant, a 55 year old truck driver had his driver's licence downgraded from a "D" to a "G" on May 16, 2001, after the Registrar received an unsolicited Medical Report from a neurologist, Physician # 1, on August 25, 2000. Physician # 1 advised that the Applicant had suffered two grand mal type seizures on August 23 and August 24, 2000 and she had prescribed Dilantin.

On July 6, 1999, Physician # 2, a neurologist, had sent a Medical Report to the Ministry suggesting a medical review for the Applicant because of possible seizures. On September 9, 1999 the Ministry requested an up-to-date medical assessment by a neurologist.

Physician # 2 reported on October 20, 1999, that the Applicant had been experiencing irregular episodes once or twice a month, which involved disorientation, followed by recent memory loss. He also had an abnormal sleep EEG. In his opinion these episodes may represent complex partial seizures. Physician # 2 recommended a trial of an anti-convulsant, such as Tegretol. In evidence it was brought out that the Applicant never took the Tegretol, because he had been advised of possible liver damage and he had Hepatitis C.

Physician # 2 reported on April 25, 2000 that the Applicant has not had anything to suggest a seizure since December and that he has stopped drinking alcohol. Also his liver function tests were normal. The Applicant stated in cross-examination that he never had a seizure in December 2000. His only seizures were in August 2000.

On May 16, 2001, the Ministry advised the Applicant that his driver's licence had been downgraded from a "D" to a "G".

Physician # 1 informed the Ministry on May 29, 2001, that the Applicant had been investigated for seizures previously and that a sleep deprived EEG was normal. In cross-examination, she admitted she had not seen the EEG report, but had been given that information by the Applicant. No more seizures had occurred, since he had been put on Dilantin and regular blood checks had indicated therapeutic levels.

A MRI scan had demonstrated multiple white matter changes, but no definite cause for the seizures was found. A neurological examination was normal.

In a letter from Physician # 1, dated July 23, 2001, she took exception to the Ministry's reference to the seizures being long standing. She states that the seizures were on one day only. In cross-examination, she admitted that she had attempted to obtain Physician # 2's records, but was unsuccessful. She was unaware of the previous seizures and that Physician # 2 had considered them as being complex partial seizures.

Physician # 1 now states in her letter of July 23, 2001 that she suspects the two seizures were actually a result of alcohol withdrawal and that the Applicant no longer drinks alcohol. On cross-examination the Respondent asked her "why she had prescribed Dilantin in August 2000, if she believed the cause was a result of alcohol withdrawal? Also, when did she change her diagnosis and if so, why is the Applicant still on Dilantin?" Physician # 1 responded that she was unsure when she changed the diagnosis, but she had continued the Dilantin because she did not want to risk another seizure, since the Applicant wanted to get his licence upgraded, as soon as possible. The Respondent then asked, "why, if she was so sure of alcohol withdrawal being the cause, was the Dilantin necessary?" Physician # 1 said "she might discontinue it at anytime, maybe even next week, if the Applicant came into her office."

The Ministry received two letters from the Applicant's solicitor, with a copy of Physician # 1's letter of July 23, 2001, requesting the Ministry reconsider the Applicant's application for reinstatement of a class "D" licence. He reiterated that there were only two seizures on August 24, 2000 with no previous history.

ISSUES:

Should the decision of the Minister to change the class or class of motor vehicles in respect of which the licence is issued in accordance with the result of the examination be varied, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

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

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

Regulation 340/94, Section 17 and 18 states:

- 17. (1) Qualifications required by an applicant for a holder of a Class A, B, C, D, E or F driver's licence are that the applicant or holder,
 - (a) has no history or clinical diagnosis of diabetes that requires insulin for control;

- (b) is not taking any drug that could, in the dosage prescribed or in the dosage recommended by the manufacturer, impair his or her ability to drive a motor vehicle of the applicable class safely;
 - (c) has no established medical history of myocardial infarction, angina pectoris, coronary insufficiency or thrombosis;
 - (d) has no established medical history of heart disease including arrhythmia or of respiratory dysfunction likely to interfere with the safe driving of a motor vehicle of the applicable class;
 - (e) is not suffering from an aortic aneurysm, whether resected or not;
 - (f) is not suffering from hypertension accompanied by postural hypotension resulting in giddiness when under treatment;
 - (g) has no established medical history of loss of consciousness or awareness due to a chronic or recurring condition;
 - (h) has no established medical history of a disorder of the musculoskeletal or nervous system that may interfere with the safe driving of a motor vehicle of the applicable class;
 - (i) has no established medical history of an intractable psychotic or psychoneurotic disorder, having particular regard for sustained hostile, aggressive, paranoid, suicidal or other destructive tendencies or depression unless it is medically determined that the condition from which the person has suffered is corrected or controlled;
 - (j) has a visual acuity by Snellen Rating, with or without the aid of corrective lenses, no poorer than 20/30 in the better eye and 20/50 in the weaker eye; and
 - (k) has a horizontal visual field of at least 120 degrees in each eye as measured by confrontation tests.
- (2) An applicant for or a holder of a Class A, B, C, D, E or F driver's licence who fails to meet the qualifications referred to in clauses (1)(a) to (i) may, despite the failure, qualify for the class of licence applied for or held if he or she demonstrated the ability to drive a motor vehicle in the applicable class as safely as any person who meets those qualifications.
- (3) An applicant for or a holder of a Class D driver's licence who fails to meet the qualification referred to in clause (1)(c) may, despite the failure, qualify for that class of licence if it is medically determined that he or she has made a full recovery and there is no established history of a second occurrence of myocardial infarction, thrombosis or recurring angina pectoris.

- (4) An applicant for or a holder of a Class B, C, E or F driver's licence whose hearing in one ear is better than in the other must be able to perceive in the better ear, with or without a hearing aid, a forced whisper at a distance of 1.5 metres or, if an audiometer is used to test the person's hearing, must not have a loss in the better ear of more than 40 decibels at 500, 1,000 and 2,000 hertz.
- 18. An applicant for or a holder of a G, G1, G2, L, M, M1, M2, or R driver's licence must have,
 - (a) in the case of a person whose vision in one eye is better than in the other, visual acuity in the better eye that is no poorer than 20/40 as measured by Snellen Rating; and
 - (b) a horizontal visual field of at least 120 degrees as measured by confrontation tests.

Section 32(12)(b)(i) states:

- 32 No person shall drive a motor vehicle on a highway unless the motor vehicle is within a class of motor vehicles in respect of which the person holds a driver's licence issued to him or her under this Act.
- (12) An applicant for a driver's licence or a person who holds a driver's licence shall submit to the examinations that are authorized by the regulations relating to this section and required by the Minister at the time and places that the Minister may require and the Minister may,
 - (b) in the case of a person who holds a driver's licence,
 - (i) impose or remove the conditions or endorsements authorized by the regulations or change the class or classes of motor vehicles in respect of which the licence is issued in accordance with the result of the examinations, or

Section 50 states:

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

APPLICATION OF THE LAW TO FACTS:

The Registrar acted in accordance with governing legislation, Regulation 340/94, Section 14, of the *Highway Traffic Act*, in downgrading the Applicant's driver's licence, after receiving Physician # 1's medical report that the Applicant had suffered two generalized seizures.

The medical evidence presented to the Tribunal had several important conflicts. Physician # 1 was unaware that Physician # 2 had diagnosed possible "complex partial seizures" and a sleep deprived EEG, was abnormal. She had apparently attempted to obtain copies of the medical records, but was unsuccessful. As a result she had to rely on information from the Applicant, which was not always factual.

The Applicant's solicitor, apparently also relied on information from his client and Physician # 1's letter of May 29, 2001.

The Tribunal accepts Physician # 2's diagnosis of "complex partial seizures" over a period of time and that the sleep deprived EEG was abnormal.

The possibility of the seizures being caused by alcohol withdrawal cannot be answered without further investigation. This theory was not suggested until July 23, 2001, in Physician # 1's letter and the Applicant had been taking Dilantin since August 24, 2000. Physician # 1 said she was 90% certain that alcohol withdrawal was the cause, but she still did not stop the Dilantin.

The Applicant testified that he stopped drinking alcohol in August, 2000, after the seizures and did not require help from AA or anyone specializing in Addictions Medicine.

The medical evidence presented of seizures supports the Registrar's decision to refuse to upgrade the Applicant's driver's licence. It confirms a condition likely to significantly interfere with the Applicant's ability to drive a truck, and supports the downgrade of the Applicant's driver's licence pursuant to Section 32(12)(b)(i) of the *Highway Traffic Act*.

DECISION:

Upon the application by the Applicant to appeal the decision dated June 29, 2001 of the Minister to change the class or classes of motor vehicle in respect of which the licence was issued pursuant to Section 32(12)(b)(i) of the *Highway Traffic Act*, and having considered the evidence filed with the Tribunal, and the submissions of the Respondent and of the Applicant;

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

LICENCE APPEAL TRIBUNAL

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

RELEASED: January 10, 2002

CHRISTIANSEN

BRIAN CHRISTIANSEN

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

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

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

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

BRIAN CHRISTIANSEN, Applicant
unrepresented

DATE OF HEARING: December 21, 2001

DECISION RELEASED: January 10, 2002 Orillia

REASONS FOR DECISION

A hearing was held on December 21, 2001, at Orillia, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

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

BACKGROUND:

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

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

Owner:	Brian Christiansen (the "Applicant")
Motor Vehicle:	1992 Dodge Sprint, plate no. AEFK 192 (the "vehicle")
Date of Appeal:	December 4, 2001

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

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

This matter came before this Tribunal on December 21, 2001 and proceeded as an oral hearing.

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

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

ISSUE:

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

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

Undo hardship
I need the car back or my boss will fire me.
Vehicle Impoundment Notice. More to follow.

The owner of the vehicle, Mr. Christiansen was sworn and gave the following testimony. He testified that at the time of the order to impound he had left his vehicle with his friend, Karen Aileen Egan. Ms. Egan had been under stress at the time and had allowed Mr. James F. Canning to drive Mr. Christiansens' vehicle. Mr. Christiansen was not aware of this until he received a phone call from Ms. Egan that his vehicle had been impounded.

According to Mr. Christiansen, he had not given Mr. Canning permission to use his vehicle and that he needed his vehicle to get to his work. As a truck driver, he travels all over and has to transport himself to the location of the tractor trailer. Where he resides there is no public transportation at the hour that he would need to be transported.

Mr. Christiansen called to the stand Ms. Karen Aileen Egan. Ms. Egan was sworn and gave the following testimony. She testified that she had the use of Mr. Christiansens' vehicle. According to Ms. Egan, she has been under tremendous emotional stress. She stated that she wanted to go for a drive but was not in any state of mind to drive and had asked Mr. Canning if he would drive. She testified that she asked Mr. Canning if he had a driver's licence and he told her that he had. She had no reason not to believe him as she had seen him driving previously. It was not until the vehicle was stopped by police and Mr. Canning was asked to produce a driver's licence which he could not. The police indicated that he had a record which indicated that he had a criminal code conviction and was driving while under suspension and that the vehicle was going to be impounded. Ms. Egan had nothing further to add and was excused from the stand.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

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

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. James F. Canning;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until October 5, 2004.

The Tribunal accepts the evidence as submitted by the Respondent which does in fact indicate that the driver of the impounded vehicle, Mr. James. F. Canning was driving while under suspension.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

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

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

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

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

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

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

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

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

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

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

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

defined time).

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

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

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

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

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

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

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

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

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

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

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

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or

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

APPLICATION OF LAW TO FACTS:

The Applicants vehicle was impounded by the Registrar under Section 55.1 of the *Highway Traffic Act* when it was found to be driven by a driver whose licence at the time was under suspension.

1. Due Diligence

The grounds of appeal under Section 50.2(3)(c) of the Act require that the Applicant show the Tribunal that he, the owner, Mr. Christiansen had exercised due diligence in attempting to determine that Mr. Canning's driver's licence was not suspended at the time of the

impoundment of the Applicant's vehicle.

The Applicant provided nothing to this Tribunal that indicated that any attempt was made to ascertain if in fact, the driver Mr. Canning was in possession of a valid driver's licence.

The onus is upon the Applicant to establish that he in fact exercised due diligence. The Applicant by his own admission had not made inquiries as to the driver's licence as he was unaware that his vehicle was being driven by Mr. Canning. The Applicant believed that Ms. Egan exercised due diligence. The evidence does not support his belief that Ms. Egan was diligent in her inquiry as to the status of Mr. Canning's driver's licence. She made no effort to ask to see Mr. Canning's Driver's licence. In any event, the legislation requires that the onus is upon the owner of the impounded vehicle to exercise due diligence. It is quite clear that due diligence was not performed in any manner as required by subsection 50.2(3)(c).

2. Exceptional Hardship

(a) Health and Safety

The Applicant has provided no supporting evidence to support his claim that the impoundment of his vehicle will result in a threat to the life or safety of any one transported by his vehicle, including himself as described by Regulation 632/98, section 22(1)(a).

(b) Financial/Employment Loss

The Applicant claims via documentary and oral testimony, that the loss of the vehicle had resulted in exceptional hardship as described by Regulation 632/98, section 22(2). In order for the Tribunal to consider whether exceptional hardship will result from the impoundment under that section, the Tribunal can only consider the specific items listed by Regulation 632/98, section 22(2)(b), (c) and (d) and if the Applicant can demonstrate that all the criteria of section 22(3) have been met.

The Applicant has not shown the Tribunal that in attempting to mitigate the loss of his vehicle, he has considered every reasonable alternative and that no alternative to the impounded vehicle was available. The Applicant was not able to provide evidence that he had in fact attempted to procure another vehicle during the impoundment period or that he had considered other alternatives such as obtaining a ride from a friend or relative, or borrowing another vehicle, or traveling by taxi. In addition, the Applicant provided no evidence of significant financial loss or threat to his employment.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section

50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

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

RELEASED: January 10, 2002

0899- ADLS - NOMC

0899- ADLS - NOMC

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

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

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

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

Applicant
unrepresented

DATE OF
HEARING: January 7, 2002

Toronto

DECISION

A hearing was held on January 7, 2002, at Toronto, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

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

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D., Presiding Member

RELEASED: January 8, 2002

0899- ADLS - NOMC

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

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

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

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF
HEARING: January 7, 2002

DECISION
RELEASED: January 8, 2002 Toronto

REASONS FOR DECISION

A hearing was held on January 7, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on January 8, 2002 with Reasons to follow.

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

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated December 13, 2001, and was received by the Tribunal on December 17, 2001, together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

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

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

The Representative of the Ministry provided the Tribunal with original certified copies of Ministry of Transportation documents on file.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice to Registrar – dated November 27, 2001.
- b) Exhibit # 2 Notice of Appeal Form – received December 17, 2001.

By the Respondent:

- a) Exhibit # 3 Ministry of Transportation submissions – received December 28, 2001.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the

Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

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

- 50.1(1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
 - (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
 - (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

- 15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
 - (a) the name, telephone number and address, with the postal code, of the medical practitioner;
 - (b) the name, date of birth and address of the person who is the subject of the report;
 - (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the

subject of the report; and

- (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner."

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

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

FACTS:

The Applicant's Driver's Licence was suspended "Nov 27 2001" as per Notice of Appeal (Exhibit # 2).

Applicant's Evidence:

The Applicant's Notice Appeal is incomplete, in that it does not provide the medical information requested.

At the hearing, the Applicant related the events that led up to the breathalyser test. The Applicant testified that he felt "... shocked, terrified ... humiliated", because of the way he was treated by the officers. The situation caused the Applicant stress which combined with the fact that the Applicant has been a heavy smoker for forty years rendered the Applicant unable to provide a breath sample, as demanded.

The Applicant explained to the Tribunal that he felt embarrassed to approach his family physician with the Notice of Appeal, and that he did not realize the importance of the information required.

In cross-examination, the Applicant confirmed that he had some heart and chest problems in the past, but the only medication he takes now, is Tylenol "...for everything ...stomach ...back ...stress...".

The Applicant established for the Respondent's Representative that he did not tell the officers of any health problems other than his back problems.

The Applicant called his wife, Eva Balog as a witness. Mrs. Balog testified as to the number of telephone calls she received from the police and the way the truck was found in the parking lot of the beer store.

In closing, the Applicant re-iterated his position regarding the incidents of the night in question. The Applicant emphasized that his treatment at the hands of the officers had made him upset, and that the stress created as a result made him uncomfortable and unable to supply a breath sample.

Respondent's Evidence:

The Respondent provided the following Documents:

1. Notice to the Registrar, certified December 21, 2001.
2. Driving Record of the Applicant, certified December 21, 2001.
3. Vehicle Record as of occurrence date, certified December 21, 2001.

The Applicant's driver's record according to the Ministry of Transportation shows no infractions since 1972, other than the current suspension. (Exhibit #3)

The Respondent called Police Officer # 1 as a witness. Police Officer # 1 testified that he has been with the Toronto Police Services since "...26 August '96".

Police Officer # 1 described the events that led to the Applicant's arrest and the subsequent demand for a breath sample.

Police Officer # 1 was present during the breathalyser session but did not administer the test. The videotape made during the Applicant's breathalyser session was ruled inadmissible, as it was not disclosed prior to the hearing.

During his dealings with the Applicant at no time did Police Officer # 1 observe the Applicant wheezing, or exhibiting any other symptoms of shortness of breath. Police Officer # 1 attested that he was present when the Applicant informed the night Sergeant at the station of a "back problem". No breathing difficulties were mentioned, nor medical assistance asked for, by the Applicant, to the Sergeant or at any other time.

In closing, the Respondent noted that the onus is on the Applicant to prove the ground for appeal. The Applicant failed to provide medical evidence to support his claim that he was unable to provide a breath sample for medical reasons.

APPLICATION OF THE LAW TO FACTS:

In his testimony and closing remarks, the Applicant raised the issue of police impropriety. As the Applicant was advised during the hearing, the Tribunal has no jurisdiction in this matter, and will not comment.

Section 50.1 (2) (b) of the *Highway Traffic Act* which allows for an appeal in circumstances where a

*“... person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood **because he or she was unable to do so for a medical reason...**”*

At issue is did the Applicant have a medical condition that could cause the Applicant to fail or not comply with the breath demand.

The onus is on the Applicant to provide the Tribunal with a medical reason as to why he was unable to provide a breath sample.

As pointed out by the Respondent, the Applicant failed to substantiate the basis for an appeal on medical grounds, as he did not provide the Tribunal with any medical reports.

The Tribunal understands and commiserates with the Applicant, regarding his embarrassment in discussing the situation with his physician. Nonetheless, page 2 of the Notice of Appeal is an important opportunity to provide medical evidence that must form the foundation of any appeal under Section 50.1(2)(b) of the *Highway Traffic Act*. As previously stated, that page is blank.

The Tribunal heard the evidence of Police Officer # 1, who at no time, during the time the Applicant was in custody, observed the Applicant afflicted with any breathing difficulties “...no wheezing ...or shortness of breath.” At no time during the course of his arrest did the Applicant seek medical assistance.

The Applicant’s testimony was credible, but by his own admission, the Applicant did not inform any of the officers involved that he had any breathing difficulties or that he was feeling anxious or stressed.

The onus being on the Applicant to establish the merit of the appeal, the Tribunal finds that the Applicant has failed to do so. Thus, the Tribunal finds that the Applicant does not meet the criteria of Section 50.1(2)(b), in that he was not able to demonstrate that he suffers from a medical condition, which would prevent him from providing a breath sample.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated November 27, 2001 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

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

LICENCE APPEAL TRIBUNAL

Antoine, Aouad, M.D.,
Presiding Member

RELEASED: January 10, 2002

TRANSPORT MADIGAN TRUCKING INC.

TRANSPORT MADIGAN TRUCKING INC.

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

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

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

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

TRANSPORT MADIGAN TRUCKING INC., Applicant
TERENCE A. MADIGAN, Agent for Applicant

DATE OF HEARING: December 28, 2001

DECISION RELEASED: January 4, 2002 Ottawa

REASONS FOR DECISION

A hearing was held on December 28, 2001, at Ottawa, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

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

BACKGROUND:

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

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

Owner:	Transport Madigan Trucking Inc. (the "Applicant")
Motor Vehicle:	1994 Kenworth COE, plate # PP9210 (the "vehicle")
Date of Appeal:	December 10, 2001

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

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

This matter came before this Tribunal on December 28, 2001 and proceeded as an oral hearing.

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

The Respondent filed certified copies of Ministry of Transportation documents, previously submitted as part of the Respondent's evidence.

The Applicant submitted copies of Mr. Joseph Anthony Jarrell's Social Security and Social Insurance cards, which were entered as exhibits without objection from the Respondent's Representative.

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

ISSUE:

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

I, Terence A. Madigan, president of TRANSPORT MADIGAN TRUCKING INC., supply the following documents regarding the impoundment order – Driver Driving when licence under suspension.

I am appealing this matter by proving that I exercised due diligence to determine that the driver's licence of Mr. Joseph Anthony Jarrell was not suspended.

Mr. Joseph Anthony Jarrell (03/02/1960) had a valid Michigan Commercial Vehicle Licence #J64 441 067 162. In addition he supplied a Michigan Department of State BUREAU OF DRIVER AND VEHICLE RECORDS abstract dated October 25th, 2001, stating NO ACCIDENTS OR CONVICTIONS FOR LAST 5 YEARS.

Seeing as it is illegal for anyone to possess more than one licence, we had no reason to investigate him having a licence in any other jurisdiction.

He supplied us with proof of Indian status; therefore allowing him to work for us in Canada.

With all the above information Mr. Jarrell commenced employment on October 29th, 2001. I believe that all steps were taken to ensure that the driver's licence in question was not under suspension.

At the hearing, Mr. Terence A. Madigan, appearing on behalf of Transport Madigan Trucking Inc., re-iterated the comments in the Notice of Appeal. A summary of the evidence follows.

Mr. Joseph Anthony Jarrell was a driver employed by an Owner Operator that worked for the Applicant.

When the truck Mr. Jarrell was driving, broke down, the Applicant hired him so that he would not lose any pay. At this time, the Applicant requested certain paperwork from the Owner Operator and from Mr. Jarrell; including, driver's licence, driver's abstract, and letter of employment authorization.

When the Applicant viewed Mr. Jarrell's driver's licence, a copy was made for its file and the information sent to its insurance company. Mr. Jarrell showed the Applicant a valid Michigan driver's licence showing that Mr. Jarrell had a Michigan address. The Applicant hired Mr. Jarrell as a driver.

Mr. Jarrell asked the Applicant to consider him Canadian for income tax purposes. As an Aboriginal, Mr. Jarrell is allowed to choose between Canadian and U.S.A. taxing authorities.

In cross-examination, the Respondent suggested that the Applicant should have checked to see if Mr. Jarrell had a driver's licence in Ontario and if it was under suspension. Mr. Madigan testified that he is aware of a North American Agreement that permits residents of North America to drive across the borders, and he is also aware that it is illegal to possess more than one driver's licence. This was not disputed by the Respondent. Accordingly, once Mr. Madigan had determined that Mr. Jarrell had a valid Michigan driver's licence, he felt no need to check if Mr. Jarrell had a driver's licence elsewhere. Transport Madigan hires drivers to drive across North America. Mr. Madigan testified that the cost to check the other forty-nine states and 10 Canadian Provinces would be exorbitant, as well as unnecessary. Thus, the Applicant, having physically seen Mr. Jarrell's Michigan driver's licence and read the clean record of the Michigan Bureau of Drive and Vehicle Records, was satisfied that no further checking was required.

The Applicant did not consider the date of issue of Mr. Jarrell's driver's licence as it is the practice of Transport Madigan to hire recently licensed drivers. Normally, further checking into a new driver's past is required, however, because Mr. Jarrell did show a clean abstract and was already working for one of the Applicant's Owner Operators, further checking was not conducted.

The Applicant testified that each driver is checked every three months for any violations but only in the jurisdiction in which they reside.

Records of Mr. Jarrell's driver's information were sent by the Applicant to the Applicant's Insurance Company for further verification.

In closing, the Applicant commented that he believed that he did all the law required of him.

Evidence for the Registrar

A summary of the Registrar evidence follows.

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

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Joseph Anthony Jarrell;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the Ontario driver's licence of the driver was then under suspension until September 25, 2002.

The Respondent offered no viva voce evidence at the hearing choosing to stand on the information provided.

In closing, the Respondent asked the Tribunal to confirm the decision of the Registrar and uphold the impoundment, on the grounds that "due diligence" requires an Applicant to do more than accept that the driver had a valid driver's license in the State of Michigan.

As there is no reciprocal agreement with the State of Michigan the Respondent's Representative contended that the Applicant should have checked with the Ontario Ministry of Transportation.

The Respondent argued that the onus is on the Applicant to verify the information provided by the driver and not to assume that no crime was committed. As the Applicant did not follow the proper enquiries with the Ministry of Transportation for Ontario, the Respondent submitted that the Applicant did not perform due diligence.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

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

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

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

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

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

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

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

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

- determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

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

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

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

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

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

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

APPLICATION OF LAW TO FACTS:

The onus is on the Applicant to establish due diligence under 50.2(3)(c) of the *Highway Traffic Act* (Ontario), which provides:

"that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's license of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension."

The above ground of appeal is the only ground on which the Tribunal may set aside the order to impound on the basis of the owner's due diligence. In this case, the driver of the motor vehicle at the time in respect of which the order was made was Mr. Joseph Anthony Jarrell. To succeed in this hearing on the basis of due diligence, therefore, the Applicant must establish that due diligence was exercised in attempting to determine that Mr. Joseph Anthony Jarrell's driver's licence was not under suspension.

The interpretation of "due diligence" in any particular case depends upon the facts of that case. The 6th edition of Black's Law Dictionary defines "due diligence" as:

“...such a measure of prudence, activity, assiduity as is properly to be expected from and ordinarily exercised by a reasonable and prudent man under the circumstances, not measured by any absolute standard but depending on the relative facts of the case.”

At issue is whether the Applicant was “reasonable and prudent” in its efforts to ensure that the driver, Mr. Joseph Anthony Jarrell, had a valid driver’s licence.

Incontrovertible evidence demonstrates that the Applicant procured and obtained the necessary information prior to hiring Mr. Joseph Anthony Jarrell. Copies of Mr. Jarrell’s Michigan driver’s licence and abstract were filed with the Tribunal by the Applicant. This information confirms Mr. Jarrell as a resident of Michigan.

The Respondent’s representative contends that accepting the information provided at face value is not sufficient and that the Applicant should have checked with the Ontario Ministry of Transportation. The Applicant counters that he hires drivers to drive across North America. The Applicant stressed that since it is illegal to possess more than one driver’s licence, verification is required only from the driver’s jurisdiction of residence. In this case, the jurisdiction of residence is Michigan and the Applicant was provided not only with a valid driver’s licence but also with a clean abstract.

The Respondent’s representative argued that a necessary element to show that the Applicant exercised due diligence is that the owner of a motor vehicle must physically see the driver’s license of the prospect driver prior to allowing the individual to drive. This criterion was met by the Applicant. The Applicant examined Mr. Jarrell’s driver’s licence, photocopied it and forwarded a copy to the Applicant’s Insurance Company. A copy of the licence is on file. The Respondent’s representative called attention to the fact that the Applicant failed to notice the date of issue of the Mr. Jarrell’s licence, which is immediately after Mr. Jarrell’s licence was suspended in Ontario. The Respondent’s representative implied that this behaviour denotes an intent to be deceptive. However, the Applicant was not aware of the Ontario driver’s licence, and the driver should not have had more than one driver’s licence. Any intent on the part of the driver to be deceptive can not be attributed to the Applicant. The Applicant also retorted that he frequently hires new drivers, thus the date of issue of a driver licence would not be too much of a concern. More particularly, there was no reason to suspect deviousness, as Mr. Jarrell was already working as a driver for one of the Applicant’s Owner Operator’s, and his abstract, dated on Oct 25th, 2001” from the Michigan Department of State BUREAU OF DRIVER AND VEHICLE RECORDS showed: “NO ACCIDENTS OR CONVICTIONS FOR AT LEAST 5 YEARS...”. Also, there is no documented evidence to corroborate the argument of the Respondent’s representative regarding concern arising from the date of issue of Mr. Jarrell’s licence. The evidence indicates that the licence expires on “ 3/2/2005” and the abstract is dated October 25th, 2001. Mr. Jarrell’s alleged intent to deceive can only be assumed and has not been proven. As a resident of Michigan State, Mr. Jarrell is entitled to a

Michigan driver's licence. The evidence regarding residence is found in Mr. Joseph Anthony Jarrell's current and valid driver's licence which shows his address as: 514 E Clarence Road – Harrison – Michigan 48625-9507.

With respect to the matter of tax deductions, the Tribunal heard evidence from the Applicant, that Mr. Jarrell requested his deductions as per Canadian regulations. As an Aboriginal, Mr. Jarrell is allowed to have dual citizenship. The Tribunal has no evidence as to whether Mr. Jarrell will be filing his income tax as a resident or non-resident. On the evidence available, the Tribunal does not find that this was sufficient reason for the Applicant to assume Mr. Jarrell was not a resident of Michigan.

The Applicant has satisfied the Tribunal that it acted reasonably and prudently according to the information provided to it and exercised due diligence to ensure the Applicant had a valid driver's licence.

DECISION:

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

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: January 4, 2002

445227 ONTARIO LTD.

445227 ONTARIO LTD.

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

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

TRIBUNAL: MALCOLM FEALING,
Presiding member

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

445227 ONTARIO LTD., Applicant
MARY NANDRAJOG, Agent for Applicant

DATE OF HEARING: December 27, 2001

DECISION RELEASED: January 3, 2002

By Teleconference

REASONS FOR DECISION

A hearing was held on December 27, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

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

BACKGROUND:

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

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

Owner:	445227 Ontario Ltd. (the "Applicant")
Motor Vehicle:	2001 Honda CRV, plate no. AKDM 528 (the "vehicle")
Date of Appeal:	December 11, 2001

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

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

This matter came before this Tribunal on December 27, 2001 and proceeded as an electronic hearing.

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

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

ISSUE:

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

My position is that the loss of this vehicle will result in exceptional hardship. I live in Caledon near Orangeville, Ontario and my business Video Effects Canada also known as 445227 Ontario Ltd. is in Brampton 40 km away. There is no public transportation in this area so a car is essential for getting back and forth to work. I also use the car for business purposes each day.

My son took the car without my permission while my wife and I were asleep. Thus the impact of the loss is upon me rather than my son who was driving while his licence was suspended.

Ved Nandrajog

Mr. Nandrajog's wife Mary acted as his agent. She asked that 445227 Ontario Ltd. Be referred to as Video Effects Canada during the hearing. She stated that the business was in Brampton, 40 Kilometres away from her home in Caledon. There is no public transportation between Caledon and Brampton.

Mrs. Nandrajog advised that the car was taken without permission by her son Gopal while she and Mr. Nandrajog were asleep. Her husband is experiencing undue hardship because he does not have the use of the automobile to drive to work and to carry out his business during the day.

As to the other automobiles registered in the family name, she gave the following explanation.

The Hyundai, KM8SC83D21U117663 is used by Surinder, her husband's brother. He lives in Brampton.

The Buick, 2G4WS52JXY1102070, is used by David Miller an employee of the company. Mary uses the Ford Mustang 1FAFP4447XF157896, to do her shopping and visiting, etc.

The Mercury Topaz, 1MEBM36XOLK616873, was recently towed to the wreckers. Daughter Prya uses the Ford Winstar 2FMDA56461BB58957.

Mr. Nandrajog has been driving Prya to work since the Honda was impounded. It takes two hours to go to Don Mills from Caledon in the morning, and another hour and a half to drive back to Brampton. This is a great loss of time that could otherwise be used to conduct business. "Time is money," said Mary, but she did admit that the loss of time was mostly a nuisance. Her husband uses the Winstar to conduct his business during the day.

In response to a further question from the Respondent, she replied that no consideration had been given to renting a car. She had a good idea how much it would cost to rent an automobile.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

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

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Gopal, Rai, D. Nandrajog;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until March 9, 2002.

The Respondent also relied upon the information provided by Mrs. Nandrajog, including full details of the use of the other automobiles, her explanation that her husband had alternative transportation, and that the hours spent traveling were more of a nuisance than a financial burden.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

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

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

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

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

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

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

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
 - (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;

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

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

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

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

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

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

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

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

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

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

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or

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

APPLICATION OF LAW TO FACTS:

As to the issue filed, the evidence established that an alternative to the impounded vehicle is available. Mr. Nandrajog has the use of a Ford Winstar to get to work and to carry out his daily business activities. The impoundment has resulted in inconvenience but has not resulted in,

- (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or

- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.

Ontario Regulation 632/98 amending Regulation 574 of R. R.O. 1990 excludes exceptional hardship where there is an alternative automobile available and where the loss of the automobile amounts to inconvenience. Also, the possibility of a slight loss of business income is, in any event, not a degree of loss that is equivalent to exceptional hardship.

DECISION:

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

LICENCE APPEAL TRIBUNAL

Malcolm Fealing, Presiding Member

RELEASED: January 3, 2002

0909- MED – ADJ

0909- MED – ADJ

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

TO APPEAL A SUSPENDED LICENCE

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

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

Applicant
unrepresented

DATE OF
HEARING: January 16, 2002 Toronto

ORDER

WHEREAS a hearing was scheduled to be heard on January 16, 2002 in Toronto in the above matter;

AND WHEREAS at the hearing on January 16, 2002 before the Tribunal the Applicant requested that the matter be adjourned to allow him to obtain new medical reports from his Physician;

NOW THEREFORE, upon consent of both parties, the Tribunal Orders that this matter is adjourned to be heard on Wednesday, February 20, 2002, at 1:30 p.m. at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario;

LICENCE APPEAL TRIBUNAL

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

RELEASED: January 17, 2002

0910-ADLS- NOMC

0910-ADLS- NOMC

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

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

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

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

Applicant
unrepresented

DATE OF HEARING: January 10, 2002 Toronto

DECISION

A hearing was held on January 10, 2002, at Toronto, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

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

LICENCE APPEAL TRIBUNAL

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

0910-ADLS- NOMC

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

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

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

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF
HEARING: January 10, 2001

DECISION
RELEASED: January 11, 2001 Toronto

REASONS FOR DECISION

A hearing was held on January 10, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on January 11, 2002, with Reasons to follow.

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

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated December 14, 2001, and was received by the Tribunal on December 14, 2001, together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

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

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

There were no preliminary matters. The documents submitted were entered as exhibits with the consent of both parties.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice to Registrar.
- b) Exhibit # 2 Notice of Appeal, 3 pages.

By the Respondent:

- a) Exhibit # 3 MTO submissions.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

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

- 50.1(1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
 - (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
 - (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

- 15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
 - (a) the name, telephone number and address, with the postal code, of the medical

practitioner;

- (b) the name, date of birth and address of the person who is the subject of the report;
 - (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
 - (3) The report shall be signed by the medical practitioner."

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

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

FACTS:

The Applicant took the stand and was affirmed. He testified that on the evening of December 9, 2001 he was driving a friend's vehicle travelling westbound on Major Mackenzie Drive. At Bathurst St. he made a left turn to proceed southbound on Bathurst St. He testified that as he made his left turn onto Bathurst St., there was an animal on the road, causing him to swerve right and left so as to navigate around the obstacle. It was at this time that he saw a police car behind him. He stated that he was about 50 meters south of Major Mackenzie when he was pulled over. He pulled over to the right side of the road and stopped his vehicle. The officer approached his vehicle and asked to see his documents and if he had been drinking that evening? The Applicant responded that he had not had anything to drink. The officer asked him to provide a breath sample in a machine. The Applicant complied and followed the officer back to the police car. The Applicant testified that he was shown how to provide a sample of his breath, that he could not, and that he did not give the officer any reason for his failure to

provide the sample of breath when requested. The Applicant asked the officer if he could be taken to give blood to prove that he was not drunk. The Applicant recalled attempting to provide a breath sample on four or five occasions but simply could not.

The Applicant testified that he was cautioned and was subsequently arrested and placed in handcuffs. The Applicant testified that the handcuffs were hurting him and asked the officer to remove them or make them looser. The Applicant was released and given a promise to appear notice. The Applicant testified that after he was released, he went home. He went to Physician # 1 on December 14, 2001 as indicated on the prescription note pad. That note indicated an antibiotic prescription and that the Applicant was off work due to illness. According to the Applicant, he has suffered from tonsillitis since the age of 18 and that is why he could not provide a sample of breath. The medical report of Physician # 1 states "off, work, 10-14/xii/01 (illness)." (Exhibit #2). When questioned, the Applicant admitted that this was a note written for work purposes and that the physician was unaware that the note would be used in this appeal. The Applicant had nothing further to add and was excused from the stand.

Police Officer # 1 took the stand and was sworn. He testified that on December 9, 2001 at approximately 11:27 p.m., he stopped a vehicle being driven by the Applicant. According to the officer, he testified that he was travelling in a marked police cruiser, eastbound on Major Mackenzie Drive in the Town of Richmond Hill. He observed a vehicle, a black neon travelling west bound on Major Mackenzie at a fast rate of speed. Police Officer # 1 turned his cruiser around and followed the Applicant's vehicle. Police Officer # 1 testified that he observed the vehicle make a left hand turn (southbound) from the left through lane on Major Mackenzie. As the subject vehicle made the turn, the vehicle was weaving in and out of the lane. Police Officer # 1 also testified that the Applicant's vehicle accelerated to between 100 and 120km/hour. Police Officer # 1 activated his roof lights and stopped the vehicle approximately 1 km south of Major Mackenzie Drive at Weldrick Ave. The officer testified that when he spoke with the driver, he detected a strong odour of an alcoholic beverage and formed the opinion that the driver had alcohol in his system. Police Officer # 1 read the demand for a breath sample to the driver, and the driver stated that he understood and would comply with the demand. The officer had the Applicant sit in his cruiser. The Officer explained the device and how to provide a sample. The Applicant was given approximately six or seven opportunities to provide an adequate sample. The Applicant was warned that if he did not provide an adequate sample, he would be charged. Subsequently, Police Officer # 1 charged the Applicant with failure to provide. After the Applicant had been charged, the Applicant asked for another opportunity which Police Officer # 1 afforded to him and again no sample was provided. The Applicant was charged and released on a promise to appear.

According to the testimony provided by Police Officer # 1, at no time did the Applicant indicate that he suffered from any medical condition which would have precluded him from providing a breath sample when requested. Police Officer # 1 stated that he is a trained observer and did not observe any indication of distress in the Applicant.

The Officer had no further testimony to give, and the Applicant had no questions of the witness. The officer was excused from the stand.

The Tribunal accepts the evidence presented by the Police Officer # 1 as fact, and where his evidence conflicts with the Applicant's evidence, prefers the evidence of Police Officer # 1.

The Applicant eludes to a "medical condition" which he has as reason for his failure to provide the breath sample as requested by police. In an appeal of this nature, the onus is on the Applicant to substantiate his position. The documents submitted by the Applicant do not substantiate his claim to the effect that he had a present medical condition which precluded him from providing a breath sample when requested by Police Officer # 1.

The report of Physician # 1, the Applicant's medical practitioner, fails to meet the specific requirements of section 15(1) of Regulation 574 of the *Highway Traffic Act* in the following respects:

1. Physician # 1 does not indicate knowledge that the report would be used in support of the Applicant's appeal; she did not sign, send, or receive the Applicant's medical information form provided with the Notice of Appeal. It was presented to the Tribunal "blank".
2. Physician # 1 does not provide any clinical information with respect to his medical condition, the history of such condition, the treatment, present or past, or how long the Applicant has had this condition.
3. Physician # 1 does not provide any details of the diagnosis, nor any clinic testing.

It appears that the Applicant did not ask Physician # 1 to provide a report for this appeal. The report does not meet the requirements of Section 15(1), and the Tribunal can attach little weight to it with respect to this appeal.

The explanatory note submitted by the Applicant sheds no light at all on his medical condition which forms the basis of the appeal.

APPLICATION OF THE LAW TO FACTS:

A review the foregoing facts establishes that the Applicant has not related his medical condition to, the requirement of Regulation 574 and Section 50(1)(2)(b) of the *Highway Traffic Act*.

The evidence is clear that the Applicant refused to blow for no stated medical reason. The Tribunal accepts the evidence of Police Officer # 1. The Tribunal recognized that the officer is not a medical physician but that he is a trained observer. Police Officer # 1 has attested to the

fact the Applicant had a strong smell of an alcoholic beverage on his breath which was the reason for him to request the sample of breath. The Applicant's failure to provide an adequate sample was the action of a person unwilling to provide that sample because of the possible negative consequences of providing that sample. As indicated by Police Officer # 1, the Applicant blew around the mouth piece or puffed out his cheeks, not forming a tight seal around the mouth piece.

The Applicant has not discharged the onus under Section 50.1 of the *Highway Traffic Act* to establish a medical reason for his failure to provide and his refusal to comply with a demand made under Section 254 of the Criminal Code (Canada) to provide a sample of breath.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated December 10, 2001 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

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

LICENCE APPEAL TRIBUNAL

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

RELEASED: January 17, 2002

HAAS

PAWELL HAAS

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

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

TRIBUNAL: CHARLES J. SANDIFORD,
Presiding member

APPEARANCES: LUBA NEUWIRTH,
Representative for the Registrar of Motor Vehicles

PAWELL HAAS, Applicant
MERRILL F. BAKER, Counsel for the Applicant

DATE OF HEARING: January 8, 2002

DECISION RELEASED: January 11, 2002 ***By Teleconference***

REASONS FOR DECISION

A hearing was held on January 8, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

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

BACKGROUND:

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

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

Owner:	Pawell Haas (the "Applicant")
Motor Vehicle:	1989 Ford Van, plate no. ACLL 807 (the "vehicle")
Date of Appeal:	December 19, 2001

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

The owner appeals on the basis that the motor vehicle was stolen at the time it was being driven and the vehicle owner exercised due diligence (i.e. all reasonable efforts) to determine that the driver's licence was not suspended, as provided in sections 50.2(3)(a) and (c) of the Act.

This matter came before this Tribunal on January 8, 2002 and proceeded as an electronic hearing.

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

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

ISSUE:

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

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

I am not sure who was driving the vehicle when impounded. The vehicle was delivered on or about November 24, 2001 to Leo Lolande who held himself out as a mechanic. The vehicle was in need of repair. It had a vacuum hose problem, required a tune up, and a safety check. The vehicle was delivered to 678 Brent, Windsor to effect the repairs. Leo Lolande, the mechanic, advised and I verily believed the repairs would be completed within one (1) weeks time. No permission was given to any party to operate the vehicle. No consent was given to its use. The vehicle was surrendered solely for needed repairs to be performed. I have no information as to the circumstances that led to the vehicle being impounded on December 12, 2001. I am not aware of the status of Leo Lolande's drivers licence, nor did I have any reason to inquire as vehicle was not to be driven by him or others.

After a review of the Applicant's submission, it was determined that the vehicle in question was not currently licenced. Because there was only an expired sticker, the Applicant saw no need to see Lalondes licence nor verify its validity as it should not be driven on the road unlicenced. There was no explanation as to why the officer did not add this offence to his report. There is reason to believe that Lalonde could have required a road test to verify the result of his repairs.

A fellow employee of the Applicant recommended Lalonde to the Applicant. Lalonde's place of business was his home. While the Applicant's submission states the vehicle was delivered November 24, 2001, it was corrected to November 30, 2001. The Applicant's casual follow up on the repair work was because of the Applicant intended to sell the vehicle once it could be certified. He had two other vehicles he could use.

When the Applicant received the impoundment order on December 12, 2001, he did not report to the police that the vehicle had been stolen, even though no permission was given to Lalonde to use the vehicle. There was no clear testimony that the Applicant told Lalonde not to drive the vehicle. It appears the Applicant assumed this would not happen because of the vehicle's expired licence plates.

Evidence for the Registrar

A summary of the Registrar's evidence follows. The Respondent reviewed with the Applicant

what is acceptable under the Act in respect of “due diligence” and what constitutes “stolen”, the Applicant’s grounds for appeal. At this time, counsel for the Applicant challenged the Act’s definition of “stolen” specifically the American Case Law reference in Black’s Law Dictionary.

The absence of a police report was again noted by the Respondent’s representative.

Due to circumstances regarding the vehicle’s expired licence plates, the issue of diligence was not pursued, as there was none.

The Respondent’s representative identified the section of the Act 51.1(21) that outlines the path for recovery of costs from Lalonde through the courts. Counsel for the Applicant stated that this course of action was already under consideration.

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

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Leo L. Lalonde;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver’s licence of the driver was then under suspension until May 7, 2003.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

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

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

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

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

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

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

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

The Applicant here appeals on the basis of sections 50.2(3)(a) and (c).

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

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

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

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

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

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

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

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

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

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

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

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular

circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

APPLICATION OF LAW TO FACTS:

The Applicant filed an appeal under section 50.2(3)(a) and (c) of the Act. Section 50.2(3)(a) states that an order to impound a vehicle may be set aside if the motor vehicle subject to the Order was stolen at the time the Order to Impound was made.

The onus to prove that the vehicle was stolen is that of the Applicant. For a vehicle to be stolen, there must be a taking of the vehicle by a person who intends to deprive the owner of that vehicle. Here, there is no evidence on which the Tribunal can draw the conclusion that Mr. Lalonde intended to deprive Mr. Haas of the latter's vehicle. Mr. Haas had left the vehicle with Mr. Lalonde for a number of days. When Mr. Haas became aware that Mr. Lalonde had been driving it and that it had been impounded, Mr. Haas did not report to the police that it was stolen. No police report was offered in evidence to support such a conclusion. Accordingly, the evidence presented at the hearing does not support the ground of appeal that the vehicle was stolen as required by section 50.2(3)(a).

As to section 50.2(3)(c) in respect to the Applicant's "due diligence", there is no evidence that the Applicant made any inquiries as to the status of Mr. Lalonde's driver's licence. Accordingly, the Applicant has not established due diligence as required under section 50.2(3)(c) of the Act.

The Tribunal finds that the evidence presented at this hearing does not support the Applicant's appeal under sections 50.2(3)(a) and 50.2(3)(c) which is the test required under the Act.

DECISION:

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

LICENCE APPEAL TRIBUNAL

Charles J. Sandiford, Presiding Member

RELEASED: January 11, 2002

HIGHWAY TRAFFIC ACT
R.S.O. 1990, CHAP. H.8 AS AMENDED, SECTION 50(1)

IN THE MATTER of an application by the
Applicant to appeal the decision of the Registrar of
Motor Vehicles pursuant to section 32(12)(b)(i) of
the *Highway Traffic Act*;

AND IN THE MATTER of

APPLICANT

APPLICANT

and

REGISTRAR OF MOTOR VEHICLES

RESPONDENT

ADJOURNMENT

WHEREAS an oral hearing in the above matter was scheduled to be held on Wednesday, January 16, 2002, at Toronto, Ontario;

AND WHEREAS the Applicant's Counsel requested an adjournment of the hearing to permit his client to confer and obtain further evidence from his Cardiologist;

TAKE NOTICE, upon consent of all parties, the Tribunal Orders:

- (1) this matter is adjourned;
- (2) the appeal shall be heard at 1:30 p.m. on Wednesday, February 6, 2002 at the Tribunal's Chambers, 1 St. Clair, Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

KOZAK

WAYNE KOZAK

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

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

TRIBUNAL: CHARLES J. SANDIFORD,
Presiding member

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

WAYNE KOZAK, Applicant
unrepresented

DATE OF HEARING: January 10, 2002

DECISION RELEASED: January 17, 2002 Peterborough

REASONS FOR DECISION

A hearing was held on January 10, 2002, at Peterborough, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

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

BACKGROUND:

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

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

Owner:	Wayne Kozak (the "Applicant")
Motor Vehicle:	1991 Ford F600, plate no. 601 3KE (the "vehicle")
Date of Appeal:	December 21, 2001

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

The owner appeals on the basis that the motor vehicle was stolen at the time it was being driven and that the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(a) and (d) of the Act.

This matter came before this Tribunal on January 10, 2002 and proceeded as an oral hearing.

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

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

ISSUE:

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

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

Appeal for vehicle release

My truck was stolen at 1:00 am while I was asleep.

When I woke up in the morning I learned that it had been taken by a drunk who was subsequently arrested.

My truck was impounded for forty-five days beginning December 18th 2001. The "drunk" in question is someone who is known to me but I have never let him drive my truck and never would since I know that he has no license to drive.

I made a complaint against him right away at the police station where he was arrested and they have charged him with theft of my truck.

I use this truck on a daily basis to earn my living, such as it is. It is my only means of earning a living, and without it for forty-five days I am sure to fall into default on my credit card balances and usual living expenses such as rent.

I ask you to consider strongly that this is financial hardship, since I only have a hand to mouth income as it is.

Also I would like to add that I personally take a very harsh view of it in the behavior of others.

Please release my truck to me as soon as is possible.

I thank you for your consideration

Sincerely

Wayne Kozak

After a review of the Applicant's submission, the Applicant expanded his relationship with the driver of the Applicant's truck at the time of the impoundment Order dated December 18, 2001 at 0124 hrs. The driver, Frank Norris, is the Applicant's employee who works in the Applicant's cartage business. The Applicant insisted at no time was Norris ever allowed to drive the Applicant's truck as he was aware of Norris' very poor driving record. Also, because Norris had knowledge of the Applicant's customer list, the Applicant considered that Norris might use the Applicant's truck to take the Applicant's business. He also stated that Norris had no key to the Applicant's vehicle but did state that during the course of a day Norris would have the opportunity to have keys made. During the Respondent's agent's questions, the Applicant reported that keys for the Applicant's truck were often left under the seat of the vehicle to facilitate the opening of the locked storage compartment so that cargo could be safely stored or delivered. This information was common to both Norris and a second employee.

The Applicant could not provide this Tribunal with a police report in spite of his continual efforts and visits to the police station and at this juncture no police report for theft of the Applicant's truck has been obtained.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The Registrar's agent established that the Applicant worked in the Toronto area throughout the week but lived in the Campbellford area on the weekend. The agent determined that the keys to the Applicant's truck could have been taken from under the seat of the Applicant's vehicle without his knowledge. The Applicant also could offer no evidence that Norris intended to keep the truck permanently.

During his statements to the Respondent's agent, it was revealed that the Applicant's insurance company had paid a claim for an accident with his truck on the same date of the Impoundment Order. The Applicant could not supply any evidence to support this information as it was not available from his, the Applicant's insurer.

The agent for the Respondent had contacted the Police Station involved with the issue and no charge of theft has been laid.

In response to the Registrar's agent's questions, it was determined that the Applicant has two other vehicles but that they cannot be used for a replacement vehicle as they both require major repairs and/or alterations before they would be suitable for his business. The Applicant dismissed any consideration for the rental of a truck as being too expensive for the possible income he might derive from its use. The Applicant did not supply any evidence to support the economics of this position.

The agent for the Registrar outlined the section of the Act (Section 55, subsection 21) where the Applicant might recover his costs against the driver through the court. The Agent also read the definition of theft contained in previous decisions of the Tribunal and the sections of Regulation 574, as amended, dealing with the term "exceptional hardship".

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

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

2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Frank R. Norris;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until November 29, 2004.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

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

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

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

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

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

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

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

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

The Applicant here appeals on the basis of sections 50.2(3)(a) and (d).

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

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

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

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

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

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

The word "stolen" as used in the crime of interstate transpiration of stolen motor vehicles includes all wrongful and dishonest taking of motor vehicles with the intent to deprive the owner

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

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

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

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

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

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

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

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

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

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.

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

APPLICATION OF LAW TO FACTS:

The Applicant filed an appeal under section 50.2(3)(a) and (d) of the Act.

Section 50.2(3)(a) states that an order to impound a vehicle may be set aside if the motor vehicle subject to the Order was stolen at the time the Order to impound was issued. The onus to prove that the vehicle was stolen is that of the Applicant. Blacks Law Dictionary (sixth edition), page 1419-1420 provides the definition of "stolen". The key point in the definition is the deprivation of possession of the property from the rightful owner. No evidence to support this conclusion was offered by the Applicant. A charge of theft by the police was not confirmed by a police report. Accordingly, the evidence presented at the hearing does not support the grounds of appeal that the Applicant's vehicle was stolen as required by section 50.2(3)(a) of

the Act.

The Applicant identifies economic loss and loss of employment opportunities as a result of the impoundment and argues that this has resulted in exceptional hardship under section 50.2(3)(d) of the *Highway Traffic Act*.

As to the Applicant's appeal under section 50.2(3)(d) for exceptional hardship, section 22(2) of Regulation 632/98 is very specific and provides the Tribunal with clear criteria that must be met by the Applicant in order to establish exceptional hardship as a result of the impoundment.

The Applicant has not provided the Tribunal with financial information to establish his sales or the effect the impoundment has had on his sales or net revenues.

Also, under section 22(2) of Regulation 632/98, the Tribunal cannot consider financial or economic loss or loss of employment opportunity unless the Applicant demonstrates that all criteria set out in section 22(3) apply. One of those criteria is that no alternative vehicle is available. Furthermore, section 22(4) of the Regulation requires the Applicant to demonstrate that every reasonable option has been explored including an alternative vehicle.

In this case, the Applicant has not shown any detailed cost figures to refit his two other vehicles to substitute for his impounded vehicle. He did not cost out the option of a rented vehicle. Such costs were not presented as evidence to the Tribunal to support his claim that a refit or a rental were revenue negative alternatives.

The burden of proof to support the Applicant's appeal under the Act is on the Applicant. Here there is insufficient evidence from the Applicant to set aside the Order of Impoundment of his vehicle on the basis of either the ground of stolen under section 50.2(3)(d) of the *Highway Traffic Act*.

DECISION:

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

LICENCE APPEAL TRIBUNAL

Charles J. Sandiford,
Presiding Member

RELEASED: January 17, 2002

FRANKLIN

MELANIE FRANKLIN

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

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

TRIBUNAL: SIMON DANN,
 Presiding member

APPEARANCES: LUBA NEUWIRTH,
 Representative for the Registrar of Motor Vehicles

MELANIE FRANKLIN, Applicant
unrepresented

DATE OF HEARING: January 16, 2002

DECISION RELEASED: January 18, 2002 ***By teleconference***

REASONS FOR DECISION

A hearing was held on January 16, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

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

BACKGROUND:

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

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

Owner:	Melanie Franklin (the “Applicant”)
Motor Vehicle:	1989 Hyundai Sonata, plate no. ALVZ 122 (the “vehicle”)
Date of Appeal:	December 28, 2001

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

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

This matter came before this Tribunal on January 16, 2002 and proceeded as an electronic hearing.

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

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

ISSUE:

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

A friend was fixing my stereo and took it to drop some people off in Cambridge without my knowledge on Dec. 23/01. It ended up that he went to Missasauga to see someone and got a flat tire he proceeded into traffic on the 401 and the OPP pulled him over for speeding. His licence was under suspension. This is very inconvenient for my son and I who is 5 yrs old. I work and live in Woodstock ONT and need my car to get back and forth to work, also to take my son to daycare and to school when I work. My doctor lives in Tavistock and my son has asthma which flares up once and awhile and recently had a pnemonia whereas I was back and forth to the doctor and for chest x-rays and for blood work.

I have also been putting resumes out for a new job and have an interview in Jan in Cambridge at a restaurant called Crabby Joe's. Right now I'm working at Swiss Chalet.

This is going to be very costly for me and it will even be more if I have to leave my car in the impound too much longer. I only recently purchased the car which my mother lent me the money because winter was coming and it was better to get around for work, school, day care, doctors, groceries etc.

Basicly, the bottom line is that I would be in dire straits if I had to leave my car at the impound for the whole 45 days. I don't know how I could afford it.

I'm very sorry that this situation has taken place and so is the person who was driving. I also now have to go out and purchase a new tire and have it installed. All these things take money and I wish this never would of transpired, but it did and I'm appealing to you please let me have my care released before the 45 days.

I'm requesting a telephone hearing because I have no vehicle to travel to Toronto from Woodstock.

I am enclosing my pay stubs from Swiss Chalet and from Ontario Works.

I'm also paying off my mother for the car and paying a student loan.

I hope that I have given you enough information. I will also give you my son's doctor's name and phone number. Dr. Hedge, Tavistock Medical, 1-519-655-2322.

P.S. I also have rent, hydro, which are necessities for us that I have to pay.

Thank you for your time. I sometimes work split shifts and the best time to get a hold of me is in the morning before 11:00 a.m.

Melanie Franklin

The Applicant confirmed that a friend of hers was installing a radio in her vehicle and that she had not given him any kind of permission to drive the vehicle. She also confirmed she is a single mother with a four-year old son who suffers from asthma and is recovering from bacterial pneumonia.

She confirmed that with her split-shift employment schedule she is experiencing undue hardship in meeting her employment obligations and ensuring her child does not spend excessively long days (11:00 a.m. to 8:30 p.m.) in a daycare centre.

She also has been unable to visit the family physician in the event of any setbacks during his recovery from bacterial pneumonia and has on one occasion had to use the Woodstock hospital emergency services.

Ms. Franklin also advised her son is very hyperactive and she is unable to leave him in the daycare centre for such a long day as it might impact his health and psychological development. She also has another daughter who lives with her mother in Oshawa and is currently unable to make the trip from Woodstock to Oshawa.

In addition, the Applicant stated the income from her minimum wage salary and the benefits she receives for daycare subsidization do not leave her any extra money.

As supporting evidence, the Applicant provided copies of a recent pay stub showing an income of \$5.95 per hour and confirmation of day care subsidy allowance. She then detailed monthly living expenses of rent, utilities, auto insurance, outstanding car and student loans which totaled approximately \$1,125.00 per month, before food and other necessities.

The Applicant confirmed that bus service is available but buses do not run after 6:00 p.m. This is a problem for her afternoon and evening split-shift schedule. She confirmed that she has taken taxis but that the \$6.00 per trip cost is unaffordable for her.

On occasion, she has received rides from a co-worker and neighbour but this was not a reliable substitute to ensure that she would always be able to get her son to daycare and then be able to pick him up, especially as her current place of employment is “across town”

The Applicant also confirmed that she has not always been able to take her son to daycare and has had to hire a babysitter as an extra expense.

Evidence for the Registrar

A summary of the Registrar’s evidence follows.

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

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Joseph Denham;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until October 25, 2002.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).

- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant's appeal to have the impounded vehicle returned is that the loss of the vehicle will result in exceptional hardship within the meaning of section 50.2(3)(d) of the *Highway Traffic Act* and Regulation 574 as amended by Regulation 632/98. The requirements for exceptional hardship under the Act and Regulations and the relevant evidence follows.

- *Is there "no alternative to the impounded motor vehicle..."*;

The evidence shows that the Applicant has considered every reasonable alternative to the impounded vehicle, and there is none available. The evidence shows:

1. while the Applicant does have access to bus service, it does not run after 6:00 p.m. which leaves her without transit access for her second daily shift;
2. during the day shift period, each bus trip takes one hour which makes it impractical to pick up her son from daycare at 3:30 p.m., take him home and then be back at work by 5:00 p.m.;
3. while rides have occasionally been provided by others, the Applicant is unable to depend on them and establish a reliable schedule;
4. the Applicant is unable to afford a rental car or taxis.

- *Is there "a threat to the health or safety of any person ordinarily transported by the motor vehicle"?*

The Applicant's son is recovering from bronchial pneumonia. In the unique circumstances in this case, the health or safety of the Applicant's son is prejudiced due to the loss of the vehicle.

It is noteworthy that (a) her son's relapse, which was treated at a nearby hospital, may have been avoided if the Applicant had been able to travel to her regular doctor (in Woodstock) for the recommended checkup after initial treatment for bacterial pneumonia; (b) her workplace supervisor's letter expresses concern for the Applicant's mobility in meeting her split shift

schedule as well as attending to a family medical emergency during a shift period, and (c) although, the Applicant was able to access the local Woodstock hospital's emergency service, regular doctor checkups for her son were cancelled as the Applicant had no transportation to Tavistock.

- *Is there “a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used”;*

The evidence establishes there is none.

The Tribunal has also considered the Applicant's financial loss as follows:

- *Will the “loss will be immediate, significant and lasting;”*

The evidence does not clearly establish that the loss has been immediate and significant. However, the Tribunal notes that on the basis of her income versus living cost details, it appears the Applicant may have to deal with an extra financial burden for an extended period of time due to the impoundment.

- *Will the “the impact of the loss will be upon a person ordinarily transported by the motor vehicle”?*

The evidence suggests the Applicant's son may be spending longer days than necessary at the daycare centre and his mother must use alternate forms of transportation to meet her employment obligations.

- *Will the impact of the loss “be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle”?*

The evidence clearly establishes that there is loss to the Applicant who is (a) having difficulty delivering the care and attention she believes her son requires; (b) is concerned about meeting her employment obligations and the impact this may have on her relationship with her employer; and (c) experiencing additional stress about how she will afford the additional costs imposed on her by the vehicle impoundment.

Considering all of the above, the Tribunal finds that the impoundment of the Applicant's vehicle is a risk to her son's health while he is recovering from bronchial pneumonia. On that basis the Tribunal finds that the Applicant has established the ground of exceptional hardship under section 50.2(3)(d) of the *Highway Traffic Act*.

DECISION:

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

LICENCE APPEAL TRIBUNAL

Simon Dann, Presiding Member

RELEASED: January 18, 2002

BARAKAT

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

IN THE MATTER OF
ROGER NICOLAS BARAKAT

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: December 21, 2001

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

ROGER NICOLAS BARAKAT

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

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

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

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

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: January 2, 2002

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

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

FROM: Roger Nicolas Barakat
2300 Danforth Ave.
Toronto, ON M4C 1K6

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereinafter the "Act") the parties to the proceeding, Roger Nicolas Barakt (hereinafter referred to as "the Applicant"), and the Registrar, *Motor Vehicle Dealers Act* (hereinafter the "Registrar") waive the requirement of a hearing and hereby consent to an Order of the Licence Appeal Tribunal (hereinafter the "Consent Order") based on the following terms and conditions to their registrations as a motor vehicle salesperson:

- 1) The Applicant agrees that if he is criminally charged or convicted in the future, he will immediately notify his employer in writing of the charges or convictions against him and provide a copy of the notification signed by his employer to the Registrar, giving the particulars of the charges or convictions.
- 2) The Applicant agrees that if he is convicted under the Criminal Code or convicted of any industry specific offences under any Statute in the future, he will be automatically revoked.
- 3) The Applicant agrees to provide full and accurate disclosure on any applications, documents, statements or other form of communication/information provided to the Registrar or his authorized representatives regardless of previous disclosure.
- 4) The Applicant acknowledges that the Registrar is relying upon the accuracy of the disclosure provided in entering into these terms and conditions.
- 5) The Applicant agrees that he will provide written notification from his employer forthwith, stating that the Applicant has disclosed to them the circumstances of his pending charges.
- 6) The Applicant agrees that his explanation of the circumstances of his pending charges, are substantially as set out in the disclosure provided to the Registrar.
- 7) The Applicant agrees not to be a partner, shareholder, officer, director or sales manager of a dealership.
- 8) The Applicant agrees not to be the final signatory on any sales contracts on behalf of the dealer.
- 9) The Applicant agrees not to transfer his registration as a motor vehicle Salesperson to another dealer without having first obtained the prior written consent of the Registrar.

- 10) The Applicant agrees that as soon as a disposition is made regarding his pending charge of "Possn for the Purpose", he will inform the Registrar of the result forthwith.

Roger Nicolas Barakat (initials)

- 11) The Applicant agrees to immediately enrol in the Ontario Motor Vehicle Industry Council Certification Course and to be responsible for all fees in relation to enrolment. The Applicant further acknowledges that enrolment in the course entitles him to a sixty (60) day conditional registration period that allows for his successful completion of the course (including passing the exam).
- 12) The Applicant agrees not to be involved in the process of buying or selling motor vehicles without the benefit of registration.
- 13) The Applicant acknowledges and understands that his registration will not be used to buy or sell motor vehicles where the Applicant knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
- 14) The Applicant agrees that his registration will not prevent the Registrar from taking administrative action, including a proposal to revoke his registration, arising from matters that may have occurred or may occur in the future related to his financial circumstances and honesty and integrity.
- 15) The Applicant acknowledges that his registration as a motor vehicle Salesperson will not prevent the Registrar from taking legal action, including a Provincial Offences prosecution, arising from matters that may have occurred or that may occur in the future.
- 16) The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
- 17) The Applicant will provide a copy of this order to his employer forthwith.
- 18) The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
- 19) The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
- 20) The Applicant acknowledges that he has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

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

(Signature) Roger Nicolas Barakat

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

Date:

Carl Compton

MERLO

HUGO JOSE MERLO

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

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

TRIBUNAL: NEIL J. MACPHEE,
Presiding member

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

HUGO JOSE MERLO, Applicant
RODRIGO JOSE MERLO, Representing the Applicant

DATE OF HEARING: January 15, 2002

DECISION RELEASED: January 17, 2002 Windsor

REASONS FOR DECISION

A hearing was held on January 15, 2002, at Windsor, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

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

BACKGROUND:

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

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

Owner:	Hugo Jose Merlo (the "Applicant")
Motor Vehicle:	1995 Mitsubishi Eclipse, plate no. TORITO (the "vehicle")
Date of Appeal:	December 28, 2001

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

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

This matter came before this Tribunal on January 15, 2002 and proceeded as an oral hearing.

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

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

ISSUE:

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

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

On Thursday December the 20th of the current year my 1995 Mitsubishi Eclipse was impounded by the Ontario Provincial Police in the town of Plympton-Wyoming for a period of 45 days. I would like to appeal this matter under section iii. the vehicle owner exercised due diligence to determine that the driver's license was not suspended and section iv. the loss of the vehicle will result in exceptional hardship. My son Rodrigo Javier Merlo was the driver of the car mentioned above when it was impounded. Note that he is not the registered owner nor has the insurance under his name. Rodrigo was found guilty on the charge that drive disqualified s. 259(1) ccc on November 27, 2000, for a period of one year. Before he drove in Canada I Hugo Jose Merlo called the Brampton Criminal Court of Justice (905-456-4702) to determine the status of his conviction. I was told by a lady named Kathy that his sentence was for a period of one year and that it was up on November 27 of the year 2001. My son then later called to confirm that information and the response was the same. It was my understanding that he was no longer prohibited to drive in Canada. Furthermore Rodrigo clearly remembered that the Judge had told him not to drive for a year in Canada, back in November 27th 2000. In addition to this his lawyer also made clear to my son what the judge had said in court. While driving on the 401 east bound my son was pulled over arrested and my car was impounded. The police officer insisted that he was suspended until August 11, 2002. When he arrived at the police station there was still a misunderstanding as to why he was still suspended. After a period longer than 3 hours the officer explained to my son that the Ministry of Transportation has him suspended until August 11, 2001. because his first sentence had to conclude in order for the second one to start. At this time I was very confused, my son, called the Court in Brampton one more time. He was told again that his sentence was up on November 27, 2001. The same response that we both got before. After he told the court that he got arrested they told my son that the Ministry of Transportation had added an extra year to his sentence. Rodrigo called the Ministry of Transportation, and indeed they told him he was suspended until August 2002. The court said that it had nothing to do with them (court in Brampton) the Ministry of Transportation told him that a registered letter was send out warning my son of his added on suspension. The letter was send to and address in Canada and Rodrigo lives in Michigan. The register letter was never signed. The lost of my car has caused a great amount of problems in my household. I cannot drive myself to work anymore. I live in a town called Rochester Hills in Michigan which does not offer any kind of public transportation. My two younger kids need a drive to and from school, because the bus does not pick them up. I start work at seven in the morning and my two kids start school at 7:30. My wife does not have a drivers license nor a car to drive them to school. This matter is confusing to me because I'm still trying to find exactly how and why my son is suspended after he has completed his sentence, and his indeed causing exceptional hardship.

Hugo Jose Merlo.

The Applicant testified that he contacted by telephone the Brampton Criminal court of Justice prior to December 20, 2001, and was told by a court employee named Kathy that the suspension of his son Rodrigo's driver's licence had expired on November 27, 2001. The Applicant was a credible witness and the Tribunal accepts his evidence as to the telephone call.

The Applicant further testified that he had suffered exceptional hardship from the impoundment since there is no public transportation in Rochester Hills, Michigan where he and his family live, that he has two school-age children who now have to walk to school as there is no school transportation available, that visits to the doctor and the nearest hospital are very difficult as his younger son is subject to sudden asthma attacks and that his wife does not have a drivers licence. He stated that he could rent a substitute automobile but that this was expensive. The Tribunal finds that there is an alternative available to the Applicant to the impounded vehicle. He is able to rent a vehicle, although he may not wish to do so.

The second witness for the Applicant was Rodrigo Jose Merlo, his son, who was the driver of the impounded vehicle and whose drivers licence was suspended at the time. He testified that he was told by his lawyer at the time of the suspension that it was for a period of one year, to November 27, 2001. He also testified that he, like his father, contacted by telephone the Brampton Criminal Court of Justice before December 20, 2001, and was told that the suspension of his drivers licence had expired. He further testified that he moved with his family to Rochester Hills, Michigan from North York, Ontario and thereafter obtained a Michigan drivers licence and surrendered his Ontario drivers licence to the Michigan authorities. This is confirmed by Exhibit #8 which is a letter from the Michigan Department of State. He produced Exhibit #6 which is a letter from the Ontario Provincial Police confirming that a notice of further suspension of his drivers licence to August 12, 2002, was sent to Rodrigo J. Merlo addressed to 445 Rustic Road, North York, Ontario. The witness states that he never received that notice as he had not lived in North York since 1996. The Tribunal accepts the testimony of this witness.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

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

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

2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Rodrigo J. Merlo;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving While Disqualified under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until August 11, 2002.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

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

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

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

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The

“owner” for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. “Owner” is defined as:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

APPLICATION OF LAW TO FACTS:

As to due diligence, the evidence established that the Applicant relied upon the information given to him and his son by the court. Information sent to him by the Ministry of Transportation extending the suspension period was not received by him. Reliance upon the Court's information was reasonable in the circumstances. Accordingly, the Tribunal finds the Applicant had exercised due diligence in attempting to determine that his son's driver's licence was not under suspension at the time of the impoundment.

As to exceptional hardship, the evidence confirms that an alternative to the impounded vehicle is available to the Applicant. Accordingly, the Applicant has not established that the impoundment would result in exceptional hardship as defined by section 22(3) and (4) of Regulation 632/98 amending Regulation 574 to the *Highway Traffic Act*.

DECISION:

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

LICENCE APPEAL TRIBUNAL

Neil J. MacPhee, Presiding Member

RELEASED: January 17, 2002

EASTERBROOK, BRADIN WAYNE AND 1306609 ONTARIO INC. O/A AUTO
WHOLESALE

BRADIN WAYNE EASTERBROOK AND 1306609 ONTARIO INC.
o/a AUTO WHOLESALE

MOTION TO CONSIDER AN APPLICATION
FOR EXTENSION OF TIME

TRIBUNAL: JOHN ORT, Member

APPEARANCES:

BRADIN WAYNE EASTERBROOK, Agent, representing himself and on
behalf of 1306609 Ontario Inc. o/a Auto Wholesale, Applicants
A. MICHAEL ROTHE, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: December 17, 2001 *Via Teleconference*

REASONS FOR RULING AND ORDER

BACKGROUND:

A motion was heard by the Licence Appeal Tribunal by teleconference on December 17, 2001, at Toronto, Ontario. Bradin Wayne Easterbrook and 1306609 Ontario Inc. o/a Auto Wholesale (the "Applicants") have filed an appeal from a Notice of Proposal (the "Proposal") by the Registrar, *Motor Vehicle Dealers Act* (the "Registrar" and the "Act", respectively). The Proposal, dated August 3, 2001, seeks to revoke the registration of 1306609 Ontario Inc. o/a Auto Wholesale and Bradin Wayne Easterbrook under the Act. The Registrar's position is that the Applicants failed to request a hearing before this Tribunal within the prescribed time. The Applicants request an extension of time pursuant to section 7 of the *Licence Appeal Tribunal Act, 1999*. The Registrar submits that an extension of time should not be granted.

The hearing of this matter proceeded on the consent of the parties as an electronic hearing. The evidence introduced by the Applicants consisted of the testimony of the Applicant Bradin Wayne Easterbrook. Documentary evidence was submitted by the Registrar.

ISSUES:

Have the requirements for service of a notice of hearing under section 7 and 20 of the *Motor Vehicle Dealers Act* been met in this case?

If the Notice of Appeal was not filed with the Licence Appeal Tribunal within the time prescribed by statute, is this an appropriate case for an extension of that time pursuant to section 7 of the *Licence Appeal Tribunal Act, 1999*?

THE FACTS:

The Registrar, *Motor Vehicle Dealers Act*, submitted the affidavit dated December 3, 2001 of Yovanka McBean. Paragraph 2 of that affidavit states in part: "On August 3, 2001 I sent a Notice of Proposal to Revoke the Registration of 1306609 Ontario Inc. o/a Auto Wholesale and Bradin Wayne Easterbrook (hereinafter referred to as the "Proposal"), by registered mail to the last known addresses for service appearing on OMVIC's records ...". Paragraph 3 of that affidavit states: "I have reviewed the documentation from Canada Post pertaining to the delivery status of said Proposals and have determined that the Proposals sent to 108 Surrey Street East, Guelph, Ontario, N1G 3P4 and 104 Surrey Street East, Guelph, Ontario, N1H 3P4 were successfully delivered on August 7, 2001. Attached hereto as Exhibit 'B' is a true copy of said documentation." Exhibit "B" of that affidavit shows that both deliveries were signed for by R. Overland on August 7, 2001.

The Registrar also submitted the affidavit dated December 3, 2001 of Janet Elizabeth Currah. Paragraph 2 of that affidavit states: "On August 7, 2001 I had a telephone conversation with Bradin Wayne Easterbrook at which time I informed him that he had been sent a Notice of Proposal to Revoke the Registration of 1306609 Ontario Inc. o/a Auto Wholesale and himself and that if he wished to maintain his registration as a motor vehicle dealer he would have to appeal the Proposal. Attached hereto as Exhibit 'A' is a copy of the electronic notes of my telephone conversation with Mr. Easterbrook, which I entered into the computer shortly after I hung up the telephone." Under the heading "notes", exhibit "A" states: "DEALER CALLED SAYS HIS FIRST LETTERS FROM AMANDA WERE NOT SENT TO HIS BUSINESS ADDRESS, I ADVISED THAT YES THAT IS WHERE THEY WERE SENT, HE THEN WANTED TO KNOW IF THERE WERE ONLY WOMEN WORKING IN THIS OFFICE. I THEN TERMINATED THE CALL, I ADVISED DEALER THAT HE HAS TO APPEAL HIS DECISION AND THAT I CANNOT DISCUSS ISSUES WITH HIM."

Testimony of Bradin Wayne Easterbrook:

Mr. Easterbrook said that the registered mail letter containing the Proposal was signed for by a Richard Overland, a previous neighbouring tenant. Mr. Easterbrook testified that he received the Proposal on August 23, 2001.

The Notice of Appeal is dated August 23, 2001 and is stamped received August 27, 2001 by the Licence Appeal Tribunal.

THE LAW:

Section 20 of the Act partly states:

"(1) Any notice or order required to be given or served under this Act or the regulations is sufficiently given or served if delivered personally or sent by registered mail ...

"(2) Where service is made by registered mail, the service shall be deemed to be made on the third day after the day of mailing unless the person on whom service is being made establishes that the person did not, acting in good faith, through absence, accident, illness or other cause beyond the person's control receive the notice or order until a later date..."

Section 7 of the Act adds in part:

"...(2) A notice ... shall state that the applicant or registrant is entitled to a hearing by the Tribunal if the applicant or registrant mails or delivers, within fifteen days after service of the notice... notice in writing requiring a hearing to the Registrar and the Tribunal, and the applicant or registrant may so require a hearing..."

Section 7 of the *Licence Appeal Tribunal Act* states:

"Despite any limitation of time fixed by or under any Act for the giving of any notice requiring a hearing by the Tribunal ..., if the Tribunal is satisfied that there are reasonable grounds for applying for the extension and for granting relief, it may,

- (a) extend the time for giving the notice either before or after the expiration of the limitation of time so limited; and
- (b) give the directions that it considers proper as a result of extending the time."

APPLICATION OF LAW TO FACTS:

The evidence submitted by the Registrar proves that the Proposal was deliver to R. Overland on August 7, 2001. Mr. Easterbrook received notice that a Proposal was sent to him during his conversation with Ms. Currah on August 7, 2001. Such notice does not appear to have been sufficient to enable him to file an appeal. The Tribunal accepts the testimony of Mr. Easterbrook that he received the Proposal on August 23, 2001. The Tribunal finds that Applicants did not, acting in good faith, through a cause beyond their control receive the Proposal until August 23, 2001. Pursuant to section 20 of the Act, the Tribunal finds that service of the Notice of Proposal was made on August 23, 2001.

The Notice of Appeal was received by this Tribunal on August 27, 2001, within fifteen days of August 23, 2001, as required by section 7 of the Act.

ORDER:

For the reasons set out above, the Tribunal finds that the Applicants filed their requests for a hearing within the prescribed time.

LICENCE APPEAL TRIBUNAL

John Ort, Member

RELEASED: January 7, 2002

J.M.M.

HIGHWAY TRAFFIC ACT

Section 50.1 and Regulation 574, R.S.O. 1990, Chap. H8 as amended

J.M.M.

IN THE MATTER of an APPEAL of A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION

AND IN THE MATTER OF the DECISION dated November 15, 2001 of
the Registrar of Motor Vehicles made pursuant to section 48.3(2) of the
Highway Traffic Act TO SUSPEND A PERSON'S DRIVER'S LICENCE
FOR A PERIOD OF 90 DAYS

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

J.M.M.

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended (the "Act"), J.M.M. (the "Applicant") initiated an appeal under section 50.1 of the Decision dated November 15, 2001 of the Registrar of Motor Vehicles made pursuant to section 48.3(2) of that Act to suspend the Applicant's driver's licence for a period of 90 days;

AND WHEREAS, the Applicant has failed to pay the filing fee authorized under section 9 of the *Licence Appeal Tribunal Act*, 1999;

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

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers and Procedures Act*, as amended, this proceeding, initiated by the Applicant's request for a hearing before this Tribunal, is dismissed;
2. Pursuant to the authority vested in it under section 50.1(4) of the *Highway Traffic Act*, this Tribunal confirms the Order of the Registrar of Motor Vehicles dated November 15, 2001 to suspend the driver's licence of J.M.M. for a period of 90 days.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

Released: January 8, 2002

STEPANEK

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

IN THE MATTER of a CLAIM by
JOSEPH F. STEPANEK

AND IN THE MATTER OF the DECISION of the
Travel Industry Council of Ontario
made pursuant to section 62(1) of Ontario Regulation 806, as amended, under
the *Travel Industry Act*

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

JOSEPH F. STEPANEK

Applicant

-and-

TRAVEL INDUSTRY COUNCIL OF ONTARIO

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Travel Industry Act*, R.S.O. 1990, Chapter T.19 as amended (the "Act") and Ontario Regulation 806/93, as amended (the "Regulation"), Joseph F. Stepanek (the "Applicant") initiated an appeal under section 62(2) of the Regulation respecting the decision dated September 25, 2001 of the Travel Industry Council of Ontario, in which its Board of Directors denied the claim of the Applicant for reimbursement of monies;

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

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

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers and Procedures Act*, as amended, this proceeding, initiated by the Applicant's request for a hearing before this Tribunal, is dismissed;
2. Pursuant to the authority vested in it under section 62(6) of Ontario Regulation 806/93 as amended under the *Travel Industry Act*, this Tribunal directs the Board of Directors to refuse the Applicant's claim for reimbursement of monies from the Compensation Fund established under the Act and Regulation.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

Released: January 2, 2002

PANARESE

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

IN THE MATTER OF
JASON PANARESE

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: January 11, 2002

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

JASON PANARESE

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

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

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

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

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

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

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

FROM: Jason Panarese
77 Vera Street
Woodbridge, ON L4L 5S4

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

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

Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.

10. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.

Jason Panarese (initials)

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

Signed in the City of _____ this _____ day of _____ 2002.

Jason Panarese (signature)

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

Date:

Carl Compton
Registrar
Motor Vehicle Dealers Act

MALKANI

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

IN THE MATTER of a CLAIM by
RAMESH MALKANI

AND IN THE MATTER OF the DECISION of the
Travel Industry Council of Ontario
made pursuant to section 62(1) of Ontario Regulation 806, as amended, under
the *Travel Industry Act*

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

RAMESH MALKANI

Applicant

-and-

TRAVEL INDUSTRY COUNCIL OF ONTARIO

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Travel Industry Act*, R.S.O. 1990, Chapter T.19 as amended (the "Act") and Ontario Regulation 806/93, as amended (the "Regulation"), Joseph F. Stepanek (the "Applicant") initiated an appeal under section 62(2) of the Regulation respecting the decision dated November 23, 2001 of the Travel Industry Council of Ontario, in which its Board of Directors denied the claim of the Applicant for reimbursement of monies;

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

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

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers and Procedures Act*, as amended, this proceeding, initiated by the Applicant's request for a hearing before this Tribunal, is dismissed;
2. Pursuant to the authority vested in it under section 62(6) of Ontario Regulation 806/93 as amended under the *Travel Industry Act*, this Tribunal directs the Board of Directors to refuse the Applicant's claim for reimbursement of monies from the Compensation Fund established under the Act and Regulation.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

Released: January 23, 2002

GRANT

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

IN THE MATTER OF
SHANE DAVID GRANT

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: October 1, 2001

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

SHANE DAVID GRANT

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

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

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

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

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: January 24, 2002

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

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

FROM: Shane Grant
206-425 William Street
North Bay, ON P1B 1X6

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

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

10. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.

Shane Grant (initials)

11. The Applicant will provide a copy of this order to his employer forthwith.

12. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.

13. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.

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

Signed in the City of _____ this _____ day of _____ 2002.

Shane Grant (signature)

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

Date:

Carl Compton
Registrar
Motor Vehicle Dealers Act

0920- ADLS - NOMC

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

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

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

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

Applicant
unrepresented

DATE OF
HEARING: January 24, 2002

Kitchener

DECISION

A hearing was held on January 24, 2002, at Kitchener, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

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

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

Elizabeth Sproule,
Member

0920- ADLS - NOMC

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

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

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

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

Applicant
unrepresented

DATE OF
HEARING: January 24, 2002

DECISION
RELEASED: January 25, 2002 Kitchener

REASONS FOR DECISION

A hearing was held on January 24, 2002, at Kitchener, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on January 25, 2002, with Reasons to follow.

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

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated December 20, 2001 and was received by the Tribunal on December 24, 2001, together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

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

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

There were no preliminary matters and the Hearing proceeded.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice to Registrar dated December 8, 2001, issued by the Registrar of Motor Vehicles.
- b) Exhibit # 2 Notice of Appeal Form received at the Tribunal December 24, 2001.

By the Respondent:

- a) Exhibit # 3 Ministry of Transportation submissions – received January 21, 2002.

ISSUE:

Having established that this appeal falls within section 50.1 of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath because he was unable to do so for a medical reason?

LAW:

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

- 50.1(1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
 - (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
 - (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

- 15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
 - (a) the name, telephone number and address, with the postal code, of the medical practitioner;

- (b) the name, date of birth and address of the person who is the subject of the report;
 - (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
 - (3) The report shall be signed by the medical practitioner."

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

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

FACTS:

Applicant's Driver's Licence was suspended "DEC 08/ '01" as per Notice of Appeal (Exhibit # 2)

Applicant's Evidence:

The Applicant provided the Tribunal with a copy of the hospital emergency report from the night in question.

Under the heading "Triage Assessment" the attending care provider noted: "...assaulted & punched & kicked in the mouth by several guys ...Aches all over."

The Physician's "History & Finding" expand as follows: "...conjunctival haemorrhages ...orbital swelling ...tender Lzygoma ...bruising/swelling ...o tender mandibular ...tender nose ...o obvious deformity ...dried epistaxis ...o loose ...cracked teeth noted..."

The Applicant's solicitor of record was unable to attend. The Applicant opted to proceed.

The Applicant explained to the panel that he would have liked to introduce the pictures taken after the beating, but was unable to obtain them, from either the police or the Crown Attorney's office.

As testimony the Applicant related the events that led up to the beating and the demand for a breath sample.

The Applicant testified that he was unable to provide a breath sample "...just because of the pain. Could not squeeze down with my mouth good enough. But, this I did not relate to them."

The Applicant relayed to the Tribunal, a conversation between two officers, overheard by him, wherein the female officer suggested that a blood sample be obtained at the hospital. The Applicant testified that the listener, a male officer, outright refused the female officer's suggestion. The Applicant denied declining any "td toxoid", as stated in the emergency report from the hospital.

In cross-examination, the Applicant contested the Respondent's Representative account of the reason the mouthpiece got stuck to his mouth. The Respondent's Representative inferred the Applicant gripped it and pulled it out. The Applicant stated the mouthpiece got stuck to his lips due to dried blood in his mouth.

The Applicant denied recollection of any refusal statements made to either officer.

The Applicant confirms not requesting treatment or medical assistance, of the officers. He requested to be allowed to get cleaned up, as his face and his suit was covered in dried blood.

After being taken to hospital, by the officers, the Applicant told the attending physician that he did not have any cuts to the inside of his mouth, and that the blood was coming from his nose.

The Applicant attested that he had been uncooperative that night to everyone except the night nurse and the doctor because they were the only people civil to him.

In response to a question posed by the Respondent's Representative, regarding follow up visits to his family doctor, or to the hospital, the Applicant replied that he had not done so, until approximately two weeks later, after realizing he needed more information for the Hearing.

The Tribunal heard evidence on behalf of the Applicant from N.D.: "...Was there ...15/20 twenty guys hitting on Louis. Pretty bad, for him to blow, I don't think ...he could have blown very well."

In cross-examination, N.D. established that he had not been present at the time of the breathalyzer session, and that he was not aware of the instrument requirements to obtain a breath sample.

N.D. saw that the Applicant was covered in blood but could not determine where the blood was coming from, and whether or not there were injuries to the Applicant's mouth.

J.L.R. also testified on behalf of the Applicant. J.L.R. did not see the Applicant until one week after the incident, at which time she noticed the Applicant's face was "...swollen under the eyes..." J.L.R. testified that she did not discern any facial bruising, but that she believed that Applicant was still in considerable pain "...could not breath ...could not chew..."

After hearing the evidence of Police Officer # 1 the Applicant objected to her affirmations that he refused medical attention. The Applicant stated that he would have gone to the hospital had the offer been made.

Prior to closing remarks, the member of the panel, Ms. Sproule, asked to re-examine the witness J.L.R. to clarify the witness's time of arrival at home and the method of transportation used to get there. The Applicant objected as he saw no relevance to this line of questioning and his inability to provide a breath sample for medical reasons.

In closing, the Applicant re-iterated his position regarding the incidents of the night in question. The Applicant emphasized that he was treated "...a little too badly in the whole situation." The Applicant feels he was set up by the off duty officer at the scene who gave him back the keys and pushed him into the truck.

The Applicant reaffirmed the fact that he could not blow into the instrument as he was in too much pain. He said that he was belligerent at the hospital he was belligerent because he already knew he had been charged. It is the Applicant's belief that the doctor did not treat him like a regular patient after he saw the officer push him up against the table. He said that the only nice person at the hospital was the nurse.

Respondent's Evidence

The Respondent provided the following Documents:

1. Notice to the Registrar, certified December 27, 2001.
2. Driving Record of the Applicant, certified December 27, 2001.
3. Vehicle Record as of occurrence date, certified December 27, 2001.

The Applicant's driver's record, according to the Ministry of Transportation, shows several infractions since 1982. (Exhibit # 3)

The Respondent called Constable Sandy Boyd as a witness. Police Officer # 1 testified that she has been employed by the City of Guelph, as a Police Officer since "...October '92".

Police Officer # 1 described the events that led to the Applicant's arrest and the subsequent demand for a breath sample. According to Police Officer # 1, a demand for a breath sample was made of the Applicant while still at the roadside. The Applicant's reply was "No".

After being transported to the station, the Applicant was asked if he wanted medical assistance. The Applicant again replied "No", but after speaking to Duty Counsel the Applicant requested to see a doctor.

The Applicant was handed over to the breathalyzer technician by Police Officer # 1 who stayed in the room as a procedural requisite. Police Officer # 1 noted that when the first demand to provide a breath sample was made by Police Officer # 2, the Applicant "...refused to blow until after using the washroom". After the second demand the Applicant "...puffed into the mouthpiece, removed it from his mouth and stated "Fuck You".

Once Police Officer # 2 determined that the Applicant was refusing to blow, the Applicant was taken to hospital. Police Officer # 1 testified that she received information from the attending physician that the Applicant had no injuries to his mouth and that the bleeding was from his nose.

Police Officer # 1, verified that the Applicant's face was covered in dried blood, prior to being cleaned at the hospital, but she did not observe any "cuts ...visible marks ...bruises ...swelling..." after the blood was "wiped out".

Police Officer # 1, substantiated the Applicant's claims that she suggested a blood sample be obtained at the hospital, but the final decision is made by the Sergeant not herself.

The Respondent's Representative also called the Breathalyzer Technician Police Officer # 2 to give evidence in this matter.

Police Officer # 2 indicated that he has been a member of the City of Guelph Police Services since 1996, and that he became a Qualified Breathalyzer Technician in "...November '99."

From his notes Police Officer # 2 was able to testify that the Applicant had preferred to remain standing, rather than acquiesce to the suggestion to sit down.

When Police Officer # 2 asked the Applicant if he understood the caution and demand that had been read to him the Applicant replied: "Yeah. I have to take a piss.". Police Officer # 2 then asked the Applicant to blow and "...held the tube towards him". Police Officer # 2 was able to detect from the Applicant's demeanour that he had no intention of providing a breath

sample, thus followed up his demand by reading the "Failure to provide Breath Sample", document. At this time the Applicant sated "I have to take a piss. I just had the shit kicked out of me. I am not blowing into that."

Police Officer # 2 declared on the stand that after a further request to provide a breath sample, the Applicant "...bent over at the waist puffed into the instrument about less than a second, when he stood up again he had the mouthpiece in his mouth ...subsequently it fell out of his mouth onto the floor..." When asked again by Police Officer # 2 "Why will you not provide a breath sample?" the Applicant replied "Fuck you".

At no time did Police Officer # 2 observe the Applicant to be bleeding, although there was dried blood on his face. The Constable noticed no "...flowing blood, swollen face or lips ...mouth."

Constable Ralph Newmann testified that he has no recollection of Police Officer # 1 suggesting that a blood sample be obtained at the hospital. According to Police Officer # 2, blood sample are discretionary and rare, and are recommended only in the event of serious injury. In this particular case, it was Police Officer # 2's opinion that the Applicant was able to provide a breath sample.

In closing, the Respondent's Representative noted that the onus is on the Applicant to prove the ground for appeal. The Applicant failed to provide medical evidence to support his claim that he was unable to provide a breath sample for medical reasons.

The Respondent's Representative argued that the Applicant clearly demonstrated that he had no intention to provide a breath sample. When asked by Police Officer # 1 at the roadside he responded in the negative. When asked several times by Police Officer # 2 to provide a breath sample, he replied "Fuck You".

The Respondent's Representative argued that the Applicant was just "playing a game" there was no medical condition that prevented him from providing a breath sample. The Respondent's Representative quoted from the medical report which states the Applicant was "uncooperative".

APPLICATION OF THE LAW TO FACTS:

The onus is on the Applicant to provide the Tribunal with a medical reason as to why he was unable to provide a breath sample.

The Tribunal accepts as fact that the Applicant was involved in a skirmish and that he was physically assaulted.

Section 50.1 (2) (b) of the *Highway Traffic Act* which allows for an appeal in circumstances where a

*“...person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood **because he or she was unable to do so for a medical reason...**”*

At issue is whether the facial injuries sustained by the Applicant were severe enough to cause the Applicant to fail or not comply with the breath demand.

The Applicant maintains that due to having been beaten about the face, he was in too much pain to form a proper seal around the mouthpiece and blow long enough to provide a breath sample. The Respondent's Representative counters that the Applicant's behaviour on the night in question denotes an obvious intention to not comply with the demand for a breath sample.

The Tribunal concurs with the Respondent's Representative. By his own admission, the Applicant stated more than once during the hearing that he had been “uncooperative” because of the way he had been treated.

As pointed out by the Respondent, the Applicant failed to substantiate the basis for an appeal on medical grounds. As far as the extent of the injuries, the Tribunal heard the evidence of both officers that there was no swelling, no visible lacerations or bruises that would prevent the Applicant giving a breath sample. The Applicant repeated several times at this hearing that he was in extreme pain, yet there is no evidence that he sought medical attention after the brawl. Evidence proves that the Applicant went home instead. Further, no medical attention was sought until the Applicant realized he needed to backup his claims for court purposes.

The Tribunal noted that the Applicant recalled the events of the night with enough clarity to challenge some of the statements made by both officers, yet he did not refute their testimony as to what took place in the breathalyser room. At the time he attempted to give a breath sample, he did not tell the officers that he could not grip the mouthpiece because of pain or discomfort although he had no difficulty expressing himself otherwise.

The onus being on the Applicant to establish the merit of the appeal, the Tribunal finds that the Applicant has failed to do so. Thus, the Tribunal finds that the Applicant does not meet the criteria of Section 50.1 (2) (b), in that he was not able to demonstrate that he suffers from a medical condition, which would prevent him from providing a breath sample.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated December 8, 2001 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

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

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

Elizabeth Sproule,
Member

RELEASED: January 29, 2002

JOHN L. COWAN LIMITED

PREHEARING

JOHN L. COWAN LIMITED

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

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

JOHN L. COWAN and STEVEN COWAN, Agents representing the
Applicant
CAROL STREET, Counsel, representing the Ontario New Home
Warranty Program

DATE OF
PREHEARING: January 24, 2002 Toronto

ORDER

FOLLOWING attendances on January 24, 2002 at a prehearing before this Tribunal of John L. Cowan and Steven Cowan, Agents, appearing on behalf of John L. Cowan Limited (the "Applicant"), and Carol Street, Counsel on behalf of the Ontario New Home Warranty Program (the "Program");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Tuesday, March 5, 2002 at the Tribunal's Chambers, 1 St. Clair, Avenue West, 12th Floor, Toronto, Ontario and to continue if necessary on March 6 and 7, 2002 at the Tribunal's above chambers;

1. The Parties to the hearing are the Applicant and the Program.

2. Attached to this Order is a Statement of Facts marked “B” with its attachment marked “Exhibit A”. This was presented at the prehearing by Carol Street, Counsel for the Program. Both the Program and the Applicant agreed that the facts enumerated in paragraphs 1 through 10 inclusive, are facts that the parties have agreed upon. The facts contained in paragraph 11 of the Statement of facts were not agreed to by the Applicant as the Applicant has no personal knowledge of the allegations there in contained.
- 3.a) The Applicant must serve the Program and the Attorney General, and file with the Tribunal, on or before February 8, 2002:
 - i) What particular provisions of any legislation, regulations, bylaws, and/or the impugned Vendor and Builders Agreements does the Applicant say infringe the Charter.
 - ii) What sections of the Charter does the Applicant say are infringed, and how they are infringed.
 - iii) The evidence, in affidavit form, that the Applicant relies upon in support of i) and ii);
 - iv) The remedy the Applicant seeks from the Tribunal;
 - v) A statement of issues, fact and law that summarizes the Applicant’s Charter challenge.
3. b) The Program must serve the Applicant, the Attorneys General of Ontario and of Canada and file with the Tribunal on or before February 18, 2002:
 - i) The evidence, in affidavit form, on which the Program relies in defending the Applicant’s Charter challenge;
 - ii) A statement of issues, fact and law that summarizes the Program’s response and defence to the Applicant’s Charter challenge.
3. c) Either party may cross-examine the deponents of the opposing party’s affidavits. These cross-examinations must take place between February 19 and March 1, 2002 inclusive. Transcripts of the cross-examinations must be provided to opposing counsel and filed with the Tribunal on or before March 5, 2002. No viva voce evidence will be heard by the Tribunal at the hearing with respect to Charter issues unless permitted by the Tribunal.

3. d) If either party fails to comply with paragraphs 3(a) through 3(c) above, the Tribunal will not hear submissions from such party regarding the Charter issues.
4. All parties to the hearing shall fully comply with the requirements of disclosure of documents or things as set forth in Rule 6.3 of the Rules of Practice of the Tribunal. All parties shall also fully comply with the disclosure requirements set forth in Rule 6.4 of the Rules of Practice of the Tribunal dealing with expert witnesses.
5. There was no settlement of any of the issues dealt with in the Registrar's Notice of Proposal and those issues remain to be decided at the hearing.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: January 25, 2002

933891 ONTARIO LIMITED O/A CLASSIC COUNTRY HOMES

PREHEARING

933891 ONTARIO LIMITED O/A CLASSIC COUNTRY HOMES

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

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

BARRY MILLS, appearing on their own behalf
CAROL STREET and BETH SYMES, Counsel, representing the Ontario
New Home Warranty Program

DATE OF

PREHEARING: January 24, 2002

Toronto

ORDER

FOLLOWING attendances on January 24, 2002 at a prehearing before this Tribunal of Barry Mills, Agent, appearing on behalf of 933891 Ontario Limited o/a Classic Country Homes (the "Applicant"), and Carol Street and Beth Symes, Counsel on behalf of the Ontario New Home Warranty Program (the "Program");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Wednesday, April 3, 2002 at the Tribunal's Chambers, 1 St. Clair, Avenue West, 12th Floor, Toronto, Ontario and to continue if necessary on April 4 and 5, 2002 at the Tribunal's above chambers;

1. The Parties to the hearing are the Applicant and the Program.

2. Attached to this Order is a Statement of Facts marked "B" with its attachment marked "Exhibit A". This was presented at the prehearing by Carol Street, Counsel for the Program. Both the Program and the Applicant agreed that the facts enumerated in paragraphs 1 through 14 inclusive, are facts that the parties have agreed upon. The facts contained in paragraph 15 of the Statement of facts were not agreed to by the Applicant as the Applicant has no personal knowledge of the allegations there in contained.
- 3.a) The Applicant must serve the Program and the Attorney General, and file with the Tribunal, on or before February 15, 2002:
 - vi) What particular provisions of any legislation, regulations, bylaws, and/or the impugned Vendor and Builders Agreements does the Applicant say infringe the Charter.
 - vii) What sections of the Charter does the Applicant say are infringed, and how they are infringed.
 - viii) The evidence, in affidavit form, that the Applicant relies upon in support of i) and ii);
 - ix) The remedy the Applicant seeks from the Tribunal;
 - x) A statement of issues, fact and law that summarizes the Applicant's Charter challenge.
3. b) The Program must serve the Applicant, the Attorneys General of Ontario and of Canada and file with the Tribunal on or before March 4, 2002:
 - iii) The evidence, in affidavit form, on which the Program relies in defending the Applicant's Charter challenge;
 - iv) A statement of issues, fact and law that summarizes the Program's response and defence to the Applicant's Charter challenge.
3. c) Either party may cross-examine the deponents of the opposing party's affidavits. These cross-examinations must take place between March 5 and 22, 2002 inclusive. Transcripts of the cross-examinations must be provided to opposing counsel and filed with the Tribunal on or before March 28, 2002. No viva voce evidence will be heard by the Tribunal at the hearing with respect to Charter issues unless permitted by the Tribunal.

3. d) If either party fails to comply with paragraphs 3(a) through 3(c) above, the Tribunal will not hear submissions from such party regarding the Charter issues.
4. All parties to the hearing shall fully comply with the requirements of disclosure of documents or things as set forth in Rule 6.3 of the Rules of Practice of the Tribunal. All parties shall also fully comply with the disclosure requirements set forth in Rule 6.4 of the Rules of Practice of the Tribunal dealing with expert witnesses.
5. There was no settlement of any of the issues dealt with in the Registrar's Notice of Proposal and those issues remain to be decided at the hearing.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: January 25, 2002

FAWZI

FIRYAL FAWZI

MOTION TO CONSIDER AN APPLICATION
FOR EXTENSION OF TIME

TRIBUNAL: JOHN ORT, Member

APPEARANCES: JALAL AL-HINNAWI, Agent, representing the Applicant
NETANUS RUTHERFORD, Counsel, representing the
Ontario New Home Warranty Program

DATE OF HEARING: January 8, 2002 *Via Teleconference*

REASONS FOR RULING AND ORDER

BACKGROUND:

A motion was heard by the Licence Appeal Tribunal by teleconference on January 8, 2002, at Toronto, Ontario. Firyal Fawzi (the "Applicant") has filed an appeal from a decision by the Ontario New Home Warranty Program (the "Program") dated September 24, 2001, wherein the Applicant's claim for a breach of warranty under section 14(3) of the *Ontario New Home Warranties Plan Act* (the "Act") was denied. The Program's position is that the Applicant failed to request a hearing before this Tribunal within the prescribed time. The Applicant requests an extension of time pursuant to section 7 of the *Licence Appeal Tribunal Act, 1999*. The Program submits that an extension of time should not be granted.

The hearing of this matter proceeded on the consent of the parties as an electronic hearing. The evidence introduced by the Applicant consisted of the testimony of Jalal Al-Hinnawi as well as documentary evidence introduced through him. The evidence submitted by the Program consisted of the testimony of Sherri Lumley and documentary evidence introduced through her.

ISSUES:

Have the requirements for service of a Notice of Appeal under sections 16 and 20 of the *Ontario New Home Warranties Plan Act* been met in this case?

If the Notice of Appeal was not filed with the Licence Appeal Tribunal within the time prescribed by statute, is this an appropriate case for an extension of that time pursuant to section 7 of the *Licence Appeal Tribunal Act, 1999*?

FACTS:

Testimony of Jalal al-Hinnawi:

Mr. Jalal al-Hinnawi testified that the Applicant, Firyal Fawzi, is his mother. He stated that the Applicant does not know sufficient English to represent herself at the hearing. Mr. Jalal al-Hinnawi said that his parents left for a vacation in Montreal around September 25, 2001. He testified that, while his mother was away, he received a card from Canada Post advising of a letter addressed to Firyal Fawzi from the Program. Mr. Jalal al-Hinnawi stated that he showed his identification at the post office, signed his name, and picked up the letter on September 28. He repeatedly stated that he did not open the letter, because it was addressed to his mother and he did not have authority to open it.

Upon cross-examination by Ms. Rutherford, Mr. Jalal al-Hinnawi stated that he had no contact with his parents while they were away in Montreal. He admitted that he could have contacted his parents if he had wanted to do so. He stated that his family received many prior letters from the Program but that none concerned a hearing.

Exhibit 3 is a Notice of Application for the Extension of Time to Appeal dated December 6, 2001 addressed to the Licence Appeal Tribunal from Firyal Fawzi, stating in part: "I firyal Fawzi was away in Montreal on vacation with my husband because he have done an operation and he was not feeling well, so I did not receive the mail my self, therefore I was not in Toronto before the due date for filing." Mr. Jalal al-Hinnawi testified that his mother opened the letter from the Program after her return from Montreal and filed a Notice of Appeal within fifteen days of her return, on October 18.

Exhibit 1 is the decision of the Program denying the Applicant's twenty claims. Mr. Jalal al-Hinnawi said that claim no. 1 was made within one year of completion of the home for the owner's possession. Although Mr. Jalal al-Hinnawi also mentioned claims no. 15 and 19, he stated that he does not remember whether those claims were submitted within the one year.

He did not claim that any of the other claims were still unresolved and were made within the one year.

Regarding claim no. 1, Mr. Jalal al-Hinnawi stated that the stairs between the main floor and the second floor squeak. He testified that he was told by Mr. Ken Haller of Home Inspection Service Inc. that the stairs were installed in a substandard way causing a bouncy feeling and that a repair would cost \$500 to \$1,000.

Testimony of Sherri Lumley:

Ms. Sherri Lumley testified that she has been a warranty representative for the Program for two years and that she is the author of the decision denying the Applicant's claims. Ms. Lumley stated that only claims no. 1, 2, and 6 described in her decision were made within the required one year.

As to claim no. 1, she stated that only a claim about squeaks in the bedroom was submitted within the one year and that squeaks in other locations were complained of only in the request for conciliation. On the other hand, the decision letter gives the reason for denial of the claim for squeaky stairs as: "While there is a slight deflection between the drywall and the stair stringer this is considered minor in nature and not readily apparent. Therefore, no warranty applied as per section 13(1)(a) of the Act." Although many claims in the decision letter are denied because they were not received within the applicable warranty period, no such wording is set out in the discussion of claim no. 1.

The Program's decision letter states in part: "There is a slight deflection heard between the drywall and the stair stringer." Upon cross-examination by Mr. Jalal al-Hannawi, Ms. Lumley admitted that she heard a noise when he walked to the top of the stairs.

Ms. Lumley testified that during her inspection on June 13, 2001, Mr. Jalal al-Hannawi and both his parents were present. Later, upon cross-examination she admitted that only Mr. Jalal al-Hannawi and his father were present, not the Applicant, Firyal Fawzi.

Upon submission of Ms. Rutherford, the Tribunal ordered production of the acknowledgement of receipt of the registered-mail letter picked up by Mr. Jalal al-Hannawi. The person who signed the acknowledgement is identified as Firyal Fawzi. The signature is illegible. The Notice of Appeal submitted by Firyal Fawzi and Jalal al-Hinnawi has two signatures, but neither signature is identified as belonging to Firyal Fawzi or Jalal al-Hinnawi, and both signatures are illegible.

THE LAW:

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

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

"(a) that the home,

"(1) is constructed in a workmanlike manner and is free from defects in material,
...

"(4) A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect, ...".

Section 20 of the Act states in part:

"Any notice or document required by this Act to be served or given may be served or given ... by registered mail ... and, where notice is served or given by mail, the service shall be deemed to have been made on the fifth day after the day of mailing unless the person to whom the notice is given establishes that the person, acting in good faith, through absence, accident, illness or other cause beyond the person's control did not receive the notice until a later date."

Section 16 of the Act adds in part:

"(1) Where the Corporation makes a decision ... it shall serve notice of the decision ...

"(2) A notice under subsection (1) shall state that the person or owner served is entitled to a hearing by the Tribunal if the person or owner mails or delivers, within fifteen days after service of the notice under subsection (1), notice in writing requiring a hearing ...".

Section 7 of the *Licence Appeal Tribunal Act* states:

"Despite any limitation of time fixed by or under any Act for the giving of any notice requiring a hearing by the Tribunal ..., if the Tribunal is satisfied that there are reasonable grounds for applying for the extension and for granting relief, it may,

(a) extend the time for giving the notice either before or after the expiration of the limitation of time so limited; and

(b) give the directions that it considers proper as a result of extending the time."

FINDINGS OF FACT:

The Tribunal finds that:

1. The Applicant, acting in good faith, did not receive notice of the Program's decision until she returned home from Montreal, after the time for filing had passed.
2. The Applicant filed the Notice of Appeal with the Licence Appeal Tribunal within fifteen days after her return home.

APPLICATION OF LAW TO FACTS:

The Tribunal found Mr. Jalal al-Hinnawi to be a credible witness. In case of conflict in the evidence, the Tribunal accepts his evidence.

The Applicant received notice of the Program's decision when she returned home from Montreal. It was then her responsibility to open the registered-mail letter from the Program. According to section 20 of the Act, the Program's letter was thus served on the Applicant when she returned home.

Mr. Jalal al-Hinnawi testified that the Notice of Appeal was filed within fifteen days of the Applicant's return from Montreal. Therefore, the Notice of Appeal was filed within fifteen days after service of the Program's letter, and it was filed within the time prescribed by section 16 of the Act.

ORDER:

For the reasons set out above, the Tribunal finds that the Applicant filed her request for a hearing within the prescribed time.

LICENCE APPEAL TRIBUNAL

John Ort, Member

RELEASED: January 25, 2002

BUCKMAN

PREHEARING

HOWARD STANLEY BUCKMAN

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF
THE *REAL ESTATE AND BUSINESS BROKERS ACT*
R.S.O. 1990, CHAPTER R.4 AS AMENDED

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: JOHN ORT, Member

APPEARANCES:

HOWARD STANLEY BUCKMAN, representing himself,
Applicant

TIM SNELL, Counsel, representing the Registrar,
Real Estate and Business Brokers Act, Respondent

DATE OF

PREHEARING:

January 21, 2002

Toronto

ORDER

Following attendances on January 21, 2002 at a prehearing before the Licence Appeal Tribunal (the "Tribunal") of Howard Stanley Buckman representing himself (the "Applicant") and Tim Snell, Counsel, representing the Registrar, *Real Estate and Business Brokers Act* (the "Registrar");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Monday, February 25, 2002, and thereafter, if necessary, to continue at 9:30 a.m. on Tuesday, February 26, 2002, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario:

1. The parties to the hearing are the Applicant and the Registrar.
2. Particulars set out as items 1 to 16, both inclusive, and particulars set out as item 24 on the Registrar's Notice of Proposal to Refuse to Grant Registration dated October 24, 2001 are admitted by the Applicant.

3. Letter from Heather A. Werry, Counsel, Law Society of Upper Canada addressed to Yvonne Nandalall, Registration Officer, Real Estate Counsel of Ontario, dated November 16, 2001, at tab 4 of book 2 of the Registrar's book of documents, is admitted without proof by consent of the parties.
4. There was no resolution of any other issues between the parties.
5. The parties shall comply fully and in a timely manner with the disclosure requirements as required by Rule 6 of the Tribunal's Rules of Practice.

LICENCE APPEAL TRIBUNAL

John Ort, Member

Released: January 25, 2002

CLYKE

CHRISTINA CLYKE

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

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

TRIBUNAL: NIVES MONTANO,
Presiding member

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

CHRISTINA CLYKE, Applicant
unrepresented

DATE OF HEARING: January 24, 2002

DECISION RELEASED: January 28, 2002 Toronto

REASONS FOR DECISION

A hearing was held on January 24, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

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

BACKGROUND:

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

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

Owner:	Christina Clyde (the “Applicant”)
Motor Vehicle:	1992 Nissan CX1, plate no. ALNM 581 (the “vehicle”)
Date of Appeal:	January 4, 2002

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

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

This matter came before this Tribunal on January 24, 2002 and proceeded as an oral hearing.

After a brief recess due to the late arrival of the Applicant, the Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

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

ISSUE:

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states (Exhibit #2):

My boyfriend borrowed my car without my permission, I knew his licence was suspended. I would have never allowed him to drive it with my consent, I do really need my car, I work nights, I live in Brampton and I work downtown Toronto. I have no other way of driving there, I would like to keep my job, if I can't get my car back, I will then be forced to quit my job.

Sincerely Christina Clyde

The following is a summary of the Applicant's sworn testimony.

The Applicant is a single, young woman who resides with her father in Brampton, Ontario. She is employed as a full-time waitress/bartender at Don Cherry's Sports Grill located near Kipling Avenue at The Queensway. Her hours of employment are 6 p.m. to closing, 5 to 6 days a week. Her place of employment is approximately a 30 to 35 minute drive from her home.

The Applicant's father owns a vehicle but since he works the evening shift as well (6 p.m. to 2 a.m.) at Maple Leaf Foods in Burlington, Ontario, his vehicle is inaccessible to the Applicant, as they both work the same hours.

With respect to the circumstances surrounding the impoundment, Mr. Bruce, the Applicant's boyfriend, came to visit the Applicant since she was home sick. Mr. Bruce asked the Applicant if she could drive him to various locations since he had some errands to run. She advised Mr. Bruce that once she gets up from resting, she would drive him. Mr. Bruce took the vehicle at approximately 2 p.m. while the Applicant was sleeping. He returned to her home that same evening at about 6 p.m. with a ticket and the *Notice to Registrar* form in hand. The Applicant is well aware that Mr. Bruce has a suspended licence and testified that she does not allow him to have care and control of her vehicle at any time.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

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

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by James Bruce;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until September 19, 2002.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).

- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Tribunal must determine whether it should set aside the Registrar's order to impound the vehicle on the basis that the owner of the impounded vehicle will suffer exceptional hardship.

The Applicant has appealed on the grounds of "exceptional hardship" under section 55.2(3)(d).

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

The Tribunal may consider the criteria set out in clause (2) (b), (c) and (d) if the owner demonstrates that,

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

These criteria are cumulative. That is, all of these criteria must be met before the Tribunal may consider the ground of "exceptional hardship" under section 50.2(3)(d). On the evidence the first and second criteria are not met.

- (a) **"no alternative to the impounded motor vehicle is available"** The Applicant has testified that she has been renting a vehicle for the past 2 weeks, but is unsure she would be able to continue to rent the vehicle as she cannot afford it.

- (b) **"the loss will be immediate, significant and lasting"** The Applicant testified that (i); she has missed 1 week of employment (the first week the vehicle was impounded); (ii) there is no threat of loss of employment since the employer is aware of her situation; (iii) she has been able to get to work with her rented vehicle; and (iv) she has not been able to contribute to the household since all her money is spent on the rented vehicle;

After considering the above requirement, the Tribunal finds that the Applicant, albeit inconvenient to get to her place of employment, has alternatives to the impounded vehicle and the impact of the loss will not be immediate, significant and lasting as required by section 22(3) of Regulation 574 as amended by Regulation 632/98.

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

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

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

DECISION:

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

LICENCE APPEAL TRIBUNAL

Nives Montano, Presiding Member

RELEASED: January 28, 2002

BARKLEY

HIGHWAY TRAFFIC ACT
R.S.O. 1990, Chap. H.8 as amended

IN THE MATTER of the ORDER to IMPOUND a MOTOR VEHICLE Order # 2500200 OWNED BY: Margaret Barkley of: 5421 Roger Stevens Drive, R 5, Smith Falls, Ontario, K7A 4S6 made pursuant to section 55.1 of the *Highway Traffic Act*, effective on: January 23, 2002.

AND IN THE MATTER of a requirement for a hearing respecting an appeal of the said Order to Impound, pursuant to section 50.2 of the *Highway Traffic Act*.

MARGARET BARKLEY

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Margaret Barkley, Applicant, and by the representative for the Registrar of Motor Vehicles, for the issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22, and having reviewed the written settlement signed by the Applicant and the Registrar of Motor Vehicles as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

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

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

Schedule "A"

LICENCE APPEAL TRIBUNAL

Between:

MARGARET BARKLEY

Applicant

-and-

THE REGISTRAR OF MOTOR VEHICLES

Respondent

WAIVER AND CONSENT

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

AGREED STATEMENT OF FACTS

1. The motor vehicle described in Order to Impound #2500200 was impounded in accordance with subsection 55.1(3) of the *Highway Traffic Act*, RSO 1990, c. H. 8 as amended, on January 23, 2002.
2. The applicant, Margaret Barkley, whose name is shown on the vehicle and plate portion of the permit for the impounded motor vehicle, is the owner of the said vehicle.
3. No other order to impound under section 55.1 of the Act has ever previously been made with respect to any motor vehicle then owned by the applicant.
4. The applicant filed an appeal to the impoundment order, in accordance with the grounds permitted under clause 50.2(3)(b) of the *Highway Traffic Act*, stating that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension.
5. Investigations conducted by the Registrar revealed that the driver of the motor vehicle at the time the impound order was made was not then under suspension.
6. The applicant has had the opportunity to obtain independent legal advice with respect to consent to this Order.

7. The parties agree that this agreement does not bind the Ministry of Transportation or the Registrar of Motor Vehicles in any way, with respect to future hearings or consent orders.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsection 50.2(5) of the *Highway Traffic Act* that the Tribunal set aside the order to impound.

MARGARET BARKLEY

REGISTRAR OF MOTOR VEHICLES

(signature of Applicant)

(signature of Registrar)

(date)

(date)

0921- MED - ALCL

0921- MED - ALCL

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

TO APPEAL A SUSPENDED LICENCE

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

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

DATE OF
HEARING: January 23, 2002 Toronto

DECISION AND REASONS

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

EXHIBITS:

- Exhibit # 1 - Applicants Notice of Appeal dated December 17, 2001.
- Exhibit # 2 - Ministry's Notice of Suspension dated September 21, 2001.
- Exhibit # 3 - The Respondent's Summary of the File presented to the Tribunal on this date.
- Exhibit # 4 - Applicant's driving record entered on this date.

FACTS:

The Applicant is a 56 year old female, who had her licence suspended after the Ministry received an unsolicited Medical Report, dated July 1, 2000, from Physician # 1, who worked in a Walk-in clinic, where the Applicant had gone to obtain some sleeping medication. Physician # 1 reported that the Applicant suffers from alcoholism and declines treatment. This was the only occasion that he had treated the Applicant. She stated that she had not been drinking for a couple of days, but had been on a binge and could not sleep.

There was a history of drinking for approximately thirty years. In 1987 she attended AA for a year and received her pin for attendance. After that, the Applicant began binge drinking again, two to three times each year. In 1991 she was hospitalized for drinking and after being released, returned to AA.

In 1994 the Applicant resumed drinking and said she felt out of control, when on a binge. She eventually was able to stop on her own for four years. In 1998 she started drinking again for unknown reasons. During the following two years the Applicant was absent from work for 37 days, because of drinking.

On April 11, 2001 the Applicant received a letter from the Ministry informing her she must have an up-to-date assessment by a physician regarding her consumption of alcohol in order to ensure her fitness to drive.

On July 20, 2001 the Applicant had an Alcohol Form completed by Physician # 2. The doctor reported under the DSM-IV Criteria for alcohol dependence; the Applicant has a loss of control during binges and reduces her important activities. She also admits to continuing to drink despite knowledge of alcohol-related physical and psychological problems.

Physician # 2 stated that the Applicant's last alcoholic drink was on July 1, 2001 and the Applicant confirmed this in evidence. Laboratory blood tests disclosed AST and ALT results abnormally high, but GGT and MCV tests were normal.

On November 1, 2001 the Applicant had an appointment with Physician # 3, a consultant in Addiction Medicine. She admitted to alcoholic binges, lasting a week, once or twice a year since 1991. She usually drank a mickey of vodka per day.

Physician # 3 counselled the Applicant regarding complete abstinence and encouraged her to continue AA meetings on a regular basis. She accepted an offer from Physician # 3 for counselling and has continued to attend twice monthly.

The Applicant states that she only drinks at home, either alone or with her sister. She never drinks and drives and has a clean driving record. She mainly uses her car to get to and from work in the early morning and late at night. She does not understand why she lost her licence because she had not been drinking when she was reported, but had admitted a drinking problem to the doctor.

ISSUES:

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

THE LAW:

Regulation 340/94, Section 14 states:

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

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

Section 47(1) states:

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

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

Section 50 of the Act states:

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

APPLICATION OF THE LAW TO FACTS:

In suspending the Applicant's driver's licence the Registrar of Motor Vehicles acted according to the law, section 47(1), after being notified by Physician # 1 on July 1, 2000, that the Applicant suffered from alcoholism and declined treatment. The Tribunal was concerned, however, that the Ministry did not contact the Applicant until April 11, 2001 to request a medical assessment and then made the due date, June 6, 2001, which is eleven months from the date of notification. To add to this time delay, the licence was not formally suspended until September 21, 2001. The reason given for this protracted period of time was a backlog of cases the Ministry was processing. Hopefully there is some prioritizing in handling the notifications, because if the Applicant had been a danger to the public, this delay would have been unacceptable.

The Applicant stopped drinking on July 1, 2001 and joined AA, once more. She made an appointment with her family physician, who completed an Alcohol Assessment Form and recommended reduced drinking. MCV and GGT blood tests were reported as normal.

Following the actual suspension of her licence, the Applicant consulted a specialist in addiction medicine, Physician # 3. Physician # 3 recommended total abstinence, continued AA meetings and one to one counselling.

In summary, the Applicant has stated that she never drinks and drives, has a clean driving record, only drinks at home, either alone or with her sister, has stopped drinking and has an incentive to remain abstinent, for the first time. She mainly needs her car to get to work and when she was drinking, stayed home and lost 37 days of work in two years. The Applicant is attending AA once a week and being counselled twice a month.

To compound the problem for the Applicant, during the delay in notification, she purchased a new car. The MAC Case Study dated November 16, 2001, states that the Applicant continues to drink in spite of serious health related concerns, inspite of the fact she had stopped drinking July 1, 2001.

The Tribunal agrees there is a concern about a relapse, but the Applicant is now fully aware of the consequences of any further drinking and has never demonstrated any disregard for the laws in the past.

The Tribunal does not find that the evidence presented supports the Registrar's refusal to reinstate the Applicant's driver's licence, based on Section 47(1).

DECISION

Upon the application by the Applicant to appeal the decision dated September 21, 2001 of the Registrar of Motor Vehicles to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act*, and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

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

LICENCE APPEAL TRIBUNAL

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

RELEASED: January 30, 2002

WEATHERBEE

JAMES WEATHERBEE

APPEAL FROM A PROPOSAL OF THE REGISTRAR
OF THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: JOHANNE M. MORISSETTE, Vice-Chair

APPEARANCES:

JAMES WEATHERBEE, representing himself
A. MICHAEL ROTHE, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: January 22, 2002 Ottawa

REASONS FOR DECISION AND ORDER

BACKGROUND:

This hearing arises from a Notice of Proposal dated May 7, 2001 issued by the Registrar of the *Motor Vehicle Dealers Act* (the "Act") to refuse the registration of James R. Weatherbee (the "Applicant") as a motor vehicle salesperson under the provisions of the Act.

The Registrar's Notice of Proposal states that the reasons for the proposal are:

- 1) The Applicant applied for registration as a motor vehicle salesperson on or about April 17, 2001. He proposes to work for Direct Motor Company Ltd. o/a Bank Street Mazda.
- 2) On the application to become a registered salesperson question 8 asks:
"Are there any unpaid judgements outstanding against you? If yes, submit a copy of each judgment. State amount outstanding and repayment arrangements."
The Applicant said "yes". "See attached letter".
- 3) On the application to become a registered salesperson question 9 asks:
"Have you ever been found guilty or convicted of an offence under any law or are any charges pending? (This includes those instances where a conditional or absolute discharge has been ordered)".
The Applicant said "yes".

- 4) The Applicant provided a letter indicating:
"AS TO MY PAST RECORD THE ONLY THING I HAVE LEFT TO PAY IS A FINE IN NOVA SCOTIA FOR POSESSION OF CONTRABAND CIGARETTES. WHICH I AM PAYING \$100.00 PER MONTH".

"ALL OTHER CHARGES HAVE BEEN DEALT WITH AND THERE IS NOTHING BEFORE THE COURTS AT THIS TIME. I HOPE THIS IS SATISFACTORY FOR YOU AND HOPE YOU CONSIDER HOW I CLEANED UP MY PAST. LOOKING TO HAVE A GOOD FUTURE".
- 5) A criminal record search found that the Applicant has the following convictions
False Pretences – October 14, 1971
Assault Causing Bodily Harm – October 21, 1977
Assault Causing Bodily Harm – May 11, 1978
Attempted Theft – March 14, 1979
Possession of Stolen Property Under \$200 – March 14, 1979
Possession of Stolen Property Over \$200 – March 14, 1979
Possession of Stolen Property Over \$200 – September 4, 1980
Break & Enter with Intent – October 30, 1980
Theft Over \$200 – October 30, 1980
Possession of Firearm without Firearm Acquisition Certificate – November 20, 1981
Trafficking in a Narcotic – February 23, 1987
Possession of Spirits Unlawfully Imported – September 15, 1995
Unlawfully Have or Sell Manufactured Tobacco or Cigars – October 11, 1995
Conspiracy to Sell Unlawfully Imported Spirits – January 24, 1997
Possession of a Schedule 1 Substance – February 26, 1999
- 6) In June 1998, the Applicant had a previous application for registration refused pursuant to section 7(3) of the Act.

THE LAW:

The relevant portion of the Act that is applicable to these proceedings is section 5(1) which reads:

1. An Applicant is entitled to registration or renewal of registration by the Registrar except where,.....

(b) the past conduct of the Applicant affords reasonable grounds for the belief that the Applicant will not carry on business in accordance with the law and with integrity and honesty; or
.....

As established by the Divisional Court of Ontario in the decision R.G. Brenner v. Registrar of the Motor Vehicle Dealers, March 9, 1983, unreported,

.....the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the Applicant afforded reasonable grounds for belief that he would not carry on business in accordance with the law and with integrity and honesty

THE EVIDENCE:

REGISTRAR'S CASE:

The only witness for the Registrar is Ms. Mary Jane South who has been Deputy Registrar since 1997 for the Ontario Motor Vehicle Industry Council ("OMVIC"). Ms. South, testified that she conducted the investigation relating to the Applicant's application (Exhibit 3, Tab 4). Ms South testified that the Applicant had never been previously registered, although he had applied on two previous occasions.

On May 25, 1998, the Applicant applied for the first time to OMVIC. At that time, he answered Question #10 in the negative, although after a search of the records, it was discovered that the Applicant did have a lengthy prior criminal record. He was denied registration by a Proposal dated June 25, 1998. The Applicant did not appeal that decision.

On September 20, 1999, the Applicant applied again to OMVIC, but this time he answered yes to question #10, but without any details of his convictions. He abandoned his application, prior to a decision being rendered.

On April 10, 2001, the Applicant applied again to OMVIC, which is the subject application to which the Proposal is made. The new format of applications, has the question about the past criminal activity in question #9. The Applicant did answer "yes" to question #9, however he failed to fully disclose his criminal record, including his most recent conviction of possession of schedule 1 substance (i.e. marihuana) on February 26, 1999.

APPLICANT'S CASE:

The Applicant gave evidence on his own behalf and called just one other witness, namely Mr. Richard Macleod, who is the general manager of Bank Street Mazda, the Applicant's current employer.

The Applicant stated that, when answering question #10 on the first application, he thought that he only had to go back three years, and that is why he responded "no" to that question. Mr. Weatherbee was of the view that his past criminal record that dates back to the 1970's and early 1980's should not be taken into consideration, since he had changed since that time. The Applicant further stated that he had stop drinking and smoking and that since the last 3 to 4 years, he had "cleaned up his act". He had been working for the same employer since that time and wanted a chance to improve his lot in life.

When asked in cross-examination, why he did not disclose his most recent conviction of February 1999 in question #9, he said, that he thought that OMVIC knew or ought to have know about it, and therefore he did not have to disclose it.

Mr. Richard Macleod, testified only to the fact that he felt that Mr. Weatherbee was trustworthy and should be given a chance. Mr. Macleod knew about his past criminal record but also felt that the Applicant had rehabilitated himself in the last few years.

APPLICATION OF LAW TO THE FACTS:

The Registrar bases her refusal on two grounds: first, the lack of disclosure by the Applicant on three separate applications to OMVIC and second, the nature and pattern of the criminal offences committed over a period of time by the Applicant that are economic in nature.

The Tribunal is not satisfied that the Applicant intentionally mislead the Registrar by failing to specifically disclose his most recent conviction of 1999 in his application of 2001. The applicant testified that he knew from the previous decision rendered in 1998, that the Registrar was aware of his record and he thought that the Registrar would also know about his most recent conviction. This does not exonerate his obligation to fully disclose, but on that ground alone, the Tribunal would not support the Proposal.

The Registrar's second ground is the more significant, that being the nature and pattern and more importantly continued and recent criminal activity of the Applicant. The Tribunal notes that Mr. Weatherbee has been conviction free since February 1999. This period is just short of three years since his last conviction and is not sufficient to impart to this Tribunal the confidence that Mr. Weatherbee is now fully reformed and that the Registrar has erred in his decision.

The Tribunal believes that Mr. Weatherbee certainly has been on the right track over the last three of four years. This is encouraging. However, considering the Applicant's history, it is reasonable that before the Applicant applies for registration more time should pass since his last offence and that at the time of re-application the Applicant provide full and honest disclosure. At present, therefore, the Tribunal finds that there is no error in the Registrar's decision to refuse Mr. Weatherbee registration.

DECISION:

By virtue of the authority vested in it under section 7 (4) of the *Motor Vehicle Dealer Act*, the Tribunal directs the Registrar to carry out his proposal dated May 7, 2001 to refuse the registration of James R. Weatherbee as a motor vehicle salesperson under the Act.

LICENCE APPEAL TRIBUNAL

Johanne M. Morissette,
Vice-Chair

Released: January 30, 2002

FEHER

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

IN THE MATTER OF
JOHN R. FEHER

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: January 4, 2002

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

JOHN R. FEHER

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

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

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

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

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: January 30, 2002

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

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

FROM: John Roderick Feher
267 Chittick Crescent
Dorchester, ON N0L 1G3

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

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

John R. Feher (initials)

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

Signed in the City of _____ this _____ day of _____ 2002.

John Roderick Feher (signature)

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

Date:

Carl Compton
Registrar

GALLO

BARBARA AND ALFRED GALLO

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

TO DISALLOW A CLAIM

TRIBUNAL: KENT MCCLURE, Chair, presiding
VICTOR DREVNIG, Vice-Chair

APPEARANCES:
ALFRED GALLO, representing himself and Barbara Gallo
KAREN JONES, Counsel, representing the Ontario New Home
Warranty Program
JOHN SESTITO, Counsel, representing GREYSTONE COUNTRY
PROPERTIES LIMITED, the Added Party

DATES OF
HEARING: January 15 and 16, 2002 at Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") by Barbara and Alfred Gallo (the "Applicants") from a decision of the Ontario New Home Warranty Program ("the Program") set out in a written decision dated March 15, 2001, which denied the Applicants' claims for compensation under the *Ontario New Home Warranties Plan Act* (the "Act").

The Applicants' appeal relates to two complaints respecting the Applicants' home:

1. the placement of the furnace and the hot water heater on the ground floor; and
2. the absence of a full length closet off the entrance foyer.

The Applicants' appeal is based on Section 14(1)(b) of the *Ontario New Home Warranties*

Plan Act (the “Act”) which reads as follows:

(1) Where,

(b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty; ...

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

THE EVIDENCE:

The evidence for the Applicants

The only witness for the Applicants was Alfred Gallo. His testimony on the two complaints is summarized below.

The Applicants, after consulting with their lawyer, signed an Agreement of Purchase and Sale (“APS”) on September 27, 1996 to purchase a Sussex style town house unit on Lot 42 from Greystone Country Properties Limited (“Greystone”). Greystone signed the agreement on September 30, 1996.

The APS contains Schedule “D”, which sets out the unit’s floor plan. The ground floor (basement level) shows a garage, a low headroom storage area, an area for a furnace and water heater, a finished room, and a laundry room. The main floor shows a foyer. In that foyer and running along the side of the foyer from the front door entrance is the notation “MIRRORED DOORS” behind which is a rectangular space with an “X” running from corner to corner with no descriptive wording.

There were written amendments to the APS. The amendment dated February 18, 1997 provided for what was described in testimony as a “switch”; that is, the laundry room originally to be installed on the ground floor (basement level) was moved to the second floor, and the washroom originally to be installed on the second floor was moved to the ground floor (basement level).

The closing date in the APS was originally August 15, 1997. This was changed to February 26, 1998 when Mr. and Mrs. Gallo received title and took possession of the property.

Mr. Gallo testified that when the unit was being built, he and Mrs. Gallo visited the site and found that the builder was making a change in the layout of the ground floor (basement level). The furnace and hot water heater were being moved to a walled-in area next to the washroom

area and would occupy part of the area designated on the building plan for the finished room. Schedule "D" to the APS shows the finished room layout with a floor area 13 feet 4 inches by 20 feet. The new walled-in area for the furnace and hot water heater reduced the finished room area by an area approximately 8 feet by 5 feet 2 inches.

Mr. Gallo complained to the builder's on site supervisor, Mr. Tony Rinomato, that this relocation was contrary to the floor layout in the APS. The Applicants were told that the move was necessary because the original location would adversely affect the operation of the furnace and would be contrary to the Ontario Building Code. Mr. Gallo told Mr. Rinomato that the Applicants would rather eliminate the washroom on the ground floor (basement level) and have the furnace and hot water heater occupy that space than have the size of the finished room reduced. Mr. Rinomato did not agree with this alternative. The builder retained the washroom and located the furnace and hot water heater in the walled-in area that diminished the finished room.

In his testimony, Mr. Gallo conceded that the relocation of the furnace and hot water heater was required. In his cross-examination, he agreed that paragraph 11 of the APS provided for modifications to comply with the Ontario Building Code. However, he felt that the builder should have followed his request to eliminate the washroom area and not diminish the size of the finished room. He felt that the builder's relocation diminished the value of the unit. Mr. Gallo testified that the reduced space of the finished room could be used, but he felt that the reduction in its space by the relocation of the furnace and hot water heater was unacceptable. He said it resulted in less space for his grandchildren to play and also less space for the Applicants' furniture. He also believed that the reduction in the size of the finished room resulted in a room that did not justify, in future, the installation of an optional direct vent gas fireplace noted on the layout in Schedule "D" to the APS. He also said that the noise of the furnace could be heard in the finished room.

In cross-examination, counsel for the Program asked Mr. Gallo for the basis on which he claimed that the relocation proposed by the builder reduced the value of the unit. Mr. Gallo stated that he had spoken to a realtor, Linda Emerson, who told him that it was very difficult to estimate a possible reduction in the unit's value because of the builder's relocation of the furnace and hot water heater. She had suggested that eliminating the washroom from the basement could reduce the unit's value by \$5,000.00. Counsel pointed out that eliminating the washroom was the Applicants' suggestion, not the builder's. Mr. Gallo responded that the realtor had indicated that it would be difficult to calculate how the relocation would affect the unit's value. Mr. Gallo referred to the Applicants' Judgment against the builder and said that the Court's Reasons for Judgment would have dealt with this, but that he had not had the Reasons for Judgment transcribed because of the cost.

Also prior to closing, and about the time that the Applicants discovered the builder's relocation of the furnace and hot water heater, the Applicants found that the front hall closet off the foyer (the "foyer closet") was not a full-length closet, as they had expected. The foyer's floor was a

lower level than the adjacent main floor that was over the garage. The recessed area of the foyer closet was over the garage. The result was that the recessed area of the foyer closet was at a higher level than the floor of the foyer by approximately one metre. The foyer closet's recessed area was only able to accommodate short jackets, not full length coats.

Mr. Gallo testified that the Applicants had expected a full-length closet and that any reasonable person would have. In cross-examination, Mr. Gallo confirmed that in Schedule "D" to the APS, the diagram shows an "X" running from corner to corner of the area behind the mirror doors in the foyer, that the diagram contains no words to the effect that this is a full closet, and that the APS contains no words "full length closet". He also conceded that off the kitchen an area is described as a broom closet and that it has no similar "X" mark. He said, however, that this distinction meant nothing to him and that a reasonable person would have concluded that the foyer closet is a full-length closet. He expected a full-length closet off the entrance foyer, and he was never warned otherwise by the builder.

Mr. Gallo testified that he complained to Mr. Tony Rinomato about the unit having a half rather than full closet off the foyer. Mr. Rinomato said that this was the result of the difference in elevations between the foyer and the adjoining main floor. Although he indicated that he was sympathetic, Mr. Rinomato took the position that the closet was built according to the APS.

Mr. Gallo investigated the cost of moving the closet to the other side of the foyer. He testified that he understood that this would require building the closet out from the exterior wall because the Ontario Building Code did not permit a reduction in the width of the foyer area. In turn, this would require approval of the local municipality because it would require a variance from the set back requirements of a local by-law. Mr. Gallo testified that he had no estimate of the cost of doing this except an oral estimate of a contractor who quoted \$3,852.00. In cross-examination, Mr. Gallo confirmed that he had no other estimate of the cost of moving the closet, had not obtained any details as to the likelihood of getting municipal approval and had no estimate of any effect the size of the closet had on the value of the unit. He stated that the realtor, Linda Emerson, had told him that the unit with or without a full-length closet would be a problem to estimate and that she would have difficulty coming up with such an estimate. He relied upon the fact that he had obtained a Judgment against the builder to confirm that he had suffered damages. He said that the Judge had remarked that it was reasonable to expect a full-length closet behind the mirrored doors off the foyer. As indicated above, the Reasons for Judgment were not provided to the Tribunal.

Mr. Gallo testified that he discussed this concern and others with his lawyer. Mr. Gallo testified that the prices of real estate had increased over the prior two years, and the Applicants would be faced with higher prices had they wished to buy another property. He felt the builder could resell the unit without difficulty. Also, the Applicants had resided in a temporary location for approximately two years, and they did not wish to start again to search out new alternatives. The Applicants decided that they would complete the purchase but negotiate with the builder

as many resolutions as possible prior to closing and seek any available remedies after closing.

Mr. Gallo also testified that he made a telephone call to the Program in January of 1998 and spoke with Judy Kruse, an employee of the Program. He testified that he told her about his concerns with the unit, including the relocation of the furnace and hot water heater. Mr. Gallo testified that Ms. Kruse advised him that the Program would not consider his complaint a warranted matter. In cross-examination, Mr. Gallo said that Ms. Kruse told him to take legal action. Later in cross-examination, when asked about whether he had notified the Program that he was suing the builder, he said he did this by telling Ms. Kruse during their conversation that that he would sue the builder. He said he accepted Ms. Kruse's statement as to the Program's position and did not again involve the Program until after he had renovated the ground floor (basement level), referred to later in this decision. He said Ms. Kruse never told him to put his concerns to the Program in writing. During cross-examination, Mr. Gallo was asked if he had received the Program's material for homebuyers. He said he had. He was asked if he read that homebuyers were required to put their concerns to the Program in writing. He said he could not recall if he had read the material cover to cover and what he recalled was not "subtle points" like that. He also responded by saying that he had been ill served by a lawyer who gave him legal advice, although he was not able to recall which particular lawyer of the lawyers he consulted, because he remembers the lawyer's advice being to sue but remembers no discussion about the Ontario New Home Warranty Program.

On February 4, 1998, Mr. Gallo inspected the unit with a representative of the builder, prior to closing the purchase. Both signed a Pre-Occupancy Inspection form and an attachment listing complaints about the unit. Mr. Gallo prepared the attached page, and one of its paragraphs states:

Interior

Major Problems include 1) lack of front hall closed and 2) movement of furnace and water heater into ground floor living space. These items will be dealt with by litigation, given lack of response by Country Homes.

The builder's lawyer sent letters on February 6, 10, 16 and 19, 1998 to the Applicants' lawyers explaining the need to relocate the furnace and offering to terminate the purchase agreement with the return of any funds paid by the Applicants if the Applicants would sign a mutual release. The Applicants did not accept this offer. On February 26, 1998 the sale closed, and the Applicants received title to the unit.

On March 2, 1998 the Applicants issued a Statement of Claim against the builder (Exhibit 4, Tab 15). The builder defended the action by Statement of Defence dated April 8, 1998 (Exhibit 4, Tab 16).

The Applicants sent a letter dated April 16, 1998 to the builder, with a copy to the Program, listing the Applicants' complaints about the unit (Exhibit 3, Tab 4). The complaints included the two complaints now before this Tribunal.

The Applicants did not start living in the unit for three months. Mr. Gallo, in cross-examination, stated that by February 24, 1998, the Applicants had decided to take possession of the home, retain a contractor, and sue the builder. They had a contractor renovate the ground floor (basement level) to achieve the placement of the furnace and hot water heater where they had asked Tony Rinomato to put them prior to the date of closing. Their contractor replaced the contents of the washroom on the ground floor (basement level) with the furnace and hot water heater, and removed the walled-in area that had contained the furnace and hot water heater to increase the size of the finished room to match that set out in the floor plan attached to the APS as Schedule "D". Mr. Gallo testified that this renovation cost \$2,300.00 to move and reinstall the furnace and hot water heater, \$1,100.00 for the building contractor, and \$1,800.00 for the carpet. Mr. Gallo did not provide the Tribunal with copies of the bills for these costs. Mr. Gallo, in cross-examination, stated that he did not advise the builder or Program that he was having this work done. The Applicants moved into the unit in May of 1998.

By facsimile transmission dated September 28, 1988, Mr. Gallo advised the builder, with a copy to the Program, of a number of defects with the unit (Exhibit 3, Tab 6).

On December 17, 1998 the Applicants obtained a Judgment of the Ontario Court of Justice (General Division) against the builder for the sum of \$13,962.64, prejudgment interest of \$563.88, their costs in the action of \$3,600.00, and interest on the Judgment at 7% per annum. The Added Party's Book of Documents contains a draft Judgment approved as to form and content by the builder's solicitors, which the parties agreed duplicated the Judgment as issued by the Court (Exhibit 4, Tab 17).

By facsimile transmission dated January 4, 1999 Mr. Gallo advised Judy Kruse, an employee of the Program of certain defects in the unit (Exhibit 3, Tab 7). Those defects did not include the matters now before this Tribunal.

By letter dated June 2, 1999, with a copy to the Program, Mr. Gallo advised the builder of defects in the unit "not yet corrected" (Exhibit 3, Tab 8). Those defects did not include the complaints now before this Tribunal.

By letter dated March 10, 2000 the Applicants advised Judy Kruse of the Program that he had attempted to have the builder take action but that there were a number of outstanding deficiencies with the unit, and he asked for the assistance of the Program (Exhibit 3, Tab 9). The particular defects were not set out in that letter. In cross-examination, counsel for the

Program asked Mr. Gallo if this was the first time the Applicants contacted the Program in writing. Mr. Gallo replied yes, it was the first time the Applicants asked the Program for assistance. However, the Tribunal notes that copies of some of the Applicants' letters to the builder were sent to the Program prior to the March 10, 2000 letter.

By letter dated April 4, 2000, Dwight Lawrence of the Program informed the Applicants that the Program would not assist the Applicants. The letter contains what appears to be a typographical error and inaccurately describes the contents of the Gallo's letter of March 10, 2000. In any event, the Program's letter states that the Program can not assist the Applicants and identifies two reasons: 1) because the Applicants had repaired the matter complained of without the Program first being given an opportunity to do an inspection and 2) because the Program cannot assist in non-payment of the Applicants' court award (Exhibit 3, Tab 10).

By facsimile transmission dated April 19, 2000, Mr. Gallo sent Judy Kruse of the Program an updated list of deficiencies (Exhibit 3, Tab 10). The specific deficiencies are not part of that Exhibit. By letter dated May 1, 2000, Ms. Kruse advised the Applicants "We received your letter on Apr. 18, 2000. We have sent a copy of your letter to your builder and have reminded them of their obligations. We trust they will contact you." Also, the Program informed the Applicants that dispute mediation service was available from the Program, if necessary (Exhibit 3, Tab 11).

There was further correspondence between the Applicants and the Program. Mr. Gallo testified that he was frustrated with the Program's process of passing on to the builder the Applicants' complaints when the Applicants had already made the builder aware of those complaints. Mr. Gallo wanted the Program to be more directly involved in satisfying the Applicants' requests. Mr. Gallo testified that the Applicants had obtained Judgment against the builder but found they could not recover payment from the builder because the builder no longer had the required assets. Mr. Gallo felt that the Program should compensate the Applicants for the amount of the Judgment.

On November 11, 2000, the Applicants signed and forwarded to the Program the Program's Request for Conciliation Form, indicating that the Applicants had obtained a Judgment "in regard to (1) Change in location of furnace room and (2) Lack of full-size closet in front hall way...". The Applicants attached a list of 9 items, of which item 10 referred to the closet and item 11 referred to the furnace room (Exhibit 3, Tab 17).

By letter dated December 20, 2000, the builder replied to the Program respecting the Applicants' request for conciliation and responding to the complaints listed by the Applicants. By letter dated March 3, 2001, the builder wrote the Applicants, with a copy to the Program, offering to do certain work listed in the letter "In the interest of bringing any and all outstanding warranty issues to a close..." (Exhibit 3, Tab 18).

By letter dated March 15, 2001, the Program wrote the Applicants confirming that the Applicants wished to withdraw their request for conciliation on items 1 through 9 of their Conciliation Request Form. Also, the letter advises that the Program would be sending the Applicants a Decision Letter “pertaining to recovery of the Court Judgment through ONHWP.” (Exhibit 3, Tab 20)

By letter dated March 15, 2001 the Program denied the Applicants’ claim respecting the movement of the furnace room. (Exhibit 3, Tab 21) The parties to this hearing confirmed that the Program also denied the Applicants’ claim for the front hall closet.

The evidence for the Program

The witness for the Program was Robert Rosset. Mr. Rosset is a Warranty Representative employed by the Program and has been a Warranty Representative for 13 years. His responsibilities include dealing with claims of homeowners under the Act, arranging conciliations, and identifying defects under the Ontario Building Code. In the course of these duties, he has inspected more than 1,000 homes.

Mr. Rosset described the Program’s process in receiving a complaint from a homeowner. A telephone caller is asked to make a complaint in writing. After receiving a letter, the builder is advised. If a complaint is not resolved, conciliation is arranged and supporting documents requested. The Warranty Representative contacts the builder and attempts to have the builder resolve the problem. If there is no resolution, the conciliation is conducted, and a conciliation report is written with the complaints categorized as warranted or not warranted. The Program asks the builder to satisfy the complaints categorized as warranted. If the homeowner is not satisfied with this resolution, the Program issues a Decision Letter. The homeowner may appeal that decision to this Tribunal.

With respect to the Applicants’ claims, Mr. Rosset testified that the Applicants’ letter of March 10, 2000 (Exhibit 3, Tab 9) was the first written request to the Program for assistance.

Mr. Rosset testified that the Applicants requested a conciliation with the Program (Exhibit 3, Tab 17) but later withdrew items 1 through 9 of the 11 items they listed. The Program did not consider the two remaining items warranted under the Act, and the Program issued a Decision Letter (Exhibit 3, Tab 21) denying the Applicants’ claims.

Mr. Rosset testified that the Applicants had taken the builder to court and were successful, but they were unable to collect on the Judgment and sought reimbursement from the Program. Mr. Rosset said that reimbursement of the Applicants’ judgment against the builder was outside the jurisdiction of the Program. He said that the Program only dealt with warranties under the Act. He felt the Applicants’ claims respecting the relocation of the furnace and hot water heater and the size of the foyer closet were not warranted.

Mr. Rosset said the relocation of the furnace and hot water tank was not warranted as a substitution. A substitution claim is not appropriate because the same furnace and same hot water tank contracted for by the Applicants were installed, although not at the location on the original floor plan, due to Ontario Building Code and the equipment's operational requirements. Moving their location in the basement was not a substitution of one material for another.

Mr. Rosset said that the Applicants had themselves renovated the basement and did this without giving the Program an opportunity to inspect the builder's work and decide if the original installation had problems warranted under the Act. Now, what was installed was the Applicants' work, rather than the work of the builder, and the Act only provides warranty coverage for the builder's work.

In addition, Mr. Rosset said that the Applicants' immediate renovation of their basement not only denied the Program an opportunity to inspect the builder's work but also denied the Program the opportunity to perform remediation at no cost to the Applicants. The Applicants' renovation without notice to the Program denied the Program this opportunity, which was contrary to the Act, and showed that the Applicants were not taking the opportunity to mitigate their damages.

He also said that he saw no contravention of the Ontario Building Code in the matters complained of.

As to the foyer closet, Mr. Rosset said the closet was a matter of design, was built as provided in the APS, and the Applicants, therefore, had no warranted claim.

Evidence of the Added Party

The added party had two witnesses. The first witness was Mr. Tony Rinomato who was on the site supervisor and was familiar with the Applicants' home and the claims now before the Tribunal.

Mr. Rinomato testified that during construction of the unit, Mr. Gallo told him that there should be a full-length closet off the foyer. Mr. Gallo also told him that he wanted the closet moved to the outside wall of the unit. Mr. Rinomato did not agree with Mr. Gallo. In cross-examination, Mr. Rinomato said that he had no involvement in discussing the requirements for a move of the closet to the other side of the vestibule.

Mr. Rinomato said that he did not give detailed construction plans to purchasers of the units and said that the foyer closet was built according to the drawings.

Also, Mr. Rinomato said that during construction of the unit, Mr. Gallo told him that the location of the furnace and hot water heater was wrong. Mr. Gallo wanted to eliminate the washroom

on the ground floor, and Mr. Rinomato disagreed with this. In cross-examination, Mr. Rinomato said he could not remember Mr. Gallo saying that he was going to hire his own contractor to change the ground floor layout or that he would start a lawsuit. He said that the layout was changed because the mechanical contractor said it had to be done (Exhibit 4, Tab 6) and that this was later confirmed by a professional engineer who said that the original location would be in violation of the Ontario Building Code. (Exhibit 4, Tab 11)

Mr. Rinomato said he first knew of the Applicants' renovation of the ground floor only after the Applicants took possession of their home and Mr. Gallo asked during the renovation if someone wanted the bathtub being removed from the ground floor.

The Added Party's second witness was Mr. William Lane, a service manager employed by the builder, who was familiar with the file.

Mr. Lane referred to Schedule "E" of the APS and confirmed that the Applicants had requested moving the washroom to the ground floor in exchange for the laundry room. (Exhibit 4, Tab 14)

Mr. Lane also referred to Schedule "D" of the APS, which is the layout diagram for the unit. He explained that the foyer closet had to have a partial obstruction in the recessed area because the level of the recessed area was raised due to the height of the garage below it. Therefore, the foyer closet's recessed area had a higher level than the foyer floor. He said the wording of the APS did not specifically state the height of the closet. It was mute on this point. In cross-examination, Mr. Lane was asked if he felt there was any obligation on the builder to advise a purchaser that there was an obstruction in the recessed area of the foyer closet. He replied that this would be "shooting themselves in the foot" as a salesman and that the buyer had the opportunity to review the layout with their own experts. He said that the floor plan was clear to him. For example, he said that a dashed line in the garage near the foyer closet indicated to him that there would be strapping and insulation behind the mirrored doors off the foyer, and the "X" in the foyer closet area indicated that the height of the closet would vary with the height of the garage.

Mr. Lane reviewed a number of reasons why the furnace could not be located in the area originally set out in the floor plan, referring to the letter of a mechanical contractor (Exhibit 4, Tab 8) and the letter from a professional engineer. (Exhibit 4, Tab 11) He indicated that the ventilation ductwork would have large, boxed-in pipes that would greatly restrict the use of the ground floor area. He said the relocation was done at no cost to the Applicants and that the enclosure of the furnace and hot water tank was like a sliding door closet in the finished room. He referred to the Program's Builder Bulletin No. 22 which indicated that a 2% variance in unit area was within the Program's acceptable standards, and he testified that the walled-in area accommodating the furnace and hot water heater was less than 2% of the unit's area.

Mr. Lane stated that the builder was not aware that the Applicants intended to have their contractor renovate the basement and first learned of this while the Applicant's contractor was

doing the work. He said that the builder knew that the Applicants were “unhappy” with the builder’s relocation plan but that the Applicants were given an opportunity to withdraw completely from the purchase, and in spite of this they proceeded.

FACTS FOUND PROVEN:

Based upon the evidence presented to the Tribunal, the following are facts found proven in this matter.

1. The Applicants took possession of their home on February 26, 1998 and immediately thereafter had their contractor start renovating the ground floor (basement level).
2. Schedule “D” to the Agreement of Purchase and Sale is a diagram of the floor plan of the Applicant’s home. The Ground Floor shows a foyer with mirrored doors and a recessed area behind the mirrored doors that contains an “X” from corner to corner of the recessed area, with no other description. This recessed area is a closet. The Main Floor shows the furnace and hot water heater located near the stairs. When the builder constructed the Applicants’ home, these pieces of equipment were located in a walled in area in part of the area shown on the Schedule “D” floor plan for the Finished Room.
3. The elevation of the garage below the recessed area of the foyer closet resulted in that recessed area being approximately 1 metre above the foyer’s floor level. The recessed area could accommodate short jackets, but not full-length coats.
4. The original location of the furnace and hot water heater on the Schedule “D” floor plan would have contravened the Ontario Building Code and restricted the operation of the equipment. As a result, it was necessary for this equipment to be moved elsewhere on the ground floor. Paragraph 11 of the Agreement of Purchase and Sale provides for modifications in the construction of the home required to comply with the Ontario Building Code.
5. When the Applicants took possession of their home on February 26, 1998, they could have inhabited the unit as a home but chose to renovate the ground floor of the unit. The primary result of their renovation was to remove the contents of the washroom, replace those contents with the furnace and hot water heater and construct the finished room to the shape and size set out in Schedule “D” to the Agreement of Purchase and Sale. The Applicants renovated without notice to the builder or the Program.
6. On March 2, 1998, the Applicants sued the builder for breach of the Agreement of Purchase and Sale. The builder defended the action. On December 17, 1998, the Applicants obtained Judgment (details noted above) against the builder. The Applicants were unable to recover the funds they were entitled to under the Judgment.

7. On March 10, 2000, the Applicants notified the Program in writing that they required the Program's assistance respecting their claims against the builder.
8. On March 15, 2001, the Program issued its Decision Letter to the Applicants, denying the Applicants claims under the Act.

THE LAW:

The Act's relevant portions are:

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

(a) that the home,

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

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

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

.....

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

.....

14.(1) Where,

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

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

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

In considering the authority of the Tribunal, the Superior Court of Justice (Divisional Court) in *Gourlay v. Ontario New Home Warranty Program* (Court file no. 654/98) held that "Section 14(1) (a) of the Act is intended to protect those who contract with a vendor and suffer financial loss where the vendor/builder never completes the transaction."

The jurisdiction of the Tribunal to make an order in this matter is set out in section 16(3) of the Ontario New Home Warranties Plan Act, which states:

16(3) Where a person or owner gives notice in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and may by order direct the Corporation to take such action as the Tribunal considers the Corporation ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Corporation.

Regulation 892 to the Act states as follows:

1. In this Regulation,

.....

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

(a) that results in failure of the load-bearing portion of any building ...or

(b) that materially and adversely affects the use of such building for the purpose for which it was intended,

including significant damage due to soil movement, major cracks in basement walls, ...but excluding floor damage, dampness not arising from failure of a load-bearing portion of the building, ...

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

.....

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

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

.....

(d) that the home is free from violations of Ontario Building Code regulations under which the Building Permit was issued, affecting health and safety, including but not limited to fire safety, insulation, air and vapour barriers, ventilation, heating and structural adequacy; and

(e) that the home is free of major structural defects.

.....

19. Every vendor of a new home warrants to the owner that where the vendor makes a substitution with respect to an item that is referred to in the purchase agreement that is not an item that is to be selected by the purchaser, the item will be of equal or better quality than the item referred to in the purchase agreement.

APPLICATION OF LAW TO FACTS:

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

Where the purchase of a home is completed, as in the Applicants' matter now before the Tribunal, the Tribunal's jurisdiction to order a remedy for the Applicants is limited to a remedy available for a breach of a warranty provide under the Act (see the *Gourlay* case above).

Under the Act, payment out of the fund is provided under section 14(1)(b) where the owner has a cause of action against a vendor for damages resulting from a breach of warranty and section 14(1) (c) where the owner suffers damage because of a major structural defect as defined in the regulations.

The Applicant has two claims:

1. the placement of the furnace and the hot water heater on the ground floor; and
2. the absence of a full length closet off the entrance foyer.

Mr. Gallo indicated in his communications with the Program that he expected compensation for the two claims now before the Tribunal primarily because he had obtained judgment against the builder, which he could not recover from the builder. That Judgment indicated that the Applicants had a remedy against the builder in the courts; however, for the Applicants to

have a remedy before this Tribunal, the Applicants must establish their entitlement under the *Ontario New Home Warranties Plan Act*. The Tribunal can consider the Applicants' claims only on that basis, and the Tribunal's analysis of the application of the Act and Regulation 892 to the Applicants' claims follows.

1. Placement of the furnace and hot water heater

Was the builder's placement of the furnace and hot water heater a breach of warranty under the Act and Regulation?

Construction in a workmanlike manner

Section 13(1)(a)(i) of the Act provides that the vendor warrants to the owner that the home is constructed in a workmanlike manner and is free from defects in material.

The Applicants conceded that the furnace and hot water heater had to be located in a different place in the basement than the place designated in the floor plan contained in Schedule "D" to the Agreement of Purchase and Sale.

The Tribunal appreciates that the Applicants wanted this relocation to be to a different location than that selected by the builder and that the Applicants believed that the builder proceeded without due regard to the Applicants' wishes. However, The Applicants provided the Tribunal with no evidence that the builder's relocation was not done in a workmanlike manner. Indeed, the Applicants removed the evidence of the builder's work by renovating the ground floor on taking possession of the property.

The Tribunal therefore does not find that the builder's relocation of the furnace and hot water heater was a breach of the warranty under the Act to construct the home in a workmanlike manner.

Not fit for habitation

The Applicants argued that the relocation of the furnace and hot water heater was a breach of the warranty under section 13(1)(ii) "that the home,...(ii) is fit for habitation".

The evidence of Mr. Gallo is that the Applicants could have moved into the home immediately on taking possession but instead chose to have their contractor renovate the ground floor (basement level). He stated that the move into the home was delayed so that the Applicants would not be subject to the noise and dust of their contractor's work.

The builder's relocation not affecting the ability of the Applicants to occupy the home, the Tribunal finds that builder did not breach the warranty that the home is fit for habitation.

Major structural defect

The Applicants, through Mr. Gallo, stated that the builder's relocation resulted in a major structural defect by significantly reducing the size of the ground floor's finished room and thereby limiting the Applicants' use of the room.

The Applicants relied upon the warranty under section 14(1)(c) that the home is free of major structural defects. Regulation 892 defines "major structural defect. The Applicants argued that the definition applied to the builder's placement of the furnace and hot water heater. Regulation 892 defines major structural defect for the purposes of clause 13(1)(b) of the Act as "any defect in work or materials, ..(b) that materially and adversely affects the use of such building for the purposes for which it was intended...".

For this definition to apply to the Applicants' complaint, the Applicants must establish the initial requirement that the subject matter of the complaint is "any defect in work or materials". However, the subject matter of the Applicants' complaint is the builder's relocation of the furnace and hot water heater to a particular site with which they disagreed. This is not "any defect in work or materials". Accordingly, the Applicants' complaint is not covered by the warranty respecting a major structural defect under the Act.

Even were the builder's relocation of the furnace and hot water heater interpreted as a defect in work, which is not the Tribunal's interpretation, the Tribunal finds that the relocation of the furnace and hot water heater on the ground floor was not work that "materially and adversely affects the use of such building for the purpose for which it was intended." Certainly, the builder's relocation of this equipment was not what the Applicants expected under the APS, and the relocation inconvenienced the Applicants by reducing the size of the finished room. Nonetheless, the reduced finished room could be used as a finished room and the building could be used as a home.

The Tribunal finds that the Applicants have not established that builder's relocation was a defect in work or materials or that the builder's relocation materially and adversely affected the use of the building for the purposes for which it was intended. Accordingly, the builder's relocation of the furnace and hot water heater was not a major structural defect under the Act.

Not a substitution of an item for equal or better quality

Section 19 of Regulation 892 provides that "where the vendor makes a substitution with respect to an item....the item will be of equal or better quality than the item referred to in the purchase agreement".

The Applicants stated that the builder's relocation of the furnace and hot water heater was a substitution under section 19 of Regulation 892 and was a substitution that was not of equal or better quality.

The Applicants agreed that relocation of the furnace and hot water heater was needed to comply with the Ontario Building Code and that the relocation of this equipment was permitted under the APS as a necessary modification of the home's plan. The Applicants also agree that there was no change in the furnace and hot water heater. Their complaint is that the site of this equipment set out in the APS was changed and that such change breached the warranty under section 19 of Regulation 892. Section 19 of Regulation 892 states:

19. Every vendor of a new home warrants to the owner that where the vendor makes a substitution with respect to an item that is referred to in the purchase agreement that is not to be selected by the purchaser, the item will be of equal or better quality than the item referred to in the purchase agreement.

The Applicants argued that the "item" in the purchase agreement was the specific location set out in the APS for the furnace and hot water heater. When the vendor changed that location, the vendor made a substitution of that item, which required compliance with section 19 of Regulation 892. The Applicants argued the builder's relocation was not of equal or better quality than the location referred to in the APS and is a breach of the warranty set out in section 19 of Regulation 892.

The Tribunal interprets section 19 to refer to physical items, not their locations. The section refers to a substitution of an item and requires that where there is a substitution, "the item will be of equal or better quality". The use of the term "item" and the requirement that it possess "equal or better quality" implies a material thing rather than its location. The location of the furnace and hot water heater not being a material thing, the change of the location is not within the warranty set out in section 19 of Regulation 892.

Even if section 19 were interpreted to mean that a location is an item, which is not the Tribunal's interpretation, and applied to the location of the furnace and hot water heater, the Applicants conceded that a relocation had to occur. They agreed that the original location set out in the APS was contrary to the Building Code and would prevent the proper operation of the equipment. It was necessary for the builder to relocate the equipment, and the builder's relocation resulted in compliance with the Ontario Building Code and enhanced the operation of the equipment. The builder's change of location was a change resulting in a location of better quality than that originally set out in the APS. Accordingly, the substitution of location met the requirements of section 19 of Regulation 892 that the substitution be of "equal or better quality".

On the evidence before it, the Tribunal finds that the relocation of the furnace and hot water heater was not a substitution under section 19 of the Regulation and not a breach of that warranty under the Act.

Proof of Damages

The Program also argued that even if the Applicants were able to establish one of the above areas of warranty coverage under the Act, the Applicants did not provide the Tribunal with evidence that they have suffered damages as a result of the builder's relocation of the furnace and hot water heater. The builder's relocation was to a different area than that wished by the Applicants. However, the Applicants' relocation would have eliminated the ground floor (basement level) washroom. The evidence of Mr. Gallo was that the realtor, Linda Emerson, said an estimate was very difficult, but that eliminating the washroom could result in the home's value being diminished by \$5,000.00. This supports the builder's relocation decision.

The Applicants, through Mr. Gallo, testified that they expended money in renovating the ground floor upon taking possession of the home. He provided no corroboration of his statements except indirectly through reference to a Judgment of the Court against the builder, which contains no details respecting the items now before this Tribunal. Mr. Gallo testified that his direct costs respecting the relocation of the furnace and hot water heater were \$2,300.00 to move the furnace and hot water heater, \$1,100.00, for the building contractor, and \$1,800.00 for carpeting. Counsel for the Program or the Added Party did not press Mr. Gallo's statement on these figures, and the Tribunal accepts these figures as accurate. However, as stated above, the relocation of the furnace and hot water heater is not valid a warranty claim under the Act, and the Applicants may not recover these expenses under the Act.

Mitigation of damages

The Program also argued that in any event the Applicants should not recover under the Act because they had not mitigated their damages by giving the Program an opportunity to perform any remedial work found to be warranted under the Act.

The Applicants' renovations were done without notice to the Program and before the Program had issued a decision letter on the Applicants' complaint. Mr. Gallo expressed his concern that the Program was moving too slowly in resolving his concerns. He also expressed the opinion that a verbal conversation he had with Ms. Kruse of the Program prior to the Applicants' putting their claims to the Program in writing gave him the impression that the Program would not consider his claims as warranted. He decided to proceed without involving the Program, which he did by suing the builder and by immediately renovating the ground floor of the home upon taking possession. The Applicants' renovations provided the Program with no opportunity to do the work claimed by the Applicants as warranted with respect to the relocation of the furnace and hot water heater.

The Act provides the Program with an opportunity to remedy a warranty claim, and the Program would do this at no cost to the Applicants. Under section 14(3) of the Act, the Program has a right to “perform or arrange for the performance of any work in lieu of or in mitigation of damages claimed under subsection (1).” In some cases it may not be reasonable for Applicants to delay doing remedial work because delay will result in further damage to their home, such as, the interior of the home being open to rain. However, the Applicants’ complaint in the matter before the Tribunal is not that type, and the Program is entitled to rely on section 14(3) of the Act.

The Applicants immediately started renovations to the ground floor when they took possession of the home. This prevented the Program from exercising its right to arrange for the performance of any work in lieu of or in mitigation of the damages claimed by the Applicants, contrary to section 14(3) of the Act. Had the Tribunal found that the Applicants were entitled to their claim under the Act respecting relocation of the furnace and hot water heater, the Applicants’ renovation would have relieved the Program of its duty to satisfy the Applicants’ claim under the Act.

2. Foyer closet

Construction in a workmanlike manner

The Applicants argued that the construction of the foyer closet was a breach of warranty under the Act in that it was not constructed in a workmanlike manner, as required under section 13(1)(a) of the Act.

The Applicants did not object to the quality of the construction of the foyer closet. They objected that it was too small to take full-length coats. Certainly, the closet was not as large as the Applicants expected. The Tribunal has no difficulty understanding the concerns of the Applicants’ disappointment that the foyer closet was too small to accommodate full-length coats. However, the size of the closet is not a warranted matter unless it was not constructed in a workmanlike manner. There is no evidence that space for a full-length closet was available but ignored. The evidence is that the closet was built to fully occupy the space that was available to it, taking into account the height of the garage below the closet’s recessed area. There is no evidence of a defect in work or materials in the closet’s construction. Accordingly, the Tribunal finds no breach of the warranty under section 13(1)(a) the Act requiring that the foyer closet be constructed in a workmanlike manner.

Proof of Damages

There being no breach of warranty under the Act with respect to the foyer closet, it is not necessary to deal with the Program’s argument that the Applicants have shown no proof of damages resulting from the construction of the foyer closet. The Applicants felt there was a reduction in their home’s value because the closet was not full-length. There is no evidence

that the home's value was depreciated by the construction of the foyer closet. The Applicants' Judgment against the builder does not provide information on this particular point. Also, Mr. Gallo testified that the realtor he consulted said she was uncertain whether or not the height of the foyer closet changed the value of the home. Mr. Gallo provided no such evaluation to the Tribunal, and from this the Tribunal has drawn the inference that there is no difference in the value of the home based on the height of the foyer closet.

DECISION:

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

LICENCE APPEAL TRIBUNAL

Kent McClure, Chair

Victor Drevnig, Vice-Chair

RELEASED: January 31, 2002

BRIDLE LANE HOMES INC.
CASTLEMARK DEVELOPMENT INC.
FAIRMOUNT HOMES LTD.
SIPER CONSTRUCTION LIMITED

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

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: WILLIAM MCINTOSH, Vice-Chair

APPEARANCES:

BRIAN CAMPBELL, Counsel for Bridle Lane Homes Inc.,
Castlemark Development Inc., and Fairmount Homes Ltd., Applicants
JOSEPH BLOOMENFELD, Counsel for Siper Construction Limited,
Applicant
CAROL STREET, Counsel for the Registrar, Ontario New Home
Warranty Program, Respondent

DATES OF HEARING: January 22 and 24, 2001, February 12-16, 2001, February 28, 2001,
March 1, 2001, April 2-5, 2001, May 16-17, 2001, January 25, 2002

REASONS FOR DECISION AND ORDER

BACKGROUND:

This hearing arises from Notices of Proposal to refuse to renew registrations sent by the Registrar under the *Ontario New Home Warranties Plan Act* (the “Registrar” and “Act” respectively) to the Applicant, Bridle Lane Homes Inc. (“Bridle Lane”) dated June 27, 2000, and to the Applicant, Castlemark Development Inc. (“Castlemark”) dated June 28, 2000, and to the Applicant, Siper Construction Limited (“Siper”) dated August 10, 2000, and to the Applicant, Fairmount Homes Ltd. (“Fairmount”) dated December 20, 2000. In addition to these original Notices, the Registrar sent Supplemental Notices of Proposal dated January 31, 2001 to each of the Applicants. The Notices of Proposal and Supplemental Notices of Proposal are hereinafter referred to as the “Proposals”.

The Registrar issued the Proposals pursuant to section 8(2) of the *Ontario New Home Warranties Plan Act* R.S.O. 1990 Chapter O.31 (the “Act”).

The Applicants each filed Notices of Appeal pursuant to section 9(2) of the Act.

By Order dated January 26, 2001, the Tribunal ordered the Appeals to be heard together.

In her opening statement, counsel for the Registrar pointed out that while the hearing involved the entitlement to registration under the Act of the named Applicants, that entitlement was in large part dependent upon evidence of the past behavior of LaGuardia Construction Ltd. ("LaGuardia"). The rationale was that LaGuardia has officers and directors common to the named Applicants, and Section 7 of the Act mandates the Registrar to review the "past conduct" of those persons in coming to his determination as to the appropriateness of continued registration. Also, by a Settlement dated December 13, 1999 (the "LaGuardia settlement"), LaGuardia agreed not to seek renewal of its registration and the Registrar withdrew his Notice of Proposal against LaGuardia while retaining the right to rely upon the "claims history and any facts with respect to LaGuardia" in assessing the right to registration of related companies.

In response, counsel for the Applicants took the position that the record of LaGuardia is irrelevant to proceedings now before the Tribunal. Counsel for the Applicants argued that it was a misuse of the Tribunal's jurisdiction to impose a judgment upon the four Applicants now before the Tribunal on the basis of the actions of a separate corporate entity. They argued that LaGuardia's obligations to the Registrar should be resolved on the basis of the agreements and guarantees between LaGuardia and the Registrar and not be used as a vehicle for policing other registrants simply on the basis of interlocking directorships.

In reply, counsel for the Registrar argued that the Registrar's position with respect to the Applicants should be affected by such facts. Indeed, it is the responsibility of the Registrar to look into activities of officers and directors of registrants for it has long been recognized that such past activities are the best guide to their ongoing suitability as home builders. Additionally, it was argued that the principal purpose of the Act is consumer protection and any suggestion that the sanctity of the corporate veil should take precedence is ill founded. Otherwise, as a practical matter, builders would be allowed to "walk away" from projects, form a new company, re-register under that new name and escape liability.

LAGUARDIA:

Ms. Vassallo, an employee of the Program, testified on behalf of the Registrar. She testified that LaGuardia was first registered with the Ontario New Home Warranty Program in August of 1986. Listed as the company's principals were Frank Sinopoli, Angelo Gentile, and Romolo Doria. The usual Vendor/Builder Agreements and a Contract of Guarantee were filed. As outlined below, the Registrar entered into these agreements pursuant to the regulations as a method of assuring compliance with Act and the guarantee was to save harmless the Registrar for any amounts paid from the guarantee fund due to breaches of warranty. All three of the LaGuardia's principals were bound and have never been released from their obligations, with the exception of Mr. Doria who died and whose place was taken by his wife in 1997.

LaGuardia renewed its registration under the Act without incident through the following years. The financial statements to 1995 reveal a company in good health. Commencing in 1995, as

shown on that year's application for registration, LaGuardia began construction of 4 homes in Tecumseh and continued in 1996 with an additional 35. These are the only years LaGuardia indicated for construction outside of Richmond Hill.

In 1996, the Registrar's underwriting department wrote Mr. Gentile at LaGuardia indicating that the required financial statements had not been received. He was told that to proceed with the renewal of registration, these financial statements would have to be reviewed along with the statements of net worth underpinning the guarantees. Also, a creditworthiness assessment was carried out on LaGuardia. That assessment revealed there was not sufficient underlying security for the homes being built. The assets of the guarantors as set forth in the statements of net worth support the guarantees. Insufficient assets requires a builder to post a security deposit with the Program on the issuance of each building certificate to safeguard the fund against the increased risk of warranty claims. The security deposit (usually \$5,000 per new unit) is returned to the builder upon expiry of the warranty in the absence of any warranty claim. A rolling account is thereby established with the Program. Security deposits are received upon enrolment of units and redeemed upon their completion.

The failure of LaGuardia to provide financial information required under the Act resulted in further risk assessments being carried out, one in April and one in May of 1998. The result, based mainly on the diminishing value of the net worth behind the various guarantors of the company, was a risk assessment requiring the imposition of a \$5,000.00 security deposit for each new home. Concerns were expressed to Mr. Gentile in a letter of May 8, 1998. Those concerns were:

- insufficient equity to cover total units under risk,
- an unfavorable credit rating from a rating agency,
- an increase in the number of homes being built,
- previous claim history, and
- below average after sales history commencing in 1997.

LaGuardia was asked for security deposits in the amount of \$120,000.00 to be received by May 22, 1998 for 24 enrolments. In cross-examination, this figure was admitted to be overstated, the correct figure being \$95,000.00. These concerns with LaGuardia were never solved to the satisfaction of the Program. Later, resolution of these LaGuardia problems was put on the Applicant Fairmount in a letter of January 29, 1999 as a condition of that company's continued registration. These conditions were agreed to by Angelo Gentile, Frank Sinopoli, Dominic Sinopoli and Mrs. Doria.

As nothing satisfactory transpired, a Notice of Proposal of June 12, 1998 was served on LaGuardia. A Supplementary Notice was issued October 21, 1998 adding grounds for failure to comply with conciliation reports and failure to diligently perform the tasks required under the Vendor/Builder agreement, being a breach of subsection 3 of Regulation 894. A further Supplementary Notice was issued January 8, 1999. Still another Supplementary Notice was issued on February 11, 1999 adding grounds of lack of technical proficiency.

The Tribunal was given a corporate history of the Applicants and there interrelationships as follows:

BRIDLE LANE:

Bridle Lane was first registered under the Act on August 10, 1994. The Application required a listing of persons with ownership interests in the company. The three principals were:

Frank Sinopoli
Angelo Gentile
Romolo Doria

The required Guarantee was filed September 14, 1994 listing as guarantors:

Frank Sinopoli
Angelo Gentile
Romolo Doria

The Vendor/Builder Agreement, required by the Regulation, was filed August 18, 1994. It was signed by Angelo Gentile, President, and Romolo Doria, Vice-President. A guarantee for Bridle Lane was executed by LaGuardia Construction and signed by Angelo Gentile. As well, a guarantee was signed by all three principals.

Registration was renewed in 1995 showing Angelo Gentile as President. Registration was renewed in 1996 showing Angelo Gentile as President. In the places on that Application form for indicating enclosure of financial statements, there is the notation, "July 3 in progress" and for Statements of Net Worth, "to follow if requested". Registration was renewed in 1997 showing Angelo Gentile as President. Marked as enclosed were the 1995 financial statements and statements of Personal Net Worth. Registration was renewed in 1998 showing Angelo Gentile as President.

In May, 1998, the Registrar carried out a risk assessment. This assessment was carried out with the three principals personally and LaGuardia as guarantors. The equity underlying the guarantee of LaGuardia was discounted to zero for being outdated. The result was an underlying "investment per unit" of \$11,857.00 or a "financial score" of 15. The financial score combined with other criteria resulted in a "total score" of 59. This score is an "average risk" and resulted in a requirement of \$5,000.00 per unit as security. This information was communicated to Bridle Lane by letter of July 2, 1998. There followed a letter of July 15, 1998 demanding security of \$5,000.00 for each of 7 homes. As there was no satisfactory answer to these demands, a Notice of Proposal was issued dated July 24, 1998. As pointed out by Ms. Vassallo, the underwriting witness employed by the Program, the real negative in the risk assessment of Bridle Lane was the underlying financial fragility of one of the guarantors, LaGuardia. As of the summer of 1998, there was in reserve at the Program \$11,000 against claims and 15 chargeable conciliations for 286 enrollments.

The Registrar by letter of February 12, 1999 agreed to allow the 1998 registration of Bridle Lane to continue on certain conditions. These included provision of updated financials and net worth statements along with the security deposits required for new and existing homes in the Windsor area.

These events also gave rise to a new risk assessment dated February 2, 1999. As all net worth statements save that of Ms. Doria were outdated and therefore discounted for underwriting purposes to nil, the ratio of underlying assets to units of construction was \$9,913. This resulted in a score of 10 on the financial side of the assessment requiring a security deposit of \$5,000 per unit. The \$35,000 security demanded by the Respondent was received and the Registrar withdrew the Proposal of July 1998. The effect was that Bridle Lane was back in good standing on March 5, 1999.

As 1999 continued, however, Bridle Lane was not enrolling new houses with the Program upon the issuance of the building certificates. Nor was the Program receiving timely financial statements. The scheme whereby security for each new home would be posted upon receipt of security refunds from closings was bypassed. The Program took the position that it was not going to chase Bridle Lane for outstanding security and would instead reinstate the requirement for \$5,000 per house upon enrollment. The record shows that the last security was received by the Program on April 4, 1999. After this date, homes were being enrolled without posting security of approximately \$50,000. The Program's informal arrangement to allow the continued registration of Bridle Lane was terminated.

In January of 2000, the Program carried out a new assessment. The result of this assessment was another "below average" rating and a further requirement to post \$5,000 as security for each new unit.

Beyond this assessment, a more in depth review was carried out as to the credit worthiness of Bridle Lane. By letter dated March 2, 2000 addressed to Angelo Gentile, Bridle Lane was informed that the further investigation revealed Statements of Claim outstanding of almost \$400,000 and details were requested as to any settlements of these outstanding claims before an assessment as to ongoing registration could be undertaken.

It was the position of Bridle Lane's counsel that such credit information, gathered from a credit-reporting agency, was an inappropriate use of the Program's mandate and jurisdiction. The Program was not party to the lawsuits and there was no way of assessing the validity of the claims. Including such inchoate amounts within the financial risk assessment may overstate the actual indebtedness of Bridle Lane and understate the value of the net worth of the guarantors. As such, counsel for the Applicant argued, including this information as grounds for revocation in the January, 2001 Notice of Proposal should be deemed invalid.

The Registrar took the position that the letter of March 2, 2000 requested an explanation from Mr. Gentile, as the controlling mind of Bridle Lane, and from the other Applicants regarding these claims against the company was a request for information perfectly within the purview of

the Program in assessing the financial ability of a company to build homes with minimum risk to the homebuyer.

As to Bridle Lane's financial stability and forthrightness with the Program, the Registrar argued that there was evidence showing that Bridle Lane commenced home construction without the payment of the prescribed fee as required by Section 12 of the Act. Counsel for Bridle Lane, Castlemark, and Fairmount took the position that this was inappropriate as evidence of underlying financial instability. They also argued that any shortcomings of Bridle Lane should not serve as evidence as to the financial circumstances of Castlemark and Fairmount solely on the basis that the companies have common officers and directors. Against this, the Registrar argued that it is possible to judge the past actions of a company through its officers and directors as they are directing minds common to all of the Applicants. If the financial constraints through obligation or otherwise upon a related company were having an adverse effect upon another related company, then the protection of the public is affected.

The end result was the Notice of Proposal of June 17, 2000 and the Supplementary Notice of January 31, 2001, both stating the Registrar's position that registration of Bridle Lane under the Act should not be renewed.

The grounds relied upon by the Registrar to sustain its position under Section 7(1)(c)(i) of the Act included:

- failure to provide financial statements necessary to enable the Program to assess the financial viability of the company
- failure to provide evidence that the company had satisfactorily dealt with the claims against it, giving the Registrar reasonable concerns about the financial well being of the company, and
- failure to complete Agreements of Purchase and Sale.

Further, under Section 8(2) the Registrar alleged breaches of terms and conditions of registration, including:

- failure to enroll homes,
- failure to provide necessary corporate documents,
- failing to fulfill warranty obligations to homebuyers and failure to offer adequate explanations for not doing so,
- failure to indemnify and save harmless the Program under the Vendor Builder Agreement for losses incurred,
- high ratio of chargeable conciliations to possessions indicating poor after sales service, and
- failure to provide required security for new home starts.

In addition, pursuant to section 7(1)(c)(i) and (ii) the Registrar found that the past behaviour of Mr. Gentile, Mr. Sinpoli and Josephine Doria as officers, directors and guarantors of not only Bridle Lane but also the related companies Castlemark and LaGuardia afforded reasonable

grounds for belief that Bridle Lane would not be financially responsible or carry on business with honesty and integrity. As grounds for this assertion, the Supplementary Notice listed under LaGuardia 39 chargeable conciliations for 43 enrolments and under Bridle Lane 27 chargeable conciliations in 43 enrolments.

CASTLEMARK:

The original application for registration by Castlemark was in June 1997 as a limited company. The contact person was listed as Angelo Gentile. The sole director and principal was also Mr. Gentile. The registration form also included the association Mr. Gentile had with LaGuardia. Eighteen units of construction were listed as the year's schedule. No financial statements were furnished with this initial application. The Vendor/Builder agreements and Guarantee were filed. No security deposits were required to be posted as, according to the witness for the Program, the associated companies at the time had favourable ratings and allowed a waiver of this requirement.

In 1998, Castlemark applied for a renewal of its registration. The application had a schedule which listed the construction of 20 homes in the Tecumseh area. No financials were provided. As stated, financial statements for the company and net worth statements of the guarantors are annual requirements for continued registration. It soon became apparent that security would be required as the situation of the related company LaGuardia was deteriorating, thereby causing the underlying assets of Mr. Gentile to decrease in the Program's risk assessment. No financial statements were received although a letter requesting them was sent September 16, 1998. Risk assessments were carried out in October 1998 and in January 1999 which resulted in a letter of January 28, 1999 advising Castlemark, through Mr. Gentile, that security of \$5,000 would be required for each new enrolment.

In July 1999, Castlemark sought a renewal of registration. Its application stated that 37 homes being constructed had been sold. Mr. Gentile was the sole principal. A guarantee with the unwitnessed signature of a Mr. Lap Hin Hui accompanied the application. No net worth statement was produced. While possibly too early in the history of Castlemark for there to be sufficient chargeable conciliations against units to warrant \$5,000 security being imposed for every enrolment, in the opinion of the Program there were sufficient defects in related companies to require this of Castlemark as a term of its continued registration under the Act.

As a result of the foregoing, a Notice of Proposal was issued June 28, 2000 which listed as the grounds for refusing renewal of registration:

- refusal to submit financial statements as required,
- failure to replace an NSF cheque for enrolment fee indicating lack of financial stability,
- failure to supply underlying financial worth behind guarantees,
- the past conduct of Mr. Gentile, a guarantor and sole officer and director of Castlemark and a principal of Bridle Lane, a related company which had a record of breaches of warranty made good by the Program's guarantee fund and for which Bridle Lane has been invoiced and defaulted,

- the breaches of Bridle Lane in failing to enroll homes without paying the required fee, and
- the failure of Bridle Lane to satisfy outstanding debts.

On January 31, 2001, the Registrar issued a Supplementary Notice repeating the material complaints against Mr. Gentile save for the NSF cheque for \$5,000, which was apparently made good, and adding as grounds the past conduct of LaGuardia, a related company of which Mr. Gentile was also an officer and director. As well, the Registrar alleged poor after sales performance citing three chargeable conciliations in 35 starts, which is above the 1 in 25 ratio required to maintain the Program's "excellent" rating and to avoid the requirement to post security. The principal grounds behind the Registrar's refusal to renew Castlemark's registration is the record Mr. Gentile developed within the industry due to shortcomings of companies with which he has been involved as an officer and director.

Counsel for the parties agreed as to the breaches of warranty of the related companies LaGuardia and Bridle Lane. Accordingly, evidence was led as to warranty problems specific to Castlemark. In the Supplemental Notice served on Castlemark, there are 3 chargeable conciliations listed against the company. As well, during the hearing two additional claims were brought forth without objection.

The first witness to give evidence respecting the Castlemark record was Mr. Hanas, an Operations Manager from the Program. He spoke to two claims specific to Castlemark. Both claims were for return of deposit due to non-completion by the closing date. The amounts were \$20,000 in each case. In both instances Castlemark exercised its right to extend the closing date up to 120 days. In neither case was a new closing date specified. Both claims were determined to be valid and were paid by the Program. At the hearing there was no testimony from the Applicants regarding the ability to pay these claims. There was cross-examination on the process undertaken by the Program in determining the claims to be valid. The Tribunal did not find the cross-examination diminished Mr. Hanas' evidence, and accepts Mr. Hanas' evidence in its entirety.

The second witness to speak to the Castlemark record was another warranty representative, Mr. Blanchard. Mr. Blanchard testified in detail respecting Castlemark's warrantable claims which, in the main, remain outstanding. It is not necessary for the purposes of this decision to parse out each of those details. The evidence showed there were untoward delays by Castlemark in rectifying complaints.

There was testimony from Mr. De Felice an employee of Castlemark, who testified as to the difficulties encountered with the homes in the Windsor area. He was not familiar with the specifics of most of the complaints dealt in the testimony of Mr. Blanchard, however he was able to speak to the general problems the Applicant had in the Windsor area.

Mr. De Felice, admitted there were delays in answering some complaints. He was not personally involved to the point of knowing the company's record of chargeable conciliations to enrolments. He stated that a large part of the difficulty an "out of town" contractor can have is

the lack of an established record with the local tradesmen. Should liens or even rumours of liens begin to appear, the local trades are chary of committing to work to clean up warrantable claims. This situation can soon result in a builder being unable to complete work in a timely manner. He testified that in the Southern Ontario market there is an "invisible barrier" at London which a Toronto builder crosses at its peril. He also spoke of the differences in completion times of projects done with Windsor or "local" trades and those done with Toronto trades. As an example, he compared what a Toronto bricklayer could do in two days to that which takes one week by one hired locally. As well, he told of the difficulty with freeing up ongoing financing with so much as one lien being registered. A \$500.00 lien could hold up a \$10,000 advance. Finally, he testified that in the Windsor area there is the lure of Detroit and payment in American currency. For all of these reasons, he concluded that Castlemark's experience in Windsor appeared to put it into the same difficulties as experienced by LaGuardia and Bridle Lane.

Mr. Gentile did not testify.

FAIRMOUNT:

A Notice of Proposal to refuse the renewal of registration of Fairmount was issued December 20, 2000. The Program's grounds were the refusal to provide financial information and the past conduct of Mr. Gentile, Mr. Sinopoli and Mr. Doria as officers and directors of companies related to Fairmount. The Registrar alleged that such conduct was sufficient to render Fairmount a future unacceptable risk to consumers of new homes. The Notice of Proposal listed allegations of numerous defaults by LaGuardia, Bridle Lane and Castlemark.

A Supplementary Notice was issued January 31, 2001. The Supplementary Notice added to the past record of Bridle Lane, LaGuardia, Castlemark and Siper. As stated, the records of Bridle Lane and LaGuardia were not challenged at this hearing, and the remaining issue for argument was how those records should affect the ongoing registrations of Fairmount.

Fairmount was incorporated in January 1989 and first registered under the Act in 1989. The application for registration shows Dominic Sinopoli as the contact person and President. The corporate record shows the original Officers and Directors as Angelo Gentile, Romolo Doria (replaced after his death by his wife Josephine), Frank Sinopoli, Tony Sinopoli and Frank Fulciniti. The required Guarantee and Vendor/Builder Agreements were duly executed and filed.

The last financial documentation was the 1998 unaudited Financial Report.

Up until 1999, Fairmount was itself an "excellent" rated company requiring no posting of security for new homes.

Due to the financial difficulties that were surfacing in LaGuardia and Bridle Lane, the Program imposed a \$5,000 security requirement upon Fairmount. A notice was sent requiring security for three homes. In order to preserve Fairmount's registration, an arrangement was reached

between Dominic Sinopoli and the Program. That arrangement was reduced to writing by letter dated January 29, 1999 to Mr. Sinopoli outlining terms and conditions that were being imposed upon Fairmount. These were:

- that “the construction performance problems of a related company La Guardia are resolved to our satisfaction as soon as possible”;
- payment of the \$15,000 owing; and
- agreement to provide \$5,000 security for each new enrolment.

These terms were acknowledged by the signatures of Frank Sinopoli, Dominic Sinopoli, Angelo Gentile, and Josephine Doria.

By a letter dated February 25, 1999 to the Program, counsel for the Applicants proposed that security being held in respect of Bridle Lane and Fairmount of some \$50,000 be blanket security for the purposes of clearing up LaGuardia’s obligations. The pledge of assets by the related corporations was an attempt to solve the burden La Guardia was placing upon the others.

There was no satisfactory resolution to the ongoing difficulties, and Fairmount’s registration for 2000 became subject to the Notice of Proposal and the Supplementary Notice.

It was the position of counsel for Fairmount that there was no “logic” in canceling the registration of a company with an excellent record on the basis of the activities of another corporate registrant, regardless of the commonality of principals between them.

It was the position of counsel for the Program that the whole scheme of the Act is to allow the Registrar to make predictive assessments to prevent Fairmount becoming like the related companies, a predictable outcome based upon the evidence of the past record of the common principals.

SIPER:

Siper was first registered in 1984 with Frank Sinopoli, Elizabeth Sinopoli, and Vito Sinopoli as officers and directors, and Frank Sinopoli as President. Both Frank and Elizabeth Sinopoli appear as guarantors on the Guarantee. The Vendor/Builder Agreement dated February 9, 1984 is signed by Elizabeth Sinopoli.

Siper’s failure to enroll a home under section 12 of the Act was established through a certified copy of the offence and evidence of breaches of warranty.

There was evidence of an attempted resignation of Mr. Sinopoli from Bridle Lane to release his personal responsibility for that company. However, there was not proper documentation before the Tribunal nor explanation as to how a unilateral withdrawal from a contractual guarantee could possibly relieve the withdrawing party from his obligations under the guarantee.

Mr. Sinopoli did not testify.

Approximately halfway through this hearing, counsel submitted an agreement to shorten the hearing. By that agreement, it was not necessary that the Registrar prove the breaches of warranty against Bridle Lane and LaGuardia. As a result, counsel representing the Applicants Bridle Lane, Fairmount and Castlemark addressed in argument only the evidence regarding the latter two. Siper, being separately represented, had its counsel speak on its behalf.

The Registrar added two additional claims as grounds for his proposal. These were deposit claims. It was noted that the agreement between the Registrar and LaGuardia, set out in Exhibit 19, preserved the Registrar's right to:

“consider and rely upon LaGuadia's registration and claims history, and apply any facts with respect to LaGuardia, in assessing the right to, or any terms and condition of, new applications for registration, or applications for renewal of registration of any currently or previously related applicants or registrants.”

The Rating System:

The evidence shows that the Registrar analyses the operations of each registrant in order to determine whether an amount in the form of a security should be levied against the registrant as a contingency against future after sales warranty problems. The amount of security required varies according to the type of new home being constructed and the number of points assessed against the builder on the basis of a formula. The analysis results in a risk assessment. The amount of security can vary but cannot exceed \$10,000 per unit. The security is kept for the one-year warranty period from the date of possession, with a discretion in the Program to release it back to the builder earlier.

The basis of these risk assessments was set out in the Program's Builder Bulletin 28, effective November 15 1995. The following criteria applied in the formulation of the assessment:

- Size: the average number of possessions per year, including associated companies;
- Tenure: the number of consecutive years of registration including associated companies;
- Business and Technical skills: essentially the level of after sales performance (the figure 1 in 25 homes problem free rates an “excellent” rating); and
- Financial Information: a review of financial statements, credit rating and payment history.

These criteria are each assigned a point total.

The Program does not require securities for builders with “excellent” after sales records. However, if a registrant's risk assessment falls below a rating of 1 “chargeable conciliation” to each 25 homes built, payment of a security deposit is imposed. The amount of security

deposit is required to be submitted to the Program prior to the enrolment of a home for construction. After a registered builder receives a municipality's permission to commence construction of a home, that builder must put that home under the warranty protection of the Act. The builder does so by the process referred to as enrolment. As enrolment is a precondition to the commencement of construction, the payment of the security becomes a precondition to continued registration as a builder.

The security deposits are kept against future warranty problems and are released back to the registrant after the expiry of the one year warranty period under the Act. These payments and refunds become, in effect, a rolling account.

The required statements of net worth assure an underlying equity in the builder for the units being constructed. If an individual is a principal in more than one company, his net worth is measured against all of the companies with which he is involved; that is, his net worth is diluted. Also, if there are unsupported statements of assets, their value is discounted to zero. For example, if a real estate holding is listed as \$250,000 in value but is not supported by a valuation, the measurable worth for the purpose of assessment is nothing. On the basis of the Program's communications to applicants and registrants, registrants are, or should be, aware of these facts.

The net worth is divided by the number of units built by of the registrant and a ratio arrived at. For example in assessing the worth of Mr. Gentile's assets underlying the units of LaGuardia, that worth would be discounted by the extent of the number of assets in Bridle Lane being underwritten by those same assets. If the resulting ratio falls below a certain figure, the registrant can be called upon to provide security per unit, as a safeguard against warranty claims being filed with the Program.

The Tribunal did not hear evidence that impugned the appropriateness of the rating system.

ISSUES:

The Issue before this Tribunal is whether the Registrar erred in his decision not to renew the registration of the Applicants under the Act.

THE LAW:

Pursuant to section 8 of the Act, the Registrar may refuse to register or renew the registration of an applicant as a vendor or a builder for any reason that would disentitle the applicant to registration under section 7(1)(c) of the Act:

"8(1) Subject to section 9, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 7."

(2) Subject to section 9, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 7, if the registrant were a an applicant, or where the registrant has a record of breaches of warranties or a failure or unwillingness to complete performance of contracts or is in breach of a term or condition of the registration.

Pursuant to section 7(1)(c) of the Act, an applicant is entitled to registration by the Registrar except where having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its undertakings, or the past conduct of its officers or directors affords reasonable grounds for belief that its undertakings will not be carried on lawfully, honestly and with integrity:

- "7. (1) An applicant is entitled to registration by the Registrar except where,
- (a) ...;
 - (b) ...;
 - (c) the applicant is a corporation and,
 - (i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its undertakings, or
 - (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its undertakings will not be carried on in accordance with law and with integrity and honesty;"

Section 7(2) sets forth the terms and conditions of registration.

7(2) A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant or imposed by the Tribunal or prescribed by the regulations.

The terms and conditions to which a registration is subject by 7(2) and upon which the Registrar is empowered to act by section 8(2) are laid out in section 1 of Regulation 894. The enumerated paragraphs in section 1 of Regulation 894 relevant to the present case are as follows:

3. The registrant shall diligently perform or cause to be performed all obligations imposed under the Plan and under any agreement made with the Corporation in respect of the Plan. ("Plan" means the Ontario New Home Warranties Plan")
4. The registrant shall indemnify and save harmless the Corporation and the insurers for the time being under any contract or contracts of insurance establishing the guarantee fund, from any loss which they or any of them may suffer by reason of the registrant's failure to diligently perform or cause to be performed all obligations imposed under the Plan and under any agreement made with the Corporation in respect of the Plan.
5. The registrant from time to time, at the registrant's expense furnish the Registrar with such documents relating to the Plan as the Registrar may reasonably require.
6. The registrant shall furnish the Registrar with such information relating to the registrant's financial affairs and position as the Registrar may reasonably request.

The Registrar can also look to section 7(2) of the Act to find his authority to act upon conditions of registration "consented to" by a registrant. These are found in the "Vendor Builder" agreements entered into by the Applicants and the Program. The obligations of the builder are set forth in these agreements and the assurance that these obligations will be met are separately contained in guarantee. Essentially these guarantees oblige the guarantors jointly and severally to save harmless the "fund" from any payments made to satisfy warranty claims left unsatisfied by the registrants. There can be no release from the guarantee obligations unless in writing.

Section 9 of the Act sets out the procedural requirements for an appeal from a decision of the Registrar and the jurisdiction of the Tribunal.

"9.(1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the Registrar shall serve notice of the proposal, together with written reasons therefor, on the applicant or registrant.

(2) A notice under subsection (1) shall state that the applicant or registrant is entitled to a hearing by the Tribunal if the applicant or registrant mails or delivers, within fifteen days after service of the notice under subsection (1), notice in writing requiring a hearing to the Registrar and the Tribunal."

(4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection 2, the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and may substitute its opinion for that of the Registrar

A proposal carried out by the Registrar is not the final determination of the issue, however, since an Applicant can subsequently apply for registration pursuant to section 10 of the Act upon new evidence or where circumstances have changed:

"10. A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed."

CASES:

The Tribunal was first referred to the case of *Norhome Development Inc.* 11 April 1986. In that case the Tribunal had to decide whether the Registrar acted reasonably in deciding that the past default on an obligation to the Program of one corporation could prejudice a second corporation if the two corporations had common principals. The reimbursement to the Program by the Applicant Norhome of the amounts paid out under warranty obligations of the related company was imposed as a condition of registration. Norhome took the position that despite the two companies having common officers, the new company should be judged in the absence of any activity attributable to the prior corporation. The Tribunal ruled that the record of a common officer could be taken into account by the Registrar in determining the suitability of any company with which he was or is associated despite the fact that there was no evidence

to suggest that Norhome itself was financially insecure. The Tribunal in interpreting section 7 of the Act stated:

“To protect the public trust, the legislation requires the Tribunal to look behind the corporate veil and it is clear under these provisions that in the case of a corporation the past conduct of its officers and directors may be taken into account in determining whether to grant registration.”

Counsel for the Applicants attempted to distinguish the present cases as being renewals of ongoing registrants as opposed to new applicants. In reviewing the powers granted to the Registrar under Section 8, the Tribunal sees this as a distinction without significance.

In the case of *Canario Design and Development* CRAT 14 November 1990, the Tribunal was asked to determine whether the Registrar acted reasonably in determining that the failure of a corporation to pay the amounts invoiced by the Program for past breaches of warranty provided grounds for revoking the registration of a related company. Once the Tribunal was satisfied that there was commonality of principals and a failure to make good on a financial obligation, it held in effect that the default of one could be regarded as the default of the other for purposes of determining whether the company would carry on business with integrity and honesty.

The case of *791209 Ontario Limited*, a Commercial Registration Appeal Tribunal decision of September 1992, involved a proposal of the Registrar to revoke the registration of the Applicant on the basis of the failure of a related company to honour an obligation to the Program. The Tribunal held that this default offered sufficient grounds for the Registrar to invoke his authority to refuse registration. It stated:

“We find as a fact that Michael Fiume is an officer and director of 791209 Ontario Limited and a former officer and director of 655533 Ontario Inc. We also find on the evidence that the corporation 655533 Ontario Inc. is indebted to the Ontario New Home Warranty Program in the sum of \$18,140.66 and Mr. Fiume under his Vendor and Purchaser(sic) Agreement is in default in respect of repayment. This is a fact of which Mr. Fiume is well aware and the repayment of which he and his company have consistently attempted to evade. He has demonstrated neither the honesty nor integrity expected of a builder under the Act nor the good faith required of any registrant who enters a contract with the Plan.”

In the case of *Castleguard* CRAT 1 September 1992, the Tribunal was asked to consider the question as to whether or not the Registrar should invoke his authority under Section 7 to revoke a registration in circumstances where there is a default by a company related to the Applicant to pay an amount owing the Program and a failure to carry out obligations to repair poor workmanship. The evidence in that case showed a failure to carry out repairs by the related company which resulted in the Program having to pay out of the Guarantee Fund but did not show an actual guarantee agreement signed by the common principal as stipulated in the Notice of Proposal. The Tribunal ruled in favour of the Applicant. The Program appealed. The Divisional Court reversed the Tribunal. The endorsement stated;

“The specific allegation against the Respondent raised DeJong's personal guarantee.-The Tribunal found this was not proven.

However there was substantial evidence supporting allegations that DeJong's past conduct was grounds for belief the Respondent would not honestly carry out its undertakings. Those included failure to repair, and failure to advise of DeJong's divesting himself of interest in the respondent a related company.

These matters were all fully explored at the hearing and the respondent was given a full opportunity to meet them. There was no failure of natural justice."

APPLICATION OF LAW TO FACTS:

The position of the Applicants is that the present hearing is a way to extract from them monies owing by LaGuardia and is therefore an illegitimate use of the Tribunal. The minutes of settlement referred to above allowing the record of LaGuardia into evidence should not be used to discredit the registration status of the other Applicants. Whatever monies LaGuardia owes to the Program should be sought through the Guarantors. The Applicants argued that LaGuardia's business and corporate history are irrelevant to the assessment of the other Applicants, and the past problems of Bridle Lane are not referable to the future conduct of the affairs of Fairmount, Castlemark, and Siper.

It is not disputed that there were breaches of warranty, particularly by LaGuardia and Bridle Lane, and that the pledged assets were not sufficient to indemnify the Program. Also, it can not be disputed that the Applicant companies and LaGuardia were related, with common addresses, the same persons listed in the corporate records and a commonality in their pledged assets. Also, LaGuardia agreed that the Registrar could rely on the record of LaGuardia in assessing the right to or terms of registration of future or existing related companies.

As to the Applicants' failure to file the necessary financial information, the evidence confirms the validity of these grounds stated in the Notices and Supplementary Notices. The issue is whether these omissions provide the Registrar with a "reasonable" basis to exercise his discretion in the present case. The position of the Registrar is that to protect the home buying public, the Registrar must have the ability to assess the financial viability of builders, and to do this he must have ongoing access to the registrant's financial information.

The Registrar also submits that this appeal is not an alternative debt collection forum. Instead, it is an appeal of the Registrar's decision under the Act to refuse to renew the registration of builders whose past record, in the opinion of the Registrar, shows them to be financially irresponsible. Whether a company's past record is built by officers while directing the affairs of the registrant company now under review or while directing the affairs of another or related company should not be viewed by the Tribunal as being a significant distinction.

Counsel for the Registrar stressed that the Act is consumer protection legislation. Corporations work through their officers, and it is a legitimate assumption that a bad building record in one company will translate into a similar record in a connected company with the same directing minds. The Registrar is specifically charged to assess the past conduct of a corporate registrant's officer or directors under section 7(1)(c)(ii) of the Act as to their conduct being carried out in accordance with the law and with integrity and honesty. Further, to state

that an associated company can not breach the warranties of another is correct in law, but if the officers of the defaulting and non defaulting company are common thereby having a common directing mind, it is legitimate to assume the business practices, good and bad would also be common. To assume otherwise would allow the sanctity of the corporate veil to thwart the object of consumer protection legislation. All consumer protection legislation assumes, to some degree, an unequal playing field between the consumer and the supplier of goods and services. The object of such legislation, in part, is to ensure that the supplier is ethically and financially sound, which is part of the Registrar's mandate set forth in section 7 of the Act.

Under Section 8(2) of the Act, the Registrar is empowered to disentitle a builder from continuing in business through refusal to renew registration. This depends upon the Registrar's assessment of the application of the grounds in Section 7. The Registrar when making a decision on renewal will consider the registrant's record of breaches of warranties, failure to complete contracts, breaches of terms and conditions of registration, and, if a corporate registrant, the past conduct of its officer or directors.

The breadth and detailed nature of the Registrar's authority under the Act leaves no doubt that the Legislature intended to give wide latitude to the Registrar to control the homebuilding industry.

There are breaches of the Act specific to Fairmount outside of the grounds of common directing minds which allow the Registrar to refuse to renew Fairmount's registration. These breaches are failure to produce annual financial reports and failure to provide documentation sufficient to allow the Registrar to properly assess the financial strength of the company. The Tribunal finds these alone are sufficient for the Registrar to invoke the authority invested in him under Section 8(2) of the Act.

The main thrust of the Registrar's refusal to renew the registrations of the Applicants, however, is that the past defaults of related companies with common officers and directors permit the Registrar to conclude that the Applicants are too great a future risk to the public to be allowed to continue as builders.

Counsel for the Registrar urged the Tribunal that under Southy J's ruling in *Brenner* (orally, March 1983 Divisional Court) deference must be given to the Registrar when reviewing his opinion on appeal. However, this deference cannot limit the obligation placed upon the Tribunal under section 9(4) of the Act to exercise its judgment in furtherance of the legislative intent of the Act. As Southy J stated:

"The proper question at the rehearing remains, however, whether the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with the law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal"

The *Brenner* case dealt with an appeal from the *Ontario Motor Vehicle Dealers Act* which has wording similar to the Act under consideration in this appeal. Accordingly, this Tribunal must

determine whether the Registrar acted reasonably in determining that there were sufficient grounds to refuse to renew the registrations of the Applicants based upon the past records of companies with common officers and directors.

There was no strenuous argument against the proposition that corporations act through their officers and directors. There was no serious contest about the existence of interrelationships among the companies now before this Tribunal; assets of one were pledged to guarantee another, with similar directors and officers giving common/personal guarantees. There was only one type of enterprise, building houses. Even the company addresses were common. From the evidence, it is clear that the slipping fortunes of first LaGuardia and then Bridle Lane affected the risk assessments of the Applicants Fairmount, Castlemark and Siper. This, in turn, led the Program to impose security requirements before new construction could commence, which further added to the companies' problems. It is also clear from the evidence that the personal guarantees given by the common officers and directors were not honoured. Surprisingly, none of the common officers was called to testify to clarify or challenge what was being alleged against them. Counsel for Siper submitted that inherent in the agreement not to challenge the breaches of Bridle Lane and LaGuardia was the removal of the necessity of the testimony of Mr. Sinopoli and Mr. Gentile. The Tribunal finds this assertion unconvincing, given the breadth of available testimony. The failure to testify more likely suggests a fear of cross-examination.

It is clear from the evidence that despite requests of the Registrar, the proper financial documentation necessary for the Registrar to assess the degree of risk to the public, and any corresponding need for security, was not forthcoming.

The Tribunal does not accept the submissions of the Applicant's counsel that the Program may have issued the Notices of Proposal as a means of debt collection and a misuse of the Tribunal. The Tribunal was not presented with evidence which would indicate misuse of its process, and it sees no reason to question the Registrar's motive in this proceeding.

On the evidence, the Tribunal concludes that there were numerous failures on the part of the Applicants to fulfill even the fundamental obligations as registrants under the Act. The evidence of Mr. De Felice about the difficulties encountered by Toronto builders in other areas of the Province and other evidence respecting the record the Applicants shows a deterioration in the after sales performance of previously good companies. The evidence also shows a failure to provide the Registrar with information requested by the Registrar and required by the Act, Regulation, and the registrants' agreements.

There was evidence of many types of shortcomings, such as, fines for commencing homes without payment of the appropriate fee in breach of section 12, failures to provide relevant financial information to the Program and failures to make repairs.

The Tribunal wishes to stress that it is the entirety of the evidence, not individual shortcomings of the Applicants, that underlies its decision. Taken as a whole, it is clear that the principals got involved in enterprises for which they were unprepared. This resulted in a series of

manoeuvres with the Program, trying to keep a step ahead of the inevitable discovery that their record as builders was coming unstuck. A great deal of time and resources of the Program was spent in assessing and corresponding with the principals, to little avail. The principals did not testify at the hearing. What the Applicants, in the end, were left with was their argument that the Program should be limited to viewing the obligations of the companies as separate and distinct from the principals. This position, assiduously argued by counsel, had to overcome the fact obvious to the Tribunal that any such treatment would undermine the ability of the Program to carry out its oversight function.

The Tribunal was faced throughout this hearing with the balance between the principle of limited corporations as discrete legal entities having separate and distinct rights and responsibilities in law and the Registrar's obligations under legislation enacted to regulate an industry. The Applicants in this case submitted that the Tribunal should respect the principle of distinct corporate entities to the point that the past activities of one corporation should not be taken into consideration when deciding the continued registration of another corporation even though the two are related through common officers and directors. The Act clearly mandates the Registrar to examine and adjudge the past conduct of officers and directors of companies engaged in the home building industry when considering whether the companies should remain registered or not. It is this power to allow or disallow registration under the Act that underpins the Regulator's ability to carry out the overall scheme of the Act to protect the consumer of new homes. It was the position of the Program that this power must extend to related companies or the regulatory scheme would be easily circumvented by defaulting builders. The Tribunal agrees with the Registrar's position.

DECISION AND ORDER:

Subsequent to the close of the case but prior to the issuance of the decision, the parties in these proceedings came to an agreement as to the disposition of the matter with respect to the Applicants Bridle Lane Homes Inc., Fairmount Homes Ltd., and Siper Construction Limited. The Tribunal was asked to render its decision respecting the Applicants in accordance with this agreement.

While resolutions of matters directly between parties is encouraged it has to be remembered that the Act is consumer protection legislation. Accordingly, to discharge its oversight function the Tribunal instructed the parties to make submissions to satisfy it that the public interest was protected by their agreement. The Minutes of Settlement were forwarded.

In essence it was the position of the parties that the Tribunal should render its decision on the evidence with regard to the Applicant Castlemark only and that the Minutes of Settlement be adopted with the other Applicants.

The Minutes of Settlement set forth a plan whereby the security provided by Fairmount and Siper be applied by the Program against the debt owed by LaGuardia and Bridle Lane. Bridle Lane's registration is to be terminated pursuant to the Notice of Proposal of June 27, 2000

and the Supplementary Notice of Proposal of January 31, 2001. The debts to the date of settlement have been satisfied and both Fairmount and Siper have agreed as a term of their continued registration up to and including February 2003 to continue to provide security of \$5,000 for each new enrolment as blanket security for additional payments out of the compensation fund. As well, the Program retains the right to revoke the registration of Siper and Fairmount should there be a default in the obligations. Finally, in any future actions by the Program against Siper and Fairmount the Program retains the right to rely upon evidence of past conduct by the officers of Siper and Fairmount and the prior registrants LaGuardia and Bridle Lane. It is the position of the Program that by this arrangement the officers and directors of the two companies have acknowledged and have accepted the past and continuing responsibilities of their corporations.

The Program put forth the additional argument that to revoke the registrations of Siper and Fairmount at this time would raise unnecessary disruption in the construction schedules of the homes they have are currently building.

The Tribunal having read the Minutes of Settlement and listened to submissions by counsel agrees that the public interest is adequately protected by the agreement reached between the parties. The Minutes of Settlement are attached to this decision.

NOW, THEREFORE, pursuant to the authority under section 16(3) of the *Ontario New Home Warranties Plan Act*, the Tribunal makes the following Order:

1. The proceedings in this matter with respect to the Applicants Bridle Lane Homes Inc., Fairmount Homes Ltd., and Siper Construction Limited are concluded and disposed of on the basis of the terms set out in the Minutes of Settlement attached to this decision and marked as Schedule "A";
2. The Registrar is directed to carry out his proposal to refuse registration of Castlemark Developments Inc. as a builder under the *Ontario New Home Warranties Plan Act*.

LICENCE APPEAL TRIBUNAL

William McIntosh, Vice-Chair

RELEASED: February 20, 2002

McLAREN, DAVID LARRY

DAVID LARRY McLAREN

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

TO DISALLOW A CLAIM

TRIBUNAL: BRIAN K. MAROTTA, Vice-Chair

APPEARANCES:

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

DATES OF

HEARING: March 19 and 20, 2001

Sudbury

REASONS FOR RULING

WHEREAS the Applicant had appealed to the Licence Appeal Tribunal from a written Decision of the Respondent dated August 8, 2000 and supplementary Decision letter dated September 28, 2000;

AND WHEREAS the matter was heard in Sudbury, Ontario, on March 19 and March 20, 2001;

AND WHEREAS at the conclusion of the hearing, the Respondent brought a Motion to dismiss the Applicant's appeal on the basis that the warranty period under the *Ontario New Home Warranties Plan Act* had expired prior to the Applicant making a claim under that Act;

AND WHEREAS the Respondent's Motion was allowed;

AND WHEREAS the Honourable Justice R. G. S. Delfrate made an Order on November 8, 2001 that the matter be returned to the Licence Appeal Tribunal for determination as to:

- (a) whether the deficiencies forming the subject matter of the Applicant's claim under Section 14 of the *Ontario New Home Warranties Plan Act* made June 29, 1999, constitute a continuation of the major structural defect reported in writing to the Respondent on August 23, 1995, and;
- (b) the quantum of compensation to which the Applicant is entitled, if any.

AND WHEREAS the Tribunal had reviewed the oral and documentary evidence provided by the parties at the hearing, and the Tribunal on the basis of that evidence released its Ruling on January 11, 2002.

AND WHEREAS the Tribunal was requested to provide reasons for its Ruling, the Reasons follow:

Continuation of Major Structural Defect

The previous owner of the property had submitted a proof of claim on August 23, 1995, well within the warranty period. The complaint included two major cracks in the basement walls, directly opposite each other, cracks in the brick work and cracks on the inside of the house on the walls and ceiling. The Program observed the two major cracks extending below grade as well as extensive cracking in the brick above. They also noted the interior cracks and shifted windows above the damaged brick. The Program ordered the builder to repair the premises and the repairs were completed by February 1997. The repairs to the exterior of the building consisted of repointing the brick and digging and placing hydraulic cement at the crack lines. There was no soil testing done nor any significant inspection of the footings or the foundation, aside from the areas directly below the visible cracks.

In June 1999, the present owner of the residence wrote to the Program indicating a significant number of complaints as follows:

1. A ridge had developed in the floor of the master bedroom.
2. One side of the bathroom floor in the ensuite had sunk.
3. The bathroom doors were out of plumb.
4. The main entrance door had separated from the brick work.
5. The mud room window had separated from the brick.
6. There was a crack in the foundation under the deck.
7. There was a crack in the foundation under the basement window.
8. There were cracks in bricks under the master bedroom window.
9. There were cracks in bricks under the bathroom window.
10. A crack had developed in the block foundation on the southeast side of the house.
11. The cracks that were repaired on the east and west sides of the home had reopened.
12. There was a stress crack in the roof of the house.
13. The windows in the master bedroom and basement bedroom were off level.
14. There was a buckle in the drywall in the dining room.
15. The windows in the bedrooms on the east side have started to separate from the brick work.
16. The patio door was separating from the brick work.

As a result of the owner's complaints, Mr. Kevin Blacklock, a warranty representative visited the premises in August 1999. He did not, however, issue any written report. Mr. Dennis

Faubert, on behalf of the Program, attended the site to view the claims on February 16, 2000 and revisited the site with an Engineer, Mr. Tibor Pal, P. Eng., on April 13, 2000.

As the result of the inspections, Mr. Tibor Pal wrote to Mr. Faubert with his findings on April 25, 2000 and listed the conditions which he observed. Most of the conditions observed were as indicated by the homeowner with the exception of some which could not be viewed because of snow cover. Mr. Pal concluded, however, by saying that it appeared that most of the movement had occurred between 1991 to 1996 and the resulting damages were repaired. He classified the movement at the areas which were repaired as small and resulting in only minor damages which did not result in the failure of load bearing elements or make the house unusable.

Mr. Faubert's Inspection Report of August 4, 2000 addresses the complaints of the homeowner and appear to attempt to minimize those complaints and to give conclusions without providing supporting facts for arriving at those conclusions.

In correspondence from the homeowner to Mr. Faubert on October 11, 2000 and in his evidence given at the hearing, the homeowner pointed out a number of deficiencies and matters overlooked in Mr. Faubert's report. Some of the items included, that the ridge in the master bedroom extended nearly all the way across the floor and not just three feet as indicated in the Report. In addition, the Report cited that the homeowner had constructed the wall under the ridge when in fact the wall was constructed by the builder. Mr. Faubert had stated that the homeowner said that there had been no water penetration into the basement when there had been. The Report had indicated that the sliding bedroom windows on the west side of the home opened without force and there had been no water penetration whereas the evidence was that the windows were casement windows located on the east side of the home and that the homeowner had not been asked about water penetration. The Tribunal prefers to accept the evidence of the homeowner where there is a conflict between statements in the Report and the evidence of the homeowner.

On cross examination, Mr. Faubert opined that the lack of cracks in the drywall indicated to him that there was no significant movement and that no major structural defect existed. He stated that a one inch slope in four feet distance in the master bedroom was not significant. He did not consider the safety aspect. When asked if it is possible that the skeleton of the house could draw back from the brick veneer without causing cracking in the drywall, he acknowledged it could be possible but he had not seen it in his experience although he admitted that may be an explanation respecting this home. He did not go under the deck to examine the crack in the foundation. He did not measure the cracks in the bricks and said that he could not argue with Mr. Netherton's measurements. He reviewed the original notes of the complaints in 1995, but there were apparently no measurements or photographs taken at that time. The Program had addressed the complaints of cracks and had not looked any further. Mr. Faubert stated that when he attended the residence with Mr. Pal, the cracks were "eyeballed" because they were only looking for large cracks or distortions. The Program had taken no measurements in 1995 and had no accurate measurements now. There had been some separation in the cracks that were repaired in 1995, however, he considered it as minor.

It was accepted as a major structural defect in 1995. He said that he hired Mr. Pal to review the matter, and to deal with certain things that he could not explain.

Mr. Pal stated that he had gone through each of the homeowner's complaints when he attended on one occasion at the residence on April 13, 2000. Generally, he had the same observations as Mr. Faubert. He viewed the cracks that had been repaired prior in the east and west wall, but did not take any measurements of them. He noticed that there had been separation from the original repair but did not think it was significant. Because the width of the separation from the original repairs was not as wide as the original repairs he came to the conclusion that most of the settlement had taken place before the repairs were made. He also opined that the rate of settlement had decreased considerably and was close to coming to a period of equilibrium. He noted that Mr. Netherton's measurements of the width of the cracks were wider than his estimates and acknowledged that Mr. Netherton's measurements would be more accurate.

Mr. Pal disagreed with Mr. Netherton's opinion that as the house settled the load was redistributed to the beam running east and west and that the southeast corner was lifting. Mr. Pal thought that the post had not settled at the same rate as the southeast corner so that beam was carrying more load and creating the ridge across the bedroom floor. Mr. Pal stated that some settlement was normal and he disagreed with the anchor method proposed by Mr. Netherton. It was his opinion that the anchors would put additional strain on the inside of the foundation walls and could possibly fail. He did not think that the block foundation walls were strong enough to resist both the soil pressure and the screw anchors additional load. He did not present any evidence to support his conclusion. He stated that normal settlement is not a major structural defect if the settlement does not affect a load bearing structure and that settlement of foundations themselves do not indicate failure of a load bearing structure.

On cross examination, Mr. Pal acknowledged that there were no tests or measurements done in 1995. He had only visited the residence on one occasion and had "eyeballed" measurements except for levels taken by instrument. He did not go under the deck to examine the crack in the foundation and made his estimate of the width from a distance of approximately twelve feet or more. He never examined the footings or the sub soil and took no soil tests. He does not know the soil composition or the conditions on which the foundation was built. He agreed the southeast corner had settled four and one quarter inches. He estimated the movement from what was repaired in 1995 to the condition that existed in 2000. He admitted that to measure movement it would be more accurate to take measurements at different times at precisely the same location and that he had not done that. A drop of four and one quarter inches is indicative of footing settling and settlement has occurred at different rates at different locations but that this was not a concern until it affected load bearing elements. He felt that his one visit was enough for him to form an opinion as to whether the house had achieved equilibrium. His opinion regarding the movement at the southeast corner was based upon his experience.

He rejected the Helical Pier system proposed by Mr. Netherton as being unnecessary. In his opinion, the structure was already in a position where it is moving very little and, therefore, it is

not necessary to stabilize the house. In Mr. Pal's opinion the movement would soon cease and then the bricks could be removed and replaced at a lot less cost. He did not offer any further information regarding repair or cost as he was not retained to comment on corrective measures and that is why there was no method of repair or costs included in his Report.

Mr. Pal admitted that four and one quarter inch settlement is excessive and more than acceptable but maintained that it had not resulted in failure of a load bearing element. He stated that the footing was a load bearing element and the walls and the concrete slab had followed the footing down, but the settlement occurred below the footing. He could have provided additional information on how the structure has behaved if he had gone back again at a later interval, however he was not asked to do so.

The homeowners witness was Dennis Netherton, P. Eng. Mr. Netherton attended at the homeowners residence on three different occasions, took soil samples, photographs and precise measurements. Some of the items commented on by Mr. Netherton were that the ridge in the bedroom floor is nine feet long and not three feet as in the Program's report. The Building Code provides for a movement of one part in one hundred and eighty and the movement in this area is one in twenty-five. His measurements of the bathroom floor showed ongoing settlement. The slope in the bathroom floor is one part in forty-eight whereas the Building Code allows for one part in one hundred and eighty. He used calibrated instruments in reaching his conclusions. He noted that the southeast corner of the house had settled four and one quarter inches. He could not state how much of that settlement occurred after the repairs but assumed that it was significant considering the length of time since the repairs were completed. The cracks that were repaired in the house foundation were not visible when the homeowner purchased the house in 1997, but were clearly visible by 1999, along with other new cracks. This evidences that the settlement is ongoing. The new crack under the deck in the foundation was one quarter inch wide which indicates there has to have been substantial settlement. He compared the elevation of the southeast corner with the estimates made by the Program on April 13, 2000 and there had been one quarter to one half inch movement since that time. He disagreed with the Program that the lack of cracks in the drywall itself was meaningful. In his opinion, the skeleton of the house was drawing away from the brick veneer facia and the windows were separating from the frames, rather than causing cracks in the drywall. He admitted that usually there is faster settlement at first and then it tapers off, but in the present situation his measurements indicated significant and ongoing settling. His inspection of the doors disclosed that the lock bolts no longer fit into the holes in the door jam demonstrating notable movement. He said it was difficult to give an accurate evaluation of the movement since the repairs were completed in 1995 because of the lack of information from that time. However, along with the new cracks which have appeared, by calculating the width of the fill in the old cracks and the distance which they have widened, he stated that there has been 35% more movement since the repairs were completed.

The conclusions of Mr. Netherton were that there was significant continued movement due to lack of adequate footing area and inadequate support from the foundation. The ongoing movement was due to the fact that the original repairs were not adequate. The original repairs were only cosmetic and did not address the actual cause of the problem. The items already

mentioned along with the buckling on the south side of the roof was consistent with his findings that additional significant distress in the structure would result if correct repairs were not made. The repairs made by the Program in 1995 were carried out in the wrong location and in an incorrect manner. The repairs corrected temporarily the effect of the problem but not its cause or location. Failure to recognize and correct the cause of the damage has resulted in significant new damage and in a failure of the load bearing portions of the house.

The evidence of Mr. Netherton was detailed, factual and based upon carefully calibrated measurements made over a period of time and a series of inspections at the residence. The Tribunal accepts Mr. Netherton's findings, opinions and conclusions in its finding that the deficiencies forming the subject matter of the Applicant's claim made June 29, 1999 constitute a continuation of the major structural defect reported on August 23, 1995.

Quantum of Damages

There was a full hearing of this matter and both parties had the opportunity to put forth any evidence they wished the Tribunal to consider, including the method of repair and quantum of damages, if they so chose. Aside from a brief reference by Mr. Pal that it could be done cheaper than the method recommended by Mr. Netherton and that he disagreed with the method proposed, there was little evidence given on costs or remedy by the Program.

Mr. Netherton provided a detailed list of the costs to rectify the deficiencies and install an anchor method to prevent further movement on the house. The cost estimated presented was \$76,903.30, plus applicable taxes. To that amount a contingency of 35% was added to bring the total to \$103,819.46 plus taxes. The Tribunal notes that the usual contingency is between 10% to 15% and considers a contingency of 35% to be excessive. Considering the nature of the problem, the Tribunal has allowed a contingency of 15% to bring the quantum of compensation to \$88,438.80 plus applicable taxes.

LICENCE APPEAL TRIBUNAL

Brian K. Marotta, Vice-Chair

Released: February 25, 2002

BAHRAMI, AFSHIN S.

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

IN THE MATTER OF
AFSHIN S. BAHRAMI

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: January 4, 2002

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

AFSHIN S. BAHRAMI

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

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

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

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

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: February 1, 2002

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

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

FROM: Afshin Bahrami
112 – 63 Widdicombe Hill Blvd.
Etobicoke, ON M9R 4B2

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

1. The Applicant agrees not to be involved in the process of buying, selling or leasing motor vehicles without the benefit of registration.
2. The Applicant agrees to provide full and complete disclosure on all future applications and discussions with the Registrar, regardless of whether disclosure has been previously provided to the Registrar.
3. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.
4. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.
5. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
6. The Applicant will provide a copy of this order to his employer forthwith.
7. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
8. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
9. The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____ this _____ day of _____ 2002.

Afshin Bahrami (signature)

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

LUNENBURG AUTO SALES

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

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

TRIBUNAL: JEAN-MARC LEFEBVRE, Q.C.,
VICE-CHAIR

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

VINCE M. CHAISSON
Agent for LUNENBURG AUTO SALES, Applicant
failed to attend the hearing or to send a representative

DATE OF HEARING: January 30, 2002

DECISION RELEASED: February 1, 2002 Ottawa

REASONS FOR DECISION

A hearing was held on January 30, 2002, at Ottawa, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

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

BACKGROUND:

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

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

Owner:	Vince M. Chaisson/Lunenburg Auto Sales (the "Applicant")
Motor Vehicle:	1990 GMC Sierra Pickup (the "vehicle")
Date of Appeal:	January 10, 2002

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

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

This matter came before this Tribunal on January 30, 2002 and proceeded as an oral hearing because the Applicant had requested an oral (in person) hearing before the Tribunal when his/its appeal form was filed with the Tribunal.

The Tribunal asked the agent representing the Ministry of Transportation if the Ministry wished to make any submissions prior to the Tribunal commencing the hearing.

A request was made for a ruling as to the fact that the Applicant had failed to attend the hearing scheduled before this Tribunal and had failed to send a representative to this hearing.

The Tribunal made its ruling on the preliminary issue in question and determined that the appointed hour set for the hearing had come and gone. The Tribunal waited at least an extra one-half hour. The Applicant failed to attend and failed to send a representative to the hearing. No explanatory telephone call or letter was received by the Tribunal.

The hearing proceeded.

ISSUE:

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

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

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

FACTS:

The Tribunal read the evidence given in support of the Applicant's position, in the form of a notice of Appeal accompanied by the Applicant's written submissions. The Tribunal read the materials and submissions of the Respondent, reviewed the evidence filed by the Respondent and heard the oral submissions of the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

Lunenburg Auto Sales
18 Couty Road
P.O. Box 9
Lunenburg, Ontario, K0C 1R0
(613) 936-9900
(613) 361-0056

January 7, 2002

To whom it may concern

I, Vince Chaisson, owner of Lunenburg Auto Sales, and the 1991 GMC pickup VIN # 2GTEK19K7L1517864 currently impounded. I wish to explain my position on the situation, appeal the impound order and reclaim my property.

On December 28, 2001 at approximately 11:45 p.m. my vehicle was stopped by a routine check by the Cornwall Police Department on Water St. East in Cornwall. At the time vehicle was in the possession of Daniel Shaver an employee of my company Lunenburg Auto Sales. The vehicle was licensed and Mr. Shaver had permission to use it. Due to the fact that Mr. Shaver had been drinking the night of the incident, his friend, Mr. Craig Currier offered to drive. Mr. Shaver had no reason to question whether Mr. Currier was legally licensed to drive. When the vehicle was stopped by the police it was determined that Mr. Currier's license was under

suspension, the vehicle was seized and impounded. Prior to this incident, the vehicle had been safetied and certified on December 20, 2001.

Mr. Donald Bower gave my salesman Jim McKee a \$500.00 cash deposit on December 28, 2001 to purchase the truck and agreed to pay the balance owing the first week of January 2002. Mr. Bower has since been made aware of the situation and would still like to complete the purchase, if we can resolve this problem and get the truck back within a reasonable time frame, or the deal will be cancelled and Mr. McKee will lose his commission.

I have attached a copy of the safety inspection certificate a copy of the bill of sale to Mr. Bower and the vehicle registration. I can only hope that poor judgment during the holiday season on the part of my employee won't cause me to lose not only the sale of the vehicle, and a good customer, as well as incur extra expenses for towing and storage, and Mr. McKee to lose income through no fault of our own.

Thank you for your consideration

Vince Chaisson

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Craig C. Currier;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving While Disqualified under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until October 15, 2004.

The Respondent made the following submissions:

1. The Applicant did not, on the evidence before the tribunal in the form of a written statement of the Applicant attached to his/its notice of Appeal, discharge the onus of due diligence. No attempt whatsoever was made by the owner of the vehicle to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension.

In fact the driver of the motor vehicle was a driver whose licence was under suspension under the Ontario *Highway Traffic Act*, pursuant to a conviction under the sections of the *Criminal Code of Canada* contemplated by the Act.

2. Under Ontario Regulation 632/98, the owner has the onus of establishing that he/it has satisfied the cumulative requirements of Section 22 (3) (a), (b), (c) and (d) (i) and (ii). Nothing in the submissions of the applicant establishes that any particular person has been or is ordinarily transported by this motor vehicle. Furthermore the ultimate prospective purchaser of the vehicle has professed a continued interest in acquiring the vehicle. The reference to the possibility that the salesman might be deprived of his commission if the proposed sale falls through is not really relevant in this case and is certainly not the type of financial hardship criteria contemplated by the Regulation under Subsections 22 (2) (b) or (3) (b) and (c).

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

APPLICATION OF LAW TO FACTS:

Based upon the evidence and submissions before this tribunal as outlined above, this Tribunal agrees entirely with the representations of the Respondent. All of the representations are factual and the analysis of the facts and of the law as submitted and listed by the Respondent as outlined herein are accepted without question as being correct in all respects. No attempt whatsoever was made by the owner of the vehicle to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension. In fact the driver of the motor vehicle was a driver whose licence was under suspension under the Ontario *Highway Traffic Act*, pursuant to a conviction under the sections of the *Criminal Code of Canada* contemplated by the Act.

Nothing in the submissions of the applicant establishes that any particular person has been or is ordinarily transported by this motor vehicle. Furthermore the ultimate prospective purchaser of the vehicle has professed a continued interest in acquiring the vehicle. The reference to the possibility that the salesman might be deprived of his commission if the proposed sale falls through is not really relevant in this case and is certainly not the type of financial hardship criteria contemplated by the Regulation under section 22 (2) (b) or (3) (b) and (c).

The Applicant has failed to discharge the onus upon him/it and his/its appeal must fail.

COSTS:

The Respondent seeks its costs in this appeal, on the basis that the Applicant has acted unreasonably in failing to attend the hearing or to send a representative and in failing to contact the Tribunal and the Ministry.

The file was reviewed and it was ascertained that the Applicant had notice of the hearing. The Tribunal waited for the Applicant for one-half hour. The hearing was then entertained by the Tribunal in the absence of the Applicant and evidence was received.

Section 14 of the Licence Appeal Tribunal Rules of Practice as amended provides that where a party believes that another party has acted unreasonably in a proceedings, that party may make a request for costs, which request shall be made with notice to all other parties to the proceedings and prior to the release by the Tribunal of its final order in the proceedings.

Rule 14 of the Licence Appeal Tribunal Rules of Practice provides as follows:

14. COSTS

14.1 Where a party believes that another party in proceedings before the Tribunal has acted unreasonably, frivolously, vexatiously, or in bad faith, that party may make a request to the Tribunal for costs, which request shall be made with notice to all other parties to the proceedings and prior to the release by the Tribunal of its final order in the proceedings.

14.2 The Tribunal in determining whether a party has acted unreasonably, frivolously, vexatiously, or in bad faith shall consider all of the circumstances, including, without limiting the generality of the foregoing, circumstances such as a party:

- (a) failing to attend a hearing before the Tribunal or to send a representative when properly given notice, without contacting the Tribunal and other parties to the hearing;
- (b) failing to comply in a timely manner with a procedural order or direction of the Tribunal where the result therefrom is undue prejudice or delay to another party or parties in the proceedings before the Tribunal;
- (c) failure to comply in a timely manner with the disclosure requirements set out in the Tribunal's Rules of Practice, including, without limiting the generality of the foregoing, the disclosure requirements respecting documents, particulars, or constitutional issues; or
- (d) knowingly presenting false or misleading evidence.

14.3 Where the Tribunal finds that a party has acted unreasonably, frivolously, vexatiously, or in bad faith, the Tribunal may order that party pay the costs of another party or parties to the proceedings subject to Rule 14.4 respecting the amount of costs that may be ordered by the Tribunal panel.

14.4 Where the Tribunal determines that an order for costs may be made under Rule 14.3,

- (1) the Tribunal when determining the appropriate award of costs shall consider all the circumstances, including without limiting the generality of the foregoing, factors such as the seriousness of the misconduct, the amount of

costs incurred by the party requesting costs, or the conduct of the party requesting costs; and

- (2) the amount of costs shall not exceed,
 - (a) where the Tribunal has not commenced a hearing, the sum of \$400.00; or
 - (b) where the Tribunal has commenced a hearing, the sum of \$800.00 multiplied by the number of days that the Tribunal conducts a hearing of the matter, with any part day being considered a full day for the purpose of this calculation of costs.

The Tribunal has considered the submissions made by the Ministry and notes that the Respondent's representative has travelled from Toronto, and has incurred overnight accommodation expenses as well, for this hearing in addition to other travelling and related costs. This Tribunal determines that the Applicant party has acted unreasonably, and that an order for costs is warranted and will be awarded unless the Applicant is able to satisfy this Tribunal that an award of costs is unwarranted.

The Tribunal considers failure to contact the Tribunal to be a form of misconduct as contemplated by Rule 14.4 (1). It is a misconduct of omission in the form of poor judgment and thoughtlessness. This particular circumstance cannot be categorized at the upper scale of misconduct seriousness although the repercussions on the party who had to travel and to incur costs are serious. In the absence of evidence of more serious consequences, this Tribunal determines the costs at \$400.00. The Tribunal did commence and conduct the hearing. Following the scheme outlined by the rules, the allocation of costs shall be \$400.00 multiplied by 1, for one day that the Tribunal conducted its hearing.

This decision is an interim decision pending February 28, 2002. The Applicant is given notice of an intention to award costs as outlined above. The Applicant is given the opportunity to make submissions to this Tribunal on the matter of costs, by forwarding written submissions on the subject of costs, to be received by the Licence Appeal Tribunal at its offices 12th Floor, 1 St. Clair Avenue West, Toronto, Ontario M4V 1K6, directed to this Tribunal, and by also forwarding a copy of the submissions to the Ontario Ministry of Transportation, Driver Improvement Office, Building A. 2680 Keele Street, Downsview, Ontario M3M 3E6, directed to the attention of Ms. Kim Beintema, hearing officer for the Registrar of Motor Vehicles, both of which are to be received by the respective offices on or before February 15, 2002. In the event Ms. Beintema receives submissions, the Registrar of Motor Vehicles shall provide its own response to the Licence Appeal Tribunal at the same address outlined herein and to the Applicant within six (6) days of such receipt and this Tribunal will take the matter under advisement.

In the event the Applicant does not avail himself/itself of the opportunity to file submissions within the time frame allocated, this decision will automatically become a final decision.

DECISION:

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

Costs are awarded to the Respondent in the amount of Four Hundred (\$400.00) dollars payable to the Respondent forthwith.

LICENCE APPEAL TRIBUNAL

Jean-Marc Lefebvre, Q.C.,
Vice-Chair

RELEASED: February 1, 2002

0932 – ADLS - NOMC

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

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

TRIBUNAL: KENNETH KOPROWSKI,
Presiding Member

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

Applicant
Counsel for Applicant

DATE OF
HEARING: February 1, 2002

Written

DECISION

A hearing was held on February 1, 2002, at Toronto, Ontario, by way of a written hearing to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

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

LICENCE APPEAL TRIBUNAL

Kenneth Koprowski, Presiding Member

RELEASED: February 4, 2002

0932- ADLS - NOMC

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

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

TRIBUNAL: KENNETH W. KOPROWSKI,
Presiding Member

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

Applicant

Counsel for Applicant

DATE OF
HEARING: February 1, 2002

DECISION
RELEASED: February 4, 2002 Written

REASONS FOR DECISION

A written hearing was held on February 1, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on February 4, 2002, with Reasons to follow.

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

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated December 28, 2001, and was received by the Tribunal on January 4, 2002, together with the prescribed fee of \$100.00, paid by certified cheque.

Reason for the Appeal

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

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

There were no preliminary matters

Submissions of Written Material

By the Applicant:

- a) Exhibit # 4 Written submissions of the Applicant.

By the Respondent:

- a) Exhibit # 1 Notice to Registrar dated December 20, 2001.
- b) Exhibit # 2 Notice of Appeal Form.
- c) Exhibit # 3 Materials and Submissions of the Respondent.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the

Applicant fail or refuse to comply with a demand made to provide a sample of breath because he was unable to do so for a medical reason?

LAW:

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

- 50.1(1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
 - (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
 - (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

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

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

- 15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
 - (a) the name, telephone number and address, with the postal code, of the medical practitioner;
 - (b) the name, date of birth and address of the person who is the subject of the report;
 - (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.

- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner."

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

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

FACTS:

This appeal arises out of the following facts.

On December 20, 2001, Police Officer # 1, Unit Commander of the Ontario Provincial Police (OPP) Tillsonburg Traffic Management Unit/RIDE Team, was conducting a RIDE Program with his team. The Unit was set up on regional Road 3 at the intersection of Regional Road 11, in the County of Haldimand, Province of Ontario.

The sequence of events that followed is set out in the Respondent's Statement of Facts contained in its written submissions. The Applicant, through his counsel, states, in his written submissions, that he adopts those facts.

Finley is a 27-year veteran of the OPP, was a qualified Breathalyzer technician from 1980 to 1991, and was, at the time of this incident, a qualified Intoxilyzer technician since February, 2000. He had conducted over one thousand breath tests on drinking subjects, and was acquainted with approved screening devices, and had provided many samples into approved screening devices for demonstration and calibration purposes.

On December 20, 2001, Finley stopped the vehicle being driven by its lone occupant, identified as the Applicant in this Hearing. The vehicle was stopped at 8:52 p.m. For the reasons that follow, this Tribunal considers that the time at which he was stopped was one of the significant factors in coming to its conclusion on this appeal.

At first, the Applicant stated to Police Officer # 1 that he had not been consuming any alcoholic beverages. Nevertheless, Police Officer # 1 detected an odour of alcohol on the Applicant's breath, and noticed that the Applicant's eyes were bloodshot and watery. Upon being questioned further, the Applicant finally admitted that he had a couple of drinks on the way home, about an hour or so earlier.

Police Officer # 1 then asked the Applicant to provide a suitable breath sample into the approved breath-screening device, an Alcotest 7410 GLC. Police Officer # 1 found the instrument to be functioning properly, and demonstrated to the Applicant how to provide such a

breath sample. He also told the Applicant to blow into the mouthpiece until Police Officer # 1 advised him to stop.

After nine attempts, the Applicant still could not provide a suitable breath sample. The Applicant would blow hard at the beginning, but stopped before Finley told him to.

After the fourth unsuccessful attempt, Police Officer # 1 had the Applicant remove the mouthpiece from the instrument, and told him to seal his lips around the one end and blow into Finley's hand. Finley could feel the Applicant blowing through the mouthpiece without difficulty. After returning the mouthpiece to the instrument, Police Officer # 1 instructed the Applicant to blow again.

The Applicant continued to blow unsuitable breath samples on five more occasions. During all nine attempts, it is significant that the Applicant gave no explanation for his failure to provide a suitable breath sample, neither presented nor complained of symptoms of any respiratory problems, injury or signs of physical condition, never requested or indicated a need for medical assistance, nor indicated that he suffered from any medical condition. Police Officer # 1 noticed no swelling in the Applicant's mouth area, but, in fact, could see that the Applicant was able to make a seal around the mouthpiece.

The Applicant maintained that he was blowing, and that there must be a problem with the machine.

After nine unsuitable breath samples, Police Officer # 1 informed the Applicant that he would be given one more opportunity to provide a suitable breath sample, failing which, he would be charged with refusal to provide a suitable breath sample.

In fact, Police Officer # 1 allowed the Applicant two more opportunities (making eleven attempts in all), but with the same unsatisfactory results.

As a result, Police Officer # 1 charged the Applicant with failure to provide a suitable breath sample, and as a result the Applicant's driver's licence was suspended for ninety days.

In appealing the ninety-day suspension of his licence, the Applicant, through his counsel, filed his written submissions, and also a note dated December 21, 2001, from his Dentist, written on a prescription note pad. The written note states that the Applicant had had a dental appointment on the evening of December 20, 2001, at 5:30, requiring the administration of a local anaesthetic.

The Applicant's Dentist also signed a further form on December 28, 2001, being a Medical Information form filed with the Notice of Appeal. On that form, the Dentist states that the Applicant had extensive dental work done on the evening of December 20, 2001, requiring a local anaesthetic, producing numbness in his tongue and lip.

In neither note did the Dentist draw any conclusion as to how the dental procedure and the

administration of a local anaesthetic affected the Applicant's ability to provide a suitable breath sample into the Alcotest instrument.

Furthermore, in support of his appeal, the Applicant's solicitor, in his written submissions, states, first, that the Applicant was never asked, throughout the above-stated sequence of events with Police Officer # 1, if he had a medical problem. Secondly, he states that the Applicant was at all times attempting to blow into the instrument as best he could. Thirdly, he speculates that the officer may have been blocking the hole in the device that allows for air to escape.

APPLICATION OF THE LAW TO FACTS:

This Tribunal cannot make a decision on speculation, so that this Tribunal dismisses the third argument, above, outright.

As for the first argument, above, it was open to the Applicant throughout the entire procedure with Police Officer # 1 to advise the officer of any medical problem that might have prevented him from providing a suitable breath sample, just as it had been open to him to make the suggestion that it was the machine that was at fault throughout the process. Not only did he fail to suggest a medical problem, but he also demonstrated no sign of a medical problem, a fact that, as already has been noted, is adopted in the Applicant's written submissions. Consequently, the argument that the police officer did not ask him specifically about any medical problem does not help the Applicant. In fact, he was never prevented from suggesting such a reason throughout the process.

As for the second argument, above, this Tribunal has doubts that the Applicant attempted to blow as best he could. These doubts are borne out by the agreed-upon fact that, on eleven occasions, the Applicant blew hard enough, but never long enough, without there being any explanation for his inability to do so.

The Tribunal is also not persuaded by the note dated December 21, 2001, and the subsequent report, dated December 28, 2001, of the Dentist, in support of the argument that the Applicant was unable to provide a suitable breath sample because of a medical condition.

Neither report complies with all the precise requirements of section 15 of Regulation 574 (as amended) under the *Highway Traffic Act*. In particular, there is no compliance with s. 15(1)(d), (e), or (f), outlined earlier in these Reasons.

But, even aside from those technical requirements, there is, more significantly, no compliance with section 15(2), as outlined earlier, to allow this Tribunal to even consider the Applicant's diagnosis and history of any condition that would prevent him from providing a suitable breath sample. Nor has this Tribunal been provided with the results of any related tests, which would allow this Tribunal to conclude that the Applicant could not legitimately provide a suitable breath sample.

Further, although Applicant's Dentist states that the Applicant had been given a local anaesthetic and that he had numbness in his tongue and his lip, the Dentist does not state how this could affect the Applicant's ability to provide a suitable breath sample. Nor does he state how long the numbness would last. This Tribunal notes that the dental procedure was performed at 5:30 p.m. The Applicant had been stopped at 8:52 p.m. How long did the numbness last? Would it prevent the Applicant from giving a suitable breath sample over three hours later, despite the efforts of an experienced officer? The Applicant did not complain of any numbness at the time he was to provide the breath samples.

These unanswered questions do not permit this Tribunal to conclude that the reports from the Applicant's Dentist satisfy this Tribunal that the Applicant suffered from a medical condition that would prevent him from providing a suitable breath sample.

Nor is this Tribunal able to so conclude, given the observations of Police Officer # 1, and the silence of the Applicant relating to any medical problem he was experiencing at the time he was asked to provide the breath samples.

This Tribunal finds that the Applicant has not satisfied the onus of establishing the merit of this Appeal.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated December 20, 2001 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

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

LICENCE APPEAL TRIBUNAL

Kenneth Koprowski,
Presiding Member

RELEASED: February 6, 2002

**HIGHWAY TRAFFIC ACT
R.S.O. 1990, CHAP. H.8 AS AMENDED, SECTION 50(1)**

IN THE MATTER of an application by Applicant to appeal the decision of the Registrar of Motor Vehicles pursuant to section 32(12)(b)(i) of the *Highway Traffic Act*;

AND IN THE MATTER of

Applicant

APPLICANT

and

REGISTRAR OF MOTOR VEHICLES

RESPONDENT

ADJOURNMENT

WHEREAS an oral hearing in the above matter was scheduled to be held on Wednesday, January 16, 2002, at Toronto, Ontario;

AND WHEREAS the Applicant's Counsel requested an adjournment of the hearing to permit his client to confer and obtain further evidence from his Cardiologist;

AND WHEREAS upon consent of the parties the hearing was adjourned to Wednesday, February 6, 2002;

AND WHEREAS the Applicant's counsel requested a further adjournment of the hearing as they are still waiting to hear from the Cardiologist, Dr. #1;

TAKE NOTICE, upon consent of all parties, the Tribunal Orders:

- (1) this matter is adjourned;
- (2) the appeal shall be heard at 1:30 p.m. on Wednesday, March 20, 2002 at the Tribunal's Chambers, 1 St. Clair, Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

RELEASED: February 5, 2002

FILE NAME: 0917.med.adj2

PREHEARING

753367 ONTARIO LIMITED O/A SOUTH SHORE HOMES

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

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: by teleconference
BRIAN CAMPBELL, Counsel, on behalf of 753367 Ontario Limited o/a
South Shore Homes
CAROL STREET, Counsel, representing the Ontario New Home
Warranty Program

DATE OF
PREHEARING: February 4, 2002 Toronto

ORDER

FOLLOWING attendances by teleconference on February 4, 2002 at a prehearing before this Tribunal of Brian Campbell, Counsel, on behalf of 753367 Ontario Limited o/a South Shore Homes (the "Applicant"), and Carol Street, Counsel on behalf of the Ontario New Home Warranty Program (the "Program");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Tuesday, March 12, 2002 at Gillespie Reporting Services, 130 Slater Street, Suite 200, Ottawa, Ontario and to continue if necessary on March 13, 14 and 15, 2002 at the above address of Gillespie Reporting;

1. The Parties to the hearing are the Applicant and the Program.

2. On or before February 11, 2002 the Applicant will provide Carol Street, the Program's Counsel, signed Vendor and Builder Agreements and Financial Statements for the year ending December 31, 2000 (and, if available, for the year ending December 31, 2001.) The Program's Counsel shall hold those documents in escrow until the Applicant's Counsel, Brian Campbell, confirms receipt of the documents referred to in clause 3 below.
3. Carol Street shall obtain from the Program and provide to Brian Campbell, a letter from the Program confirming that the Program will not release the Financial Statements of the Applicant to any third party, including a credit agency. Brian Campbell undertakes to hold this document in escrow until Carol Street confirms that she is in receipt of the documents referred to in clause 2 above.
4. Once the documents in clauses 2 and 3 have been exchanged, the Program will withdraw its Notice of Proposal and will forthwith advise the Tribunal that the hearing will not proceed. The Program will then process the renewal of the Applicant's registration in the normal course.
5. A second Pre-Hearing by teleconference shall proceed at 9:30 a.m. on Monday, February 25, 2002 if the intended settlement set out above is not implemented. If the intended settlement proceeds as set out above, the Program will advise the Tribunal that the February 25, 2002 Pre-Hearing shall not proceed and at the same time, the Program shall advise the Tribunal that the Notice of Proposal has been withdrawn.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: February 5, 2002

MacVINNIE, GEOFFREY RONALD

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

IN THE MATTER OF
GEOFFREY RONALD MacVINNIE

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: December 13, 2001

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

GEOFFREY RONALD MacVINNIE

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

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

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

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

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: February 6, 2002

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

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

FROM: Geoffrey Ronald MacVinnie
C/o Bay King Motors (1968) Ltd.
1655 Upper James Street
Hamilton, ON L9B 2J1

Pursuant to subsection 5(2) of the *Motor Vehicle Dealers Act*, Geoffrey Ronald MacVinnie (hereinafter referred to as “the Applicant”) and the Registrar, *Motor Vehicle Dealers Act*, (hereinafter referred to as “the Registrar”), in accordance with section 4.1 of the *Statutory Powers Procedure Act*, do hereby waive the requirements of a hearing and consent to an Order of the Licence Appeal Tribunal based upon the following Terms and Conditions:

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

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

Signed in the City of _____ this _____ day of _____ 2002.

Geoffrey Ronald MacVinnie (signature)

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

Date:

Carl Compton
Registrar

AMZAD A. KHAN DBA KHAN AUTO REPAIRS AND AMZAD A. KHAN

PREHEARING

AMZAD A. KHAN DBA KHAN AUTO REPAIRS AND AMZAD A. KHAN

APPEAL FROM A NOTICE OF THE DIRECTOR OF VEHICLE
INSPECTION STANDARDS ISSUED PURSUANT TO CLAUSES
91(8)(a) and (c) AND CLAUSES 93(a) and (c) OF THE *HIGHWAY*
TRAFFIC ACT R.S.O. 1990, CHAPTER H.8 AS AMENDED

TO REVOKE AMZAD A. KHAN D/B/A/ KHAN AUTO REPAIR'S
LICENCE AS A MOTOR VEHICLE INSPECTION STATION AND
AMZAD A. KHAN'S REGISTRATION AS A MOTOR VEHICLE
INSPECTION MECHANIC

TRIBUNAL: STUART CORK, Member

APPEARANCES: AHMAD A. KHAN, Agent, representing the Applicants

PATRICK MOORE, Counsel, representing the Director of
Vehicle Inspection Standards

DATE OF
PRE-HEARING: January 29, 2002 Toronto

ORDER

Following attendances on January 29, 2002, at a pre-hearing before this Tribunal of Ahmad A. Khan, Agent on behalf of Amzad A. Khan dba Khan Auto Repairs and Amzad A. Khan (the "Applicants") and Patrick Moore, Counsel, on behalf of the Director of Vehicle Inspection Standards ("the Director");

The Tribunal makes the following Order respecting the hearing scheduled to commence at the Tribunal's Chambers, 1 St. Clair, Avenue West, 12th Floor, Toronto, Ontario at 9:30 a.m., on Monday May 6, 2002, and to continue if necessary May 7, 8, 9 and May 10, 2002.

1. The Parties to the hearing are
 - (a) Amzad A. Khan dba Khan Auto Repairs;
 - (b) Amzad A. Khan; and
 - (c) The Director of Vehicle Inspection Standards

2. It was determined that the filing dates with the Tribunal of submissions and documents to be used in the hearing by both parties would occur on or before Friday April 26, 2002.

Both parties will file five copies with the Tribunal and deliver one copy to all parties. It was confirmed that the Tribunal requires full disclosure 10 days prior to the hearing.

3. The Respondent will present testimony and evidence from five witnesses, all of whom are Ontario Ministry of Transportation ("MTO") Inspectors: Officer John Tomasone, Officer Cory Stewart, Officer Dan Ventura, Officer Ivor Johnson, and possibly retired Officer Helmut Beintner.

Each witness for the Respondent will testify as an expert to give information supporting the facts for charges against the Applicant. The witnesses will give evidence regarding the following:

- Safety Standard Certificates ("SSC's") that were issued to vehicles that later turned out to be defective,
- False statements in an Application for a mechanics licence made by the Applicant
- Mr. Ahmad Khan's continuation of issuing SSC's following the refusal of his application by the Director
- The excessive number of SSC's and inspection stickers issued by the Applicant,
- Whether the station is in control of the licensee Mr. Ahmzad Khan
- Mr. Ahmzad Khan's lack of attendance at the facility,
- Documented pre-signing of SSC's and annual inspection certificates,
- History of previously held licences by related persons, and
- SSC's not itemized in the Director's Notice, but part of the Director's case.

The Respondent's evidence will cover the period from the end of 1998 to the date of issuance of the Director's .Noice as well as the relationship of the Applicant, Mr. Khan, with other inspection stations.

Among the materials the Respondent's witness will rely upon will be notes, Field Inspection Reports, and MTO records from the Ministry computerized data base.

4. The Applicant will present evidence and testimony from four witnesses, including Ahmzad Khan, licensee and brother of the Applicant, Azam Khan, son of the Agent Ahmad Khan, and two mechanics from the Applicant's facility, Wayne and Randy.

The Witnesses for the Applicant will testify that the vehicles in question were properly certified. The Applicant's witnesses will also present documentary evidence that Officer Bob Lickers improperly closed the Applicant's facility.

5. The Applicant is to provide the Respondent and the Tribunal with a complete witness list which is to include the full names of each of the Applicant's witnesses, within one

week of receiving this Order. It was noted that should the Applicants decide to call any witnesses to testify as experts, the Applicants must comply with the Tribunal's Rules of Practice, and particularly Rule 6.4 which provides specific criteria that parties must follow regarding expert witnesses at a hearing before the Tribunal.

6. The parties present at this Prehearing Conference recorded that there was no resolution of the issues between them.
7. It was confirmed at the Prehearing Conference that the Director has issued a Notice to Revoke Amzad A. Khan, d/b/a/ Khan Auto Repairs licence as a Motor Vehicle Inspection Station pursuant to clause 91(8)(a) and (c) of the *Highway Traffic Act* (the "Act") and Amzad A. Khan's registration as a Motor Vehicle Inspection Mechanic pursuant to clauses 93(a) and (c) of the *Highway Traffic Act*, with the Notice to Revoke being dated November 24, 2001.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Member

RELEASED: February 6, 2002

L.J. KERNAGHAN CONSTRUCTION LIMITED

MOTION TO CONVERT AN IN PERSON HEARING TO
A ELECTRONIC HEARING ON SHORT NOTICE UNDER
THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*
RESPECTING AN APPEAL OF A PROPOSAL

TO SUSPEND REGISTRATION

TRIBUNAL: JOHN ORT, Member

APPEARANCES:

JOHN KERNAGHAN, Agent, representing the Applicant
CAROL STREET, Counsel, representing the Registrar,
Ontario New Home Warranties Plan Act

DATE OF
MOTION:

February 4, 2002

By Teleconference

ORDER

WHEREAS the Registrar under the Ontario New Home Warranty Program ("Respondent") issued a proposal dated October 31, 2001 to suspend the registration of L.J. Kernaghan Construction Limited (the "Applicant") under the *Ontario New Home Warranties Plan Act*;

AND WHEREAS the Applicant requested a prehearing and a hearing before the Licence Appeal Tribunal to appeal the above noted proposal;

AND WHEREAS the Tribunal scheduled a prehearing and a hearing of this matter to commence in person at Kingston, Ontario;

AND WHEREAS there was a motion brought by the Respondent to convert an in person hearing to an electronic hearing on short notice;

AND WHEREAS both parties consented to convert the in person hearing to an electronic hearing.

NOW THEREFORE this Tribunal orders that the prehearing in this matter shall proceed electronically on Thursday, February 7, 2002 at 9:30 a.m.

LICENCE APPEAL TRIBUNAL

John Ort, Member

Released: February 6, 2002

DEVONIAN HOMES LTD.

MOTION TO CONVERT AN IN PERSON HEARING TO
A ELECTRONIC HEARING ON SHORT NOTICE UNDER
THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*
RESPECTING AN APPEAL OF A PROPOSAL

TO SUSPEND REGISTRATION

TRIBUNAL: JOHN ORT, Member

APPEARANCES:

BRUCE LONNEBERG, Agent, representing the Applicant
CAROL STREET, Counsel, representing the Registrar,
Ontario New Home Warranties Plan Act

DATE OF
MOTION:

February 4, 2002

By Teleconference

ORDER

WHEREAS the Registrar under the Ontario New Home Warranty Program ("Respondent ", "Program") issued a proposal dated October 29, 2001 to suspend the registration of Devonian Homes Ltd. (the "Applicant") under the *Ontario New Home Warranties Plan Act*;

AND WHEREAS the Applicant requested a prehearing and a hearing before the Licence Appeal Tribunal to appeal the above noted proposal;

AND WHEREAS the Tribunal scheduled a prehearing and a hearing of this matter to commence in person at Kingston, Ontario;

AND WHEREAS there was a motion brought by the Respondent to convert an in person hearing to an electronic hearing on short notice;

AND WHEREAS at the commencement of the motion on February 4, 2002 by teleconference the parties came to an agreement that:

(1) the Builder will sign the Vendor and Builder Agreements, pay the renewal fee of \$321.00 and provide financial statements and backup documentation confirming the information set out in its Personal Net Worth Form and return the information to the Ontario New Home Warranty Program by February 18, 2002;

(2) if the Builder does not execute and provide the Program with a copy of the Vendor and Builder Agreements by February 18, 2002, the parties will attend a prehearing before this Tribunal on February 20, 2002 by teleconference at 1:30 p.m.; and

(3) if the Builder provides the above-noted documentation by February 18, 2002, the request for a prehearing on February 20, 2002 before this Tribunal is on consent of both parties withdrawn and the Program will withdraw its Notice of Proposal to suspend the Applicant's registration and will so advise the Tribunal.

NOW THEREFORE IT IS ORDERED THAT:

1. Subject to paragraph 2 below, the prehearing before this Tribunal scheduled for February 6, 2002 is adjourned to 1:30 p.m. on February 20, 2002 and is to be conducted by teleconference; and
2. If on or before February 19, 2002, the Program notifies the Tribunal in writing that the above-noted terms of settlement have been complied with, these proceedings are hereby concluded before this Tribunal.

LICENCE APPEAL TRIBUNAL

John Ort, Member

Released: February 6, 2002

MAKKINGA CONSTRUCTION INCORPORATED

MOTION TO CONVERT AN IN PERSON HEARING TO
A ELECTRONIC HEARING ON SHORT NOTICE UNDER
THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*
RESPECTING AN APPEAL OF A PROPOSAL

TO SUSPEND REGISTRATION

TRIBUNAL: JOHN ORT, Member

APPEARANCES:

HANK MAKKINGA, Agent, representing the Applicant
CAROL STREET, Counsel, representing the Registrar,
Ontario New Home Warranties Plan Act

DATE OF
MOTION:

February 4, 2002

By Teleconference

ORDER

WHEREAS the Registrar under the Ontario New Home Warranty Program ("Respondent") issued a proposal dated October 31, 2001 to suspend the registration of Makkingsa Construction Incorporated (the "Applicant") under the *Ontario New Home Warranties Plan Act*;

AND WHEREAS the Applicant requested a prehearing and a hearing before the Licence Appeal Tribunal to appeal the above noted proposal;

AND WHEREAS the Tribunal scheduled a prehearing and a hearing of this matter to commence in person at Thunder Bay, Ontario;

AND WHEREAS there was a motion brought by the Respondent to convert an in person hearing to an electronic hearing on short notice;

AND WHEREAS at the commencement of the motion on February 4, 2002 by teleconference and after some preliminary discussions, Mr. Hank Makkingsa, agent for the Applicant stated on the record that the Applicant's request for a prehearing and hearing before this Tribunal is withdrawn;

NOW THEREFORE this Tribunal orders that these proceedings are concluded before this Tribunal.

LICENCE APPEAL TRIBUNAL

John Ort, Member

Released: February 6, 2002

REDPARK HOMES LTD

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

TO REFUSE TO RENEW REGISTRATION

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

APPEARANCES:

SHAEL BECKENSTEIN, Counsel, representing Redpark Homes Ltd.
CAROL STREET, Counsel, representing the Registrar, Ontario New
Home Warranty Program

DATE OF
HEARING:

February 5, 2002

Toronto

ORDER

Pursuant to the provisions of the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, Chapter O.31, as amended, Redpark Homes Ltd. (the "Applicant") appealed a Notice of Proposal dated June 7, 2001 of the Registrar of the Ontario New Home Warranty Program (the "Registrar") to refuse to renew the registration of the Applicant;

WHEREAS the Applicant appealed the proposal to the Licence Appeal Tribunal requesting a hearing;

AND WHEREAS the Registrar issued a Supplemental Notice of Proposal dated January 8, 2002;

AND WHEREAS the hearing commenced on February 5, 2002 and Counsel for the Applicant and Counsel for the Registrar advised the Tribunal that on consent of all parties they wished to have an adjournment in order to continue with settlement discussions;

NOW THEREFORE this Tribunal orders, on the consent of the parties that this proceeding is adjourned to continue at the Tribunal's Chambers, 12th floor, 1 St. Clair Avenue West, Toronto at 9:30 a.m. on Monday February 18 and to continue February 19, 20 and 21, 2002 if necessary.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley, Vice-Chair
Presiding

Released: February 7, 2002

SHEPHARD, SHERRY LYNN

SHERRY LYNN SHEPHARD

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

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

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

APPEARANCES: LUBA NEUWIRTH,
Representative for the Registrar of Motor Vehicles

SHERRY LYNN SHEPHARD, Applicant
unrepresented

DATE OF HEARING: February 4, 2002

DECISION RELEASED: February 12, 2002

By Teleconference

REASONS FOR DECISION

A hearing was held on February 4, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

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

BACKGROUND:

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

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

Owner:	Sherry Lynn Shepard (the "Applicant")
Motor Vehicle:	1991 Ford Taurus, plate no. 773 RSM (the "vehicle")
Date of Appeal:	January 17, 2002

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

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

This matter came before this Tribunal on February 4, 2002 and proceeded as an electronic hearing.

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

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

ISSUE:

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

I am requesting this appeal because my vehicle was taken without my permission by my common-law spouse, while I was sleeping. He had another man with him who had a drivers licence, whom I thought would have been driving my car, when I got up in the morning and noticed my car was gone; so I did not report it stolen.

I live in the country about five miles away from town with three children aging from 16 to one and a half years old. I have no telephone and no other vehicle. I am now a single mom as my common-law spouse is incarcerated due to this incident. I am on Ontario Works (Welfare) and have no other source of income and I will not be able to afford the impound fees; which I have found out will be in the amount of \$1037.50. I will not be able to find work or get around without imposing on others; therefore I need my car back. Thank you for your time and consideration.

Sherry Lynn Shephard

At the hearing, the Applicant re-iterated the points stated on the Notice of Appeal, basically emphasising her inability to get the money to pay for the impoundment/storage charges.

The Applicant also explained the circumstances leading up to the incident which resulted in the vehicle impoundment. She and the driver of the vehicle, Mr. John Douglas Knapman have been living common-law for some time. Ms. Shephard was well aware that Mr. Knapman has never had a drivers' licence and that he has a lifetime suspension on driving. The Applicant believed that his friend whom she believes has a driver's licence would drive the vehicle. She stated that she was not aware that Mr. Knapman would drive the car. The Applicant claims that the vehicle was not stolen but taken without her permission. The Applicant did not report the car missing due to her relationship with Mr. Knapman.

The Applicant noted that she cannot afford to rent a vehicle, but has relied on her father and sister, who both live 5 miles from her in the town of Brighton to assist her with her daily needs. For their services to her, she pays them 5 to 10 dollars each time that they transport her. Other than this expenditure, she has not suffered any financial losses.

When asked if she had explored the possibility of renting or borrowing a vehicle, she stated that it was out of the questions as she was on a fixed income.

The Applicant had nothing further to add.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

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

3. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner
4. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by John Douglas Knapman;
5. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
6. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving While Disqualified under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until February 26, 2004.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

by the owner of the vehicle currently being impounded.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- (ii) while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).

- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

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

The Applicant has not argued or presented evidence that the impoundment will be a threat to the health or safety of a person ordinarily transported in the vehicle under subsection 22(1) of Regulation 574.

The Tribunal will proceed to review the criteria required to meet the onus for consideration of financial loss.

Is there no alternative to the impounded vehicle?

Subsection 22(3)(a) Regulation 574 as amended by O. Reg. 632/98 provided that the Tribunal may not consider financial or economic loss as a ground of appeal unless no alternative to the impounded vehicle is available

The Applicant had not made any inquiry into any other available vehicles which may have been at her disposal during the impoundment period. She took the position that she was on a fixed income and could not afford it. However, she has been able to rely on her father and sister for needed transportation to meet her everyday needs. An alternative to the impounded vehicle is available, although inconvenient.

The criteria required under subsection 22(3) of O. Reg. 632/98 is cumulative. That is, to be successful, an Applicant must demonstrate all of the criteria of subsection 22(3). There being an alternative to the impounded vehicle, the Tribunal may not consider the balance of the criteria under subsection 22(3) of the Regulation with respect to financial or economic loss. Therefore, the Tribunal may not consider the loss identified by the Applicant.

After assessing the evidence presented, the Tribunal finds that Applicant has been

inconvenienced but has not demonstrated exceptional hardship as circumscribed by section 22 of Ontario Regulation 632/98 amending Ontario Regulation 574 under the *Highway Traffic Act*.

DECISION:

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

LICENCE APPEAL TRIBUNAL

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

RELEASED: February 12, 2002

NATIONAL CHILDRENS BURN SOCIETY

HIGHWAY TRAFFIC ACT
R.S.O. 1990, Chap. H.8 as amended

IN THE MATTER of the ORDER to IMPOUND a MOTOR VEHICLE Order # 2500198 OWNED BY: National Childrens Burn Society of: 41 Craiglee Drive, Toronto, Ontario, M1N 1L9 made pursuant to section 55.1 of the *Highway Traffic Act*, effective on: January 22, 2002.

AND IN THE MATTER of a requirement for a hearing respecting an appeal of the said Order to Impound, pursuant to section 50.2 of the *Highway Traffic Act*.

NATIONAL CHILDRENS BURN SOCIETY

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

CONSENT ORDER

Upon the application to the Tribunal by the National Childrens Burn Society, Applicant, and by the representative for the Registrar of Motor Vehicles, for the issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22, and having reviewed the written settlement signed by the Applicant and the Registrar of Motor Vehicles as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

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

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

RELEASED: February 12, 2002

Schedule "A"

LICENCE APPEAL TRIBUNAL

Between:

NATIONAL CHILDRENS BURN SOCIETY

Applicant

-and-

THE REGISTRAR OF MOTOR VEHICLES

Respondent

WAIVER AND CONSENT

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

AGREED STATEMENT OF FACTS

1. On January 22, 2002, the motor vehicle described in **Order to Impound #2500198** was impounded in accordance with subsection 55.1(3) of the *Highway Traffic Act*, RSO 1990, c. H. 8 as amended.
2. The applicant, the National Childrens Burn Society, whose name is shown on the vehicle portion and the plate portion of the permit for the impounded motor vehicle, is the owner of the said vehicle.
3. No other order to impound under section 55.1 of the Act has ever previously been made with respect to any motor vehicle then owned by the applicant.
4. The applicant filed an appeal to the impoundment order, in accordance with the grounds permitted under clause 50.2(3)(d) of the *Highway Traffic Act*, stating **that the order will result in exceptional hardship.**
5. Materials provided to the Registrar indicate that exceptional hardship will result from the impoundment of the motor vehicle as defined by Regulation 632/98 of the *Highway Traffic Act*.
6. The applicant has had the opportunity to obtain independent legal advice with respect to consent to this Order.
7. The parties agree that this agreement does not bind the Ministry of Transportation or the Registrar of Motor Vehicles in any way, with respect to future hearings or consent orders.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsection 50.2(5) of the Highway Traffic Act that the Tribunal set aside the order to impound.

National Childrens Burn Society

The Registrar of Motor Vehicles

(signature of Applicant)

(signature of Registrar)

(date)

(date)

BALDWIN TRAVEL & TOURS LTD.

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

IN THE MATTER of the REGISTRATION of
BALDWIN TRAVEL & TOURS LTD.
as a travel agent

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

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

BALDWIN TRAVEL & TOURS LTD.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

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

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

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

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: February 12, 2002

APPEAL TRIBUNAL

BETWEEN:

BALDWIN TRAVEL & TOURS LTD.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

WAIVER AND CONSENT

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

AGREED STATEMENT OF FACTS

BACKGROUND

1. Baldwin Travel & Tours Ltd. ("the Registrant") has been registered as a travel agent (Registration No. 2324770/R) since February 18, 1985 and as a travel wholesaler (Registration No. 4228433/W) since February 8, 1994. Maintenance of a "*Travel Industry Act Trust Account*" is one of the Terms and Conditions of the Registrant's registration.

GROUND FOR THE PROPOSAL

2. Subsection 36 (1) of Ontario Regulation 806/93, as amended, made under the Act (the "Regulation") states that a registrant shall maintain a trust account to protect customer funds if the registrant is required to maintain a trust account under the terms and conditions specified in the registrant's registration.
3. The registrant was visited by one of TICO's Inspectors on November 20, 1995. It was noted during the visit that the "*Travel Industry Act Trust Account*" was not being maintained in that it was inactive and incorrectly labelled. The Registrant advised the inspector, that it would immediately implement trust accounting.
4. By letter dated June 24, 1999, TICO advised the Registrant that there was information missing from the financial statements for the fiscal year ended January 31, 1999. The Registrant was asked to file the previously requested accounts receivable listing over 90 days old, the gross Ontario travel sales,

and the trust reconciliation, by July 7, 1999, failing which the Registrar would initiate administrative action including a possible proposal to revoke registration.

5. On June 28, 1999, the Registrant telephoned TICO and left a voice message that it was not required to be on trust accounting.
6. By letter dated June 28, 1999, the Registrant was advised by TICO that it was required to reply in writing, to TICO's letter dated June 24, 1999, and provide the required documentation, which had been omitted from the annual filing of its financial statements for January 1999. The letter also reminded the Registrant that Trust Accounting is one of the Terms and Conditions of its wholesale registration, and that the trust reconciliation is an annual requirement to be filed with the financial statements for the Registrant. This information was due July 7, 1999.
7. On July 16, 1999, TICO received a fax from the Registrant's accountant, detailing the accounts receivable listing, the gross travel sales, and advising that the trust account balance was nil.
8. On October 7, 1999, the Registrant was visited by one of TICO's inspectors. The visit revealed that the Registrant had not implemented trust accounting. The Registrant indicated during the visit that it was installing a new computer system. The visit concluded that monthly monitoring was strongly recommended and that the Registrant could result in a risk to the Fund without proper implementation and maintenance of its trust account.
9. On October 26, 1999, one of TICO's inspectors requested by fax, from the Registrant, a progress report on the implementation of the new accounting system and trust accounting.
10. By fax dated November 3, 1999, the Registrant advised TICO that as of December 1, 1999, the Registrant would be commencing full implementation of its new accounting system and trust accounting.
11. On March 6, 2000, one of TICO's inspectors reminded the Registrant that the January 2000 financial statements, which were due by April 30, 2000, were to include the trust reconciliation (customer obligation list and reconciliation of customer funds and obligations), as part of its annual filing.
12. By fax dated July 6, 2000 the Registrant was advised by TICO that a review of its financial statements for fiscal January 2000, received on May 16, 2000, could not be completed, due to missing information, despite the Registrant's assurances that its January 2000 financial statements would be filed in the required format. Missing from the financial statements were the trust reconciliation, sales, and accounts receivable listing.
13. By letter dated October 11, 2000, TICO reminded the Registrant that financial statements for the fiscal year ended January 31, 2000 were missing information. The letter advised that despite numerous telephone and fax correspondence over the past five months, TICO was unable to complete its financial review. The letter gave a due date of October 31, 2000, to file all missing required information.
14. By fax dated October 30, 2000, the Registrant's accountant provided the required information, which had been omitted from the January 2000 financial statements.
15. On April 24, 2001, the Registrant was visited by one of TICO's inspectors. The visit concluded that the Registrant continued to demonstrate resistance to operating a trust bank account.
16. By letter dated May 22, 2001, the Registrar, *Travel Industry Act* advised the Registrant that a review of its files indicated ongoing compliance problems regarding improper maintenance of its *Travel Industry Act Trust Account*. The Registrant was requested to provide a letter of credit in lieu of trust

accounting no later than June 15, 2001, failing which the Registrar would issue a proposal to revoke registration.

17. On June 6, 2001, TICO received financial statements for the Registrant for the fiscal year ended January 31, 2001, which were due April 30, 2001. Those statements revealed a trust deficit of \$81,809.
18. On June 7, 2001 the Registrant telephoned TICO and advised that it could not provide a letter of credit to TICO, and promised that it would immediately implement and maintain the trust account. The Registrant asked for two months to get organized.
19. On June 27, 2001 the Registrant was requested by TICO to provide additional information in order that TICO be able to complete its review of the Registrant's financial statements for the fiscal year ended January 31, 2001.
20. By letter dated August 13, 2001, the Registrant was requested by TICO to provide proof that it had implemented and was properly maintaining the *Travel Industry Act Trust Account*. Additionally, the Registrant was asked to provide copies of the most current bank statements, for all accounts, no later than August 31, 2001.
21. On August 16, 2001, the Registrant's accountant telephoned TICO to advise that he would attempt to produce a hand written list of customer obligations. He stated that the Registrant did not do trust accounting, and that general and trust monies were co-mingled.
22. On August 22, 2001 the Registrant telephoned TICO to advise that it had taken the necessary steps to bring the company into compliance re: trust accounting.
23. On September 4, 2001, the Registrant provided TICO with a written list detailing steps taken to meet trust account requirements, along with bank branch information, and bank account numbers. Copies of bank statements were not provided, as previously requested.
24. On October 9, 2001 the Registrar, *Travel Industry Act*, issued a letter to the Registrant acknowledging receipt of steps taken by the Registrant to meet its trust account requirements. The letter requested a trust reconciliation for the month of September 2001, to be accompanied by a copy of the *Travel Industry Act Trust Account* bank statement(s) for the corresponding period. This information was due by October 30, 2001.
25. By November 6, 2001, there had been no further response from the Registrant and TICO had not received the required customer deposit reconciliation. On that date, the Registrar issued the Proposal to Revoke the Registrant's Registration.
26. The Registrant has since provided trust reconciliations and the corresponding bank statements for the months of September, October, November, and December 2001. The reconciliations, as filed, indicate that the Registrant is currently adhering to the trust accounting requirements of the Regulation.
27. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

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

1. the Registrar refrain from carrying out the Proposal to Revoke Registration dated November 6, 2001;
2. the Registrant's registration is to be subject to the following terms and conditions:
 - (a) The Registrant shall at all times maintain sufficient funds to cover its customer obligations. Such funds shall be maintained in a properly designated "Travel Industry Act Trust Account" and in accordance with the trust accounting requirements as stipulated in section 36 of the Regulation or such subsequent provision as may be in force from time to time;
 - (b) The Registrant shall submit a monthly trust account reconciliation with corresponding bank statements to the Registrar's satisfaction beginning with the month of January 2002, no later than 30 days after the end of each calendar month, for so long as the Registrar shall so require;
3. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) and (b) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.
4. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

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

DATED at Mississauga this ____ day of January, 2002

Ms Harjeet Davda
Baldwin Travel & Tours Ltd.
I have authority to bind the corporation

Mr. Michael Pepper
Registrar, *Travel Industry Act*

J.R. DIAMOND HOMES INC.

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

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: TERENCE A. WARDROP, Q.C., Vice-Chair, Presiding

APPEARANCES:

No one appearing for J.R. DIAMOND HOMES
CAROL STREET, Counsel, for the Registrar, Ontario New Home
Warranty Program

DATE OF
HEARING: January 7, 2002 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This hearing arises from a Notice of Proposal dated June 7, 2001, (the "Original Proposal"), issued by the Registrar of the Ontario New Home Warranties Plan (the "Registrar"), to refuse to renew the registration of J. R. Diamond Homes Inc. (the "Applicant"), as a vendor or a builder under the provisions of Section 8(2) of the *Ontario New Home Warranties Plan Act* R.S.O. 1990. Ch. 0.31 (the "Act"). Pursuant to Section 3 of the Act, the Registrar is appointed by Ontario New Home Warranty Program, the corporation designated to administer the Act under Section 2 thereof (the "Program") and is charged with the duties and required to exercise the powers given to the Registrar by the Act.

The Registrar issued a Supplemental Notice of Proposal dated November 29, 2001, (the "Supplemental Proposal") which, by adding information and statements supplemental to the Original Proposal, had the effect of making the Original Proposal current as at the date of the Supplemental Proposal. This hearing dealt with the Original Proposal and the Supplemental Proposal together, as a single proposal (collectively the "Proposal").

The Applicant by a notice requested a hearing before the Licence Appeal Tribunal (the "Tribunal") respecting the Proposal pursuant to the provisions of sections 9(2) and 9(4) of the Act.

ISSUES:

The Registrar issued the Proposal under Section 8(2) of the Act based upon the Registrar's opinion that the Applicant is disentitled to registration as a vendor or a builder pursuant to Section 7(1) and Section 8(2) of the Act. It is the opinion of the Registrar, as stated in the Proposal, that the Applicant cannot reasonably be expected to be financially responsible in the conduct of its undertakings, the past conduct of the Applicant and its officers and directors affords reasonable grounds for belief that the Applicant will not carry on the Applicant's undertakings in accordance with law and with integrity and honesty, and further, that the Applicant does not have sufficient technical competence to consistently perform the warranty service required of it. The Registrar also alleges in the Proposal that the Applicant is in breach of a term or condition of its registration and the Act.

The Applicant in its Notice of Appeal dated June 22, 2001, (the "Appeal") gave no indication of either the specific items of the Proposal that it wished to appeal nor any reasons therefor and thus, this Tribunal has some difficulty in being able to understand with which item or items of the Proposal the Applicant takes issue, or why. The Applicant's Appeal gives no direction to the Tribunal except a bland, or blanket, statement that it "disagrees with ... the Registrar of ONHWP on all counts in the NOP", that is, of all the issues set out in the Proposal which are to be heard and addressed by this Tribunal.

The issues in this hearing are further complicated due to the fact that the solicitor who undertook the Appeal, and signed the Appeal on behalf of the Applicant as its "Representative", breached not only his duty to his client but also to the Tribunal by abandoning this matter without appearing before this Tribunal.

In any event, the solicitor's non-appearance gives rise to a great deal of wasted time and expense for the Respondent, its Counsel and its witnesses, not to mention the Tribunal and its staff. In this connection, efforts were made by the Respondent's Counsel and the staff of the Tribunal to ascertain whether any other person, other than the said solicitor, would be attending on behalf of the Applicant at the hearing of the issues raised by the Appeal but to no avail.

EVIDENCE:

The Respondent gave its evidence by way of the testimony of Adil Darr (an employee in the licensing and underwriting department of the Program) and Richard Johnston (being a Warranty Representative of the Program). As stated above, the Applicant neither appeared nor gave any evidence at the hearing to support the issues raised in its Appeal. The evidence given by both witnesses at the hearing was straight forward, clear and precise, thus giving this Tribunal little trouble in understanding the facts which give rise to the Proposal. It is unnecessary to relate in any detail the evidence given at the hearing, except to refer to the 240 items contained within the four volumes of Exhibit #3 and the other Exhibits filed.

THE FACTS:

From all of the evidence given at the hearing, this Tribunal finds as facts the following:

1. The Applicant executed an agreement with the Program dated August 12, 1999, (the "Vendor/Builder Agreement");
2. The Applicant was validly registered pursuant to the Act as a Vendor/Builder as of May 2, 2000;
3. The Applicant applied to the Program for a renewal of its registration as a Vendor/Builder dated May 2, 2001, which application was filed and received by the Program on May 3, 2001, without any supporting current financial or up-to-date notarized net worth statements as required in the form of application;
4. The Registrar issued a Notice of Proposal dated June 7, 2001, with respect to the Original Proposal;
5. A solicitor, purporting to act on behalf of the Applicant, filed a Notice of Appeal with the Tribunal pursuant to Section 9(4) of the Act dated June 22, 2001, with respect to the Appeal;
6. The Registrar issued a Supplemental Notice of Proposal dated November 29, 2001, with respect to the Supplemental Proposal;
7. The Applicant is in breach of its agreements set forth in the Vendor/Builder Agreement;
8. The allegations described and contained within the Proposal are true.

THE LAW:

Pursuant to section 8(2) of the Act, the Registrar may refuse to renew the registration the Applicant as a vendor or a builder for any reason that would disentitle the Applicant to registration under section 7(1) of the Act, or in circumstances where the Applicant has a record of breaches of warranties or of failure or unwillingness to complete performance of contracts, or is in breach of a term or condition of the registration:

"8 (2) Subject to section 9, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 7, if the registrant were an applicant, or where the registrant has a record of breaches of warranties or of failure or unwillingness to complete performance of contracts, or is in breach of a term or condition of the registration."

Pursuant to subsections (a), (b) and (c) of section 7(1) of the Act, the Applicant is entitled to registration by the Registrar except where having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its undertakings, or its past conduct or the past conduct of its officers or directors affords reasonable grounds for belief that its undertakings will not be carried on lawfully, honestly and with integrity:

- "7. (1) An applicant is entitled to registration by the Registrar except where,
- (a) having regard to the applicant's financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of the applicant's undertakings;
 - (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on the applicant's undertaking in accordance with law and with integrity and honesty;
 - (c) the applicant is a corporation and,
 - (i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its undertakings, or
 - (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its undertakings will not be carried on in accordance with law and with integrity and honesty;"

Pursuant to section 7(1)(d) of the Act, the Applicant is entitled to registration as a builder except where the Applicant does not have sufficient technical competence to consistently perform the warranties:

- "7. (1) An applicant is entitled to registration by the Registrar except where,
- (a) ...;
 - (b) ...;
 - (c) ...; or
 - (d) in the case of an application for registration as a builder, the applicant does not have sufficient technical competence to consistently perform the warranties."

Based upon the above noted facts, the Registrar has reached the decision that the Applicant cannot reasonably be expected to be financially responsible in the conduct of its undertakings. The Registrar has further concluded that the Applicant has a record of breaches of warranties and a record of failures or unwillingness to complete performance of contracts, and is in breach of a term or condition of its registration. In addition, the Registrar has decided that there are reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty. Pursuant to sections 9(1) and 9(2) of the Act, the Registrar is required to serve a notice of proposal on the Applicant:

- "9. (1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the Registrar shall serve notice of the proposal, together with written reasons therefor, on the applicant or registrant.
- (2) A notice under subsection (1) shall state that the applicant or registrant is entitled to a hearing by the Tribunal if the applicant or registrant mails or delivers, within fifteen days after service of the notice under subsection (1), notice in writing requiring a hearing to the Registrar and the Tribunal."

The appeal comes to this Tribunal by virtue of section 9(4) of the Act, which provides:

"9. (4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar."

Based upon the evidence presented at the hearing, this Tribunal is in accord with the Registrar's conclusions set forth above.

DECISION AND ORDER:

The onus of proof that the Proposal is correct lies with the Respondent and this Tribunal finds that this onus has been discharged in light of all of the evidence given at the hearing and for the reasons hereinbefore stated. Accordingly, pursuant to the authority vested in it by section 9(4) of the Act, this Tribunal directs the Registrar to carry out the Proposal to refuse the renewal of the registration of the Applicant as a vendor/builder under the Act.

LICENCE APPEAL TRIBUNAL

Terence A. Wardrop, Q.C.,
Vice-Chair, Presiding

Released: February 13, 2002

LEE, DONALD P.

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

IN THE MATTER OF
DONALD P. LEE

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: September 25, 2001

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

DONALD P. LEE

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

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

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

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

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: February 13, 2002

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

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

FROM: Donald Patrick Lee
21489 Warden Avenue West
Queensville, ON L0G 1R0

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereinafter the "Act") the parties to the proceeding, Donald Patrick Lee (hereinafter referred to as "the Applicant"), and the Registrar, *Motor Vehicle Dealers Act* (hereinafter the "Registrar") waive the requirement of a hearing and hereby consent to an Order of the Licence Appeal Tribunal (hereinafter the "Consent Order") based on the following terms and conditions to their registrations as a motor vehicle salesperson:

1. The Applicant agrees that if he is criminally charged or convicted in the future, he will immediately notify his employer in writing of the charges or convictions against him and provide a copy of the notification signed by his employer to the Registrar, giving the particulars of the charges or convictions.
2. The Applicant agrees that if he is convicted under the Criminal Code or convicted of any industry specific offences under any Statute in the future, he will be automatically revoked.
3. The Applicant agrees to provide full and accurate disclosure on any applications, documents, statements or other form of communication/information provided to the Registrar or his authorized representatives regardless of previous disclosure.
4. The Applicant acknowledges that the Registrar is relying upon the accuracy of the disclosure provided by the Applicant in entering into these terms and conditions.
5. The Applicant agrees that his explanation of the circumstances of his criminal record, are substantially as set out in the disclosure provided to the Registrar.
6. The Applicant agrees that he will continue to follow the current and all future treatments prescribed by his physician.
7. The Applicant agrees not to be a partner, shareholder, officer, director or sales manager of a dealership.
8. The Applicant agrees not to be the final signatory on any sales contracts on behalf of the dealer.
9. The Applicant agrees not to transfer his registration as a motor vehicle Salesperson to another dealer without having first obtained the prior written consent of the Registrar.
10. The Applicant agrees to immediately enrol in the Ontario Motor Vehicle Industry Council Certification Course and to be responsible for all fees in relation to enrolment. The Applicant further acknowledges that enrolment in the course entitles him to a sixty (60) day conditional registration period that allows for his successful completion of the course (including passing the exam).

11. The Applicant agrees not to be involved in the process of buying or selling motor vehicles without the benefit of registration.
12. The Applicant acknowledges and understands that his registration will not be used to buy or sell motor vehicles where the Applicant knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
13. The Applicant agrees that his registration will not prevent the Registrar from taking administrative action, including a proposal to revoke his registration, arising from matters that may have occurred or may occur in the future related to his financial circumstances and honesty and integrity.
14. The Applicant acknowledges that his registration as a motor vehicle Salesperson will not prevent the Registrar from taking legal action, including a Provincial Offences prosecution arising from matters that may have occurred or may occur in the future related to his financial circumstances and honesty and integrity.
15. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
16. The Applicant will provide a copy of this order to any future employer.
17. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
18. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
19. The Applicant acknowledges that he has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____, this _____ day of _____ 2002

(Signature) Donald Patrick Lee

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

Date:

Carl Compton
Registrar
Motor Vehicle Dealers Act

ADİYAMAN, SÜLEYMAN

SÜLEYMAN ADİYAMAN

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

PHILIP I. ULRICH, Counsel, representing the Applicant
A. MICHAEL ROTHE, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: February 5, 2002 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

Suleyman Adiyaman (the "Applicant") appeals the Proposal of the Registrar of the *Motor Vehicle Dealers Act* (the "Act") to refuse the Applicant's registration as a salesperson of motor vehicles. The Proposal was issued on August 8, 2001 in terms of Section 7(1) of the Act.

THE ISSUES:

The Registrar bases his proposal to refuse the Applicant's registration under section 6.(1) of the Act which reads as follows:

6.(1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 5.

The Registrar further bases his proposal under section 5.(1)(b) and section 7.(1) of the Act which reads as follows:

5(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or

.....

7.(1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the Registrar shall serve notice of the proposal, together with written reasons therefore, on the applicant or registrant.

In support of his Notice of Proposal to refuse, the Registrar furnished the following particulars:

The reasons for this proposal are:

1. On or about July 24, 2001 Suleyman Adiyaman (the "Applicant") submitted an application for registration as a salesperson.
2. On the application to become a registered salesperson question 9 asks:
"Have you ever been found guilty or convicted of an offence under any law or are any charges pending? (This includes those instances where an absolute discharge has been ordered). If yes, list all charges and/or convictions and the circumstances surrounding each (attach additional sheets if necessary)."
The Applicant said "yes", and stated in the space provided:
"I was found guilty of fraud over \$1,000 in 1995 in the prosece(sic) waiting for my pardon to come.
3. A criminal record search found that the Applicant has the following convictions:

Poss of Property Obtained by	
Crime over \$1,000	March 8, 1995;
Fraud over \$1,000	March 8, 1995;
Fraud over \$1,000 (3 Chgs)	April 6, 1995;
Poss of Property Obtained by	
Crime over \$1,000	April 6, 1995; and
Fraud over \$1,000	April 6, 1995.
4. The Applicant has failed to comply with the Act and in particular with section 5.

THE EVIDENCE:

The evidence of the Registrar consisted of documentary evidence as well as the testimony of Louise Gingras ("Gingras"). Gingras' evidence is summarized hereunder.

LOUISE GINGRAS

Gingras testified that she has been an inspector with the Ontario Motor Vehicle Industry Council ("OMVIC") since 1977.

She explained that OMVIC has since 1977 been delegated with responsibility to administer

the Act which has been enacted to protect the public. OMVIC, in terms of its delegated duties, oversees the registration of applicants, inspects dealerships, institutes investigations and attempts, through mediation, to resolve disputes between consumers and motor vehicle dealers. Her duties further include conducting investigations with a view to ensuring compliance with the Act.

Gingras stated that she is familiar with the Registrar's file pertaining to the Applicant. The Applicant has at no time been registered as a salesperson of motor vehicles under the Act.

In July 1996 the Applicant submitted an application for registration as a motor vehicle salesperson. Question # 10 on that application stated as follows:

Have you ever been found guilty or convicted of an offence under any law or are there any charges pending? This includes where a conditional discharge or an absolute discharge has been ordered.

If yes, attach full particulars on a separate signed and dated statement.

Note: Where the applicant has been previously registered, list only those convictions, conditional charges, absolute discharges or charges which have not been previously disclosed.

Alongside this question the Applicant had ticked "Yes" in answer to the question. Nubridge Auto Centre Inc. had certified at the end of the Application that it was willing to employ the Applicant subject to his registration being granted. (Exhibit 1, Tab 7)

Following receipt of the Applicant's July 1996 application the Ministry of Consumer and Commercial Relations, which at that time handled all applications for registration, called for a C.P.I.C. report on the Applicant from the Ontario Provincial Police. In response to the request, a C.P.I.C. report was furnished to the Ministry and that report revealed that the Applicant had the following criminal record:

<u>DATE & PLACE</u>	<u>CHARGE</u>	<u>DISPOSITION</u>
MAR 08 95 TORONTO	(1) POSS OF PROPERTY OBTAINED BY CRIME OVER \$1000 SEC 354(A) CC (2) FRAUD OVER \$1000 SEC 380(1) CC	(1-2) 9 MOS ON EACH CHG CONC
APR 06 95 TORONTO	(1) FRAUD OVER \$1000 (3 CHGS)	(1-3) 9 MOS ON ECAH CHG CONC
	(2) POSS OF PROPERTY OBTAINED BY CRIME OVER \$1000 (3) FRAUD OVER \$1000	
JUL 06 95		PAROLED

It was this C.P.I.C. report that influenced the Ministry to decide to issue a Notice of Proposal to

refuse the Applicant's registration as a motor vehicle salesperson.

The Applicant, according to Gingras, abandoned his July 1996 application.

When in 1997 OMVIC was established, it took over the functions and duties that had previously been attended to by the Ministry of Consumer and Commercial Relations. When this transition took place the records of the Ministry, including the file relating to the Applicant, in microfiche form, were sent to OMVIC. Included in this file was the information regarding the Applicant's criminal record.

In May 1997 the Applicant again made written application for registration as a motor vehicle salesperson and as OMVIC were now handling all applications for registration this 1997 application was directed to OMVIC. In this application form the same question # 10 appeared as appeared on the Applicant's 1996 application. In completing the application form the Applicant again answered "Yes" to question # 10. Attached to this application form was a letter under the Applicant's signature which stated as follows:

May 16, 1997

Suleman Adiyaman
20 Black Oak Drive
Brampton, Ontario
L6R 1C1

Dear Sir or Madom:

This is to regard to my application for salesmen licence. I applied for this licence in 1996 but was rejected, due to my criminal charges in april of 1995. I feel that I am very sorry for want (sic) I have done and regret any and all actions, that I have done at that time.

But I must look for the future now, and look to you for your help, and hopefully you can look past (sic) my mistacks (sic) as I but (sic) my best foot forward for the future for me and my family.

If you have any questions please call me at: (416) 746-7010 or (416) 806-7039

Yours Truly,
S. Adiyaman

(Exhibit 1, Tab 6)

The Registrar issued a Proposal to Refuse registration pursuant to his application of May 1997 and the Applicant abandoned his 1997 application. The particulars of the Registrar's Notice of Proposal to refuse registration was as follows:

PARTICULARS

The reasons for this proposal are:

1. The Applicant submitted an application for registration as a motor vehicle salesperson on or about May 16, 1997.

2. The Applicant has a record of criminal convictions including possession of property obtained by crime over \$1,000 and 3 counts of fraud over \$1,000.

(Exhibit 2)

In July 1999 the Applicant again made written application for registration as a motor vehicle salesperson. In answer to question # 9 in that application, which contained the same wording as question # 10 in the previous two applications, the Applicant answered "No". (Exhibit 1, Tab 5)

As with his two previous applications, this application was abandoned by the Applicant due to opposition from the Registrar.

In July 2001, the Applicant again filed an application for registration as a motor vehicle salesperson, and it is this application that has resulted in the Registrar's present Notice of Proposal to refuse registration. In the July 2001 application, the following question is posed:

Have you ever been found guilty or convicted of an offence under any law or are any charges pending? (This includes those instances where a conditional or absolute discharge has been ordered). If yes, list all charges and/or convictions, and the circumstances surrounding each (attach additional sheets if necessary).

Note: Applicants are subject to background and criminal record searches. Submitting a false or incomplete disclosure is an offence under the MVDA and will result in disqualification. Do not assume that convictions are automatically deleted from your record. If you have any questions about the information you must disclose please call OMVIC.

(Exhibit 1, Tab 4)

The Applicant answered "yes" to that question.

In the space provided under question 9 the Applicant wrote as follows:

I was found guilty of fraud over \$1000. in 1995 in the prosece (sic) of waiting for my pardon to come.

(Exhibit 1, Tab 4)

In the 1997, 1999 and 2001 applications the motor vehicle dealer that certified that it was prepared to employ the Applicant was Rita Adiyaman operating under the name of Megacity Motors Inc.

Gingras stated that after receiving the 2001 application from the Applicant the Registrar called for a further C.P.I.C. report. This report was obtained and contained the same information as the C.P.I.C. report obtained by the Ministry of Consumer and Commercial Relations in 1996. (Exhibit 1, Tab 8)

Gingras further stated that although the Registrar had asked the Applicant for details of its convictions, he did not furnish such details and the details obtained regarding the Applicant's convictions came from the C.P.I.C. report. Following receipt of the C.P.I.C. report, the

Registrar obtained from court details of the charges that led to the Applicant's convictions. (Exhibit 1, Tab 9)

On charges 1 and 2 the Applicant plead guilty and was found guilty. He was sentenced on each charge to 9 months imprisonment to run concurrently.

On a further charges the Applicant also plead guilty and was found guilty and sentenced on each further charge to 9 months imprisonment to be served concurrently.

The court also ordered restitution to be made by the Applicant to "his victims" in a total sum of \$38,500. Other charges that were brought against the Applicant were withdrawn.

In conclusion of her testimony in chief, Gingras stated that the Registrar's position remains that a full and accurate disclosure by all applicants is necessary and this was not done by the Applicant.

Under cross-examination by the Applicant's counsel, Gingras stated that it is not the position of the Registrar that an Applicant should be barred from registration for life if such Applicant has prior criminal convictions. In considering an application by an Applicant with prior convictions, it would be relevant to consider the time that has elapsed since the offences took place. In this instance, the acts which resulted in convictions against the Applicant took place in 1993/1994, some eight years ago. She said that eight years is insufficient for the Registrar to consider consenting to register the Applicant, more particularly as the convictions were industry related. However, she was not able to indicate what period would have to elapse to enable the Registrar to favourably consider registering the Applicant.

Gingras did agree with the Applicant's counsel that where a party makes restitution to a victim of a crime, such fact would be relevant in affecting the Registrar's decision. Further, if there were no convictions within the past eight years, that fact would be relevant as far as the Registrar is concerned. A further relevant factor would be cooperation by an Applicant with the police.

Gingras stated that as of August 1996 the Ministry of Consumer and Commercial Relations was in possession of the Applicant's criminal history and that OMVIC would have been in possession of the Applicant's criminal history when it took over the administration of the Act in 1997.

The evidence for the Applicant consisted of his testimony. There were no witnesses who were called to testify on behalf of the Applicant.

SULEYMAN ADIYAMAN

The Applicant stated he is 34 years of age and that he landed in Canada as an immigrant from Turkey in July 1992. He is presently married with two children who were born to him and his

wife Rita Adiyaman. He also has a 17 year old son whom he sponsored as an immigrant to Canada after the Applicant who sponsored him to Canada.

The Applicant confirmed he was denied registration as a motor vehicle dealer pursuant to his 1996 application. The reason for his being denied registration was his criminal record. At the time of the criminal charges being laid against him, he was in partnership in a auto body shop. He and his partner brought stolen motor vehicles and they changed the VIN's on the stolen vehicles and then sold them with false VIN's. From October 1993 to about February 1994 they sold four or five stolen vehicles. When in 1994 he and his partner terminated their partnership their criminal activity ceased. Within a week of the Applicant and his partner "splitting", the police arrived at the body shop and observed a stolen vehicle on the premises and charged the Applicant. He stated that upon being charged with the criminal activities, he cooperated with the police, admitted his involvement in such activities and subsequently plead guilty to the five criminal charges that were brought against him. He was sentenced to 9 months imprisonment on the charges to run concurrently. Prior to his sentencing on the charges, the Applicant made full restitution to the victims of the crimes. The total amount that he paid in restitution was about \$80,000.00.

The Applicant also stated that due to the convictions, he was prevented from applying for Canadian Citizenship until recently, and he has been restricted in travel to the United States. Furthermore, he has not been able to become a registered motor vehicle salesperson. He confirmed that he had applied for registration in 1996, 1997, 1999 as well as 2001 and that in all the applications, save and except the 1999 application, he had disclosed by answering "Yes" alongside the relevant question, that he had been convicted. He stated that the answer of "No" to question 9 in his 1999 application was a "mistake" on his part and was not done with the intention of misleading the Registrar who, already as far back as 1996 had knowledge of his criminal convictions. The Registrar had initially gained this knowledge from the Applicants own voluntary disclosure in his 1996 application for registration as well as from the C.P.I.C. report that had been obtained in 1996 by the Minister of Consumer and Commercial Relations following the Applicant's disclosure.

Following his convictions and imprisonment, the Applicant has worked as a truck driver for two to three years for his brother in law who trades as Miracle King Bedding. Since 1997 he has been employed by Megacity Motors Inc. where he repairs motor vehicles as well as attending to administrative matters. He does not attend auto auctions nor does he buy or sell motor vehicles. He does drive cars for Megacity Motors Inc. when it is necessary to deliver vehicles to auto auctions or drive vehicles from auto auctions. The business of Megacity Motors Inc. is owned by Rita Adiyaman, his wife.

In conclusion of his testimony in chief, the Applicant stated that he wants a second chance in life and that he has now matured and has settled down with a family.

Under cross-examination, the Applicant stated that he in fact runs Megacity Motors Inc. and makes all business decisions. He does not go to the auto auctions nor does he act as a salesperson. He conceded that by making restitution to the victims of his crimes "things would

go easier for me in court”.

In answer to questions put to him by the Tribunal, the Applicant stated that his two children by his wife are nine and four years old and that in August of 1998 he and his wife jointly purchased a home in Calendon East where he, his wife and all the children now reside. He also stated that he has no debt.

FACTS FOUND PROVEN:

The following are the facts found to have been proven.

- 1) On March 8, 1995 the Applicant was charged with and found guilty of possession of property over \$1,000.00 obtained by crime in terms of section 354(A) of the Criminal Code of Canada.
- 2) On March 8, 1995 the Applicant was charged with and found guilty of fraud over \$1,000.00 in terms of section 380(1) of the Criminal Code of Canada.
- 3) The Applicant was sentenced by court to 9 months imprisonment on each of the charges in paragraphs 1 and 2 above to be served concurrently and the Applicant was ordered to make restitution to the victims of the crimes referred to in paragraphs 1 and 2 above.
- 4) On April 6, 1995 the Applicant was charged with and found guilty of charges of fraud over \$1,000.00, was charged with and was found guilty of a charge of possession of property over \$1,000.00 obtained by crime, and was charged with and found guilty of fraud over \$1,000.00.
- 5) The Applicant was sentenced by Court to 9 months imprisonment on each of the charges in paragraph 4 above to be served concurrently, and the Applicant was ordered to make restitution to the victims of the crimes referred to in paragraph 4 above.
- 6) The Applicant has served the sentences of imprisonment imposed upon him and has made restitution to all the victims of his crimes in a total amount of approximately \$80,000.00.
- 7) The Applicant made written application for registration as a motor vehicle salesperson in 1996, 1997, 1999 and 2001.
- 8) In 1996, the Ministry of Consumer and Commercial Relations obtained a C.P.I.C. report from the Ontario Provincial Police concerning the criminal convictions of the Applicant and denied the Applicant's 1996 application for registration as a motor vehicle salesperson as a result of such C.P.I.C. report.

- 9) The aforesaid C.P.I.C. report was forwarded by the above Ministry to OMVIC in 1997 when OMVIC assumed the duties of the Ministry to administer the Act and its regulations.
- 10) OMVIC has since 1997 been in possession of, and knew of, the Applicant's criminal record through the C.P.I.C report.
- 11) The Applicant, in response to question on his 1996, 1997 and 2001 applications for registration as a motor vehicle salesperson, answered "Yes" to whether he had ever been found guilty of or convicted under any law.
- 12) The Applicant answered "No" to the question in his 1999 registration application, which asked whether he had ever been found guilty of or convicted under any law.
- 13) The Applicant has, to the knowledge of the Registrar, not been convicted of any offence since his convictions in March and April 1995.
- 14) The Applicant has made restitution in the approximate amount of \$80,000 to victims of crimes he committed in 1993/94.
- 15) The Applicant has, since his release from incarceration following upon his convictions for his 1993/1994 crimes, been employed by his brother-in-law as a truck driver for some three years and thereafter and to date has been employed in his wife's motor vehicle dealership in the capacity as manager of such dealership.
- 16) The Applicant is married and he and his wife are the parents of two children, ages four and nine years.
- 17) The Applicant sponsored his 17 year old son as a landed immigrant to Canada and that son resides with the Applicant and his wife and 2 children.
- 18) In 1998/1999 the Applicant and his wife have jointly purchased and become the owners of a residential home in Ontario where he resides with his wife and children.
- 19) The Applicant has no personal debt.

DECISION AND REASONS:

The issue for decision is whether the Registrar erred in his refusal to register the Applicant as a salesperson.

Section 6.(1) of the Act entitles the Registrar to refuse the Applicant's registration where the Registrar is of the opinion that the Applicant is disentitled to registration under Section 5.(1)(b) of the Act. The aforementioned section entitles the Applicant to

registration, except where the past conduct of the Applicant affords the Registrar reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.

The onus of proof rests on the Registrar to satisfy the Tribunal that reasonable grounds exist to enable the Registrar to believe that the Applicant should be refused registration, as his past conduct affords reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.

In the case of *Brenner 19 CRAT SCO Decisions and Orders (1971-1989) page 95*, Southey J. held that a Tribunal should only refuse to direct the Registrar to carry out his proposal if it thinks the Registrar was in error in concluding that the past conduct of an Applicant afforded reasonable grounds for belief that such Applicant would not carry on business in accordance with law and with integrity and honesty.

In the *Brenner* case, the learned Judge stated that the proper question for a Tribunal to consider is "whether the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal."

Accordingly, to overrule the decision of the Registrar the Tribunal must conclude that the Registrar was in error and that the conduct of the Applicant does not afford reasonable grounds for the Registrar's belief that the Applicant will in the future carry on business in contravention of the Act. In confirming this, the Divisional Court in the matter of *Albert Fascenda (1994) CRAT Part 11, 1050* stated that "it follows that the Tribunal should have refused to direct the Registrar to carry out his proposal only if it thought the Registrar was in error in his belief."

In this matter, the Registrar bases his proposal on two grounds.

The first ground is that the Applicant failed to fully disclose his criminal convictions to the Registrar when the Applicant submitted his July 24, 2001 application for registration as a motor vehicle salesperson. This failure to fully disclose convictions is indicative of a lack of honesty and integrity on the Applicant's part, which justified the Registrar in his decision to refuse the Applicant's registration as it was predictive of the Applicant's future conduct in business.

The second ground upon which the Registrar relies, is that the Applicant has a criminal record which affords the Registrar reasonable grounds for his belief that the Applicant will not in the future carry on business in accordance with law and with integrity and honesty.

These two grounds are analyzed hereunder.

FAILURE TO DISCLOSE:

The evidence of Gingras is clear and unambiguous. She stated that pursuant to the Applicant's 1996 application, the Ministry of Consumer and Commercial Relations called for and obtained the C.P.I.C report which contained all the criminal convictions pertaining to the Applicant. When in 1997 OMVIC took over the duties of the Ministry, it received from that Ministry the records of the Applicant, including the 1996 C.P.I.C. report. The Registrar therefore knew of the Applicant's convictions when the 1997, 1999 and 2001 applications were made. The Applicant himself was aware that OMVIC was in possession of that C.P.I.C. report, and it was on the strength of that report that the Registrar decided not to register the Applicant.

Gingras also conceded that in the Applicant's 1996, 1997 and 2001 applications, the Applicant did respond in the affirmative when asked if he had previous convictions. In responding in his 1999 application in the negative, it is clear in the Tribunal's mind that such negative statement was, as the Applicant stated in his testimony, "a mistake." There is in the Tribunal's opinion, no justification for the Registrar implying that there was intent on the Applicant's part to mislead the Registrar for he had already disclosed the fact of his convictions in his 1996 and 1997 applications.

Based on the Applicant's convictions, the Applicant was denied registration in 1996, 1997 and 1999. Again in 2001 the Applicant was denied registration due to his criminal convictions as contained in the C.P.I.C. report. The C.P.I.C report of July 27, 2001 indicated that there were no further or other convictions registered against the Applicant since 1995. The July 27, 2001 C.P.I.C. report mirrored the original report furnished to the Ministry of Consumer and Commercial Relations in 1995.

Accordingly, the Registrar was in possession of the Applicant's criminal convictions when he considered not only the Applicant's 1997 and 1999 applications but also his July 24, 2001 application. For the Registrar to imply that the Applicant had not disclosed his convictions in his July 24, 2001 application is both incorrect and unjustified. The Registrar did know of the Applicant's convictions when considering his 2001 application, as well as when he considered the 1997 and 1999 applications.

Accordingly, the Tribunal finds that in his applications the Applicant did disclose the fact that he had criminal convictions although he failed to give explicit details of such convictions. However, the Registrar became fully aware of the nature of the convictions as far back as 1997 when OMVIC commenced administering the Act and its regulations. The failure by the Applicant to be explicit in his 1999 application as to his convictions is in no way indicative of an intention to deceive the Registrar, particularly when the Registrar had full and complete knowledge of such convictions, and the Applicant had disclosed those convictions in his 1996 and 1997 applications.

The Tribunal accordingly believes that the Registrar erred in concluding that the Applicant was without integrity and honesty when he did not fully answer the questions regarding convictions in his 1999 application.

CRIMINAL CONVICTIONS:

The Applicant's convictions were recorded in March and April of 1995, some seven years ago, since which time the Applicant has been conviction free. The criminal acts upon which the convictions are based occurred some eight years ago, in the period commencing October 1993 and terminating with his arrest in March 1994. The Applicant has an unblemished record since the commission of the crimes and his convictions. He has made full restitution to the victims of his crimes in the amount of approximately \$80,000. There was no evidence to the contrary to show that the Applicant had not made full restitution. He pleaded guilty to the crimes of which he stands convicted. He disclosed his convictions to the Ministry of Consumer and Commercial Relations and OMVIC in his applications, other than in his 1999 application. The Tribunal found the Applicant forthright in his evidence when subjected to cross-examination. He did not attempt to colour his testimony or offer excuses for his past conduct, and he appeared to be remorseful of his conduct. The Tribunal accepts that in not disclosing his convictions in his 1999 application, the Applicant did not intend to mislead the Registrar and further accepts that the non disclosure was a "mistake."

The Applicant has since 1997 been employed by and has administered his wife's motor vehicle dealership. There is no evidence to show that consumers have been jeopardised through the Applicant's administration of his wife's dealership. There have been no complaints registered against the dealership. The Applicant, since the commission of his crimes, has married and become the father of two young children, ages nine and four years. The Applicant and his wife have jointly become the owners of a home. He has no debt, which speaks to his financial stability. Since his imprisonment he has been gainfully employed, initially as a truck driver with a firm owned by his brother-in-law and presently in the capacity of a manager of a motor vehicle dealership.

All the above are important factors in predicting the future behaviour of the Applicant should he be registered under the Act.

In contradiction to the above mitigating facts there are the convictions themselves. The crimes resulting in the convictions are industry related. The nature of the crimes are serious and the amounts involved were large. The past conduct of the Applicant was not only dishonest, but criminal.

The question to be dealt with by the Tribunal is whether the actual convictions of the Applicant are indicative that he will in the future not carry on business in accordance with the law and with integrity and honesty.

The Registrar bases his refusal to register the Applicant on the past conduct of the Applicant which the Registrar believes affords reasonable grounds to conclude that the Applicant will not carry on business in accordance with law and with integrity and honesty.

The Registrar has not placed any evidence before the Tribunal that the Applicant's behaviour

since 1993/1994 is indicative of conduct that would afford the Registrar reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty. Opposed to the Registrar's lack of evidence in the above regard are the uncontested mitigating factors to which the Applicant testified. The Applicant's unblemished conduct over the last eight years does not support the Registrar's belief that the Applicant should not be registered. The mitigating factors found by the Tribunal clearly outweigh any negative factors that stand in contradiction of the mitigating factors.

The penalty sought by the Registrar is too severe and the Tribunal believes that registration, subject to terms and conditions, are appropriate in this matter.

Accordingly, the Tribunal believes that the Applicant is entitled to registration as a motor vehicle salesperson, subject to terms and conditions.

DECISION:

Accordingly, the Tribunal pursuant to the authority vested in it by section 7(4) of the *Motor Vehicle Dealers Act*, directs the Registrar to refrain from carrying out his proposal dated August 8, 2001 to refuse the Applicant's registration subject to the Applicant complying with the following five terms and conditions.

1. If the Applicant at any time in the future shall be charged with, found guilty of or convicted of any offence under any law he shall forthwith advise the Registrar.
2. If the Applicant at any time in the future is convicted of any charge under the Criminal Code of Canada, the Registrar shall be entitled to forthwith revoke the Applicant's registration as a motor vehicle salesperson under the Act.
3. The Applicant shall at no time in the future, unless with the Registrar's prior written consent, become an officer, director or partner in a motor vehicle dealership.
4. The Applicant shall not transfer his registration as a motor vehicle salesperson without the prior written consent of the Registrar.
5. The Applicant, in all his future applications for registration, renewal or reinstatement as a motor vehicle salesperson, shall fully and honestly answer all questions in his application forms. Should he fail to do so, the Registrar shall be entitled to forthwith revoke the Applicant's registration as a motor vehicle salesperson.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: February 13, 2002

PREHEARING

L. J. KERNAGHAN LIMITED

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

TO REVOKE REGISTRATION

TRIBUNAL: DOUGLAS MACKINTOSH, Vice-Chair

APPEARANCES:

L. JOHN KERNAGHAN, agent representing the Applicant
CAROL STREET, Counsel, representing the Ontario New Home
Warranty Program

DATE OF
PREHEARING: February 7, 2002 teleconference

ORDER

Following the attendance at a prehearing by teleconference before the Licence Appeal Tribunal ("the Tribunal") on February 7, 2002 with L. John Kernaghan representing his company, L.J. Kernaghan Limited ("the Applicant") and Carol Street, Counsel representing the the Ontario New Home Warranty Program ("the Program");

The Tribunal makes the following order respecting the hearing scheduled to commence at 9:30 a.m. on Monday April 22, 2002 at the Tribunal's Chambers at 1 St. Clair Avenue West, 12th Floor Toronto and to continue if necessary on April 23 and April 24, 2002;

1. The Parties to the hearing are the Applicant and the Program.
2. The facts and evidence agreed upon between the Parties are attached and marked as Exhibit "A"
3.
 - (a) The Applicant must serve the Program, the Attorney Generals of Ontario and of Canada and file with the Tribunal on or before Friday March 8, 2002 with:
 - i) The particular provisions of any legislation, regulations, by-laws and the particular parts of the impugned Vendor and Builder's Agreement which the Applicant says infringes the Canadian Charter of Rights and Freedoms.

- ii) The particular sections of the Charter which the Applicant says are infringed and how these sections are infringed.
 - iii) The evidence, in affidavit form, which the Applicant relies on in support of i) and ii)
 - iv) The remedy the Applicant seeks from the Tribunal
 - v) A statement of issues, fact and law that summarizes the Applicant's Charter challenge.
- (b) The Program must serve the Applicant, the Attorney Generals of Ontario and Canada and file with the Tribunal on or before March 22, 2002 with:
- i) The evidence in affidavit form on which the Program relies in defending the Applicant's Charter challenge.
- ii) A statement of issues, fact and law that summarizes the Programs Response and defence to the Applicants's Charter challenge.
- (c) Either party may cross-examine the deponent of the opposing party on his or her affidavit. This must be completed between March 25, 2002 and April 5, 2002. Transcripts of the cross-examinations must be provided to the opposite party and filed with the Tribunal by April 12, 2002.

No viva voce evidence will be heard by the Tribunal at the ensuing hearing at this Tribunal with respect to the Charter issues unless specifically permitted by the Tribunal.

- 4. If either party fails to comply with these requirements, the Tribunal will not hear submissions from such party regarding the Charter issues.
- 5. Both parties to the hearing shall fully comply with the requirements of disclosure of documents and things under section 6.3 of the Rules of Practice of the Tribunal. In addition, both parties must comply with section 6.4 of the Rules of Practice of the Tribunal dealing with expert witnesses.
- 6. Although the above dates in this order have been agreed to by both parties, the Applicant, nevertheless, is encouraged to start the process sooner, if possible.

LICENCE APPEAL TRIBUNAL

Douglas Mackintosh, Vice-Chair

RELEASED: February 14, 2002

1241757 ONTARIO LIMITED o/a MARLIN TRAVEL

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

IN THE MATTER of the REGISTRATION of
1241757 ONTARIO LIMITED o/a MARLIN TRAVEL
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: October 30, 2001

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

1241757 ONTARIO LIMITED o/a MARLIN TRAVEL

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by 1241757 Ontario Limited o/a Marlin Travel, the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

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

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

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: February 14, 2002

LICENCE APPEAL TRIBUNAL

BETWEEN:

1241757 ONTARIO LTD. O/A MARLIN TRAVEL

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

WAIVER AND CONSENT

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

AGREED STATEMENT OF FACTS

BACKGROUND

1. 1241757 Ontario Ltd. o/a Marlin Travel (hereinafter referred to as the "Registrant") has been registered as a travel agent (registration number 4535613/R) under the *Travel Industry Act*, R.S.O., c. T-19, as amended (hereinafter referred to as "the Act") since July 24, 1997. The Registrant has a fiscal year end of May 31st.

FINANCIAL STATEMENTS – GROUNDS FOR THE PROPOSAL

2. Subsection 24(2) of the Regulation states that if a registrant had sales of less than \$10 million during the previous fiscal year, the registrant shall file within three months of the end of the fiscal year annual financial statements with a review engagement report by a public accountant licensed under the *Public Accountancy Act*.
3. By letter dated April 23, 2001, the Travel Industry Council of Ontario ("TICO") requested that the Registrant file its financial statements for its fiscal year ending May 31, 2001 by August 31, 2001.

4. On August 30, 2001 TICO received a fax from the Registrant requesting a “small extension”, and made reference to its accountant, and the telephone number for the accountant.
5. On August 31, 2001 the Registrant was advised by fax, by TICO, that there was no provision in the Act for extensions, and that TICO was unable to agree to the Registrants request.
6. By letter dated September 20, 2001, TICO advised the Registrant to file its financial statements by September 30, 2001.
7. On October 3, 2001, the Registrant was issued a further final due date of October 11, 2001 to file its financial statements, failing which the Registrant was advised that a proposal to revoke its registration would be issued.
8. By October 30, 2001, the Registrant had failed to submit its financial statements. On that date, the Registrar issued a Proposal to Revoke the Registrant’s registration.
9. To date, the Registrant’s financial statements for its fiscal year ended May 31, 2001, which were due by August 31, 2001, remain outstanding.

COMPLIANCE HISTORY – LATE FILING / WORKING CAPITAL

10. The Registrant has a history of late filing and failing to meet the minimum working capital requirements as summarized by paragraphs 11 through 16.
11. The Registrant’s financial statements for its fiscal year ended May 31, 1998 revealed a working capital shortage of \$8,175.00 based on the Registrant’s reported sales of \$927,172.00. The Registrant subsequently addressed this shortfall.
12. The Registrant’s financial statements for its fiscal year ended May 31, 1999, which were due by August 31, 1999, were filed on October 1, 1999. The statements, as filed, revealed a working capital shortfall of \$16,425.00 based on the Registrant’s reported sales of \$1,419,178.00. The Registrant subsequently addressed this shortfall.
13. The Registrant’s financial statements for its fiscal year ended May 31, 2000, which were due by August 31, 2000, were filed on September 25, 2000. The statements, as filed, revealed a working capital shortfall of \$25,000.00 based on the Registrant’s reported sales of \$2,228,521.00. The Registrant subsequently addressed this shortfall.

14. The Registrar issued a previous Proposal to Revoke the Registrant's registration on September 20, 2000 due to the Registrant's failure to file its Form 1 and make the corresponding payment to TICO for its fiscal year ended May 31, 2000, as required by section 47 of the Regulation.
15. On September 25, 2000, the Registrant completed its Form 1 for its fiscal year ended May 31, 2000.
16. On January 17, 2001, the Registrar withdrew his proposal dated September 20, 2000 and cautioned the Registrant that should circumstances require another proposal to be issued there may be sufficient grounds to believe that the Registrant is not capable of carrying on business in accordance with the law and with integrity and honesty and that any subsequent proposal may not be withdrawn, even if there is compliance after the proposal has been issued.
17. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

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

1. the Registrar refrain from carrying out the Proposal to Revoke Registration dated October 30, 2001;
2. the Registrant's registration is to be subject to the following terms and conditions:
 - (a) The Registrant shall file its financial statements for its fiscal year ended May 31, 2001 by March 31, 2002;
 - (b) If the above-noted financial statements as filed reveal a working capital shortfall or are otherwise deficient, the Registrant will have 30 days from the date of notice of the deficiency to fully and completely address the deficiency and produce proof of such correction to the Registrar. Thereafter, the Registrant shall maintain the minimum working capital as required by section 25 of the Regulation or such subsequent provision as may be in force from time to time. The Registrar shall send a Notice of the deficiency, if any, by courier or registered mail to the Registrant.
 - (c) The Registrant shall file its financial statements for its fiscal year ended May 31, 2002 by August 31, 2002 and in accordance with section 24 of the Regulation or such subsequent provision as may be in force from time to time;

- (d) The Registrant shall file its financial statements for its fiscal year ended May 31, 2003 by August 31, 2003 and in accordance with section 24 of the Regulation or such subsequent provision as may be in force from time to time;
 - (e) The Registrant shall file Form 1 filing for its fiscal year ended May 30, 2002 on time and make the corresponding payments to TICO, as required by section 47 of the Regulation or such subsequent provision as may be in force from time to time; and
 - (f) The Registrant shall file its Form 1 filing for its fiscal half-year ending November 30, 2002 on time and make the corresponding payments to TICO, as required by section 47 of the Regulation or such subsequent provision as may be in force from time to time.
3. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) through (f) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.
4. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

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

DATED this ____ day of February, 2002

Ms Margaret Perrotta
1241757 Ontario Ltd. o/a Marlin Travel
I have authority to bind the company

Mr. Michael Pepper
Registrar, *Travel Industry Act*

RUSSELL HOCKEY ENTERPRISES LTD.

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

IN THE MATTER of the REGISTRATION of
RUSSELL HOCKEY ENTERPRISES LTD.
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: October 30, 2001

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

RUSSELL HOCKEY ENTERPRISES LTD.

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Applicant

Respondent

CONSENT ORDER

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

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

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

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: February 14, 2002

LICENCE APPEAL TRIBUNAL

BETWEEN:

RUSSELL HOCKEY ENTERPRISES LTD.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

WAIVER AND CONSENT

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

AGREED STATEMENT OF FACTS

BACKGROUND

1. Russell Hockey Enterprises Ltd. (hereinafter referred to as the "Registrant") has been registered as a travel agent (registration number 4671004/R) under the *Travel Industry Act*, R.S.O., c. T-19, as amended (hereinafter referred to as "the Act") since May 14, 1999. The Registrant has a fiscal year end of May 31st.

FINANCIAL STATEMENTS – GROUNDS FOR THE PROPOSAL

2. Subsection 24(2) of the Regulation states that if a registrant had sales of less than \$10 million during the previous fiscal year, the registrant shall file within three months of the end of the fiscal year annual financial statements with a review engagement report by a public accountant licensed under the *Public Accountancy Act*.
3. By letter dated April 23, 2001, the Travel Industry Council of Ontario ("TICO") requested that the Registrant file its financial statements for its fiscal year ending May 31, 2001 by August 31, 2001.

4. By letter dated September 20, 2001, TICO advised the Registrant to file its financial statements by September 30, 2001.
5. On September 25, 2001, the Registrant faxed financial information to TICO. This information was unacceptable, because it was not reviewed and signed by a Licensed Public Accountant, as required by the Regulation.
6. On September 26, 2001, TICO telephoned the Registrant to advise that the financial information submitted was unacceptable. The Registrant advised TICO that the required information would be forthcoming.
7. On October 3, 2001, the Registrant was issued a further final due date of October 11, 2001 to file its financial statements, failing which the Registrant was advised that a proposal to revoke its registration would be issued.
8. On October 11, 2001, the Registrant faxed an exact copy of the unacceptable financial information, which had been previously faxed on September 25, 2001. TICO telephoned the Registrant, and again advised that the financial information submitted was unacceptable.
9. By October 30, 2001, the Registrant had failed to submit its financial statements as required by the Regulation. On that date, the Registrar issued a Proposal to Revoke the Registrant's registration.
10. To date, the Registrant's financial statements for its fiscal year ended May 31, 2001, which were due by August 31, 2001, remain outstanding.
11. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

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

1. the Registrar refrain from carrying out the Proposal to Revoke Registration dated October 30, 2001;
2. the Registrant's registration is to be subject to the following terms and conditions:
 - (a) The Registrant shall file its financial statements for its fiscal year ended May 31, 2001 by March 31, 2002;

- (b) If the above-noted financial statements as filed reveal a working capital shortfall or are otherwise deficient, the Registrant will have 30 days from the date of notice of the deficiency to fully and completely address the deficiency and produce proof of such correction to the Registrar. Thereafter, the Registrant shall maintain the minimum working capital as required by section 25 of the Regulation or such subsequent provision as may be in force from time to time. The Registrar shall send a Notice of the deficiency, if any, by courier or registered mail to the Registrant; and
 - (c) The Registrant shall file its financial statements for its fiscal year ended May 31, 2002 by August 31, 2002 and in accordance with section 24 of the Regulation or such subsequent provision as may be in force from time to time.
- 3. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) through (c) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.
 - 4. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

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

DATED this ____ day of February, 2002

Mr. Robert Russell
Russell Hockey Enterprises Ltd.
I have authority to bind the company

Mr. Michael Pepper
Registrar, *Travel Industry Act*

OLYMPIC HOLIDAYS CANADA LTD.

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

IN THE MATTER of the REGISTRATION of
OLYMPIC HOLIDAYS CANADA LTD.
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: December 10, 2001

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

OLYMPIC HOLIDAYS CANADA LTD.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a prehearing in the above matter on February 19, 2002;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicant* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 1:30 p.m., on Monday, March 18, 2002.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: February 15, 2002

GIBSON, SHEILA

SHEILA GIBSON

APPEAL FROM A DECISION OF THE COMPLAINTS
COMMITTEE, BOARD OF FUNERAL SERVICES
FUNERAL DIRECTORS AND ESTABLISHMENTS ACT

TRIBUNAL: MARJORIE L. HILEY, Vice-Chair

APPEARANCES:

SHEILA GIBSON, representing herself
EUGENE ZALUCKY, Counsel, representing the Respondent,
MICHAEL NEWEDIUK of Newediuk Funeral Home
BERNIE LEBLANC, Counsel, representing the Board of Funeral
Services

DATE OF
HEARING:

December 17, 2001

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This matter was commenced by the decision of the Complaints Committee dated April 4, 2001 and released on May 14, 2001 by the Registrar, Board of Funeral Services. The Complainant, Sheila Gibson, by her Notice of Appeal dated May 15, 2001 requested a hearing before the Tribunal under the *Funeral Directors and Establishments Act* (the "Act"). The hearing was held on December 17, 2001 with the Complainant, Sheila Gibson, and the Respondent, Michael Newediuk, and the Registrar, Board of Funeral Services, in attendance.

ISSUES:

Did the Complaints Committee of the Board of Funeral Services err in not referring the complaint of Sheila Gibson to the Discipline Committee of the Board of Funeral Services?

EVIDENCE:

Preliminary Matters:

The Applicant had a number of photographs of the mausoleum. The Tribunal did not find these to be relevant and they were not admitted into evidence. The death certificate of Brian John Gibson was admitted as an exhibit.

Opening Statements:

Applicant:

The Applicant submitted that the Complaints Committee based its decision on materials that were not relevant. She stated that she was not treated properly by the Funeral Home. She submitted that the Funeral Home should act by what is right and not by who is paying the bill.

Respondent:

Counsel stated that the conduct of the Respondent did not warrant a referral to the Discipline Committee. The funeral director is not responsible for the arrangements at the cemetery or for the inscription on the marker.

The Tribunal should consider the decision in Brenner. The Tribunal must find that the Complaints Committee was wrong in its decision.

Counsel submitted that though a trial was mentioned, nothing in the Complaints Committee decision turns on that. In this case the funeral home gave reasonable advice. There was a family situation in which the funeral director had no ability to resolve the dispute.

Board of Funeral Services:

Counsel stated that the Board of Funeral Services did not wish to take an active role in this case.

Testimony of Sheila Gibson:

Ms. Gibson testified that she had custody of her young son, Brian, by a court order in April, 1992. She was in a car accident on November 18, 1994. Her son, Brian, was injured in that accident. His father, Brian MacDonald, was notified. Mr. MacDonald came to the hospital on November 19th. The child was on life support and was brain dead. Following the visit to the

hospital, Mr. MacDonald went to the Newediuk Funeral Home.

Ms. Gibson testified that on November 20th, 1994 her child was pronounced dead. He was three years of age. At that time she was at another hospital having treatment for her injuries. On November 21st her sister brought Ms. Gibson to Toronto. While at her sister's house, Ms. Gibson telephoned the Newediuk Funeral Home at 4:00 pm on November 21st. She thought she was speaking to Mr. Michael Newediuk but it could have been his son. She requested that her son Brian be buried in a tuxedo which she would be providing prior to the burial.

Ms. Gibson stated that she was told that Mr. MacDonald was paying for the funeral and that clothes for Brian had already been provided by Mr. MacDonald. She was told to discuss the matter with Mr. MacDonald. She told the funeral home that she could not speak to Mr. MacDonald.

Ms. Gibson stated that after this conversation she did speak to Mr. MacDonald's sister, Helen, to ask that Brian be buried in the proper clothing. Helen did not want to get involved. Ms. Gibson then called the Funeral Home on November 21st at 4:30 pm to speak to Michael Newediuk but he was not available. The viewing was scheduled from 2 pm to 4 pm on November 22nd, 1994. Ms. Gibson took the tuxedo over to the Funeral Home and spoke to an employee there. She wanted Brian to be put in the tuxedo, but her request was ignored by this employee. On November 23rd Ms. Gibson attended the funeral in the morning and then went to the cemetery. She was shocked to find that Brian was not being buried in the family plot which contained a still born baby girl. Instead he was buried in the mausoleum in the same cemetery, Glendale Memorial Gardens.

Ms. Gibson stated that she had no discussions with Mr. Newediuk about the burial arrangements. She did discuss the burial arrangements with Mr. MacDonald. Ms. Gibson stated that Brian was not buried in accordance with the discussion she had with Mr. MacDonald.

Ms. Gibson testified that she asked the Funeral Home for a copy of the death certificate. She telephoned the Funeral Home from November of 1994 to January of 1995 asking to speak to Mr. Newediuk. She does not know who she spoke to at the Funeral Home. She sent a letter on January 10, 1995. She did not get a response, and finally she got the death certificate from the Registrar's office in Thunder Bay.

Under cross-examination, Ms. Gibson stated that Brian had lived with her in Simcoe and Mr. MacDonald had access to him every other weekend. Ms. Gibson believed that she had sole custody of Brian, not joint custody.

Ms. Gibson stated that though the doctors suggested taking Brian off life support and Mr. MacDonald agreed to that, she did not want it to happen. She held Brian in her arms when he was taken off life support.

Ms. Gibson agreed that Mr. MacDonald had told her he was making the funeral arrangements.

She had used Newediuk Funeral Home when they had the still born baby. She did not oppose Mr. MacDonald making the funeral arrangements.

Ms. Gibson could not recall if Mr. Newediuk told her that he had spoken to Mr. MacDonald about the clothing and that Mr. MacDonald had not consented to it.

According to Ms. Gibson, Mr. MacDonald was not a father to Brian as he did not pay child support for Brian.

Ms. Gibson agreed she had not discussed the burial arrangements with the Newediuk Funeral Home.

In response to the question of why she made the complaint after six years, Ms. Gibson responded that after her conviction she had restrictions and conditions on her. It was in 2001 that she was finally off probation.

Testimony of Carol McComb:

Ms. McComb is a friend of Ms. Gibson. She had given Ms. Gibson a tuxedo for Brian at the Christmas prior to the accident. She could see that Ms. Gibson was distraught when at the viewing at the Funeral Home. Ms. Gibson had brought the tuxedo wrapped in plastic to the Funeral Home. The employee had said there was nothing they could do about this and that she should put the tuxedo away and go over to the Gibson side of the room.

Under cross-examination, Ms. McComb stated she did not know who Ms. Gibson spoke to about the tuxedo. The arrangements were made by Mr. MacDonald. They were to stay on opposite sides of the room. Brian was dressed in child's clothes like jeans.

Testimony of Judy Gibson:

Ms. Judy Gibson is the sister of the Complainant, Sheila Gibson. She testified that Ms. Gibson told her that the Funeral Home had said that if she could not resolve the issue of the clothing then she could take the funeral elsewhere. She knew that her sister made a number of calls to the Funeral Home but Mr. Newediuk was not available. Ms. Gibson stated that it was a very emotional situation.

Under cross-examination, Ms. Gibson stated that she did not have a direct conversation with the Funeral Home. Her sister made the telephone calls from her kitchen in Toronto.

Testimony of Brian MacDonald:

Mr. MacDonald is the natural father of the child Brian John MacDonald. Mr. MacDonald said that the child was registered as Brian John MacDonald at birth, but subsequently, he believed, the child's name was changed to Brian John Gibson.

Mr. MacDonald would visit Brian every second weekend. He was under the impression that he had joint custody.

On November 19th, 1994 he spoke to his son that morning. Brian was coming to Toronto for the Santa Claus parade that weekend. He never heard from them. Ms. Gibson's father told Mr. MacDonald that Brian had been hospitalized but did not say it was serious. Mr. MacDonald telephoned hospitals until he found his son at the London Hospital. He went there on the Friday night and spoke to the doctors. Brian was on a number of machines. Ms. Gibson was not there. He did have a brief discussion with Ms. Gibson on Saturday.

Brian died in his arms. Ms. Gibson was not there when the child died as Brian lasted some time after he was off the machines. Mr. MacDonald stated that Ms. Gibson did not object to Brian going off the machines nor to him making the funeral arrangements. He went to the Newediuk Funeral Home on the Sunday evening. He made the arrangements and paid for the funeral.

Mr. MacDonald stated that he remembered at some point that Ms. Gibson wanted a limo for her parents. He buried Brian in jeans, Power Rangers sweat shirt and his jean jacket. Those were Brian's favorite clothes. He remembered someone calling him from the Funeral Home about Ms. Gibson's request that Brian be buried in a suit. He refused that request. Mr. MacDonald could not recall if Ms. Gibson ever spoke to him directly about the clothes. He did make the funeral arrangements with Newediuk Funeral Home and the burial arrangements with the cemetery.

Testimony of Michael William Sanders:

Mr. Sanders is a licensed funeral director. He has been licensed since September, 1978. He recalled that Mr. MacDonald called him on Saturday to say that Brian was not expected to live. They discussed the transportation issues as the child was out of town. On Sunday, Mr. MacDonald called him to say that Brian had died. Mr. Sanders then called the hospital in London.

Mr. Sanders stated that the funeral arrangements were made by Mr. MacDonald and his sister and paid for by them. Mr. MacDonald told him that Ms. Gibson knew that the funeral arrangements were being made by Mr. MacDonald.

Mr. Sanders stated that the death was registered in the name of John Brian Gibson. Mr. MacDonald brought in the clothing for the child. Mr. Sanders had no contact with Ms. Gibson. When Ms. Gibson spoke of Mike she was referring to Michael Newediuk.

In response to a question from the Tribunal, Mr. Sanders stated that there were no guidelines for funeral directors as to who should make the funeral arrangements in these circumstances. Custody was never discussed nor was the issue of who had the legal care of the child. Mr. Sanders stated that he had never been involved in this type of situation before. He was not aware of any directives from the Registrar on this issue. He did not know there was any

dispute between the parties regarding the funeral arrangements.

Testimony of Michael Newediuk:

Mr. Newediuk stated that he has been a licensed funeral director since 1989. He is the manager of Newediuk Funeral Home. Ms. Gibson called the funeral home regarding the issue of clothing. Mr. Newediuk knew she was the mother of the child. She had a tuxedo which she wanted Brian to wear for the burial but he already had clothes for the child which had been given to him by the father. Mr. Newediuk told Ms. Gibson that the child was dressed in that clothing. He told her that he would have to contact Mr. MacDonald about this issue of clothing.

Mr. Newediuk stated there was no discussion as to custody, and he had not questioned Mr. MacDonald's right to make the funeral arrangements.

Mr. Newediuk stated that he contacted Mr. MacDonald who told him that he wanted Brian in the clothing provided by Mr. MacDonald. Mr. Newediuk then told Ms. Gibson that Mr. MacDonald did not agree to the tuxedo and she would have to speak to Mr. MacDonald and reach some resolution of this issue. As he did not hear further from Ms. Gibson Mr. Newediuk thought the matter had been settled. Mr. Newediuk was not at the Funeral House for the viewing but conducted the funeral the next day. Mr. Newediuk has no recollection of any other requests by Ms. Gibson. The next time he heard about the clothing issue was when he got notice of Ms. Gibson's complaint.

Mr. Newediuk stated that he had no knowledge of the telephone calls made by Ms. Gibson after the funeral. He has a pager and his staff can reach him at any time. There were no messages from her. He had no correspondence from her.

Mr. Newediuk testified that he had no recollection of Ms. Gibson stating to him that she had custody of Brian. There are no guidelines to establish custody of a child prior to making the funeral arrangements.

Under cross-examination, Mr. Newediuk stated that his employee would have been reprimanded for saying to Ms. Gibson to stay on one side of the room if he had known about this comment.

In response to a question from the Tribunal, Mr. Newediuk stated that if he had thought there was a dispute he would have sought advice from the Register, Board of Funeral Services or from legal counsel. He did not think there was an outstanding issue.

Closing Statements:

By Ms. Gibson:

Ms. Gibson stated that there should be guidelines for funeral directors to follow in these situations. She had told the Funeral Home that she had sole custody of the child.

By Counsel for Mr. Newediuk:

Counsel stated that even if the Tribunal accepts the evidence of Ms. Gibson, it still falls far short of being misconduct. Mr. Newediuk never refused to listen to Ms. Gibson. He had expected that if the problem had remained, Ms. Gibson would have contacted him again. But that did not happen.

Counsel stated that the Complaints Committee did what they were supposed to do. They set out the evidence in their report.

Counsel stated that the Alice Spokina case (CRAT Feb.1999) dealt with a conflict within the family over the private viewing of the body. This case cites the Brenner case 19 CRAT SCO Decisions and Orders (1971-1989). The test is as follows: "The effect of Section 7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty."

LEGISLATION:

The relevant legislation is the *Funeral Directors and Establishments Act* which provides as follows:

Section 14(1) The Complaints Committee shall consider and investigate complaints regarding the conduct or actions of any licensee, but no action shall be taken by the Complaints Committee under subsection (2) unless,

- a) a written complaint has been filed with the Registrar and the licensee whose conduct or actions are being investigated has been notified of the complaint and given at least two weeks in which to submit in writing to the Committee any explanations or representations the licensee may wish to make concerning the matter; and
- b) the Committee has examined or has made every reasonable effort to examine all records and other documents relating to the complaint.

(2) The Complaints Committee in accordance with the information it receives may,

- (a) consider all or part of the matter;
- (b) direct that all or part of the matter be referred to the Discipline Committee; and
- (c) subject to subsection (9), take or recommend such action that it considers appropriate in the circumstances and that is not inconsistent with this Act, the regulations or the bylaws.

(3) The Complaints Committee shall advise the Registrar in writing of the action it proposes to take or recommend and its reasons therefor.

(4) Subsections (3) and (6) do not apply to a matter that is referred to the Discipline Committee.

(5) The Complaints Committee is not required to hold a hearing or to afford any person an opportunity for a hearing or to make oral submissions before it prior to it taking action or making a recommendation under this section.

(6) The Registrar shall send to the complainant and to the person complained against by prepaid first class mail a copy of the proposal of the Complaints Committee and its reasons therefore, if any, together with notice that informs the person to whom it is sent that the person is entitled to a hearing by the Tribunal if the person mails or delivers to the Registrar and to the Tribunal, within fifteen days after the notice is served on the person, notice in writing requiring a hearing and the person may so require such a hearing.

(7) If a complainant or the person complained against does not require a hearing by the Tribunal, the Complaints Committee may carry out the proposal stated in the notice to the complainant or the person complained against.

(8) If the complainant or the person complained against requires a hearing, the Tribunal shall appoint a time for and hold a hearing.

(9) After holding a hearing, the Tribunal may by order direct the Complaints Committee to carry out the proposal or refrain from carrying out the proposal and to take such action as the Tribunal considers the Complaints Committee ought to take in accordance with this Act and the regulations and, for such purposes, the Tribunal may substitute its opinion for that of the Complaints Committee.

(10) The Tribunal may attach such conditions to its order as it considers proper to give effect to the purposes of this Act.

(11) The Registrar, the person who required the hearing and such other persons as the Tribunal may specify are parties to proceedings before the Tribunal under this section.

APPLICATION OF LAW TO FACTS:

This is a complaint brought by Ms Gibson against Mr. Newediuk and the Newediuk Funeral Home. The funeral of her son had taken place on November 23, 1994. Ms. Gibson sent a written complaint to the Registrar, Board of Funeral Services on January 26, 2001. The Complaints Committee of the Board of Funeral Services by its decision dated April 4, 2001 and released to Ms. Gibson on May 14, 2001 found that the complaints of Ms. Gibson had no basis for a referral to the Discipline Committee. Ms. Gibson upon receipt of this decision of the Complaints Committee filed a Notice of Appeal dated May 15th, 2001 with the Tribunal. In her Notice of Appeal, Ms. Gibson listed her complaints as follows: 1. Her rights were violated; 2. Her son was buried with the wrong surname and in the wrong place in the cemetery; 3. The information considered by the Complaints Committee was not relevant; and 4. The Newediuk Funeral Home acted inappropriately and in a rude fashion to her. The Tribunal will deal with

each issue in turn.

1. Her rights were violated as the custodian parent:

Ms. Gibson stated that she was the custodian parent of the child Brian Gibson. She stated that this was by court order. Mr. MacDonald, the natural father of the child, suggested that it was a joint custody order. The custody order was not filed as an exhibit. The Tribunal assumes that Ms. Gibson does have legal custody. Her letter of January 26, 2001 speaks of her being the custodial parent. That was not challenged by Mr. Newediuk or his counsel.

When asked by the Tribunal, both Mr. Sanders and Mr. Newediuk stated that they knew of no directives or guidelines established by the Board of Funeral Services to assist funeral directors when dealing with the death of minor children of separated or divorced parents. Both funeral directors stated that they were not told of any formal custodial arrangements by either Mr. MacDonald or Ms. Gibson. They knew that Mr. MacDonald was the father of the deceased child. They were not aware that Ms. Gibson was challenging the authority of Mr. MacDonald to make the arrangements. Mr. Newediuk stated that if he had known of any dispute in such a situation he would have sought advice from the Registrar, Board of Funeral Services or from legal counsel.

The Tribunal was surprised that there are no directives or guidelines issued by the Board of Funeral Services to assist funeral directors with such difficult legal situations. Divorce, separation and blended families are quite common in today's society. The death of a minor child will always be a terribly stressful event for the parents and for the funeral directors who are guiding the grieving parents through the funeral rites. It would be extremely helpful if the Board of Funeral Services were to issue some directives or guidelines to its funeral directors so they are aware of any legal or ethical problems when dealing with the death of a minor child whose parents are separated or divorced. It does not necessarily follow that the parent who arranges the funeral services and pays the bills is in control of the process.

In this case the Tribunal does not find that Ms. Gibson's rights as a custodial parent were violated. She testified that Mr. MacDonald informed her that he would make the funeral arrangements. She knew the Newediuk Funeral Home, as they had buried a still born baby using its services. She did not oppose Mr. MacDonald making the funeral arrangements. Ms. Gibson cannot now state that her rights were violated when over seven years ago she did not vocalize any opposition to Mr. MacDonald making the funeral arrangements. Although neither Mr. Sanders nor Mr. Newediuk inquired into custody, that does not mean that they violated the rights of Ms. Gibson. It is the opinion of the Tribunal that this ground of the complaint has no legal basis.

2. Her son was buried with the wrong name and in the wrong place in the cemetery:

Ms. Gibson testified that though she obtained custody of her son under the name of Brian John MacDonald, she had legally changed his surname to Brian John Gibson. Mr. MacDonald

testified that his son had been registered at birth as Brian John MacDonald. He thought the name had been changed. He told the Complaints Committee that the surname had been changed without his consent. It was the testimony of Mr. Sanders and Mr. Newediuk that the Newediuk Funeral Home dealt with the funeral arrangements. Mr. MacDonald stated that he made separate arrangements with Glendale Gardens for the burial arrangements.

The Tribunal finds no basis for the complaint by Ms. Gibson. The Newediuk Funeral Home was responsible for the funeral arrangements only. They did register the child as Brian John Gibson. They were not responsible for the burial arrangements for the child. Ms. Gibson would need to deal with Glendale Gardens on that point and arrange with them to change the headstone. Having seen the interaction between Ms. Gibson and Mr. MacDonald in the hearing room, the Tribunal is quite aware of the animosity between these parties. While it is upsetting to Ms. Gibson that her son is buried with an incorrect headstone, she cannot attribute that error to Newediuk Funeral Home but more likely to Mr. MacDonald who had and continues to show great anger towards her over the death of his son. He made the burial arrangements, and he told Glendale Gardens what name to be inscribed on the headstone. As to where the child was buried, that again is not the responsibility of Newediuk Funeral Homes but Mr. MacDonald. Ms. Gibson did not show any inclination to challenge the decisions of Mr. MacDonald at the time of the burial and it is not appropriate to do so now. In any event, this Tribunal has no authority to exhume bodies. The child has been buried now for over seven years.

3. The Complaints Committee looked at materials that were not relevant to the complaint:

Under section 14(1) of the *Funeral Directors and Establishments Act* the Complaints Committee has the authority to examine all records or other documents relating to the complaint. Though Ms. Gibson does not go into specifics on this ground in her Notice of Appeal nor in her verbal testimony, the Tribunal assumes she is complaining of the information that the Complaints Committee received from Mr. MacDonald and Mrs. Misener, the sister of Mr. MacDonald. Though this information might cause some distress to Ms. Gibson it would appear to be factually correct. She was convicted of impaired driving arising out of the accident in which her son was injured. Her son did die from those injuries. There were newspaper articles arising out of the criminal trial and her conviction. The Complaints Committee did not specifically mention these matters in its reasons for decision. This was quite proper as these facts had no bearing on the issues before the Complaints Committee which were dealing with the conduct of Mr. Newediuk. Under section 14(2) of the *Funeral Directors and Establishments Act*, the Complaints Committee can consider all or part of the materials before it. The Tribunal finds that the Complaints Committee acted properly in its consideration of the evidence.

4. That Newediuk Funeral Home acted inappropriately and in a rude fashion to Ms. Gibson

Ms. Gibson stated that Mr. Newediuk did not act appropriately when he denied her request to

have her son buried in a tuxedo. As well she and her family and friends were told to stay on one side of the room during the viewing of the body and nothing was done about the tuxedo when she brought it with her to the viewing. She further stated that her requests for a copy of the death certificate were not honoured. Mr. Newediuk stated that he had a conversation with Ms. Gibson, was told about her wishes, contacted Mr. MacDonald who said no to the tuxedo and then spoke to Ms. Gibson and asked her to reach some resolution of the matter with Mr. MacDonald.

He said he was not present for the viewing of the body though he was present at the funeral. He had no knowledge that she was trying to contact him after his initial telephone conversations with Ms. Gibson. He did not receive the letter dated January 10, 1995 requesting the death certificate although he agreed the address in the letter for the Newediuk Funeral Home was correct. There is no postal receipt to indicate the letter was ever mailed to the Funeral Home.

The Tribunal finds that if there is any discrepancies between the testimony of Mr. Newediuk and that of Ms. Gibson, the Tribunal accepts that of Mr. Newediuk. Ms. Gibson in her verbal testimony before the Tribunal contradicted a number of statements made in her letter of written complaint dated January 26, 2001 to the Registrar, Board of Funeral Services. She stated in her letter that Mr. MacDonald made the funeral arrangements with Newediuk Funeral Home without her knowledge, yet in her testimony she stated that she knew he was going to make such arrangements as he told her when they talked at the hospital on the Saturday. In her letter, she says Mr. Newediuk only told her Mr. MacDonald was paying for the funeral and they would follow his requests. However, in her testimony, she stated that Mr. Newediuk had asked her to talk to Mr. MacDonald about the matter.

The Tribunal finds that Mr. Newediuk did not act inappropriately. He tried to mediate between the parties. He did contact Mr. MacDonald and told him of Ms. Gibson's request. He asked Ms. Gibson to discuss the matter with Mr. MacDonald. When he did not hear back from Ms. Gibson, he assumed an agreement had been reached between the parties. While that was a wrong assumption, it was still up to Ms. Gibson to assert herself if this was a matter of serious concern. Going to the viewing with the tuxedo is not appropriate as by that time Ms. Gibson should have realized that the child was already dressed for the burial. If Ms. Gibson and Ms. McComb thought the attendant was rude, that should have been brought to the attention of someone in authority at the funeral home. As Mr. Newediuk stated, such a comment was not proper and the employee would have been reprimanded if he had known of that comment. The Tribunal does not find this ground of complaint to have any legal basis.

The Tribunal finds that the Complaints Committee decision was correct and dismisses the grounds of appeal stated by Ms. Gibson. In so doing, the Tribunal is sympathetic to the circumstances of Ms. Gibson and the tragic circumstances that led to his death. The Tribunal considered the delay of over six years before sending the January 26, 2001 to be a significant factor. Despite the evidence of Ms. Gibson that she was confined by certain conditions on her probation, there was nothing presented to show that she was prevented from sending a letter of complaint within a reasonable period of time after the funeral of her son. It is obvious that

Ms. Gibson continues to emotionally suffer from the death of her son. It would be in her best interests if she were to seek out professional help to counsel her and provide closure in this matter.

ORDER:

Pursuant to the authority vested in it by section 14(9) of the *Funeral Directors and Establishments Act*, the Tribunal orders the Complaints Committee of the Board of Funeral Services to refrain from referring the complaint of Sheila Gibson made against Michael Newediuk of Newediuk's Funeral Home Limited to the Discipline Committee of the Board of Funeral Services.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley, Vice-Chair

RELEASED: February 15, 2002

RICHARD McPHEE AND COMPANY LIMITED

PREHEARING

RICHARD McPHEE AND COMPANY LIMITED

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

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

RICHARD McPHEE, Agent representing the Applicant
CAROL STREET, Counsel, representing the Ontario New Home
Warranty Program

DATE OF
PREHEARING: February 18, 2002 Toronto

ORDER

FOLLOWING attendances on February 18, 2002 at a prehearing before this Tribunal of Richard McPhee, Agent, appearing on behalf of Richard McPhee and Company Limited (the "Applicant"), and Carol Street, Counsel on behalf of the Ontario New Home Warranty Program (the "Program");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Monday, April 15, 2002 at the Tribunal's Chambers, 1 St. Clair, Avenue West, 12th Floor, Toronto, Ontario and to continue if necessary on April 16 and 17, 2002 at the Tribunal's above chambers;

1. The Parties to the hearing are the Applicant and the Program.
2. Attached to this Order is a Statement of Facts marked "B" with its attachment marked "Exhibit A". This was presented at the prehearing by Carol Street, Counsel for the Program. Both the Program and the Applicant agreed that the facts enumerated in paragraphs 1 through 14 inclusive, are facts that the parties have agreed upon.

3.

a) The Applicant must serve the Program and the Attorney General, and file with the Tribunal, on or before March 15, 2002 the following:

- i) The particular provisions of any legislation, regulations, bylaws, and/or the impugned Vendor and Builders Agreements that the Applicant says infringes the Charter.
- ii) The sections of the Charter that the Applicant says are infringed, and how they are infringed.
- iii) The evidence, in affidavit form, that the Applicant relies upon in support of i) and ii);
- iv) The remedy the Applicant seeks from the Tribunal;
- v) A statement of issues, fact and law that summarizes the Applicant's Charter challenge.

b) The Program must serve the Applicant, the Attorneys General of Ontario and of Canada and file with the Tribunal on or before April 2, 2002 the following:

- i) The evidence, in affidavit form, on which the Program relies in defending the Applicant's Charter challenge;
- ii) A statement of issues, fact and law that summarizes the Program's response and defence to the Applicant's Charter challenge.

c) Either party may cross-examine the deponents of the opposing party's affidavits. These cross-examinations must take place between April 3 and April 10, 2002 inclusive. Transcripts of the cross-examinations must be provided to opposing counsel and filed with the Tribunal on or before April 12, 2002. No viva voce evidence will be heard by the Tribunal at the hearing with respect to Charter issues unless permitted by the Tribunal.

d) If either party fails to comply with paragraphs 3(a) through 3(c) above, the Tribunal will not hear submissions from such party regarding the Charter issues.

4. All parties to the hearing shall fully comply with the requirements of disclosure of documents or things as set forth in Rule 6.3 of the Rules of Practice of the Tribunal. All parties shall also fully comply with the disclosure requirements set forth in Rule 6.4 of the Rules of Practice of the Tribunal dealing with expert witnesses.

5. There was no settlement of any of the issues dealt with in the Registrar's Notice of

Proposal and those issues remain to be decided at the hearing.

6. The Tribunal noted at this prehearing that the Applicant made reference to possible further reasons for appeal. The Tribunal urged the Applicant to advise the Program of any such reasons well in advance of the hearing to avoid objections being raised by the Program.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: February 19, 2002

D'ANGELO, MARCO

MARCO D'ANGELO

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

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

TRIBUNAL: CHARLES J. SANDIFORD,
Presiding member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

MARCO D'ANGELO, Applicant
unrepresented

DATE OF HEARING: February 15, 2002

DECISION RELEASED: February 19, 2002 Orillia

REASONS FOR DECISION

A hearing was held on February 15, 2002, at Orillia, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

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

BACKGROUND:

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

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

Owner:	Marco D'Angelo (the "Applicant")
Motor Vehicle:	1983 Chevrolet Pickup, plate no. 4910EY (the "vehicle")
Date of Appeal:	January 25, 2002

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

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

This matter came before this Tribunal on February 15, 2002 and proceeded as an oral hearing.

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

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

ISSUE:

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

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

January 23, 2002-02-05

I Marco D'Angelo, am the owner of the 1983 Chevrolet pick up truck plate number 491 0EY, impound order number 2500197. I am appealing the order for the impoundment of my truck.

The driver Les Cruickshanks was under hire to do repairs on my truck. He was not given permission to drive my truck. He told me of the suspension of his license. That is why I made arrangements with his girlfriend Robin to deliver the truck back to me. I needed it to plow that evening. He had informed Officer Wallbank of the situation immediately. Office Wallbank was aware that Les did not have authority to drive the truck. I also informed Officer Wallbank of the situation when I arrived. I told him myself that Les Cruickshanks did not have permission to drive the truck. There was no room for doubt in the matter of who was to be driving the truck. Under advisement of my lawyer my truck should not have been impounded at all.

I need my truck for plowing this winter. Without it we will suffer monetary loss that could be devastating. The purchase of my house and the costs of an upcoming wedding have us in the need of extra money. The extra money from plowing is keeping our ends met. The loss of the truck for 45 days will surely see us through the end of the winter season and no means for us to make up the loss of income.

Sincerely
Marco P. D'Angelo

During the Applicant's testimony he stated he was fully aware of the driver's licence of Les Cruickshank's was suspended for driving while impaired. That being the case, further investigation of this issue would be redundant.

The Applicant again stated he made it very clear to Cruickshank that he was not to drive the truck, only repair it. The driving of the vehicle was delegated to Cruickshank's girlfriend, Robin.

The Respondent questioned the Applicant in respect to his fulltime job. He is on the counter of a large auto parts firm for the past five years where he earns thirty nine thousand dollars a year. His income from clearing driveways is up to eight hundred dollars annually. His customers are his brother, parents and a neighbour.

He has another vehicle for personal transportation, which is a 1991 Corsica.

He offered a copy of an invoice for the part, which Cruickshank needed to repair his truck, which was entered as Exhibit #3. He stated that he had known Cruickshank for a long time and he had repaired his truck many times in the past and felt he would not drive the vehicle as requested.

The lawyer referred to in the Applicant's submission was actually a quasi-legal service. The Applicant offered no witnesses.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

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

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Leslie Thomas Cruickshanks;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Blood/Alcohol Content in Excess of .08 under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until November 26, 2002.

The Respondent's representative reestablished that the Applicant was fully aware that Cruickshank's licence was under suspension and reviewed the terms of the Act under which the Applicant was seeking his appeal.

Constable Wallbank testified as a witness for the Respondent. Constable Wallbank has spent fifteen years in police service work and has been with OPP for the past eighteen months. Some member of the Applicant's circle of friends informed Constable Wallbank that Cruickshank never stopped driving after his conviction and was at this time driving the Applicant's truck, which led to his apprehension. Wallbank was advised of this information by email from his office as it dealt with his area of patrol. The unknown informant also stated that Cruickshank worked for the Applicant plowing driveways and had for sometime.

The Respondent's representative in her closing remarks asked the Tribunal to give

considerable weight to the officer's evidence even though it was clearly hearsay.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

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

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

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

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

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

The owner may appeal the Registrar's order on only four specific grounds set out in subsection

50.2(3):

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).

- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant has appealed under section 50.2(3)(c) and (d) of the Act. With respect to Section (c), the Applicant argued that he did exercise due diligence to determine the status of the driver's licence. He was aware without any investigation that Cruickshank's licence to drive had been suspended. Failure to make any investigation is not "due diligence." More importantly section 50.2(3)(c) requires due diligence to determine that the driver's licence was not under suspension. Here the driver's licence was under suspension. This fact obviated the need for any "due diligence" as described in the Act. The Applicant's decision to allow Cruickshank and his friend to take the vehicle under these circumstances was an extreme risk.

In regard to 50.2(d) of the Act, the Applicant argued that the impoundment of the vehicle will and has resulted in exceptional hardship due to the loss of earning from the truck which will support the upcoming wedding expense and house repairs he has undertaken and indeed his ability to "make ends meet."

Section 22 of Regulation 632/98 is very specific and provides the Tribunal with clear criteria that must be met by the Applicant in order to establish exceptional hardship as a result of the impoundment.

The Tribunal cannot consider any other factors arising from or directly related to the impoundment itself.

Under section 22(2) of the Regulation 632/98 the Tribunal cannot consider financial or economic loss or loss of employment or employment opportunity unless the Applicant demonstrates that all the criteria set out in section 22(3) apply. One of those criteria is that no alternative to the impounded vehicle is available.

In this case, the Applicant's impounded vehicle was used to clear snow. the Applicant offered no evidence that an attempt to secure an alternate vehicle was undertaken. The loss while immediate, was not significant nor lasting. The income from the use of the impounded vehicle is secondary to his salary from his regular employment which is unaffected by the impoundment of the subject vehicle as he has another car for transportation.

The burden of proof to provide evidence for the grounds of the Applicant's appeal under section 50.2(3)(c) and (d) of the Act is that of the Applicant. The Tribunal based on the evidence presented does not find support for Applicant's Appeal.

DECISION:

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

LICENCE APPEAL TRIBUNAL

Charles J. Sandiford,
Presiding Member

RELEASED: February 19, 2002

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

IN THE MATTER OF a CLAIM by
LOUIS DIONNE AND BARBARA MILROY

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

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

LOUIS DIONNE AND BARBARA MILROY

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter on April 2 and 3, 2002;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Respondent* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Monday, April 22, 2002 and to continue April 23, 2002, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: February 19, 2002

R.S.

HIGHWAY TRAFFIC ACT
Section 50(1) and Regulation 574, R.S.O. 1990, Chap. H8 as amended

R.S.

IN THE MATTER of an APPEAL of A SUSPENSION OF A DRIVER'S
LICENCE

AND IN THE MATTER OF the DECISION of the Registrar of Motor
Vehicles made pursuant to section 47(1) of the *Highway Traffic Act* TO
SUSPEND A PERSON'S DRIVER'S LICENCE FOR A MEDICAL
REASON

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

R.S.

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended (the "Act"), R.S. (the "Applicant") initiated an appeal under section 50(1) of the Decision of the Registrar of Motor Vehicles made pursuant to section 47(1) of that Act, to suspend the Applicant's driver's licence;

AND WHEREAS, the Applicant has failed to pay the filing fee as prescribed by section 3(2) of Ontario Regulation 632/98 under the *Highway Traffic Act*;

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

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers and Procedures Act*, as amended, this proceeding, initiated by the Applicant's request for a hearing before this Tribunal, is dismissed;
2. Pursuant to the authority vested in it under section 50(2) of the *Highway Traffic Act*, this Tribunal confirms the Order of the Registrar of Motor Vehicles to suspend the driver's licence of R.S.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

Released: February 19, 2002

EVERSON, ALEXIS E.

ALEXIS E. EVERSON

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

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

TRIBUNAL: NIVES MONTANO
Presiding member

FRANK WOLMAN
Member

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

ALEXIS E. EVERSON, Applicant
unrepresented

DATE OF HEARING: February 14, 2002

DECISION RELEASED: February 20, 2002 Toronto

REASONS FOR DECISION

A hearing was held on February 14, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

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

BACKGROUND:

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

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

Owner:	Alexis E. Everson (the "Applicant")
Motor Vehicle:	1991 Volkswagon Jetta, plate no. AMDJ 866 (the "vehicle")
Date of Appeal:	January 28, 2002

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

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

This matter came before this Tribunal on February 14, 2002 and proceeded as an oral hearing.

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

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

ISSUE:

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

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

I AM APPEALING THIS IMPOUNDMENT ON THE FOLLOWING BASIS:

1. EXCEPTIONAL HARDSHIP: I AM A REAL ESTATE SALES REPRESENTATIVE AND REQUIRE MY VEHICLE TO TRAVEL TO AND TRANSPORT CLIENTS TO AND FROM PROPERTIES IN ORDER TO EARN A LIVING. I HAVE BEEN UNABLE TO RENT A VEHICLE BECAUSE I DO NOT HAVE A CREDIT CARD. I HAVE, ALSO, BEEN UNSUCCESSFUL IN BORROWING A VEHICLE.
2. MY DAUGHTER, SHIRLEY EVERSON, WHO DROVE MY VEHICLE TO THE LOCATION AT WHICH IT WAS IMPOUNDED, ASSURED ME THAT SHE HELD A VALID DRIVER'S LICENCE. I WAS AWARE THAT IT HAD BEEN SUSPENDED AT SOME TIME PRIOR TO THE LETTER OF REINSTATEMENT DATED SEPT 5, 2000 (COPY ENCLOSED). I WAS UNAWARE THAT IT HAD BEEN SUSPENDED A SECOND TIME AND HAD NO REASON TO DOUBT MY DAUGHTER'S WORD. IF I HAD KNOWN THAT HER LICENCE WAS UNDER SUSPENSION I WOULD NOT HAVE LET HER DRIVE. MY DAUGHTER, SHIRLEY EVERSON, WILL NOT BE ALLOWED TO DRIVE ANY VEHICLE OF MINE IN THE FUTURE. ENCLOSED: COPIES OF OWNERSHIP, LETTER OF REINSTATEMENT, IMPOUND ORDER.

ALEXIS E. EVERSON

The following is a summary of the Applicant's affirmed testimony.

The Applicant is a full-time real estate agent with Coldwell Banker Case Realty located on Kingston Road in Toronto. She is a mother of 3 children, the youngest, 19, residing with her in Toronto. The Applicant's 2 other children reside in Lindsay, Ontario. One of the two children residing in Lindsay, Shirley Everson, is a single mother of 2 children on welfare. Her sibling resides with her at the moment since he is unemployed. None of the children are employed, own vehicles or possess credit cards.

At the request of the Tribunal, the Applicant was asked after much testimony, to provide the Tribunal with information surrounding the circumstances of the impoundment.

On the evening the vehicle was impounded, the Applicant was visiting Shirley in Lindsay for the weekend. Shirley had asked the Applicant to borrow her vehicle so that she could meet up with an acquaintance who got off work at 11 p.m. She would then follow this acquaintance to

her home to pick up some used baby clothes and baby items. Once at the location, the acquaintance and Shirley went to a back shed to get the clothing. Allegedly, a neighbour heard noises and saw someone other than the occupant of the home, loading items into a vehicle in the driveway. The neighbours proceed to call the police. The police arrived and advised Shirley and her acquaintance that they had been called regarding a possible “break and enter”. The Applicant testified that Shirley failed to provide her driver’s licence to police as identification and therefore they impounded the vehicle and arrested her.

The Applicant also provided the Tribunal with information regarding her financial circumstances.

The Registrar’s representative did not call the police officer who was involved in the impoundment to give evidence in this matter.

Evidence for the Registrar

A summary of the Registrar’s evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows (Exhibits 4 and 5):

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven or in the possession of Shirley Margaret Everson;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Dangerous Driving under the *Criminal Code of Canada* pursuant to which the driver’s licence of the driver was then under suspension until September 12, 2002.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

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

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

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

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

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

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

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

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

- (d) that the order will result in exceptional hardship.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

55.1 as follows:

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

APPLICATION OF LAW TO FACTS:

Appeal under Due Diligence

The issue to be considered in this appeal is whether the Applicant exercised due diligence in attempting to determine that Shirley Everson's driver's licence at the time in respect of which the order was made was not then under suspension.

The Applicant testified that she is the owner of the vehicle that has been impounded and at the time of impoundment her daughter, Shirley, was driving the vehicle.

The onus of proof is on the Applicant to establish that due diligence was performed which is required under Section 50.2(3)(c) of the Act.

The evidence before the Tribunal, in the Applicant's own testimony, was that the Applicant at no point in time saw Shirley's valid driver's licence. Shirley showed the Applicant her driver's reinstatement paperwork on or about December 2000. She was under the impression and merely assumed that her daughter had a valid driver's licence and the thought never crossed her mind to check. She relied on her daughter's word. Unfortunately, the Applicant did not take any measures to ensure that her daughter had a valid driver's licence. Furthermore, there was no evidence heard that would confirm the Applicant's actions were anything but passive in nature.

The Tribunal therefore has no evidence that the Applicant exercised due diligence as required by section 50.2(3)(c) of the Act.

Appeal under Exceptional Hardship

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

The Tribunal may consider the criteria set out in clause (2) (b), (c) and (d) if the owner demonstrates that,

- (a) no alternative to the impounded motor vehicle is available;
- (b) the loss will be immediate, significant and lasting;
- (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
- (d) the impact of the loss,

- (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
- (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).

These criteria are cumulative. That is, all of these criteria must be met before the Tribunal may consider the ground of "exceptional hardship" under section 50.2(3)(d). On the evidence the first and second criteria are not met.

(a) **"no alternative to the impounded motor vehicle is available"** The Applicant said she was unsuccessful in borrowing vehicles from her sister, friends and co-workers. Coldwell Banker Case Realty does not have fleet vehicles. The Applicant was unable to rent a vehicle because she did not have a credit card due to bad credit. The Applicant provided no details as to her inquiries respecting rental cars. The Applicant has testified that she has been getting to work by way of public transit. Taxis are available, but the Applicant "thought about taxis", but did not inquire into them. The Tribunal finds that alternatives to the Applicant's vehicle are available, although inconvenient.

(b) **"the loss will be immediate, significant and lasting"** The Applicant testified that:

- (i) within the 8 weeks prior to the vehicle being impounded, she sold 8 homes, all of which have closed. She was able to draw 65% from each sale prior to its closing, but indicated that since it was during the Christmas period, she spent "a lot" of money and has nothing left;
- (ii) she currently has 1 client which she had before the impoundment. She gained 2 additional clients within the 2-3 weeks of impoundment, but they subsequently moved onto other agents. One of the two new clients told the Applicant they were going elsewhere since she could not chauffeur them around. Each of these 2 new clients purchased homes. The Applicant advised that the loss of commission is between \$2,500 and \$4,000. She did not provide the Tribunal with proof of these sales. She currently remains with her original client whom she does not foresee purchasing a property until June, 2002;
- (iii) she currently has no listings;
- (iv) there is no threat of loss of employment since she is an independent agent;
- (v) she has been able to get to work by way of public transit;
- (vi) being a real estate agent is her only source of income. When the Tribunal inquired about her Fenelon Falls address, she advised it was her family home/rental property. The last tenants were evicted in October, 2001 and has been vacant since due to a number of renovations which need to be made;

The Applicant testified that there is no possible threat to the health or safety of any person ordinarily transported by the motor vehicle. Nor has she missed any doctors' appointments.

After considering the above requirements, the Tribunal finds that the Applicant, albeit inconvenient to carry on her day-to-day operations, has alternatives to the impounded vehicle

and that the impact of the loss will not be immediate, significant and lasting as required by section 22(3) of Regulation 574 as amended by Regulation 632/98.

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

DECISION:

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

LICENCE APPEAL TRIBUNAL

Nives Montano, Presiding Member

Frank Wolman, Member

RELEASED: February 20, 2002

STEWART, RICKEY A.

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

IN THE MATTER OF
RICKEY A. STEWART

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: October 18, 2001

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

RICKEY A. STEWART

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

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

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

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

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: February 20, 2002

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

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

FROM: Rickey A. Stewart
67 Havenbrook Blvd., Apt. 8
North York, ON M2J 1A7

Pursuant to subsection 5(2) of the *Motor Vehicle Dealers Act*, Rickey A. Stewart (hereinafter referred to as "the Applicant") and the Registrar, *Motor Vehicle Dealers Act*, (hereinafter referred to as "the Registrar"), in accordance with section 4.1 of the Statutory Power Procedures Act, do hereby waive the requirements of a hearing and consent to an Order of the Licence Appeal Tribunal based upon the following Terms and Conditions:

1. The Applicant agrees, if he is charged in the future, to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.
2. The Applicant agrees if he is convicted under any law of an industry-specific offence or if he is convicted under the Criminal Code, the Registrar is directed to and shall carry out the proposal.
3. The Applicant agrees not to transfer his registration as a salesperson under the *Motor Vehicle Dealers Act* to another dealer without the prior written consent of the Registrar.
4. The Applicant shall not be an officer, director, owner or partner in a dealership.
5. The Applicant agrees to provide full and accurate disclosure on any applications, documents, statements or other form of communication/information provided to the Registrar or his authorized representatives regardless of previous disclosure.
6. The Applicant confirms that the circumstances surrounding the conviction are substantially as disclosed to the Registrar.
7. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.
8. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.
9. The Applicant will provide a copy of this order to his employer forthwith.
10. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.

- Signed in the City of _____ this _____ day of February 2002.

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

Date:

PENTO, TULLIO AND 1357138 ONTARIO INC.

TULLIO PENTO AND 1357138 ONTARIO INC.

APPEAL FROM A DECISION OF THE BOARD OF TRUSTEES OF
THE ONTARIO MOTOR VEHICLE DEALERS COMPENSATION
FUND

TO DISALLOW A CLAIM

TRIBUNAL: JOHN ORT, Member

APPEARANCES:

H. DAVID MARKS, Q.C., Counsel, representing
the Applicants
LARRY BANACK, Counsel, representing the Board of
Trustees, Ontario Motor Vehicle Dealers Compensation
Fund

DATE OF
HEARING: January 25, 2002 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") from a decision letter of the Board of Trustees, Ontario Motor Vehicle Dealers Compensation Fund (the "Board") dated October 1, 2001. The Board refused the Applicants' claim on the basis that the Applicant 1357138 Ontario Inc., as claimant, does not fall within the definition of "customer" set out in the Terms of Compensation Fund Schedule to Regulation 801 under the *Motor Vehicle Dealers Act* (the "Schedule"). Section 1 of the Schedule was amended on March 23, 2000 to define "customer" as follows: "a natural person but does not include a natural person, partnership or association of individuals acting in the course of carrying on business".

PRELIMINARY ORDER:

On motion made at the hearing by counsel for Tullio Pento and 1357138 Ontario Inc., on consent of the parties, the Tribunal ordered that 1357138 Ontario Inc. be added as Applicant.

ISSUE:

Should the Tribunal confirm the determination of the Board or set aside the determination of the Board and allow the Applicants' claim for compensation under section 12(3) of the Terms of Compensation Fund Schedule of Regulation 801 under the *Motor Vehicle Dealers Act*, in whole or in part?

FACTS:

The evidence introduced by the parties consisted of documentary evidence. No witness testified.

Exhibit 4 sets out facts that are not in dispute. It states that:

- 1.) 1357138 Ontario Inc. was incorporated on or about September 10, 1999. Ms. Franca Pento occupies all of the officer positions and acts as director of 1357138 Ontario Inc. She is the wife of the Applicant Tullio Pento.
- 2.) On or about September 29, 1999, 1357138 Ontario Inc. became the registered owner of a 1998 blue 4 door Toyota Corolla bearing VIN #2T1BR12E4WC710630 (the "Vehicle").
- 3.) On or about December 21, 1999, 1357138 Ontario Inc., as vendor, sold the vehicle to 1085693 Ontario Inc. c.o.b. as Northern Auto Service ("Northern Auto") for \$12,176.00.
- 4.) Northern Auto provided a cheque payable to 1357138 Ontario Ltd. in the amount of \$12,181.10, post-dated to January 10, 2000 (also set out at Exhibit 3, Tab 4). The parties to this hearing agree that the payee was intended to be 1357138 Ontario Inc. The cheque was not honoured by the bank on or about January 13, 2000 and was stamped "pursuant to clearing this cheque should not be cleared unless certified" (Exhibit 3, Tab 4).
- 5.) At all relevant times Northern Auto was a registered dealer under the *Motor Vehicle Dealers Act*.

An Application for Claim was filed with the Motor Vehicle Dealers Compensation Fund on December 18, 2000 by "1357138 Ontario Ltd. Tullio Pento" for \$12,176.60 (Exhibit 5, Tab 2, Page 1). The parties agree that the name 1357138 Ontario Inc. should have been on the Application for Claim.

The basis of the claim is that the principal of Northern Auto, Jamie Gillies, has been convicted of theft and fraud not relating to this transaction (Exhibit 5, Tab 2, Page 2).

The Application for Claim was presented to the Board of Trustees of the Motor Vehicle Dealers Compensation Fund on September 19, 2001, and the Board of Trustees denied the claim by letter dated October 1, 2001 (Exhibit 1). The decision was appealed by Notice of Appeal dated October 15, 2001 (Exhibit 2).

LAW:

Section 1 of the Terms of Compensation Fund Schedule of Regulation 801 under the *Motor Vehicle Dealers Act* (the "Schedule", the "Regulation" and the "Act", respectively) was amended by Regulation 207/00 under the Act on March 23, 2000 by adding the following definition:

"'customer' means a natural person but does not include a natural person, partnership or association of individuals acting in the course of carrying on business".

"Participant" is defined in section 1 of the Schedule as:

"a registered motor vehicle dealer who participates in the Fund".

Section 12(3) of the Schedule states in part:

"A customer may make a claim against the Fund where the customer gives written notice of the claim to the Registrar within two years of the participant's refusal or failure to pay, ... and where the claim meets one of the following requirements:

1. The customer has recovered in any court in Ontario a judgment ...
2. The participant has been convicted of an offence under the *Criminal Code* (Canada) involving fraud, theft or false pretences in connection with a transaction out of which the claim arose and the claim is for a liquidated amount and the customer makes an application that is supported by evidence of the conviction and of the correctness of the liquidated amount.
3. The participant has become bankrupt ...
4. The customer has made payment ... to a participant with respect to an undelivered motor vehicle ...
5. The customer has made payment for an extended warranty or service plan ...".

Section 12(5) of the Schedule adds:

"No customer of any participant shall have any vested or absolute right to payment of a claim against the Board, the Tribunal, the Trustee or the Fund."

Section 15(3) of the Schedule states:

"Where a claimant requires a hearing before the Tribunal under subsection (1), the Tribunal shall appoint a time for and hold the hearing and, after affording the claimant an opportunity to be heard, may confirm the determination of the Board or may set aside the determination of the Board with respect to all or any part of a claim and direct the Trustee to pay the amount determined by the Tribunal."

APPLICATION OF LAW TO FACTS:

According to section 12(3) of the Schedule, a customer may make a claim against the fund within two years of the participant's refusal or failure to pay. At all relevant times, Northern Auto was a participant, a registered motor vehicle dealer who participates in the compensation

fund. The Vehicle was sold to Northern Auto by 1357138 Ontario Inc., not by Tullio Pento. The participant issued a cheque that was dishonoured to 1357138 Ontario Inc., not to Tullio Pento. Therefore, Tullio Pento is not a customer within the meaning of section 12(3) of the Schedule, and Tullio Pento is not entitled to compensation under that section.

Further, section 12(3) of the Schedule states that a customer may make a claim against the compensation fund within two years of refusal or failure to pay, and where the claim meets one of the five requirements that follow in that section. The basis of the claim of 1357138 Ontario Inc. is that the principal of Northern Auto, Jamie Gillies, has been convicted of theft and fraud not relating to this transaction. One of the requirements enumerated in section 12(3) is: "The participant has been convicted of an offence under the *Criminal Code* (Canada) involving fraud, theft or false pretences in connection with a transaction out of which the claim arose and the claim is for a liquidated amount and the customer makes an application that is supported by evidence of the conviction and of the correctness of the liquidated amount.". Northern Auto, and not Jamie Gillies, was the registered motor vehicle dealer who participated in the compensation fund. Therefore, Jamie Gillies is not a participant. There was no evidence suggesting that Northern Auto was convicted of theft. Further, it is admitted by the Applicants that the conviction of Jamie Gillies does not relate to this transaction. No evidence was introduced of compliance with any of the other alternate requirements set out in section 12(3) of the Schedule.

Therefore, the Applicant 1357138 Ontario Inc. failed to satisfy section 12(3) of the schedule and is not entitled to compensation under that section.

Counsel for the Applicants argued that amendment of schedule 1 on March 23, 2000 to introduce the definition of "customer" as "a natural person but does not include a natural person, partnership or association of individuals acting in the course of carrying on business" does not apply in this matter. It is admitted that the Vehicle was sold by 1357138 Ontario Inc. and the cheque issued by Northern Auto was dishonoured before the amendment. It is also admitted that the schedule was amended before the Application for Claim was filed with the Board.

Counsel for 1357138 Ontario Inc. argued that his client had an accrued, vested right that could not be taken away by the amendment unless the amendment specifically said so. Counsel for the Applicants argued that it is presumed that legislation is not intended to have a retroactive or retrospective application. Further, counsel argued that application of the definition of "customer" added to the Schedule repeals the right of the Applicant 1357138 Ontario Inc. to be an applicant under the compensation fund.

On the other hand, Counsel for the Board argued that section 12(5) of the Schedule precludes an argument that the Applicant 1357138 Ontario Inc. had any vested right. Section 12(5) states that no customer shall have any vested or absolute right to payment of a claim.

Clearly, it is not necessary for the Tribunal to decide this matter. Since both counsel asked for

guidance on this point, the Tribunal states its opinion that the Applicant 1357138 Ontario Inc. had no vested right prior to submitting an Application of Claim, due to section 12(5) of the Schedule, and that the definition of "customer" added on March 23, 2000 applies to exclude the claim of 1357138 Ontario Inc. against the Board.

ORDER:

Accordingly, by virtue of the authority vested in the Tribunal under section 15(3) of the Terms of Compensation Fund Schedule of Regulation 801 under the *Motor Vehicle Dealers Act*, the Tribunal confirms the determination of the Board of Trustees of the Ontario Motor Vehicle Dealers Compensation Fund dated October 1, 2001 to disallow the claim.

LICENCE APPEAL TRIBUNAL

John Ort, Presiding Member

RELEASED: February 20, 2002

HIGHWAY TRAFFIC ACT
R.S.O. 1990, CHAP. H.8 AS AMENDED, SECTION 50(1)

IN THE MATTER of an application by the
Applicant to appeal the decision of the Registrar of
Motor Vehicles pursuant to section 32(12)(b)(i) of
the *Highway Traffic Act*;

AND IN THE MATTER of

APPLICANT

APPLICANT

and

REGISTRAR OF MOTOR VEHICLES

RESPONDENT

ADJOURNMENT

WHEREAS a written hearing in the above matter was scheduled to be held on Wednesday, May 1, 2002, by the Tribunal;

AND WHEREAS the Applicant requested an adjournment of the hearing to obtain additional medical information;

TAKE NOTICE, upon consent of all parties, the Tribunal Orders:

- (1) this matter is adjourned;
- (2) the Respondent's response is due March 4, 2002;
- (3) the Applicant's reply is due March 13, 2002;
- (4) the written appeal shall be heard on Thursday, March 14, 2002 by this Tribunal.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

RELEASED: February 21, 2002

ISLAND BREEZE TRAVEL

PREHEARING

ISLAND BREEZE TRAVEL

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
TRAVEL INDUSTRY ACT

TO REVOKE REGISTRATION

TRIBUNAL: RICHARD C. DELANEY, Presiding Member

APPEARANCES: NADINE FAGAN, Counsel for the Applicant

TREVOR BRANION, Counsel representing the Registrar,
Travel Industry Act

DATE OF
PRE-HEARING: February 19, 2002 Toronto

ORDER

Following attendances on February 19, 2002 at a prehearing before this Tribunal of Nadine Fagan, sole proprietor o/a Island Breeze Travel and Trevor C. D. Branion, counsel for the Registrar, *Travel Industry Act*;

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Wednesday May 15, 2002 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario;

- 1) The Parties to the hearing are the Applicant and the Registrar, *Travel Industry Act*.
- 2) Both parties shall comply fully and in a timely manner with the disclosure requirements set out in Rule 6 of the Tribunal's Rules of Practice.
- 3) The Registrar expects to call one witness, Maria Descours. The Applicant was not in a position to confirm witnesses.

- 4) There was no agreed statement of facts between the parties.
- 5) The hearing is expected to last ½ day, unless otherwise agreed to by the parties.
- 6) The issues for the hearing are those contained in the Registrar's Notice of Proposal dated December 13, 2001.

LICENCE APPEAL TRIBUNAL

Richard C. Delaney,
Presiding Member

Released: February 21, 2002

PEEL CONDOMINIUM CORPORATION No. 498

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

IN THE MATTER OF a CLAIM by
PEEL CONDOMINIUM CORPORATION No. 498

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

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

PEEL CONDOMINIUM CORPORATION No. 498

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

SUNDIAL HOMES (OSPREY) LIMITED

Added Party

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter on March 18 to 22, and March 25 and 26, 2002;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicant* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Monday, April 22, 2002 and to continue April 23, 24, and 25, 2002, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: February 21, 2002

GARDINER, CHARLES ERIC

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
CHARLES ERIC GARDINER

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: February 7, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

CHARLES ERIC GARDINER

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Charles Eric Gardiner, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: February 21, 2002

TO: The Registrar
Motor Vehicle Dealer Act
Ontario Motor Vehicle Industry Council
36 York Mills Road, Suite 110
Toronto, Ontario M2P 2E9

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Charles Gardiner
22 D'Aubigny Road, Apt. B
Brantford, ON N3T 6K1

Pursuant to subsection 5(2) of the *Motor Vehicle Dealers Act* Charles Eric Gardiner (hereinafter referred to as "the Applicant") and the Registrar, *Motor Vehicle Dealers Act*, (hereinafter referred to as "the Registrar"), in accordance with section 4.1 of the *Statutory Powers Procedure Act*, do hereby waive the requirements of a hearing and consent to an Order of the Licence Appeal Tribunal based upon the following Terms and Conditions:

1. The Applicant agrees, if he is charged in the future, to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.
2. The Applicant agrees if he is convicted under any law of an industry specific offence or if he is convicted under the Criminal Code, the Registrar is directed to and shall carry out the proposal.
3. The Applicant agrees not to transfer his registration as a salesperson under the *Motor Vehicle Dealers Act* to another dealer without the prior written consent of the Registrar.
4. The Applicant agrees not to be involved in the process of buying, selling or leasing motor vehicles without the benefit of registration.
5. The Applicant shall not be an officer, director, owner or partner in a dealership.
6. The Applicant confirms that the circumstances surrounding the convictions are substantially as disclosed to the Registrar.
7. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.
8. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.
9. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
10. The Applicant will provide a copy of this order to his employer forthwith.
11. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
12. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.

13. The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____ this _____ day of _____ 2002.

Charles Gardiner (signature)

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Date:

Carl Compton
Registrar
Motor Vehicle Dealers Act

KIANI, ZAHRA

ZAHRA KIANI

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding member

APPEARANCES: KYLE BIEL,
Representative for the Registrar of Motor Vehicles

ZAHRA KIANI, Applicant
unrepresented

DATE OF HEARING: February 18, 2002

DECISION RELEASED: February 21, 2002 Toronto

REASONS FOR DECISION

A hearing was held on February 18, 2002, at Toronto, Ontario, to consider the Applicant’s appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Zahra Kiani (the "Applicant")
Motor Vehicle:	1993 Honda Civic Si, plate no. AKJR 489(the "vehicle")
Date of Appeal:	January 30, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the motor vehicle was stolen at the time it was being driven and the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(a) and (d) of the Act.

This matter came before this Tribunal on February 18, 2002 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

Prior to the commencement of the Hearing, the Tribunal established that the Applicant's son, Amin Amirsalam was present, only to assist his mother in the event of language comprehension difficulties.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the motor vehicle was stolen at the time in respect of which the order was made?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

The owner's grounds for appeal are:

- a) that the owner was unaware that the suspended driver was taking the vehicle,
- b) that the impoundment order will cause exceptional hardship for the owner.

At the hearing the Applicant reiterated the grounds for the appeal. The Applicant explained that her son Omid Amirsalam, the driver of the vehicle at the time of suspension, suffers from schizophrenia. Sometimes, he forgets that he is not allowed to drive. The Applicant testified that normally she hides the keys to the car, but on the occasion in question he was able to obtain the keys while she was out of the room.

The Applicant feels that vehicle was taken without her permission, however she did not lay charges, as she could not do that to her son, particularly one who is ill.

The Applicant admitted to owning another vehicle with current license plates valid until 2002. Given the cost of the insurance, the Applicant does not drive the vehicle in the winter, and cancelled the insurance for the time being.

The Applicant has arranged for someone from her work to drive her to work and back and pays \$50.00 to \$60.00 a week for the service. Thus, the Applicant has not missed any time off work.

As for extra expenses, the Applicant mentioned the cost of storage at the pound.

Mr. Omid Amirsalam is required to see his doctor once or twice per month, yet the Applicant has managed to get him there, and he has not missed any appointments.

The Applicant, in closing, confirmed the need for the vehicle.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Omid Amirsalam;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Dangerous Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until January 24, 2002.

The Respondent offered no viva voce evidence at the hearing choosing to stand on the information provided.

The Respondent's Representative proffered into evidence a Ministry of Transportation Vehicle Registration search, indicating that the Applicant has a 1998 convertible BMW registered in her name. Said document was entered on consent, as Exhibit #4.

In closing the Respondent's Representative, read out the applicable legislation and asked the Tribunal to confirm the decision of the Registrar and uphold the impoundment, on the grounds that the Applicant's testimony might amount to inconvenience but did not constitute hardship.

As for the Applicant's argument that the vehicle was stolen, the Respondent's Representative referred to the Divisional Court's decision, issued February 14th 2002, as to what constitutes theft. According to Mr. Biel, the Court has suggested that instead of Black's Law Dictionary, the Tribunal should be referring to the Criminal Code of Canada for the definition of "Theft". Mr. Biel quoted section 322.(1), from the Carswell Pocket Criminal Code 2002.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of section(s) 50.2(3)(a) and (d).

With respect to an appeal under subsection 50.2(3)(a) alleging that the vehicle was stolen, the meaning of “stolen” is not provided in the *Highway Traffic Act*.

The Shorter Oxford Dictionary, provides the definition of “stolen” as follows:

Stolen: 1. Obtained by theft. 2. Accomplished or enjoyed by stealth; secret. 3. Of time: obtained by contrivance

Theft: 1. The action of a thief; the felonious taking away of the personal goods of another; larceny 2. That which is or has been stolen; the proceeds of thieving.

Black’s Law Dictionary (Sixth edition), page 1419-1420 provides the definition of “stolen” as follows:

Stolen: Acquired, or possessed, as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership (or possession) permanently.

The word “stolen” as used in the crime of interstate transpiration of stolen motor vehicles includes all wrongful and dishonest taking of motor vehicles with the intent to deprive the owner of the rights and benefits of ownership, regardless of whether theft constitutes common-law larceny; and felonious taking may be effected by diverse means known to both common and statutory law, such as larceny, embezzlement, false pretenses, larceny by trick and other types of wrongful acquisition. *Lake v. U.S.*, Colo, 338F.2d 787,788. It is not necessary that the taking of the vehicle be unlawful. Even if possession of the vehicle is lawfully acquired, the vehicle will be deemed “stolen” if the defendant thereafter forms the intent to deprive the owner of the rights and benefits of ownership, and converts the vehicle to his own use. *United States v. Turley*, 352 U.S. 407, 417, 77 S.Ct. 397, 402. 1 L.Ed.2d 430.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
 - (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
 - (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
 - (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making

arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The onus is on the Applicant to establish the stolen vehicle and exceptional hardship grounds of appeal as provided in subsections 50.2(3)(a) and 50.2(3) and (d) of the Act, respectively.

The Applicant has appealed on the grounds that the vehicle was stolen at the time of impoundment, in accordance with section 50.2(3)(a) of the Act.

In order to decide whether the vehicle was stolen at the time of impoundment, the Tribunal must consider the meaning of the word "stolen". As the *Highway Traffic Act* does not define the word "stolen". The Tribunal would ordinarily look to Black's Law Dictionary for reference as to what is commonly accepted by the judiciary as constituting theft. In this case the Tribunal has also reviewed the information presented by the Respondent's Representative, section 322 (1) found in Carswell's Pocket Criminal Code 2002 which prescribes as follows:

"Every one commits theft who fraudulently and without colour of rights takes, or fraudulently and without colour of right converts to his use or to the use of another person, anything whether animate or inanimate, with intent

a) to deprive, temporarily or absolutely, the owner of it, or the person who has a special property or interest in it, of the thing or of his property or interest in it..."

The passage hereinbefore quoted does not differ substantially from Black's Law Dictionary which defines "stolen" as follows: "...acquired or possessed, as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership (or possession) permanently."

In any event, regardless of the legal point of reference used, the fact remains as the Respondent's Representative pointed out, that the Applicant failed to report the vehicle missing or to lay charges against the suspended driver, Omid Amirsalam. The Tribunal understands and sympathizes with the Applicant's situation in that Mr. Omid Amirsalam is her son. Nonetheless, according to the Applicant's own admission Mr. Omid Amirsalam did not intend "...to deprive, temporarily or absolutely ..." the Applicant. Further, no charges were laid, thus the Tribunal cannot support the Applicant's ground of appeal that the vehicle was stolen at the time of the impoundment, as described by section 50.2(3)(a) of the Act. Accordingly, the Applicant's ground of appeal based on the vehicle being stolen is dismissed.

With respect to undue hardship as per subsection 50.2(3)(d) of the Act, the Tribunal will proceed to review the criteria required to meet the onus for consideration of financial loss.

Is there no alternative to the impounded vehicle?

Subsection 22(3)(a) Regulation 574 as amended by O. Reg. 632/98 provided that this Tribunal may not consider financial or economic loss as a ground of appeal unless no alternative to the impounded vehicle is available.

The Applicant owns another vehicle, but has chosen to cancel the insurance and not drive the vehicle in the winter. Further the Applicant has successfully made arrangements with a co-worker to be taken to and from work.

As the Applicant has alternate methods of transportation available, the Tribunal may not consider the provisions of 22.1 of Regulation 574.

Is the loss immediate, significant and lasting?

The Applicant does not meet the criteria of O. Reg. 632/98, Subsection 22(3)(b) which provides that the Tribunal may not regard economic loss unless the Applicant shows proof that loss will be immediate, significant and lasting.

The Applicant stated that she incurred no incidental or any other out of pocket expenses, as a result of the impoundment, other than the cost of the impoundment.

Thus, the Tribunal may not consider O. Reg. 632/98, Subsection 22(3)(b).

The Applicant having an alternative vehicle and the loss due to the impoundment not being immediate, significant or lasting, it is not necessary to review further criteria set out in the Regulation.

The individual affected by the impoundment, has an alternative method of transportation, and has incurred no significant or permanent loss.

After assessing the evidence presented, the Tribunal finds that the Applicant has not established exceptional hardship ground for appeal, as required under section 50.2(3) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal **confirms** the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: February 21, 2002

CELESTIAL HOMES INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: JOHN ORT, Member

APPEARANCES: No-one appearing for the Applicant
KENNETH T. ROSENBERG, Counsel, representing
the Registrar, *Ontario New Home Warranties Plan Act*

DATE OF
HEARING: February 11, 2002 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") from a Notice of Proposal (the "Proposal") issued by the Registrar, *Ontario New Home Warranties Plan Act* (the "Registrar") pursuant to Section 9 of the *Ontario New Home Warranties Plan Act* (the "Act"). The Proposal dated August 24, 2001 seeks to refuse to renew the registration of Celestial Homes Inc. (the "Applicant", the "Registrant") under the Act.

In the Proposal and in a Supplementary Notice of Proposal dated January 11, 2002, the Registrar alleges that:

- a) having regard to the Registrant's financial position, the Registrant cannot reasonably be expected to be responsible in the conduct of its undertakings,
- b) the Registrant has failed to enrol homes built for sale,
- c) the Registrant has failed to provide the security required with respect to the construction and sale of units,
- d) the Registrant has a record of breaches of warranties,
- e) the Registrant does not have sufficient technical competence to consistently perform warranties, and
- f) the Registrant is in breach of a term or condition of registration, including failure to furnish the Registrar with such documents relating to the Ontario New Home Warranties Plan as the Registrar may reasonably require.

No-one appeared for the Applicant at 9:42 a.m. on February 11, 2002. The hearing was adjourned for thirty minutes in case the Applicant was delayed. When the hearing commenced at 10:20 a.m., no-one appeared for the Applicant. The Tribunal proceeded to hear the evidence of the Registrar in the absence of the Applicant.

ISSUE:

Should the Tribunal direct the Registrar to carry out the Registrar's Proposal to refuse to renew the registration of Celestial Homes Inc.?

FACTS:

The evidence presented by the Registrar consisted of the testimony of Mr. Adil Darr as well as documentary evidence introduced through him.

TESTIMONY OF ADIL DARR:

Mr. Darr stated that he is a Chartered Accountant and holds a Bachelor of Commerce degree. He testified that he is a senior financial analyst with the Ontario New Home Warranty Program (the "Program"), and that he analyzes financial statements to determine financial viability of builders.

At tab 14, volume 1 of exhibit 3 is a letter dated October 24, 2001 from Connie Carreiro of the Ontario New Home Warranty Program to Tom Tester, Celestial Homes Inc. Mr. Darr testified that he is familiar with the author of the letter and with the letter itself. He stated that the letter was sent by the Program in its normal, ordinary course of business. The letter asks the Registrant for the following:

1. \$321.00 renewal fee,
2. completion of enclosed personal net worth statement along with supporting documents,
3. 2001-year-end financial statements for the Registrant,
4. copies of certificates of completion of possession for homes that have closed,
5. payment of outstanding claim in the amount of \$4,266.14 for the home at 8 Grist Mill Crt., Tyrone, and
6. satisfaction of the statements of claims on Celestial Homes Inc.

Mr. Darr testified that to date the Program has received none of the items requested in the letter of October 24, 2001.

A letter from Sarbjit Sandhu of the Ontario New Home Warranty Program to Tom Tester, Celestial Homes Inc., dated February 2, 2001 appears at tab 6 of volume 1 of exhibit 3. It requests a current financial statement for Celestial Homes Inc., prepared by an accountant. A

further letter to Tom Tester, Celestial Homes Inc., dated March 8, 2001, appearing at tab 7 of volume 1 of exhibit 3, states in part: "We have not received any of the information requested in our letter. This is your final notice. If we do not hear from you by March 22, 2001, the Registrar must refuse to renew your application for renewal registration." Mr. Darr testified that both letters were sent by the Program in its normal, ordinary course of business, and that the financial statement has not been received by the Program.

The first page of exhibit 4 is an invoice dated January 16, 2002 from the Program to Celestial Homes Inc. demanding payment of \$2,042.63, including warranty claim of \$1,660.00, regarding the residence of Mr. & Mrs. Pearsall at 2483 Prestonvale Rd., Courtice. Mr. Darr stated that the amount is still owing.

Mr. Darr pointed out the Builder Agreement at tab 8 of volume 1 of exhibit 3 and the Vendor Agreement at tab 9 of volume 1 of exhibit 3, both signed by Tom Tester of Celestial Homes Inc. Clause 2.1 of both agreements requires the Registrant to indemnify and save the Program harmless from and against all losses, claims, costs, damages and/or liabilities whatsoever resulting from non-performance or inadequate performance of warranty obligations.

Mr. Darr said that he requested the Equifax Commercial Credit Report dated February 8, 2002 concerning Celestial Homes Inc. set out in exhibit 4. The summary of the report shows 2 collection claims for \$1,669, 8 legal suits for about \$279,000, and 1 judgment for \$12,173. Further, the report gives particulars of statements of claim for services rendered, and goods sold & delivered by various trade contractors, including Canales Carpentry, Anti-Wall Concrete Forming Inc., Keyon Dry Wall, and Raymar Building Contractors. Mr. Darr testified that the number and amounts of statements of claim are significant and raise concerns about the financial viability of the Registrant.

Mr. Darr pointed out at tab 5 of volume 1 of exhibit 3 a guarantee signed by Tom Tester as guarantor with respect to Celestial Homes Inc. as vendor/builder. The guarantee states in part that the guarantor agrees to indemnify and save harmless the Program from any loss which it may suffer by reason of the failure of the vendor to diligently perform all obligations imposed on it under the program and/or the Ontario New Home Warranties Plan. Therefore, Mr. Darr requested the Equifax Consumer Report of exhibit 4 concerning Thomas Tester. He said that the Beacon score of 510 shown in the report is low. Mr. Darr testified that a score of 650 usually is the minimum accepted by the Program.

At tab 10 of volume 1 of exhibit 3 is a letter from Aubrey L. LeBlanc, President/Registrar of the Ontario New Home Warranty Program, dated July 12, 2001 addressed to Tom Tester, Celestial Homes Inc. and consented and agreed to by him. The letter states in part:

"I propose to make your registration in ONHWP subject to the following conditions:

(1) During the term of your registration you shall not, without prior written consent, have under construction or in inventory more than six (6) homes or a condominium project.

(2) You shall provide security of \$5,000 with each enrolment."

At tab 11 of volume 1 of exhibit 3 is a photocopy of a cheque, regarding 7 Robert Adams Drive, for \$5,580 from Celestial Homes Inc. to ONHWP marked "Pursuant to clearing rules, this item may not be cleared again unless certified.". A letter dated July 31, 2001 from Connie Carreiro of the Program to Tom Tester, Celestial Homes Inc. appears at tab 12, volume 1, exhibit 3. The letter requests a certified replacement cheque in the amount of \$5,626.75. Mr. Darr testified that no such cheque has been received by the Program.

At tab 27 of volume 1 of exhibit 3 appears a photocopy of certified true copies of an Information and related documents concerning conviction of the Registrant on eleven counts of an offence under section 22(1)(b) of the Act of constructing homes without having notified the Program and without having paid the prescribed fees as required by section 12 of the Act.

At tab 28 of volume 1 of exhibit 3 is a similar photocopy concerning conviction of Tom Tester on eleven counts of an offence contrary to section 22(1)(b) of the Act of constructing homes without having notified the Program and without having paid the prescribed fees as required by section 12 of the Act.

LAW:

Section 8 of the Act states:

"(1) Subject to section 9, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 7.
(2) Subject to section 9, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 7, if the registrant were an applicant, or where the registrant has a record of breaches of warranties or a failure or unwillingness to complete performance of contracts or is in breach of a term or condition of the registration."

Section 7(1) of the Act adds in part:

"An applicant is entitled to registration by the Registrar except where,...

(c) the applicant is a corporation and,
(i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its undertakings, or
(ii) the past conduct of its officers or directors affords reasonable grounds for belief that its undertakings will not be carried on in accordance with law and with integrity and honesty ...".

Section 12 of the Act states:

"A builder shall not commence to construct a home until the builder has notified the Corporation of the fact, has provided the Corporation with such particulars as the Corporation requires and has paid the prescribed fee to the Corporation."

Section 22 of the Act adds in part:

"Every person who, ... contravenes section ... 12 ... and every director or officer of a corporation who knowingly concurs in such ... contravention is guilty of an offence ..."

Section 5 of Regulation 894 under the Act states:

"The registrant shall from time to time, at the registrant's expense, furnish the Registrar with such documents relating to the Plan as the Registrar may reasonably require."

Section 6 of Regulation 894 under the Act adds:

"The registrant shall furnish the Registrar with such information relating to the registrant's financial affairs and position as the Registrar may reasonably request."

APPLICATION OF LAW TO FACTS:

The Registrant has failed to provide information requested by the Registrar, including its corporate financial statements and personal net worth statement of Mr. Tester. Such information is required to evaluate the viability of the builder and to protect the public. It is reasonable for the Registrar to request such information and the failure of the Registrant to provide it is contrary to sections 5 and 6 of Regulation 894 under the Act, the Vendor Agreement, and the Builder Agreement signed by Mr. Tester on behalf of Celestial Homes Inc.

The credit report shows an unsatisfied judgment against the Registrant and legal suits against it, mainly by trade creditors, for about \$279,000. Similarly, the Beacon score on the credit report of Mr. Tester is unsatisfactory. Clearly, the Registrant, having regard to its financial position, cannot reasonably be expected to be financially responsible in the conduct of its undertakings, contrary to section 7(1) of the Act.

The registrant has failed to provide security of \$5,000 with respect to enrolment of 7 Robert Adams Drive, breaching Registrant's condition of registration, contrary to section 8(2) of the Act.

The Registrant and Tom Tester have been convicted of an offence under section 22 of the Act. Clearly, the past conduct of the Registrant and of Tom Tester affords reasonable grounds for belief that the Registrant's undertakings will not be carried on in accordance with the law and with integrity and honesty, contrary to section 7 of the Act.

DECISION:

Accordingly, by virtue of the authority vested in it under section 9(4) of the *Ontario New Home Warranties Plan Act*, the Tribunal directs the Registrar to carry out the Proposal to refuse to renew the registration of Celestial Homes Inc.

LICENCE APPEAL TRIBUNAL

John Ort, Presiding Member

Released: February 21, 2002

GOODARZI, ROOHOLLAH

ROOHOLLAH GOODARZI

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

RICHARD KESTON, Agent, representing the Applicant
B. MICHAEL ROTHE, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: February 12, 2002 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

Roohollah Goodarzi (the "Applicant") appeals the Proposal of the Registrar of the *Motor Vehicle Dealers Act* (the "Act") to refuse the Applicant's registration as a motor vehicle salesperson. The Proposal was issued on October 24, 2002 pursuant to Section 7(1) of the Act.

THE ISSUES:

The reasons given by the Registrar in his Proposal for refusing the registration of the Applicant are as follows:

The intention and objective of the Act is to protect the public interest. The requirements of the Act include that Registrants be financially responsible in the conduct of business and that Registrants carry on business in accordance with the law and with integrity and honesty. The Applicant's past conduct is inconsistent with the intention and objective of the Act, and therefore warrants disentitlement to registration under the Act. Therefore, the Registrar is unwilling to register Roohollah Abtin Goodarzi under the *Motor Vehicle Dealers Act*.

The particulars given by the Registrar in his Proposal to Refuse the Applicant's registration are

as follows:

The reasons for this proposal are:

1. The Applicant applied for registration as a motor vehicle salesperson on or about July 23, 2001. He proposes to work for 1249592 Ontario Ltd. o/a Quality Auto Wholesalers.
2. On the application to become a registered salesperson question 9 asks:
"Have you ever been found guilty or convicted of an offence under any law or are any charges pending? (This includes those instances where an absolute discharge has been ordered)."

The Applicant said "no".

3. A criminal record search found that the Applicant has the following convictions:

June 29, 1998:	Assault (Youth Court)
August 02, 2000:	Possession of a Scheduled Substance
January 18, 2001:	Assault (withdrawn)
	Peace Bond of \$500 for one year

4. The Applicant's Driver's Licence is suspended for unpaid fines.
5. The Applicant has failed to comply with the Act, in particular with Section 5.

The Applicant appealed the Registrar's proposal to Refuse, and gave as his reason for appealing, the following:

The Applicant's past conduct is consistent with the intention and objective of the *Motor Vehicle Dealers Act*. The Applicant's past conduct, under the circumstances should not disentitle him from registration under the Act.

At the outset of the hearing, the Applicant's Agent admitted on the Applicant's behalf that the Applicant was charged with unlawfully possessing a controlled substance, to wit cannabis (marihuana), in an amount not exceeding 30 grams, contrary to Section 4(1) of the *Controlled Drugs and Substances Act* and that the Applicant on August 2, 2000 pleaded guilty to and was found guilty on such charge when he was sentenced to a conditional discharge and placed on probation for one year. (Exhibit 3, Tab 8)

The Applicant's agent also admitted the correctness of the contents of the Ministry of Transportation's extract from its records relating to the convictions, discharges, and other actions regarding the applicant. (Exhibit 3, Tab 6, last 3 pages)

THE EVIDENCE:

The evidence consisted of both documentation and oral testimony. The oral testimony for the Registrar was presented by Laura Gordon. The Applicant testified on his own behalf and his testimony was followed by his father's, Rakmkhoda Goodarzi.

Testimony of Laura Gordon

Laura Gordon ("Gordon") stated that she is the Director of Compliance with the Ontario Motor Vehicle Industry Council ("OMVIC"). OMVIC is a non-profit organization and was established in 1997 with authority to ensure compliance with the Act and regulations. By ensuring that the Act and regulations are complied with, the public is protected in their dealings with motor vehicle dealers and salespersons. It is for this reason that the Act is referred to as a consumer protection statute.

Ms. Gordon reviewed the Notice of Proposal of October 24th, 2001, and the particulars therein, which formed the basis for such proposal. (Exhibit 3, Tab 2)

Ms. Gordon also reviewed the Applicant's written application, dated June 6, 2001, for registration as a motor vehicle salesperson. This application was only received by OMVIC July 24, 2001. (Exhibit 3, Tab 4)

She stated that when reviewing the application, question 4 therein caught her attention. This question reads as follows:

"Do you have a current and valid Ontario driver's licence? Please provide an explanation if you have indicated that you will be buying and or selling vehicles on behalf of the dealer but do not have a valid Ontario driver's licence?"

In response to the question the Applicant had answered "Yes" and the following words were added under the question:

"my driver's licence is suspended until I pay the fines."

She also noted that to question 8 in the application, which reads as follows:

"Are there any unpaid judgements or outstanding court orders pending against you? If yes, submit a copy of each judgement and/or court order. State the amount outstanding and repayment arrangements."

the Applicant had answered "Yes" and in addition the following words had been added by the Applicant:

"I am paying my tickets monthly."

Ms. Gordon went on to state that in answer to question 9 on the application which reads:

"Have you ever been found guilty or convicted of an offence under the law or are any charges pending? (This includes instances where a conditional or absolute discharge had been ordered). If yes, list all charges and/or convictions, and the circumstances surrounding each (attach additional sheets if necessary)."

the answer "No" had been ticked.

On receipt of the application, the Applicant was contacted by OMVIC. Pursuant to this contact the Applicant, on October 16th, 2001, forwarded to OMVIC an extract of his driver's record which he had obtained from the Ministry of Transportation. (Exhibit 3, Tab 6)

A perusal of this extract indicated that the Applicant was initially licenced to drive with a class "G2" licence on December 2, 1997 and that licence was suspended on March 12, 2001 for unpaid fines. The extract also revealed seven speeding convictions during the period March 21, 2000 and July 16, 2001, as well as convictions for "failing to have insurance card", improper turns, an unsafe move, and disobeying a red traffic signal.

After receipt of the Applicant's driver's record, OMVIC sought and obtained a copy of the Ontario Provincial Police's CPIC report. This report revealed that on August 8, 2000, the Applicant was convicted on a criminal charge under the *Controlled Drugs and Substances Act* of Possession of a Scheduled Substance. The Applicant pleaded guilty to this charge, was found guilty and received a conditional discharge and probation for one year.

Ms. Gordon stated further that OMVIC caused a print out to be obtained from the Ministry of Transportation's data base regarding the Applicant's driving record. This print out confirmed the contents of the extract regarding the Applicant's driver's record already forwarded to OMVIC by the Applicant.

Upon considering the Applicant's driver's licence record, the CPIC report of the Applicant's criminal record and the Applicant's failure to disclose his criminal conviction in his application for registration, the Registrar concluded that the Applicant had failed to meet the test of honesty and integrity, and acting within the law as required by Section 5 of the Act. The registrar accordingly denied the Applicant's registration and issued his Proposal to Refuse the Applicant's registration.

Testimony of Roohollah Abtin Goodarzi

The Applicant testified that that he emigrated from Iran in 1994. He has been in Canada since that time. The Applicant stated that he signed his application for registration as a motor vehicle salesperson on June 6, 2001.

He confirmed that he had enrolled in OMVIC's certification course with the Canadian Automotive Institute at Georgian College. He stated that he made a "mistake" when, in answer to question 4 in his application for registration, he had answered "Yes" to that question which asked whether he had a current and valid driver's licence. (Exhibit 3, Tab 4, page 3)

He went on and stated that in answering "Yes" to question 4 he did add the following words to his answer:

"my driver's licence is suspended until I pay the fines."

He stated that he has now paid all fines, totalling some \$2,000.00, which were levied against him regarding driving infractions.

Insofar as question 9 on his application form was concerned, to which he had answered "No", he stated that when he pleaded guilty and was found guilty and sentenced on the criminal charge of possession of a controlled substance, duty counsel representing him told him that the conviction would not appear on his record, and that was the reason for his not disclosing the conviction of possessing a controlled substance.

On cross examination, the Applicant repeated that he did not know his convictions would appear on his record as duty counsel had informed him it would not appear. The Applicant was asked by the Registrar's Counsel to review the record of his convictions for driving offences as enumerated in the print out of the Ministry of Transportation's records (Exhibit 3, Tab 9), and he confirmed the correctness of those convictions and the description of the offences with which he had been charged. He also confirmed the suspension of his driver's licence as recorded in the Ministry's records. He went on to state that he "understood enough of the questions" in his application to enable him to answer the questions.

RAHMKOHDA GOODARZI

Following upon the evidence given by his son, the Applicant, the latter's father, Rahmkohda Goodarzi, testified as follows.

He stated that he reviewed the application with his son before his son signed it. He also stated that he was present in court when his son was convicted on the charge of possession of a controlled substance and stated that "according to our understanding" his son's conviction "would not affect his record."

Finally, Rahmkohda Goodarzi handed in photocopies of four letters from friends of his.

Each of the above typed letters are identical and read as follows:

"Re: Roohollah Abtin Goodarzi

I have known Abtin and his family for many years. Abtin is of good character and is a moral and honest person.

I have no hesitation in providing this reference in support of Abtin's application for a sales licence pursuant to the Motor Vehicle Dealers Act."

Each letter bears a signature and date.

(Exhibits 4, 5, 6, and 7)

Rahmkohda Goodarzi. stated that all four of the persons who signed the above letter were friends who knew the family and also knew the Applicant. In each instance he had informed the

four persons, prior to their signing their individual letter, “about my son’s convictions.”

FACTS FOUND PROVEN

The following are the facts the Tribunal has found proven.

- 1.) The Applicant applied for registration as a motor vehicle salesperson by written application dated June 6, 2001. The Applicant signed the Application.
- 2.) On August 2, 2000 the Applicant, pursuant to his pleading guilty, was found guilty and was convicted of unlawfully possessing a controlled substance namely cannabis (marihuana) in an amount not exceeding 30 g rams, in contravention of Section 4(1) of the *Controlled Drugs and Substances Act*.
- 3.) The Applicant received a conditional discharge when sentenced by court on the above charge and was placed on probation for 1 year.
- 4.) The Applicant received a class “G2” driver’s licence on December 2, 1997.
- 5.) The Applicant, during the period March 21, 2000 and July 16, 2001 was convicted of 7 speeding violations and in addition was convicted of “fail to have insurance card, improper left turn at intersection, unsafe move, disobeying a red light traffic signal.
- 6.) The Applicant’s driver’s licence was, on December 2, 2001, suspended for unpaid fines and was thereafter April 8, 2001 again suspended for 60 days.
- 7.) As of October 3, 2001 the Applicant had accumulated 4 demerit points on his driver’s licence.
- 8.) The Applicant, in his June 6, 2001 application for registration as a motor vehicle salesperson, in answer to questions therein as to whether he had ever been found guilty or convicted of an offence under any law, answered “No.”

THE ISSUES

The following are the issues to be decided by the Tribunal.

1. Does the criminal conviction against the Applicant under Section 4(1) of the *Controlled Drugs and Substances Act* as well as the various convictions against the Applicant for driving offences under the *Highway Traffic Act* constitute past conduct that affords the Registrar reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty?
2. Does the Applicant’s failure to disclose his criminal conviction and convictions under

the *Highway Traffic Act* in answer to question 9 in his application constitute past conduct that affords the Registrar reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty?

THE LAW

5(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or

.....

(d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

.....

6.(1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 5.

.....

7.(1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the Registrar shall serve notice of the proposal, together with written reasons therefore, on the applicant or registrant.

(2) A notice under subsection (1) shall state that the applicant or registrant is entitled to a hearing before the Tribunal if the applicant or registrant mails or delivers, within fifteen days after service of the notice under subsection (1), notice in writing requiring a hearing to the Registrar and the Tribunal, and the applicant or registrant may so require a hearing.

.....

DECISION AND REASONS

The onus of proof rests on the Registrar to prove that the past conduct of the Applicant affords reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.

The grounds upon which the Registrar bases his Proposal are:

- (a) The criminal conviction registered against the Applicant upon his being found guilty of unlawfully being in possession of a controlled substance, which conviction was admitted by the Applicant through his agent during the course of the hearing,
- (b) The driving record of the Applicant which contains convictions registered against the Applicant for numerous offences and which convictions were admitted by the Applicant through his agent during the course of the hearing, and,
- (c) The non-disclosure by the Applicant in his June 6, 2001 application for registration regarding his August 2, 2000 conviction of unlawfully possessing a controlled

substance namely cannabis (marihuana) in an amount not exceeding 30 grams, a contravention of Section 4(1) of the *Controlled Drugs and Substances Act*.

In the leading case of *Brenner 19 CRAT SCO Decisions and Orders (1971–1989) page 95 Southey J.* held that a Tribunal should only refuse to direct the Registrar to carry out his proposal if it thinks the Registrar was in error in concluding that the past conduct of an Applicant afforded reasonable grounds for belief that such Applicant would not carry on business in accordance with law and with integrity and honesty.

Brenner 19 CRAT SCO Decisions and Orders (1971-1989), page 59, is a decision issued on April 7, 1983 where the Divisional Court overruled a decision of this Tribunal. Southey J. states that the Registrar proposed to refuse registration because of the existence of the specific circumstances set out in Section 5(1)(b) of the *Motor Vehicle Dealers Act*:

The effect of Section 7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself.

In the *Brenner* case, due to the particular facts in that case, Southey J. sent it back for a rehearing. However, he adds in the third last paragraph:

The proper question at the rehearing remains, however, whether the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal.

To overrule the decision of the Registrar, the Tribunal must conclude that he was wrong in his decision and that the conduct of an Applicant does not afford reasonable grounds for the Registrar's belief that the Applicant will in the future carry on activities in contravention of the Act and its Regulations. This was confirmed by Divisional Court in the matter of *Albert Fascenda (1994) 26 CRAT Part II 1050* where that court on appeal quashed the Tribunal's decision to direct a Registrar not to carry out his proposal and in sending the matter back for re-hearing stated at page 1051.

It follows that the Tribunal should have refused to direct the Registrar to carry out his proposal only if it thought the Registrar was in error in his belief.

Based upon the evidence adduced at the hearing, the Tribunal's conclusions and reasons follow.

CRIMINAL CONVICTION and CONVICTIONS FOR DRIVING OFFENCES

The Applicant has conceded and admitted that he was convicted of possessing a controlled substance, namely marihuana, in contravention of Section 4(1) of the *Controlled Drugs and Substances Act*. This conviction is recent in time having taken place on August 2, 2000. The offence upon which the conviction was based took place on or about May 21, 2000 and is also recent in time.

There is no doubt in the Tribunal's mind, that when the Applicant completed his application for registration on June 6, 2001 he was well aware of his conviction which had taken place some ten months previously. Question 9 in his application is clear and unambiguous. That question refers not to the Applicant's having a record (the underlining is that of the Tribunal) of a conviction or convictions, but refers to whether the Applicant had "ever been found guilty or convicted of an offence under any law." The Applicant in his testimony stated that he understood the questions on the application form. From the Tribunal's observation of the Applicant it is satisfied that the Applicant, although by no means perfect in expressing himself in the English language, readily grasped the questions put to him in English and clearly understands the English language. The Tribunal has no difficulty in concluding that, not only question 9 was understood by the Applicant, but that in answering the question in the negative the Applicant was being dishonest in deliberately withholding material and relevant information from the Registrar.

The Tribunal further believes that it is not credible that duty counsel would have advised the Applicant that the conviction would not appear on his record. The Tribunal notes that in his testimony the Applicant's father stated that he heard the discussion between duty counsel and the Applicant and that "according to our understanding" (underlining is that of the Tribunal) he believed the conviction would not affect his son's record. He did not state that he heard duty counsel actually say the conviction would not appear on the Applicant's record.

Insofar as the *Highway Traffic Act* convictions are concerned, all of the convictions were admitted by the Applicant, and the Tribunal accepts that there clearly was full disclosure by the Applicant in regard to these violations and convictions.

However, the very nature of the repeated and many traffic violations by the Applicant speaks to the Applicant's disregard for law and of the Applicant's refusal to act in a lawful and orderly manner

All the traffic violations are recent in nature. The seven speeding violations occurred over a period of approximately fifteen months. In that period the Applicant violated the *Highway Traffic Act* in many other ways as is indicated in the facts found proven. His conduct indicated a reckless disregard or concern for other users of the road, and the convictions showed a

disregard and disrespect for the law.

The Applicant's course of conduct both in regard to his criminal conviction and his *Highway Traffic Act* convictions paint a picture of an individual who has not been prepared to comply with the laws that govern a law abiding society. There is much in the recent conduct of the Applicant which indicates that the Applicant's future business conduct will not be in accordance with law and with integrity and honesty.

Based upon the Applicant's recent conduct, the Tribunal has no difficulty in concluding that the Registrar was justified his belief that the Applicant will not in the future carry on business in accordance with law and with integrity.

DECISION:

Accordingly, pursuant to the authority vested in it by section 7(4) of the *Motor Vehicle Dealer Act*, the Tribunal confirms the Registrar's decision and directs the Registrar to carry out his proposal Proposal to Refuse the Applicant's registration as a motor vehicle salesperson.

LICENCE APPEAL TRIBUNAL

Derek Israel,
Vice-Chair

Released: February 22, 2002

REDPARK HOMES LTD

APPEAL FROM PROPOSALS OF THE REGISTRAR UNDER
THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: MARJORIE L. HILEY, Vice-Chair, Presiding

APPEARANCES:

SHAEL BECKENSTEIN, Counsel, representing Redpark Homes Ltd.
CAROL STREET, Counsel, representing the Registrar, Ontario New
Home Warranty Program

DATE OF
HEARING:

February 5, February 18, 2002

Toronto

ORDER

Pursuant to the provisions of the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, Chapter O.31, as amended, Redpark Homes Ltd. (the "Applicant") appealed Notices of Proposal dated June 7, 2001 and January 8, 2002 of the Registrar of the Ontario New Home Warranty Program (the "Registrar") to refuse to renew registration of the Applicant;

WHEREAS the Applicant appealed the proposal to the Licence Appeal Tribunal requesting a hearing;

AND WHEREAS the hearing was held on February 5, 2002 and to be continued on February 18 to 21, 2002;

AND WHEREAS the hearing commenced on February 18, 2002 and Counsel for the Registrar advised the Tribunal that they have withdrawn their proposals;

NOW THEREFORE this Tribunal orders, on consent of the parties, that the proceedings in this matter are hereby withdrawn and this matter before the Tribunal is therefore concluded.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley, Vice-Chair
Presiding

Released: February 22, 2002

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: KIM BEINTEMA, Representative for the Registrar of Motor Vehicles

Applicant
Solicitor for Applicant

DATE OF HEARING: February 20, 2002 Ottawa

DECISION

A hearing was held on February 20, 2002, at Ottawa, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

ANTOINE AOUAD, M.D.
Presiding Member

RELEASED: February 22, 2002

0948 - ADLS - ANX

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

Applicant
Solicitor for Applicant

DATE OF
HEARING: February 20, 2002

DECISION
RELEASED: February 22, 2002 Ottawa

REASONS FOR DECISION

A hearing was held on February 20, 2002, at Ottawa, Ontario, to consider appeal of The Applicant (the "Applicant") pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on February 22, 2002, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated January 14, 2002, and was received by the Tribunal on January 15, 2002, together with the prescribed fee of \$100.00, paid by certified cheque.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason.

Preliminary Matters

The Representative of the Ministry provided the Tribunal with original certified copies of Ministry of Transportation documents on file, which were entered as exhibits with the consent of the Applicant's solicitor.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice to Registrar dated December 23, 2001
- b) Exhibit # 2 Notice Of Appeal Form – received January 15, 2001
- b) Exhibit # 4 Understanding Depression brochure – received February 20, 2002
- b) Exhibit # 5 Recognizing Excessive Anxiety brochure – received February 20, 2002

By the Respondent:

- a) Exhibit # 3 Ministry of Transportation submissions – received February 15, 2002

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath because he was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

- 50.1(1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
 - (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
 - (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

- 15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
 - (a) the name, telephone number and address, with the postal code, of the medical practitioner;
 - (b) the name, date of birth and address of the person who is the subject of the report;
 - (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;

- (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
- (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

Appellant's Driver's Licence was suspended "2001.12/23" as per Notice of Appeal (Exhibit # 2)

Appellant's Evidence

Page two of Notice of Appeal dated January 7, 2002, under the signature of Physician #1 informs under the category "Details and Diagnosis of patient's present condition", that the Applicant " has been taking medication to treat anxiety and depression since Dec 11/01 ...under a great amount of stress...". Physician #1 goes on to describe the symptoms of the anxiety attacks "...heart racing, sweating, dry mouth, hyperventilation ...difficulty with his memory... "

Under "Relevant details of last visit and when your patient was last seen" Physician #1 writes that "...It is quite possible that if ...placed in a stressful situation that he could suffer an anxiety attack that rendered him incapable of performing properly what was requested..." (Exhibit # 2)

In a letter addressed to the Applicant's solicitor, Physician #1 details the treatment and medication that the Applicant is undergoing and concludes that "...the "fight-flight" reaction which the body mimics during an acute anxiety attack could have caused him a dry mouth, hyperventilation, confusion, tremulousness and difficulty in concentrating. All of which led him to be unable to perform a breath test properly."

Copies of the side effects of the prescribed medication form part of the Applicant's appeal. At the hearing, submissions on behalf the Applicant were made by his counsel who advised the Tribunal that the Applicant would not be testifying.

Applicant's Solicitor called Physician #1 as a witness. For the benefit of the Tribunal,

Physician #1, established her credentials as a physician stating that she has been a physician for ten years, and has owned a walk-in-clinic for nine. The walk-in-clinic consists of a group practice of four full time physicians and six part-time physicians.

Physician #1 described the bulk of her practice as being mainly family care, which involves a considerable amount of psychotherapy. Physician #1 attested that she is accustomed to dealing with depression arising out of situational crisis. It is difficult to obtain psychological care in the city, thus, Physician #1 elucidated that psychotherapy is a significant part of her practice, as she tends to take care of her own patients' mild to moderate depressions.

Prior to becoming Physician #1's patient in "...October of 98...", the Applicant was seen at the clinic as a walk-in patient since "...January 14, '97".

In the past the Applicant was seen about once or twice a year, for check ups, but has been seen on a more regular basis since "...December 11th, 2001". At that time the Applicant presented with a situational crisis as well as symptoms of anxiety and depression.

Physician #1's testified that the Applicant had had a "...very stressful fall...", having had moved out of "...his dream home in approximately September...". The stress level was culminated, by changes at work, as the Applicant found it difficult to adjust to a new Manager, and by the Applicant's father who was required to undergo emergency surgery.

Physician #1's used the "SADIFACES" flyer, introduced and entered on consent as exhibit # 4, as a tool to evaluate the Applicant's depression.

Based on the criteria set out in "SADIFACES", Physician #1 assessed the Applicant as being in a depressed and anxious state warranting medication. Physician #1 detailed the Applicant's depressive symptoms, at the time as "...disturbances in sleep, in appetite, in mood, in interest, fatigue, agitation, ...denied concentration/memory changes, although a little memory problems, difficulty concentrating but not excessive, as well as some suicidal thoughts".

In terms of the Applicant's anxiety level, Physician #1 confirmed that the Applicant "...had begun to suffer from daily anxiety attacks ...symptoms including heart racing, sweating, dry mouth, hyperventilation and tremulousness ...difficulty controlling ...emotions ...tearful and irritable ...difficulty sleeping and ...suicidal thoughts..."

Physician #1's conclusions as to the Applicant's state of mind were arrived through questioning the Applicant, her observations of the Applicant while in her office as well as by the information provided by the Applicant's boss. The Applicant's boss was concerned enough with The Applicant's behaviour to call the clinic to discuss the matter with Physician #1 and to subsequently accompany him on a visit to the clinic.

During the hour and half visit, Physician #1's perception of the Applicant was noted as "...his mood was down, but his affect was agitated, he was agitated he was speaking quickly, he was

somewhat tremulous, he was jumping from thing to thing, he wasn't hyperventilating but he certainly had breathing and speaking quickly, just a very anxious affect at that time". At the end of this particular visit, Physician #1 was able to determine a final diagnosis of "...situational stress plus depression and anxiety, plus/minus depression and anxiety..."

Physician #1 asserted during her testimony that if an individual is in a severe enough anxious state, no triggers are required to set off an attack, but that when placed in a stressful situation an anxious individual will probably respond to the stimuli by having an anxiety attack.

At this time the Applicant's counsel suggested the flyer entitled "Recognizing Excessive Anxiety", be entered as an exhibit. That flyer was entered on consent as Exhibit # 5.

As a method of treatment, the Applicant was prescribed with a medication called Effexor, which is used to treat anxiety as well as depression, and the anxiolytic Clonazepam. Both medications were prescribed because, according to Physician #1, the Applicant "...was excessively anxious ...he was very agitated ...he had a lot on his plate, he had to deal with his work situation, he had his father that was going into emergency surgery..."

For most of the remainder of her testimony-in-chief Physician #1 offered in depth testimony as to alterations in the dosages of the Applicant's medications, as well as the effects and possible side effects of the medications prescribed to the Applicant.

Physician #1 quoted from page 501 of the C.P.S. guide introduced as part of the Applicant written submissions. Some common side effects of Effexor mentioned by Physician #1, were: "...somnolence, insomnia, dizziness, nervousness, anxiety, tremor, dry mouth, anorexia, nausea, vomiting, headache, sweating ...the possibility of cognitive impairment ...abnormal thinking, confusion ...changes in behaviour and personality..."

With respect to the side effects of Clonazepam, Physician #1 noted that Clonazepam is a member of the Benzodiazepines family, and that "...sedation" is the strongest contraindication. Other adverse effects could be listed as "...ataxia, dizziness, light headedness, residual day time drowsiness, weakness, fatigue, dry mouth ...confusion, slurred speech, headache, tachycardia, palpitations, trembling, unusual tiredness or weakness..."

Physician #1 also recommended that the Applicant seek the assistance of a psychologist, in order to learn relaxation techniques and stress management strategies. Although she has not as yet received a formal report, Physician #1 is aware that the Applicant has consulted with Physician #2.

The Applicant's counsel, Applicant's Solicitor, asked Physician #1 to offer an opinion as to whether or not there was a medical reason as to why the Applicant was unable to provide a breath sample on the night in question. Physician #1 replied, "...from what The Applicant had discussed and described ...on a subsequent visit, he had described symptoms in keeping with an anxiety attack ...heart racing, sweating, dry mouth, hyperventilation, tremulousness. He was particularly distraught as to how dry his mouth was..."

Physician #1 verified that the clinic was open Thursday and Friday during the week of Christmas, and that she had seen the Applicant on December 28th for the purpose of reviewing the dosage of his medication. It was during the January 3rd, 2002 visit that the Applicant related to Physician #1, the occurrence of his arrest. Apparently the Applicant had concerns about what happened during the incident and was looking for answers, as to whether the medication could have possibly have an effect on his ability to provide a breath sample.

Applicant's Solicitor repeated her previous question to Physician #1, "Is it your opinion that there was a medical reason for him not being able to provide a sample suitable to the officer, and if so what would that medical condition be?" Physician #1, replied: "I wasn't there ...these symptoms were being reported back to me, but if somebody had presented this constellation of symptoms and knowing how stressed this patient was, knowing that he was having some anxiety attacks, and with the description of symptoms compatible with anxiety, my feeling was that it quite probable or highly probable that The Applicant was experiencing an anxiety attack at the time of the incident ...probably 80%, 75%/80%..."

Physician #1, recited for the Tribunal the symptoms experienced on the night in question by the Applicant as he described them to her: "...nervous ...begun to shake ...trembling ...hyperventilating ...difficulty blowing ...very dry mouth ...having difficulty concentrating and feeling overwhelmed..."

The Applicant is still on medication and being seen regularly by Physician #1.

In cross-examination by Ms. Beintema, the Respondent's Representative, Physician #1 reiterated that the focus of the Applicant on the December 28th and January 3rd was to discuss the side effects of the medication that the Applicant was experiencing and to re-adjust the dosages.

Ms. Beintema pointed out to Physician #1, that in her report she offered two possible motives as to why she believed the Applicant was unable to provide a breath sample, the first being anxiety, the second the side effects of the medication. Ms. Beintema, asked Physician #1 for clarification as to "...whether it was his medications or it was an anxiety attack..." that prevented the Applicant from providing an adequate breath sample. Physician #1 retorted, "...both things could have played in there..."

In response to Ms. Beintema's questions, Physician #1, was reluctant to confirm that some of the symptoms of anxiety are clearly visible to the untrained person. Physician #1 feels that some people may experience symptoms, such heart racing or sweating, and yet go unnoticed. There is a spectrum, and whether the signs are noticeable or not depends on the degree of the attack.

Ms. Beintema questioned whether Physician #1 ever considered reporting the Applicant to the Department of Motor Vehicles, given the Applicant's established condition. Physician #1 countered that she believed that the Applicant could be treated with medication and support,

regain control of his life, and that "...he was not in any danger to himself or to others..."

Physician #1 confirmed that the Applicant has seen a psychologist and is taking his medication, and continues to attend her clinic every four to six weeks.

Under questioning from Ms. Beintema, Physician #1, admitted to not being familiar with the Alcotest requirements, nor ever having administered Pulmonary Function Tests.

The Applicant was never prescribed an inhaler to control his breathing, nor referred to a pulmonary flow test by Physician #1.

At the request of Ms. Beintema, Physician #1 explained to the Tribunal the "fight-flight" reaction experienced by humans.

Ms. Beintema reviewed with Physician #1, the symptoms experienced by the Applicant, on the night in question, as he related them to her during his visit on January 3rd: "nervous, shaking, trembling, dry mouth, hyperventilating, overwhelmed, difficulty concentrating". Ms. Beintema asked Physician #1 if she believed that these symptoms could be noticeable by the untrained eye, as signs of distress. Physician #1 replied, "they could ...yes". Physician #1 also emphasized that someone experiencing the symptoms described would not be able to just sit and have a normal conversation, "... one might notice that the patient was anxious ... having difficulty breathing ..."

Physician #1 referred to the Constable #1's notes and picked out the fact that the Applicant "...started and stopped..." might signify that hyperventilation.

Physician #1, proffered that if faced with a similar situation she "...would be a little more anxious than usual but that does not mean that I can't provide what is required ..."

Applicant's Solicitor in redirect questioned Physician #1 as to the possibility of the Applicant experiencing progressive symptoms. It was not just any one symptom but the combination thereof which made it impossible for the Applicant to provide a breath sample. Physician #1 replied that based on her experience and her knowledge of the Applicant's history, she would think it "...possible ...likely".

In closing, the Applicant's counsel Applicant's Solicitor noted that it was clearly demonstrated to the Tribunal that the Applicant did not wilfully refuse to provide a sample. Documented evidence both before and after the occurrence illustrates that the Applicant suffered from anxiety. The contention, substantiated by Physician #1's testimony is that it is possible that the Applicant was having an anxiety attack, albeit unnoticed by Constable #1, and that this attack was the reason the Applicant was unable to provide a breath sample. Constable #1 did consider the possibility the instrument could be malfunctioning, but being untrained, did not turn his mind to the possibility that there was a medical reason why the applicant was not complying.

Respondent's Evidence

The Respondent provided the following Documents:

1. Notice to the Registrar, certified January 17th, 2002.
2. Driving Record of The Applicant, certified January 18th, 2002
3. Vehicle record, certified January 18th, 2002
4. Notes of Constable #1, Badge # XXXXX, Ontario Provincial Police, Ottawa Detachment.

The Applicant's driver's record, since 1981, according to the Ministry of Transportation, shows the current suspension and one other infraction. (Exhibit # 3)

The Respondent called Constable #1 as a witness. Constable #1 testified that he has been employed with the Ontario Provincial Police since November 19th, 2001. Prior to that he had been with the Carlton Place Police since August 1990.

Constable #1 has been conducting roadside breathalyser tests since 1990 and became a Qualified Breathalyser Technician in November of 1998. Over the years Constable #1, has conducted over three hundred breath tests.

Referring to his notes to refresh his memory, Constable #1 attested to the events of the evening that led to the demand for the breath sample.

After reading the breath demand to the Applicant and asking him if he understood it, the applicant replied, "I guess". Constable #1 repeated the demand and the Applicant paraphrased it, indicating that he has understood. Constable #1 also demonstrated by blowing into the air, how the breath sample was to be provided into the machine. Constable #1 was sitting in the front seat of the cruiser, approximately "a foot and a half..." from the Applicant who was in the back seat.

The Applicant was co-operative; he was not shaking or trembling. He attempted to provide a sample but provided a "short sample". Constable #1 described what is meant by a "short sample". The Applicant "started to blow, initially. He stopped, then he continued to blow ...that re-sets the machine and shows an error code, because he did not blow long enough for the instrument to recognize..." the sample.

Constable #1 stated that the Applicant "...at that time had no difficulty whatsoever breathing, he was not hyperventilating, he was very calm, he was very cool..."

The Applicant was given a total of five opportunities to provide a breath sample and each time he "started and stopped." Constable #1 indicated that the Applicant never gave any reason, medical or otherwise as to why he could not provide a breath sample. He just indicated to the Constable that: "...he was trying."

Constable #1 recollected that at one point, he asked the Applicant to "...just blow ...take a normal breath and just blow. And he had no trouble with that whatsoever...".

Constable #1 testified that the Applicant had at first denied having a drink but later recanted and admitted to having had something to drink at the Casino.

At no time did the Applicant request medical attention, or to be taken to hospital. At no time did Constable #1 observe the Applicant as having any type of breathing difficulty. The Applicant did not appear to be shaking, sweating or exhibiting any other signs of physical distress. In fact the Applicant was able to remove the mouthpiece from the instrument and insert a fresh one.

Constable #1 noted that the only time that the Applicant expressed nervousness was after being advised that he was under arrest for failing to provide a breath sample. The Applicant stated, "You are scaring me ...I do not understand...".

The Applicant did not appear to be in a confused state. He was able to contest the date that he was given to go and provide his fingerprints. The Applicant was able to inform Constable #1 that he would be away on holidays at that time.

In cross-examination Constable #1 indicated that he was in close enough proximity to the Applicant to be able to detect any signs of physical distress.

Constable #1 is not only a trained observer as his job requires him to be, but is also certified in First Aid and CPR, as well as being a qualified Life Guard since 1993. In terms of psychological training, Constable #1 studied psychology for a year as part of his police training.

Applicant's Solicitor suggested the possibility that some of the Applicant's comments and symptoms were omitted from Constable #1's notes. Constable #1 clarified that his notes are basically to refresh his memory and prod his independent recollection.

Constable #1 emphasized that he coached the Applicant on how to blow into the machine, and had no reason to believe that the Applicant did not understand as he summarized what was said.

In reply to Applicant's Solicitor's question as to why he gave the Applicant five chances after testifying that three is the norm, Constable #1 stated that he likes to give everyone "...the benefit of the doubt...", and that when testifying in court he needs to be absolutely sure, when he tells a Judge that the individual "...was playing games...". Further, Constable #1 likes to test the instrument himself to erase any doubt from his own mind or any one else's mind that the instrument is working well.

In closing, the Respondent's Representative, Ms. Beintema, accepted the Applicant's diagnosis of anxiety disorder, but argues that neither Physician #1's written nor viva voce

evidence substantiate the claim that the Applicant was unable to provide a breath sample for medical reasons. Physician #1 speculates that “it is possible”, that the Applicant was having an anxiety attack at the time he was requested to provide a breath sample. Ms. Beintema contends that an officer of Constable’s experience would have been able to detect the signs described by the Applicant as signs of physical distress.

Ms. Beintema alluded to the fact that the Applicant did not seek medical attention immediately after the incident. Further, when he visited Physician #1’s clinic on December the 28th, it was to follow up on the medication. Following up on the medication was also the purpose of his visit on January the 3rd, but the issue of the breathalyser came up in conversation, and the Applicant related the incident to Physician #1.

There is the contention that the Applicant was also exhibiting signs of confusion at the time, yet his head was clear enough to remember he would be away on vacation on the date assigned for fingerprints.

Physician #1’s evidence is that it “...may have, could have, it might...” Constable #1 is a first hand witness at to the events that took place on the night in question.

Ms. Beintema asked that the Tribunal confirm the order of the Registrar.

APPLICATION OF THE LAW TO FACTS:

The circumstances leading up to the breathalyzer session and whether or not the Applicant actually showed signs of impairment or was impaired are not relevant to these proceedings.

What is relevant is Section 50.1 (2) (b) of the Highway Traffic Act, which prescribes:

“...person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason...”

Thus, at issue is did the Applicant have a medical condition that could cause the Applicant to fail or not comply with the breath demand.

The Tribunal finds that the Applicant suffers from depression and an anxiety disorder. Physician #1’s well written report and erudite viva voce evidence substantiates this finding.

The question remains, how does the medical condition preclude the Applicant from providing an adequate breath sample.

Much evidence was proffered as to the Applicant’s physical and mental condition as well as regarding the possible adverse effects of the medication the Applicant is taking.

The Respondent's Representative claims that Physician #1's testimony is pure speculation as far as it relates to the ability of the Applicant to provide a breath sample. Physician #1, very truthfully pointed out that she "...wasn't there...". The events of the night were relayed to Physician #1 by the Applicant.

The Respondent's Representative further contends that the only pertinent evidence consists of the visual observations of Constable #1. The Tribunal must concur. Physician #1's testimony is quite useful in establishing that the Applicant suffers from depression and an anxiety disorder, but at best it is a knowledgeable educated guess, as to the Applicant's ability to provide a breath sample when it was requested by Constable #1.

Two people were present during the incident, and privy to what transpired, the Applicant and Constable #1. The Applicant opted not testify on his own behalf. The Tribunal has no alternative but rely solely on the testimony of Constable #1 concerning the Applicant's demeanour during the breathalyser session.

Applicant's Solicitor challenged the testimony of Constable #1, as he is not trained in matters of depression and anxiety disorders. Ms. Beintema maintains that the symptoms exhibited by the Applicant: "nervous, shaking, trembling, dry mouth, hyperventilating, overwhelmed, difficulty concentrating", could easily be detected by an untrained observer, let alone a trained experienced observer like Constable #1.

The Tribunal agrees with the Respondent. Constable #1's credentials are impeccable; he has been a qualified breath technician since 1998. He is an experienced police officer who has spent ten years with the Carlton Place Police Force and two years with the Ontario Provincial Police. Constable #1 testified that he has taken one-year psychology, is certified in First Aid and CPR, and is a qualified Life Guard. On the stand Constable #1, was a credible witness. His testimony was straightforward and forthcoming. The Tribunal finds him to be a reliable witness.

There is no doubt that Constable #1, due to his training and his close proximity to the Applicant, would have been able to detect any signs of physical distress. According to Constable #1, at the time of the incident the Applicant did not demonstrate any sign of breathing difficulties, such as shortness of breath, nor any of the signs of anxiety as described by the Applicant to Physician #1. Constable #1 was adamant that the Applicant "...had no difficulty whatsoever breathing, he was not hyperventilating, he was very calm, he was very cool...".

As pointed out by the Respondent's Representative and corroborated by Constable #1's evidence, at no time did the Applicant request medical attention.

As mentioned by the Respondent's Representative, the Applicant's condition was not severe enough to warrant seeking medical assistance immediately after the incident. Although the Applicant's first visit to his physician was on December the 28th, he did not feel the incident

merited discussing. It was not until the second visit on January 3rd that the matter came up in conversation. The original focus of both visits has been to re-assess the dosage of the Applicant's medication according to Physician #1's testimony, during testimony-in-chief and cross-examination.

The onus being on the Applicant to establish the merit of the appeal, the Tribunal finds that the Applicant has failed to do so. Thus, the Tribunal finds that the Applicant does not meet the criteria of Section 50.1 (2) (b), in that he was not able to demonstrate that he suffers from a medical condition, which would prevent him from providing a breath sample when requested by Constable #1.

DECISION:

Upon the application by The Applicant to appeal the suspension order of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal **confirms** the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: February 28, 2002

HANS AND JO CONSTRUCTION LTD.

PREHEARING

HANS AND JO CONSTRUCTION LTD.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO SUSPEND REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: by teleconference
ANS and HANS VAN DEN HANENBERG, Agents representing the
Applicant
CAROL STREET, Counsel, representing the Ontario New Home
Warranty Program

DATE OF
PREHEARING: February 22, 2002 Toronto

ORDER

FOLLOWING attendances on February 22, 2002 at a prehearing by teleconference before this Tribunal of Ans and Hans van den Hanenberg, Agents, appearing on behalf of Hans and Jo Construction Ltd. (the "Applicant"), and Carol Street, Counsel on behalf of the Ontario New Home Warranty Program (the "Program");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Tuesday, May 21, 2002 at Gillespie Reporting Services, 130 Slater Street, Suite 200, Ottawa, Ontario and to continue if necessary on May 22 and 23, 2002 at the aforesaid address;

1. The Parties to the hearing are the Applicant and the Program.
2. Attached to this Order is a Statement of Facts marked "B." This was presented at the prehearing by Carol Street, Counsel for the Program. The Applicant at this stage cannot confirm the contents of Paragraph 1 of that Statement of Facts. Both the Program and the Applicant agreed that the facts enumerated in paragraphs 2 through 19 inclusive of that Statement of Facts, are facts that the parties have agreed upon.

3. Ms. Carol Street, Counsel for the Program, undertook to ascertain from Mr. Pat Varco of the Program whether the Program is prepared to furnish the Applicant with a letter confirming that in the event of the Applicant executing the new Builder and Vendor agreements, already sent to the Applicant, no personal liability would attach to either Ans or Hans van den Hanenberg under those agreements.
4. In the event of the Program furnishing Ans and Hans van den Hanenberg with a letter confirming that they would have no personal liability pursuant to the Applicant executing the Builder and Vendor agreements, the Applicant undertakes to immediately sign and return those agreements to the Program.
5. Upon receipt of the signed Builder and Vendor agreements, the Program undertakes to immediately withdraw its Proposal to Suspend the Applicant's registration and the Applicant shall in writing withdraw its appeal to this Tribunal.
6. Should the Applicant fail or refuse to sign the Builder and Vendor agreements after the Applicant receives the Program's letter referred to in paragraph 4 above, this matter will proceed to the hearing as presently scheduled. In this event, the Applicant shall by no later than April 26, 2002 serve the Program and file with the Tribunal full particulars specifying each and every section of the Builder and Vendor agreements that will be in contention at the hearing.
7. All parties to the hearing shall fully comply with the requirements of disclosure of documents or things as set forth in Rule 6.3 of the Rules of Practice of the Tribunal. All parties shall also fully comply with the disclosure requirements set forth in Rule 6.4 of the Rules of Practice of the Tribunal dealing with expert witnesses.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: February 25, 2002

724471 ONTARIO LIMITED

PREHEARING

724471 ONTARIO LIMITED

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO SUSPEND REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: by teleconference
ANS and HANS VAN DEN HANENBERG, Agents representing the
Applicant
CAROL STREET, Counsel, representing the Ontario New Home
Warranty Program

DATE OF
PREHEARING: February 22, 2002 Toronto

ORDER

FOLLOWING attendances on February 22, 2002 at a prehearing by teleconference before this Tribunal of Ans and Hans van den Hanenberg, Agents, appearing on behalf of 724471 Ontario Limited (the "Applicant"), and Carol Street, Counsel on behalf of the Ontario New Home Warranty Program (the "Program");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Tuesday, May 21, 2002 at Gillespie Reporting Services, 130 Slater Street, Suite 200, Ottawa, Ontario and to continue if necessary on May 22 and 23, 2002 at the aforesaid address;

1. The Parties to the hearing are the Applicant and the Program.
2. Attached to this Order is a Statement of Facts marked "B." This was presented at the prehearing by Carol Street, Counsel for the Program. The Applicant at this stage cannot confirm the contents of Paragraph 1 of that Statement of Facts. Both the Program and the Applicant agreed that the facts enumerated in paragraphs 2 through

19 inclusive of that Statement of Facts, are facts that the parties have agreed upon.

3. Ms. Carol Street, Counsel for the Program, undertook to ascertain from Mr. Pat Varco of the Program whether the Program is prepared to furnish the Applicant with a letter confirming that in the event of the Applicant executing the new Builder and Vendor agreements, already sent to the Applicant, no personal liability would attach to either Ans or Hans van den Hanenberg under those agreements.
4. In the event of the Program furnishing Ans and Hans van den Hanenberg with a letter confirming that they would have no personal liability pursuant to the Applicant executing the Builder and Vendor agreements, the Applicant undertakes to immediately sign and return those agreements to the Program.
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LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: February 25, 2002

FULLER, TIMOTHY AND SWICK, PATRICIA

TIMOTHY FULLER AND PATRICIA SWICK

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSE OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DOUGLAS MACKINTOSH, VICE-CHAIR

APPEARANCES:

TIMOTHY FULLER , representing himself and Patricia Swick
SARA KARGES, Counsel , representing the Ontario New Home
Warranty Program
COLLEEN BURN, Counsel, representing the Added Party,
ASHCROFT HOMES CENTRAL PARK INC.

DATES OF
HEARING:

September 25-28, 2001

Ottawa

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal by Timothy Fuller and Patricia Swick (the "Applicants") from a decision of the Ontario New Home Warranty Program ("the Program" or "ONHWP") set out in a letter dated February 8, 2001.

THE FACTS:

On November 16, 1997, the Applicants entered into a contract with Ashcroft Homes - Central Park Inc. ("Ashcroft") to build and sell to them a new home at 63 Central Park Drive, which is part of a large new subdivision in Ottawa. The final price was \$155,125 and it was the first house the Applicants had ever purchased.

The vendor, Ashcroft Homes Central Park Inc. ("Ashcroft") is owned by Mr. David Choo, a highly qualified engineer with 30 years experience in the business. The vendor had an extensive enterprise. He offered 95 models for the 1,300 low profile houses being constructed in the subdivision. Five "after sales service" employees looked after problems that might arise with newly constructed homes. At the time, Ashcroft Homes was selling 40 to 50 new houses each month.

The original closing date for the sale was June 27, 1998, but on due notice it was delayed two months to August 28, 1998. Unfortunately, the City of Ottawa had not issued an occupancy permit as a blue dye test had not been done for the plumbing system.

Prior to taking possession, Mr. Fuller was unable to do the pre-delivery inspection report ("PDIR") on schedule. He had retained an agent from Ottawa Valley Building Inspection Service to assist him, but when they went to do the inspection on August 26, 1998, there were still seven tradespeople in the house, and the inspection that day had to be called off.

Mr. Fuller had expressed dissatisfaction about the quality of the vendor's service in a letter of July 20, 1998 to the construction manager, Mr. John Stokes (Exhibit # 9).

The PDIR (Exhibit # 3/6) was done on August 27, 1998 prior to closing. It contains a list of 48 items needing correction, with 18 additions made by Mr. Fuller. All but five were recognized by Ashcroft as deficiencies. The number was abnormal because Mr. Choo testified that a PDIR rarely exceeds 10 to 15 items.

On their solicitor's advice, the Applicants did not move in until September 4, 1998. At this time the dye test was complete and they had an undertaking from Ashcroft to obtain the occupancy permit.

Upon moving in, the Applicants were beset with a large number of construction deficiencies, four or five times the norm. This surprised them as they had previously checked with the Program for the standing of the vendor, Ashcroft Homes, and it appeared to be faultless (Exhibit # 3/16).

For a year, Mr. Fuller tried to get these deficiencies remedied. In January 1999, he wrote to the Program asking for help with his growing concern about the quality of service and the lack of consultation (Exhibit # 3/16).

The relationship deteriorated. On the one side, Ashcroft informed the Program (but not Mr. Fuller) that the new owners were not co-operating, making it hard for Ashcroft to fulfill its contract. On the other side, Mr. Fuller claimed that Ashcroft was not performing and was not treating him with due courtesy (Exhibit # 3/15).

By August of 1999 Mr. Fuller had compiled a list with 5 pages of grievances which he sent to the Program (Exhibit # 3/17). The list covered 112 deficiencies and fourteen substitutions made by Ashcroft without the Applicants' agreement. The Program responded by urging both parties to settle the disputes between themselves (Exhibit # 3/18 and 19).

In November of 1999, the Applicants wrote for the forms for conciliation (Exhibit # 3/26). Soon after, the Program warned Ashcroft that if there was only one item that Ashcroft had not remedied which was found to be a warrantable during the conciliation, the conciliation would

be charged to Ashcroft as the vendor, and it could affect their rating. (Exhibit # 3/29). This was of no avail.

The Conciliation inspection then took place on two different days. The matters inside the house were inspected on February 25, 2000, and, the matters on the outside of the house were inspected on April 18, 2000. The findings were issued in two reports dated March 14, 2000 and May 4, 2000 respectively. (Exhibit # 3/36,37 and 48, 49)

Over one hundred complaints were addressed. The Program found that 46 complaints were warranted and 61 were not warranted. Cory Beverdam, the Program's warranty representative, who has a wide experience in house construction, prepared the reports.

The Program gave Ashcroft a deadline to do the warranted work, which Ashcroft did not meet. As a result, the Program notified Ashcroft on August 11, 2000 that Ashcroft had not resolved all the warrantable items in the conciliation reports and was in breach of its warranty obligations. The Program wrote, "... we will now proceed to resolve this claim" (Exhibit # 3/64). This was critical information for the Applicants to know, but the Program did not tell them about it until February 20, 2001.

In December of 2000, the Program's warranty representative, Mr. Beverdam, contacted Mr. Fuller and offered to settle the remaining claims. Mr. Fuller did not know that the Program had taken over the claims. A meeting was arranged with the addition of the Program's acting operations manager, Mr. Perry Harkin. The Program's settlement offer was \$6,350 on six warranty items. On the remaining 21 warranty items, based on estimates that Mr. Fuller had obtained, the settlement offer was \$6,475 making a total of \$12,825. At that meeting, Mr. Fuller felt intimidated by Mr. Harkin's threat that, if he did not settle, the situation could change to his disadvantage. The Program's offer was subsequently put in writing but was rejected by Mr. Fuller for a variety of reasons.

Mr. Fuller would have accepted the offers but for the conditions attached, including the agreement of a signed release which would absolve both Ashcroft and the Program from all existing and all future claims. Mr. Fuller wrote to the Program indicating he would accept the settlement offer without the restrictions (Exhibit # 3/68), but the Program did not respond.

Following the aborted attempt to settle, the Program issued its decision letter of February 8, 2001 (Exhibit # 3/1). The key paragraph in bold reads:

It is ONHWP's formal decision in keeping with sections 14(2) & (3) of the Act, the owner(s) as a result of refusing the offered settlement, have failed to mitigate their damages and can offer no further assistance in this matter.
(sic)

The wording is misleading in this sentence (indicating that it is the owner, rather than the Program, who can offer no further assistance) but it seems obvious what is meant.

The Applicants forthwith appealed the Program's decision.

At the four day hearing before this Tribunal, Mr. Fuller, unrepresented by counsel, and Counsel for the respondent, the Program, and the Added Party, Ashcroft were well prepared. The Tribunal heard testimony from five witnesses and 158 exhibits were filed.

THE LAW:

The Act's relevant portions are:

13.(1) Every vendor of a home warrants to the owner,

(a) that the home,

- (i) is constructed in a workmanlike manner and is free from defects in material,
- (ii) is fit for habitation, and
- (iii) is constructed in accordance with the Ontario Building Code;

(b) that the home is free of major structural defects as defined by the regulations; and

(c) such warranties as are prescribed by the regulations.

.....

13.(4) A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed.

.....

14.(1) Where,

(a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;

(b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty; or

(c) the owner suffers damage because of a major structural defect as defined in the regulations for the purposes of section 13, and the claim is made within four years after the warranty expires or such longer time under such conditions as are prescribed,

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

In considering the authority of the Tribunal, the Superior Court of Justice (Divisional Court) in *Gourlay v. Ontario New Home Warranty Program* (Court file no. 654/98) held that "Section 14(1) (a) of the Act is intended to protect those who contract with a vendor and suffer financial loss where the vendor/builder never completes the transaction."

The jurisdiction of the Tribunal to make an order in this matter is set out in section 16(3) of the Ontario New Home Warranties Plan Act, which states:

16(3) Where a person or owner gives notice in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and may by order direct the Corporation to take such action as the Tribunal considers the Corporation ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Corporation.

Regulation 892 to the Act states as follows:

4.(1) Each person with a claim under the Plan shall give written notice of the claim to the Corporation.

.....

15.(2) Every vendor of a new home warrants to the owner

(a) that the home is constructed in a workmanlike manner and is free from defects in materials including windows, doors and caulking such that the building envelope of the home prevents water penetration;

.....

(d) that the home is free from violations of Ontario Building Code regulations under which the Building Permit was issued, affecting health and safety, including but not limited to fire safety, insulation, air and vapour barriers, ventilation, heating and structural adequacy; and

(e) that the home is free of major structural defects.

.....

17. (1) Every vendor of a new home of a type referred to in clause (a) or (b) of the definition of "home" in section 1 of the Act warrants to the owner that in the event of a delay in closing that is more than five days beyond,

- (a) the date originally fixed for closing the purchase agreement; or
- (b) an extension referred to in clause 3 (a) or (b),

the vendor shall compensate the owner for all direct costs caused by the delay in an amount that does not exceed \$100 a day for living expenses and \$5,000 in total. R.R.O. 1990, Reg. 892, s. 17 (1).

.....

18. (1) Every vendor of a new home warrants to the owner that the vendor shall make no substitutions in those items of construction or finishing for which the purchaser is entitled to make selection pursuant to the purchase agreement without the written consent of the purchaser. R.R.O. 1990, Reg. 892, s. 18 (1).

2) Subsection (1) does not apply where,

(a) the purchaser, having been notified, does not make a selection within thirty days after executing the purchase agreement or within such other time period as may be agreed; or

(b) an item selected under clause (a) is not available and the purchaser does not make a selection within seven days of receiving written notice from the vendor or within such other time period as may be agreed that the item is unavailable. R.R.O. 1990, Reg. 892, s. 18 (2).

(3) Every vendor of a new home warrants to the owner that where the purchaser fails to make a selection under clause (2) (a) or (b) that the vendor will make a selection on the purchaser's behalf that is of equal or better quality than the original selection as set out in the purchase agreement. R.R.O. 1990, Reg. 892, s. 18 (3)

19. Every vendor of a new home warrants to the owner that where the vendor makes a substitution with respect to an item that is referred to in the purchase agreement that is not an item that is to be selected by the purchaser, the item will be of equal or better quality than the item referred to in the purchase agreement.

THE ISSUES:

The Tribunal dealt with five issues in its analysis.

1. Was the home constructed in a workmanlike manner as warranted under section 13(1) of the Act ?
2. Did the builder substitute items contrary to section 18 or 19 of Regulation 892 of the Act?

3. Are the Applicants entitled to damages for delay in closing, pursuant to section 17 of Regulation 892 of the Act?
4. Where the Applicants can establish that the Vendor has breached a warranty under the Act, what is the amount of the Applicant's damages?
5. Are the Applicants disentitled to warranty coverage under the Act due to their rejection of the offer of settlement made by the Vendor or by refusing to give the Vendor access to the home?

APPLICATION OF LAW TO FACTS:

The Tribunal's analysis below is divided into four categories:

- 1.) Claims that are not warranted under the Act
- 2.) Claims that are warranted under the Act
- 3.) The effect of the settlement offer on the Applicants' claim
- 4.) The effect of the denial of access on the Applicants' claim

1.) CLAIMS THAT ARE NOT WARRANTED UNDER THE ACT

#45 Change in the Loft Dimensions (numbered from the Conciliation report)

Mr. Fuller claims that a 6" jog in the loft wall encroaches into the original plans of the home. This, he says, reduces the area of their home and he wants compensation based on that reduction compared to the overall floor area of the home.

Cory Beverdam, for the Program, testified that the industry standard is to accept up to a 2% reduction in the floor area of a house. He said the jog measured 4 inches by 6 or 7 feet and that fell within the 2%. He said he was not sure why the jog was made. But, he said, a builder is entitled to make minor changes and the industry guidelines allows a 2% deviation respecting the total square feet without penalty. The Program's policy is the same.

Since the jog or check is found to be within the 2% variance allowed and since there is no evidence before this Tribunal that this affected the value of the home, this claim is denied.

#45 The Fireplace

The Applicants' claim is that they are entitled to a more expensive fireplace than that which was installed. Mr. Fuller said that he had contracted for a more expensive fireplace in Schedule D of the Agreement of Purchase and Sale (ex3/3 p7). That schedule lists extras. The relevant section referring to the fireplace reads:

FIREPLACE IN LIVING ROOM (NOT A FULL WALL, SHELF TYPE INSTALLATION) Price
\$3,000 incl

Since both types of fireplaces available are shown to have shelves (photos ex 8 nos. 29 & 53) and since the description is unclear, the Tribunal is not persuaded Ashcroft knowingly made a substitution. Mr. Fuller is quite sure about what he chose and therefore that there was a substitution. A salesman, he said, took the details of what he wanted and wrote it down on the order. But Mr. Fuller's intention does not by itself determine if there was a contract for what he wanted.

In Eli Lilly v Novopharm [1998] 2 SCR 129 para 54 the Court said,

The contractual intent of the parties is to be determined by reference to the words they used in drafting the document, possibly in the light of the surrounding circumstances which were prevalent at the time. Evidence of one party's subjective intention has no independent place in this determination

The Tribunal is left in some doubt as to contractual intent of the parties. In addition, there is the evidence that the fireplace Mr. Fuller wanted could not be installed because the open concept in his Tiffany model home did not allow it. Also, Mr. Beverdam indicated that the two fireplaces in question were of equal value.

The Tribunal finds that the Applicants have not discharged the onus of proof which rests upon them to prove their claim's validity on the balance of probabilities. Accordingly, the Tribunal is unable to find in their favour, and this claim is denied.

#46 Hydro and Phone Boxes

The Tribunal has concluded that the offending hydro box is probably located off the Applicants' property. No survey was presented. The best evidence came from Mr. Beverdam who said he used the water valve stand pipes as a guide as they are usually on the property line, and he concluded that the hydro box was outside the Applicants' property. He said, and the Tribunal accepts, that municipal services are excluded from warranty.

The Tribunal finds that the Applicant's complaint is not a warrantable claim under the Act and the claim is denied.

The Retaining Wall (Item 48 from Applicants' Summary (Exhibit #4)).

Along the back perimeter of the Applicants' property, there is a retaining wall built a few feet inside the fence line. It is a top quality grey stone wall about three feet high and three feet wide made up of three layers of big stones (Exhibit # 8 photos) and (Exhibit # 3/81). The Applicants' complaint is that the wall encroaches on a five-foot-wide right-of-way (which enables occupants of adjacent houses to get to their back yards on foot), and repositions the right-of-way further onto the Applicants' property.

The contract of sale stipulates,

"the title will be subject to certain rights of way,

(a) a pedestrian right of way around the block (not exceeding five feet) of the rear yard". (Exhibit # 3/1 page 4)

Mr. Choo testified that the wall was necessary for pipes etc., that it was the most expensive type of wall, and that the wall sets off the perimeter nicely.

The Applicants have not persuaded the Tribunal that they have suffered any damage.

The Tribunal therefore denies this claim.

#50 Structural Anomaly - Basement (number taken from Conciliation Report)

This claim involves a footing pad supporting an upright beam shown in Exhibit # 8, photo 12. Proof of the Applicant's claim would require evidence from an expert. Mr. Fuller indicated that at this time he did not want to pursue this further. The Applicants not proceeding with this claim, the Applicants' claim is denied.

2.) CLAIMS THAT ARE WARRANTED UNDER THE ACT

Identity Numbers are from Exhibit #4 (the list of warranted items)

The following items by agreement are warranted with the following values:

#2	Foyer Moulding	\$ 10
#9	Cracked plaster near fireplace	\$ 15
#18	Drywall defect near main stairs	\$ 50
#19	Plaster stipple defect	\$ 25
#20	Plaster paint defect	\$ 15
#24	Damaged drywall	\$ 15
#25	Moulding defect	\$ 15
#33	Missing phone jack	\$ 50
#35	Window frame not plumb	\$ 150
#1	Window well improperly installed	\$ 125
#10	Parging required	\$ 50
#11	Shingle on roof lifted	\$ 75
	Painting of repaired areas	\$ <u>300</u>

Total \$ 895

The Tribunal finds the Applicants entitled to \$895.00 for the above-noted items.

The following items are agreed to be warranted, but the parties did not agree as to their value. The Tribunal's evaluation of their value follows.

Both the Program and Mr. Fuller obtained quotations for repairs on a number of warranted items. The contractors who submitted the quotations were not called by either party although the Program 's warranty representative, Cory Beverdam, reviewed some quotes.

The Program's quotations came from A. Philion Construction Inc. The Applicants' quotations were obtained from Impeccable Construction. Where there is no other evidence besides the two quotes, the Tribunal finds that a reasonable solution is to split the difference between the quotations. The Tribunal finds that the Applicants are entitled to \$1,740 respecting the following items.

#3 Correct twisted pillar

Program's proposal \$320.	Applicants' claim \$500.	Tribunal's Award \$410

#4 Repair crooked bathroom maple wall

Program's proposal \$320.	Applicants' claim \$500.	Tribunal's Award \$410

#8 Repair door jamb in garage

Program's proposal \$320.	Applicants' claim \$800.	Tribunal's Award \$560

#17 Strengthen stringer on the stairs

Program's proposal \$220.	Applicants' claim \$500.	Tribunal's Award \$360

Total Award	<u>\$1,740</u>

#26 Poured footing not finished

The assessment of this claim was not a contested issue as Mr. Fuller indicated in his evidence that he accepts \$180.

Program's proposal \$180.	Applicants' claim \$500.	Tribunal's Award \$180

Repairs to drywall

This item was not challenged by other evidence from the Applicants.

Program's proposal \$860	Tribunal's Award \$860

#11 Repairs to the runner on the sliding door

For this item, the Tribunal accepts the evidence of the Program's representative Mr. Beverdam, who inspected the door and found dents and scratches in the runner which needed filing. He stated \$50 would repair the damage. He had another quotation for \$150. Mr. Fuller at first wanted the door replaced for \$1,000 as the supplier had indicated on the phone that the runner could not be fixed. In evidence, Mr. Fuller said he would take \$300.

Program's proposal \$50. Applicants' proposal \$300. Tribunal's Award \$150

The parties did not agree that the following items were warranted, or their values. The Tribunal finds these items warranted under the Act and its evaluation of their values follows.

#29 Hose lying across the basement floor (draining the furnace)

Mr. Beverdam testified he examined the hose on the concrete basement floor, connecting the furnace to the drain. He explained that the rule about drains in the basement used to be that they could simply empty into a hole in the concrete floor. That rule has been changed and that procedure is no longer allowed. Mr. Beverdam said the hose must now go directly into a drain which it does by going across the basement floor. He found this was not a defect and not in conflict with the Ontario Building Code ("OBC").

Mr. Fuller on the other hand submitted the hose lying across the floor constitutes an intrusive trip hazard.

The Tribunal finds that the builder should have anticipated the drain requirement before the concrete floor was poured. A pipe could have been set in the concrete going to the drain. This new home should not have such things as an essential drain hose obstructing the basement floor.

The current installation breaches the warranty that the home be constructed in a workmanlike manner and is a warranted claim. Mr. Fuller's claim is for \$100 and that is what the Tribunal finds reasonable.

Tribunal's Award \$100

#32 Kitchen and bathroom cabinets

The evidence in this dispute is really a matter of contract. It relates to the manner in which specific selections were made by Mr. Fuller.

During the preparation of the agreement of purchase and sale, the Applicants made a variety of specific choices on a selection sheet. One choice was for the kitchen cabinets and another was for the bathroom cabinets. Mr. Fuller stated that sales staff (Fran and Sherrie) gave their approval.

The selection sheet has various headings. It is a formal document signed by both Applicants. Under the caption of Kitchen & Vanities, the following choices were indicated:

Kitchen style	CHATEAU
Kitchen colour	NATURAL <u>MAPLE</u> (underlined twice)
Main washroom style	CHATEAU
Main washroom colour	DESERT

The Applicants did not get the natural maple cabinet they selected. Instead they got oak. But, as it turns out, natural maple was not a selection they should have been able to make because their house was a Tiffany style that did not permit the choice of maple cabinets. Mr. Choo testified that maple cabinets were three or four levels up from oak and several times more expensive. He also stated that "Desert" is not available for the Chateau line to which the Applicants were confined. The Chateau line only comes in oak.

Ashcroft sales staff had therefore agreed to selections the Applicants should not have been given.

Mr. Fuller testified that before the cabinets were installed, he had pointed out to Ashcroft that they were the wrong ones. He also testified that Mr. Choo said they would replace their cabinets, then a few days later reversed himself and said he would not. Mr. Fuller's solicitor brought this to the attention of Ashcroft's solicitor in his letter of August 31, 1998 in which he wrote, "During a telephone conversation of August 27, 1998 with Mr. Choo (Ashcroft President), my client was informed that the cabinetry will be changed".

Mr. Choo confirmed this but said at that point he was doing it for customer relations. No doubt he also had in mind that approval had been given by his sales staff. Mr. Choo stressed that it was Mr. Fuller's responsibility to know if a maple cabinet was outside the standard Regal line. However, the Tribunal finds the failure was on the part of the sales staff, and not the fault of the Mr. Fuller. Mr. Choo also claimed the selection is a colour selection not a type selection, implying that a colour choice exculpates Ashcroft from having to provide a natural maple wood cabinet.

The position taken by Ashcroft has not been consistent. On June 12, 2000 Ashcroft's After Sales Manager, Patricia Corkum, wrote to the Program (Exhibit # 3/55) with this paragraph. "In addition I have had discussions with Mr. Fuller respecting repair/replacement of the kitchen cabinets. As you can appreciate this (is a) great deal of work. Mr. Fuller indicated that he in no way wished to be inconvenience(d) in this process. This is impossible and therefore Ashcroft Homes is unable to proceed further with this matter".

Next month, that position changed. On July 14, 2000 Ashcroft issued one of its deficiency correction forms (Exhibit # 6/29) directed to Canac, the supplier of these cabinets. It reads as follows:

Deficiencies to be completed ...

"this is the house that the kitchen cupboards need to be made in MAPLE, please attend to measure the cupboards".

(in unsigned handwriting)

the Chateau door is an 'oak' the maple door is Tuscon or Toledo. Cost to replace kitchen \$1,950 + gst".

Now, Ashcroft suggested \$1,950 is the value of the maple cabinets. To the contrary, Canac, the manufacturer, quoted Mr. Fuller \$5,200 for the maple cabinets that he had selected (Exhibit # 3/7). This higher value is supported by Mr. Choo's statement that the maple selected is several times more expensive.

Counsel for the Program, however, also argued that any compensation should be based on the figure of \$1,950 appearing in handwriting on the deficiency form. That value Mr. Beverdam testified is equivalent to the value of the oak cabinet.

Mr. Fuller's position has not been consistent either. On July 21, 2000 (Exhibit # 3/21), Mr. Fuller wrote to Ashcroft and asked for \$2,100 compensation for the kitchen and bathroom cabinets. This amount was later changed to \$6,000 consisting of \$5,200 for maple cabinets and \$800 to remove the existing cabinets in the kitchen and bathroom. He testified that both his contractor and Canac, the manufacturer, said there would be no salvage value.

Finally, in his testimony Mr. Fuller indicated that he would settle for the cost of the maple cabinet without the cost of removal. That makes sense as it avoids concern about unjust enrichment and the benefit that would be accruing to the Applicants by keeping the oak cabinets.

The Tribunal concludes that there was an offer and acceptance in this specific selection of kitchen and bathroom cabinets and therefore a contractual obligation on the part of Ashcroft to provide a maple cabinet in the kitchen and "Desert" in the bathroom which the vendor substituted with oak.

Respecting a fair compensation on the kitchen cabinet, Tribunal's decision is that it should be the \$5,200 less the value of the oak cabinet of \$1,950 for an award of \$3,250 in round figures.

With respect to the specific colour selection of "Desert" for the bathroom, Mr. Beverdam testified he got a quotation from Canac for \$200 to \$300, so another \$250 should be added for a total award for this item of \$3,500.

Wrong Colour of Siding (Item 43)

This item involves a question of resolving another conflict in the contract of sale.

On the selection sheet (Exhibit # 3/3) in the contract of sale, the Applicants are shown to have chosen Exterior package 4 which apparently indicates "Antique Rose" as a siding colour. However, instead they got "Grey" and they claim \$2,000 in compensation. Ashcroft offered \$1,800 in the settlement to the Applicants to replace the siding (Exhibit # 3/67).

The Program originally found the selection of the colour not to be warranted, but later changed its position because it found that the Applicants had made a specific selection which is covered by section 18 of Regulation 892. But in his evidence, Mr. Beverdam made the distinction between an acceptance of the colour as opposed to a selection of this colour. Both Counsel advanced the same argument, but the Tribunal finds it is without substance.

Mr. Fuller described how he chose the siding. In a letter to the Program of June 2, 2000 (Exhibit # 3/54) he wrote the following,

"The colour package for our home (including the siding) was shown to and accepted by us before the building was erected. The siding on our home is grey and not rose as per the selection sheet."

In this context the Applicants' acceptance of the colour rose is a selection of the colour rose. The fact is recorded on a selection sheet with other choices by the Applicants. Antique rose is the colour they were shown and the colour they wanted. The colour of a house is usually a matter of great significance to the owners.

It is understandable, as Mr. Choo testified, that architectural control attends to the look and feel of the subdivision to avoid monotony. A variety of house colours adds to the value of the houses in a subdivision. The photographic evidence does not enlighten the Tribunal on whether a change in colour was called for (Exhibit # 8 and 3/81).

Mr. Choo admitted he would change the selection process now. His reliance for denying the claim rested on a clause in schedule "B" of the contract of sale which reads,

" All exterior material, elevations and colours are subject to architectural control".

Section 18 of Regulation 892 addresses the selection process for warranty and overrides that clause.

Accordingly, the Tribunal finds the Applicants were entitled to have the siding they selected, and are entitled to compensation. The value ascribed by Ashcroft Homes in the settlement

offer of December 15, 2000 (Exhibit # 3/67) is \$1,800. Mr. Fuller obtained a recent quote from Maize Siding (Exhibit # 3/7) for \$3,870. There being no evidence to resolve the difference in value, the Tribunal finds a fair value to be the average of the two prices and awards the Applicants \$2,835.00.

Lack of Shingle Overlap #5 (from Conciliation Report of May 2, 2000)

The Program takes the position that the lack of overhang on the front gable end of the roof is not warrantable. Mr. Cory Beverdam, for the Program, testified this was not readily visible, and that the condition was therefore not a defect in workmanship.

The Tribunal notes that this may appear as a small matter but in the photograph in Exhibit 8 there is no visible overhang. That lack should be rectified, not just for appearance but certainly for its function. The overhang obviously helps to keep the weather away from the fascia board. Mr. Fuller asks for \$100 and that is reasonable. Accordingly, for this breach of warranty, the Tribunal awards the Applicants \$100.

#49 Delay in Closing (numbered from the Conciliation Report)

As already related, the original closing date was June 27, 1998. On April 21st it was changed to August 13th and then, at the request of the Applicants to avoid bank charges, changed again to August 28th. But on their solicitor's advice the Applicants did not move in until September 4, 1998, seven days later. The city of Ottawa had not issued an occupancy permit and could not do so until a dye test had been carried out. When that was done, the Applicants accepted an undertaking from Ashcroft to procure the permit.

The Program submitted that the seven day delay in closing (August 28 to September 4, 1998) was not caused by Ashcroft. The Program argued that the delay was caused when the Applicants would not close without an occupation permit, required and issued by the City of Ottawa.

The evidence is quite clear. Ashcroft had failed to ask for this occupation permit. The City had not done the dye test needed before it could issue the permit. On August 28, the City still had this test to do, and it was not until September 4 that it was completed by the City, a fact recorded in the correspondence between the solicitors for the vendor and the buyers (Exhibit # 3/14). When the test was finally done, the Applicants accepted an undertaking from Ashcroft to provide the permit and took possession.

From the delay, the Applicants make two claims, one for legal expenses caused by the delay and the other for living expenses.

The Applicants are seeking \$799.83 for the extra legal expense pertaining to work done after the closing of August 28, 1998. Their solicitor, Patrick Murray, makes the point in a letter to Ashcroft's solicitor dated December 4, 1998, " our client received two separate invoices, one

for fees relating to the transaction up to the original closing date, and the other for fees (only) incurred due to the delay in closing” (Exhibit # 3/14).

Mr. Murray’s account is for 5.5 hours resulting from the delay in closing, which from his invoice shows $\frac{3}{4}$ of his \$747.50, account is related to the problems of the late closing. (Exhibit # 13/p.34) Therefore, the Tribunal finds that \$600, with GST included, is directly a cost of the delayed closing.

The situation required legal advice and negotiation power. The contract of sale provides:

31. TIME IS OF THE ESSENCE Time shall be in all respects of the essence in this agreement and every part hereof.

The Applicants therefore needed legal advice. The possibilities of not closing on the specified date could have exposed them to significant liabilities.

The legal cost of \$600 is directly a result of the delayed closing.

Section 17 (1) of Regulation 892 provides,

Every vendor of a new home warrants to the owner that in the event of a delay in closing that is more than 5 days beyond

.....

b) an extension referred to in clause 3(a) or (b),

the vendor shall compensate the owner for *all direct costs caused by the delay* in an amount that does not exceed \$100 a day for living expenses and \$5,000 total. [Emphasis added]

The \$600 being a direct cost, as required under section 17 of regulation 892, the Tribunal finds the Applicants’ claim for this amount falls within the warranty provisions of the Act.

The remaining question is how much compensation, if any, is due to the Applicants for alternate living expense.

The Applicants extended the lease of their accommodation for a month at a cost of \$620. Both party’s Counsels argue that the Applicants had committed themselves to this extended rent before they knew they would not be able to close as scheduled. As it turns out that was a wise precaution and justified by the subsequent events. In the circumstances the Tribunal finds that \$100 a day would be fair for the seven days of delay, but with only evidence before it of \$620.00, the Tribunal’s award is limited to \$620.00. Accordingly, the Tribunal finds the Applicants’ claim of \$600.00 for legal costs and \$620.00 for living expenses are claims within the warranties provided by the Act.

When the Applicants took possession of their home, there was an open duct on the furnace leading nowhere. It should have gone to the loft above the garage but somehow that got omitted. This omission is not construction of the home in a workmanlike manner as warranted under the Act. In the first offer of settlement the Program quoted \$500.00 from the builder as compensation (Exhibit3/67) which the Tribunal finds reasonable, and the Tribunal finds the Applicants entitled to \$500.00.

#9 Landscaping (Number Taken from Conciliation Report)

The Applicants complain that they did not get the trees they expected as shown on the site plan (Exhibit # 18). However, most of these trees were outside their property and there should have been only one tree, a Serviceberry, just inside their property line. Its absence is established by photos 44 and 45 in Exhibit # 8.

Mr. Choo testified that there are various holdbacks and an \$8 million line of credit. He suggested that an owner of a house can complain to the City to rectify the lack of trees which the City can arrange by the use of the line of credit.

The Tribunal finds that Mr. Fuller should get the missing tree, for which he was quoted \$225 by Knippel Nursery (Exhibit # 3/77).

The Tribunal finds the Applicants entitled to \$225.00

#10 Repair to the floor where hardwood meets vinyl

The problem with the floor is shown in a photograph contained in (Exhibit # 8/26). There is clearly a defect that needs fixing. An offer to fix the floor for \$150 is shown in Exhibit # 4, which the Tribunal finds and awards to the Applicants \$150.

With respect to the balance of the Applicants' claims in these proceedings that are not specifically mentioned in this decision, the onus is on the Applicants to establish the amount of damage they have suffered. That has not been done. For instance, there is some intimation respecting items 12, 13 & 14 in Exhibit # 4 that it might take \$400 to repair those items. Lacking evidence, the Tribunal can not rely on such a figure. Accordingly, unless the Tribunal has specifically found a claim warranted in this decision, that claim in these proceedings is dismissed.

The Tribunal therefore finds the Applicants entitled to a total award of \$12,455 for claims warranted under the Act.

3. EFFECT OF THE OFFER OF SETTLEMENT ON THE APPLICANTS' CLAIMS

Counsel for the Program referred to the letter of December 15, 2000 from the Program (Exhibit # 3/67) and submitted that the Applicants failed to mitigate their damages by refusing a reasonable settlement offer. This was the basis for the Program's position set out in its decision letter that the Program could not be of further assistance.

Counsel for Ashcroft submitted that the Applicants' appeal should be dismissed because the offer of settlement was a reasonable one and by rejecting it they failed to mitigate their damages. Counsel also submitted that the Applicants' rejection of the offer should be taken into account in assessing any damages in these proceedings.

An important first finding by the Tribunal is that the release was an essential part of the whole offer to settle, which was in two sections. The release was treated that way by Mr. Fuller in his response to the Program (Exhibit # 3/68). In addition, Ashcroft set this pattern in an earlier offer mentioned in its letter of May 4, 2000 to the Program where a \$3,500 cash settlement was tied to a waiver (Exhibit # 3/47). It read,

“.... as well, Ashcroft Homes lawyer will be including a waiver that must be signed by the homeowners.”

Mr. Beverdam initiated the settlement offer over the phone. The Applicants requested a meeting which took place on December 6, 2000. Mr. Perry Harkin from the Program came with Mr. Beverdam. The meeting was not a success, according to Mr. Fuller, as he felt threatened both by Mr. Harkin's statement that if he did not settle, it could change to his disadvantage and by the terms of the offer to settle with its conditions and waiver of liability. Mr. Fuller's observation was that the Program was not being a conciliator but an ally with Ashcroft, against him.

During these negotiations for settlement, Mr. Fuller still had not been informed that, four months before in August, the Program had found Ashcroft in breach of its warranty obligations and had taken over the claim. Consequently, until February 20, 2001, when the Program finally informed him of the situation, Mr. Fuller remained under the misapprehension that he was still dealing with both the Program and Ashcroft.

The Program put the terms of the settlement offer in writing but Mr. Fuller rejected it because of the attached release which was required and, according to Mr. Beverdam, drawn up by Ashcroft's lawyer. (Exhibit # 3/67, 68).

Section 14(3) of the Act provides:

The corporation may perform or arrange for the performance of any work in lieu of or in mitigation of damages claimed under this section.

Under the settlement, the Program was not going to arrange for the performance of work. Rather, the Program was to delegate to Ashcroft which was to delegate to the Applicants who

in turn were to delegate the work to a particular contractor. All of this was proposed in the absence of an existing contract without any prior consultation with Mr. Fuller.

In addition, there is nothing in the Act entitling the Program to demand a waiver of liability and nothing to allow the Program to shed its responsibility for the 7 year warranty for a major structural defect.

The release offered to the Applicants contains five conditions which rightly caused them concern (Exhibit # 3/68).

1. The work on 21 warranted items had to be done by a company called Impeccable General Contracting ("Impeccable"). This decision was made without any consultation with the Applicants. At the time, the Applicants' only dealings with Impeccable were an informal oral estimate and some talk of availability. There was no contract between them.
2. The \$6,475 for the work to be done was to be paid, not to the Applicants out of the guarantee fund, but by Ashcroft. In addition it was to be paid to Impeccable directly. The liability of any costs overrun would of course have been the Applicants', as Impeccable was identified as the contractor of the undersigned Applicants.
3. Ashcroft would only pay the \$6,475 upon completion of the work.
4. The work on the 21 items had to be complete within 60 days.
5. A discharge had to be given by the Applicants to Ashcroft and to the Program absolving them from any future claims and from all claims made to date for deficiencies in the construction of their home.(Exhibit # 368/)

The Tribunal finds these requirements inappropriate in the circumstances. The Program had taken over the claim. Under the Act it could have either compensated the homeowners or arranged for work to be done, but it did neither. For some reason the Program was safeguarding Ashcroft's interests.

Mr. Fuller is entitled to sue Ashcroft quite apart from warranted matters under the Act. That should not be a concern of the Program once their conciliation efforts are over.

Mr. Fuller rightly protested. He had no binding contract with the contractor Impeccable, only estimates. He knew repairs done by Impeccable would not be covered by the extended warranty, but he would have had an extended warranty if the Program had arranged the repairs. And he was not happy with the time limit, as the work was extensive and would mean a substantial inconvenience for him with no arrangements for alternate accommodations being made. Also, the loss of the seven-year warranty for major structural defects implicit in the release of both the Program and Ashcroft of that liability would have adversely affected the value of the home and was an attempt to contract out of the Act.

Mr. Fuller made a reasonable response in his letter of December 22, 2000 where he wrote out his objections and added:

"In the event that there was agreement to remove the, in effect, illegal restriction, we would consider accepting compensation in the amount of \$12,925.00 which is the total value of reparations already being proposed". (Exhibit # 3/68).

The Program did not act on that proposal. There was no response except as set out in the decision letter.

For these reasons, the Tribunal finds that the Applicants had no obligation to accept the settlement offer to mitigate their damages. Indeed, it would have been unwise for them to have done so. Accordingly, the Tribunal finds that the Applicants refusal to accept the proposed settlement does not affect their entitlement to compensation for breach of warranties under the Act.

4. EFFECT OF THE DENIAL OF ACCESS ON THE APPLICANTS' CLAIMS

Considerable controversy developed over Ashcroft's right of access to the home. The agreement of purchase and sale carried this section,

18. ACCESS TO PROPERTY It is understood and agreed that at any time either before or after the completion of the within transaction and the delivery of a transfer to the purchaser, the vendor, its servants, agents or any person authorized by the Vendor, upon giving notice, 48 hours minimum, shall have free access at all reasonable hours to the lands and buildings comprising the Real Property in order to make inspections or do any work or repair therein or thereon which the Vendor may deem necessary.

Prior to August 11, 2000 when the Program took over the claim (Exhibit # 3/64), Ashcroft's employees were refused access on several occasions for various reasons.

Undoubtedly from Ashcroft's perspective Mr. Fuller was being difficult. He had so many claims, some unnecessarily detailed, and he wanted some control of the proposed methods of repair. Ashcroft says it alone had the right to decide on the method of repair and that Mr. Fuller was uncooperative.

To some extent that is true, but the Applicants were contending for years with a disturbing number of unsolved deficiencies in their home. This may have arisen because Ashcroft was "in great difficulties with finishing houses" according to a fax (Exhibit # 3/44) from Patricia Corkum, Ashcroft's After Sales and Service Manager. The Applicants became dissatisfied early on with the quality of service provided by Ashcroft (which Mr. Fuller described as like having a broken leg re-broken) and he complained about the slowness of response and Ashcroft's discourteous attitude. He had another complaint. When the Applicants wanted to

be re-assured that their home would be restored to its prior condition after some proposed repairs and asked for the details, Ashcroft refused to give them the details in advance.

Mr. Fuller testified he took offence to a letter from Ashcroft to the Program stating that numerous items could have been dealt with if he had allowed access to the residence (Exhibit # 3/55) . He said he knew of his obligation to allow tradespeople in, and he had gone beyond that. He also maintained that he had been co-operative and that he was never informed prior to this hearing that he had not been.

Mr. Fuller conceded that there were three occasions that he refused access to Ashcroft employees. Once, Mr. Fuller refused entry to an Ashcroft worker called Pierre who came to the home unscheduled. On a second occasion, Mr. Fuller refused access when Pierre and Flemec, tradespersons, refused to sign a waiver. Mr. Fuller said he asked for a waiver because the Program recommended that he get one. Mr. Fuller refused access a third time when Mr. John Stokes, the construction manager, arrived with Patricia Corkum. On this occasion, Mr. Fuller said, Mr. Stokes became flustered and left when Mr. Fuller told him he only wanted one person in at a time, and they decided Ms. Corkum would be the one. Mr. Fuller only wanted one person in at a time because on a previous occasion two had come at once and each disappeared off into the house independently, making it impossible for Mr. Fuller to follow what they were each doing. Mr. Stokes was not excluded from the house when he was by himself. He testified he had been through the house with Mr. Fuller on another occasion and had been over the list of deficiencies.

In the written submissions, Counsel for the Program argued that where Mr. Fuller refused access to Ashcroft's employees or tradespeople, the Applicants are disentitled to compensation on eight claims amounting to over \$6,430.

Counsel for Ashcroft submitted that the Applicants' appeal should be dismissed noting that had the Applicants been fully co-operative and allowed the repairs to be undertaken without interference of any kind, including the manner of the repairs, they would not have suffered any damages.

These positions are in sharp contrast to the position taken by Mr. Fuller. There are a number of factors favouring Mr. Fuller, in particular the poor performance by Ashcroft.

By August of 1999, Mr. Fuller sent to the Program an accumulated list of five pages of issues still outstanding, some of them respecting shoddy work. He was not alone in his observation about poor performance because in the Final Notice letter to Ashcroft dated June 28, 2000 Mr. Beverdam, wrote:

"Seems that there have (been) a lot of people/trades in the home to LOOK at the repairs that have to be done, but very little action taken to resolve them" (Exhibit # 3/57).

New home owners are entitled to have deficiency claims handled with reasonable dispatch, efficiency and courtesy, enabling them to live without undue disruption. There has to be

reasonableness on both sides, the purchasers' and the vendor's, otherwise a vendor could easily upset the purchaser of a new home to the point where the purchaser is bound to refuse access for repairs of deficiencies and the vendor would get the benefit of the purchaser being disqualified from making claims.

Mr. Fuller expressed his predicament in a letter of August 28, 2001 addressed to the Program (Exhibit # 3/66). He wrote:

"I have an idea as to the proper sequence of events which should transpire to end this two year plus nightmare. Would you please inform me of the process which will bring this issue to a judicious end".

Although poor performance appears to be quite out of character for Ashcroft Homes, it continued and led to the company being found in breach of its warranty obligations leaving the Program to take over the Applicants' claims (Exhibit # 3/64). The Tribunal finds that this was the root cause when the Applicants refused access to Ashcroft.

As an example of poor performance, there is one photo in Exhibit#8 showing a conspicuous piece of molding repair stuck on the wall at the top of the stairs. The molding is off level, the edges do not meet the vertical corner, and they are not flush against the step under it. In addition, the molding sticks out beyond the step. The plaster repaired around the molding is smudged and uneven.

Mr. Fuller was naturally reluctant to have his home repaired in this fashion and wanted to be sure that the proposed repairs were what should be done. He therefore wanted some say to make sure the repairs did not create further problems.

A number of events concerning specific refusals should be considered individually, as follows:

Replacement of Kitchen Cabinets

In this instance, the refusal is claimed to be set out in a letter from Ashcroft to the Program on June 12, 2000 (Exhibit # 3/55), which states,

"Mr. Fuller indicated to me that he in no way wishes to be inconvenienced during this process. This is impossible and therefore Ashcroft is unable to proceed further with this matter".

What the note does not mention is that Mr. Fuller was obviously simply holding his ground during negotiations with Ashcroft on an offer recorded in Ashcroft's letter of May 4, 2000 to the Program (Exhibit # 3/47), which read,

"We have offered \$3,500 and I have enclosed a breakdown of what it would cover.

Kitchen and vanity	\$1,733
Hardwood floor	800

Vent run in garage	300
vinyl floor repair	70
Miscellaneous	<u>597</u>
	\$3,500

.... as well, Ashcroft Homes lawyer will be including a waiver that must be signed by the homeowners."

Ashcroft is not in a good position here to complain about Mr. Fuller. The conciliation had already taken place (March 14, 2000 and May 4, 2000) and the May 19, 2000 deadline for arrangements to be made to resolve the warranted items with the homeowners had passed.

In this instance, the Applicants' refusal of access was reasonable and the complaint respecting that refusal is therefore not justified.

#27 Duct to the loft

On January 21, 1999 Pierre and another person arrived at the home with a sledge hammer to carry out the instructions on a Deficiency and Correction Form that read, "Reconnect or run missing heat run as previously discussed". Under that, is a note " Does not want job done. REL I WILL NOT SIGN RELEASE!" followed by an initial (Exhibit # 6/51).

Mr. Fuller asked the men for a waiver as he says he had been advised to do so by the Program. The workers proposed two systems of repair to install the duct in a box on one visit and to go through the garage on another visit. Neither would have left the Applicants' home in its condition prior to the repair being done, and Mr. Fuller sent the two workers away.

Mr. Fuller should have been more cooperative with Ashcroft. Nonetheless, under the circumstances the refusal was not altogether unreasonable.

#10 Repair to the floor where hardwood meets vinyl

A letter from Argos Carpets indicates that they arrived on February 20, 1999 to repair the vinyl floor where it meets the hardwood floor, but Mr. Fuller was not interested unless they were going to do all their work, which included replacing the tiles in the bathroom. (Exhibit # 3/41)

This was a conditional refusal. The underlying implication was that Mr. Fuller did not want repairmen visiting endlessly but wanted them to do all the jobs they could while they were there. In such circumstances, Mr. Fuller's refusal showed a lack of co-operation but was not of sufficient weight to carry the penalty of forfeiting the Applicants warrantable claims under the Act.

7 Shimming of the living room floor and adjustment of the hearth

In his evidence, Mr. Fuller acknowledged that he did not permit an Ashcroft worker, Pierre, to use a wedge to fix the sagging floor in the living room. This floor dips down to a wall (shown in a photograph, Exhibit # 8). Mr. Fuller described the inadequacy of the proposed method of correction as comical. Also, he knew Pierre and believed that the work was outside Pierre's area of expertise. So Mr. Fuller told Pierre to go back to Ashcroft.

Mr. Fuller's evidence was uncontradicted. He said the sagging floor appeared to be caused by defective framing. The Tribunal wonders how a problem of that magnitude could be solved with a wedge. Later, Ashcroft arranged for a structural engineer to examine the problem, which Ashcroft should have done in the first place (Exhibit # 3/62).

The proposed method of repair that was presented to the Applicants was unreasonable and sending the worker back to Ashcroft should not result in the Applicants losing this claim under the Act.

On various occasions the Tribunal has taken into account a homeowner's refusal to allow the Program or the builder to carry out remedial work.

In Migliano [1994]12 CRAT 137 the Tribunal found no breach of warranty because "the builder made what appeared to be a reasonable offer to repair or compensate". The Tribunal directed the Program "to deny the claim of the Applicants so long as the Applicants continue to refuse the builder's offer to repair or compensate because no breach of warranty exists". This order is a common sense approach allowing the Applicants to undo their refusal and co-operate.

In Wilkinson [1998] CRAT 78 the Applicant did not relent and consistently refused to allow the builder to repair his driveway with sealant. His claim was denied. That is not the situation in this case. Mr. Fuller was obviously fully prepared to be co-operative.

To some extent, both the Applicants and the Builder were in the wrong. However, the instances of lack of access for the Builder do not warrant loss of the Applicants' claims under the Act.

ORDER:

Accordingly, pursuant to the authority vested in it by section 16 (3) of the *Ontario New Home Warranties Plan Act* , the Tribunal directs the Ontario New Home Warranty Plan to pay \$12,455.00 compensation to the Applicants to cover all the warranty claims found by the Tribunal in these proceedings to be warranted under the Act.

LICENCE APPEAL TRIBUNAL

Douglas Mackintosh,
Vice-Chair

RELEASED: February 25, 2002

DAGENAIS, DAVID

PREHEARING

DAVID DAGENAIS

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, VICE-CHAIR

APPEARANCES: by teleconference
DAVID DAGENAIS, representing himself
FIL CECE, Agent, representing the Ontario New Home Warranty
Program
CHRIS THOMPSON, Agent, representing C. Thompson Homes Ltd., the
Added Party

DATE OF
PREHEARING: February 22, 2002 Toronto

ORDER

Following the attendances by teleconference on February 22, 2002 at a prehearing before this Tribunal of David Dagenais, appearing on his own behalf (the "Applicant"), and Fil Cece, Agent on behalf of the Ontario New Home Warranty Program (the "Program") and Chris Thompson, Agent on behalf of C. Thompson Homes Ltd. (the "Added Party");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Tuesday April 2, 2002 at Holiday Inn Select, St. Clair "B" Room, 1855 Huron Church Road, Windsor, Ontario and to continue, if necessary, on April 3, 2002 at the aforesaid address;

- 1) The Parties to the hearing are the Applicant, the Program and the Added Party;
- 2) There were no facts or evidence agreed upon by the parties, nor was there settlement of any issue or issues;

- 3) The Applicant informed the Tribunal that he had not consulted with nor had he retained a legal advisor or expert in connection with the hearing due to commence on April 2, 2002. The Tribunal urged the Applicant to do so immediately, more particularly in that all parties are required by the Rules of Practice of the Tribunal to make disclosure of documents and things in terms of Rule 6.3 and to make disclosure under Rule 6.4 where a party intends to rely on or refer to the evidence of an expert witness at the hearing. The Tribunal informed the Applicant that where he or any other party intends to rely on the evidence of an expert witness at the hearing that party shall provide to every other party the information set forth under Rule 6.4 (a)(b)(c) and (d) within at least 30 days before the hearing on April 2, 2002

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: February 25, 2002

SHAH, NASIR MOHAMMED o/a SHAH AUTO SERVICE AND USED PARTS

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
NASIR MOHAMMED SHAH o/a SHAH AUTO SERVICE AND USED PARTS

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: October 17, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

NASIR MOHAMMED SHAH o/a
SHAH AUTO SERVICE AND USED PARTS

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Nasir Mohammed Shah o/a Shah Auto Service and Used Parts, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: February 26, 2002

Schedule "A"

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road, Suite 110
Toronto, Ontario M2P 2E9

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Mohamad Shah
o/a Shah Auto Service and Used Parts
2359 Danforth Avenue
Toronto, ON M4C 1K8

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereinafter the "Act") the parties to the proceeding, Mohamad Shah o/a Shah Auto Service and Used Parts (hereinafter referred to as "the Applicant"), and the Registrar, *Motor Vehicle Dealers Act* (hereinafter the "Registrar") waive the requirement of a hearing and hereby consent to an Order of the Licence Appeal Tribunal based on the following terms and conditions:

1. The Applicant acknowledges and understands that he will not retain the services of a salesperson unless the salesperson is registered as a salesperson to the Applicant.
2. The Applicant further acknowledges that the restrictions concerning the activities of a salesperson referred to in these terms and conditions applies to buying, selling and leasing on behalf of a dealer. "Buying, selling and leasing" refers to showing a vehicle to a prospective purchaser or any form of negotiation concerning the purchase, sale or lease of a motor vehicle and is not limited to the signing of contracts. This further includes attendance at auctions on behalf of the Applicant.
3. The Applicant agrees to operate exclusively from the location approved by the Registrar. The Applicant agrees to apply for the Registrar's approval, by way of prior written notice, of any change in location in the form required by the Registrar.
4. The Applicant agrees not to invite the public to deal at a place other than his approved location.
5. The Applicant will not knowingly purchase or sell a motor vehicle to anyone who is in the business of buying and selling motor vehicles.
6. The Applicant will ensure that all advertisements placed by or on behalf of the Applicant will identify his registered name and the address of the location approved by the Registrar.
7. The Applicant will ensure that any vehicles purchased or sold are registered in the name of the purchaser. The Applicant further agrees to register all vehicles purchased in his name within 6 days in accordance with the Highway Traffic Act.
8. The Applicant will not purchase vehicles without ensuring that the vehicle is registered to the seller.

9. The Applicant will not knowingly engage in any illegal activity or breach the provisions of the Motor Vehicle Dealers Act or any other act which impacts upon the purchase and sale of a motor vehicle.
10. The Applicant agrees to provide full and accurate disclosure on any applications, documents, statements or other form of communication/information provided to the Registrar or his authorized representatives regardless of previous disclosure.
11. The Applicant acknowledges that he has provided full and complete disclosure to the Registrar in all previous discussions with representatives of the Registrar and on all previous applications for registration. The Applicant further acknowledges that the Registrar is relying upon the accuracy of the disclosure provided by the Applicant in entering into these terms and conditions.
12. The Applicant agrees that he is under a positive obligation to disclose all material facts in writing about the vehicles he sells to his customers. Material facts include but are not limited to salvage, previous salvage, frame and unibody damage, rebuilt, accident repair, theft recovery, prior use as a police cruiser, taxicab or daily rental and branded vehicles. The Applicant agrees that should any material fact come to light concerning a vehicle the Applicant has sold, the Applicant will comply with all reasonable requests made by the Registrar to provide compensation to the purchaser.
13. The Applicant agrees that where a vehicle's odometer reading is unknown the Applicant is under a positive obligation to disclose in writing the last known mileage and that the true mileage is unknown. The Applicant further agrees that if he exchanges or repairs an odometer he will do so in accordance with the Motor Vehicle Dealers Act and ensure that the identical reading appears on the new odometer.
14. The Applicant will comply with the Ontario Motor Vehicle Industry Council's Code of Ethics and Standards of Business Practice as may be amended from time to time. Attached hereto as Schedule "A" is a copy of the current Standards of Business Practice.
15. The Applicant agrees to maintain a garage register in accordance with the Highway Traffic Act and will maintain all books and records as required by the Motor Vehicle Dealers Act. The Applicant agrees that all books and records relating to motor vehicles sold or leased by or on behalf of the Applicant before and after registration shall be kept at the Dealer's registered premises and be readily available for inspection. The Applicant further agrees to provide free access to his books and records to any authorized representative of the Registrar without any prior notice being given.
16. The Applicant agrees to ensure that all third party warranties and fees collected pursuant to those warranty agreements are submitted to the warranty company in question within 7 days of completing the agreement. The Applicant further agrees that if for whatever reason a warranty company fails to accept the warranty and/or the fees the Applicant will inform the consumer forthwith.
17. The Applicant agrees that he will not be involved with the buying and selling of motor vehicles without the benefit of registration.
18. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred in the past or that may occur in the future related to his financial circumstances and his honesty and integrity.
19. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences

prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.

20. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
21. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
22. The Applicant hereby acknowledges that he have obtained or have had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of this day of February 2002.

Mohamad Shah
o/a Shah Auto Service and Used Parts (signature)

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Date:

Carl Compton
Registrar

NICORR INVESTMENTS INC. o/a ALL WORLD TRAVEL

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
NICORR INVESTMENTS INC. o/a ALL WORLD TRAVEL
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: October 30, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

NICORR INVESTMENTS INC. o/a ALL WORLD TRAVEL

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by Nicorr Investments Inc. o/a All World Travel, the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: February 26, 2002

LICENCE APPEAL TRIBUNAL

BETWEEN:

NICORR INVESTMENTS INC. O/A ALL WORLD TRAVEL

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

BACKGROUND

1. Nicorr Investments o/a All World Travel (hereinafter referred to as the "Registrant") has been registered as a travel agent (registration number 2547220/R) under the *Travel Industry Act*, R.S.O., c. T-19, as amended (hereinafter referred to as "the Act") since July 1, 1986. The Registrant has a fiscal year end of May 31st.

FINANCIAL STATEMENTS – GROUNDS FOR THE PROPOSAL

2. Subsection 24(2) of the Regulation states that if a registrant had sales of less than \$10 million during the previous fiscal year, the registrant shall file within three months of the end of the fiscal year annual financial statements with a review engagement report by a public accountant licensed under the *Public Accountancy Act*.
3. By letter dated April 23, 2001, the Travel Industry Council of Ontario ("TICO") requested that the Registrant file its financial statements for its fiscal year ending May 31, 2001 by August 31, 2001.

4. By letter dated September 20, 2001, TICO advised the Registrant to file its financial statements by September 30, 2001.
5. On October 3, 2001, the Registrant was issued a further final due date of October 11, 2001 to file its financial statements, failing which the Registrant was advised that a proposal to revoke its registration would be issued.
6. By October 30, 2001, the Registrant had failed to submit its financial statements. On that date, the Registrar issued a Proposal to Revoke the Registrant's registration.
7. The Registrant's financial statements for its fiscal year ended May 31, 2001, which were due by August 31, 2001, were filed on December 7, 2001.

COMPLIANCE HISTORY – LATE FILING

8. The Registrant has a history of late filing and failing to meet the minimum working capital requirements as summarized by paragraphs 10 through 15.
9. The Registrant's financial statements for its fiscal year ended May 31, 1993, which were due by August 31, 1993, were filed on October 29, 1993.
10. The Registrant's financial statements for its fiscal year ended May 31, 1994, which were due by August 31, 1994, were filed on October 18, 1994.
11. The Registrant's financial statements for its fiscal year ended May 31, 1995, which were due by August 31, 1995, were filed on September 18, 1995.
12. The Registrant's financial statements for its fiscal year ended May 31, 1996, which were due by August 31, 1996, were filed on November 6, 1996.
13. The Registrant's financial statements for its fiscal year ended May 31, 1997, which were due by August 31, 1997, were filed on November 18, 1997.
14. The Registrant's financial statements for its fiscal year ended May 31, 1998, which were due by August 31, 1998, were filed on November 18, 1998.
15. The Registrant's financial statements for its fiscal year ended May 31, 2000, which were due by August 31, 2000, were filed on October 6, 2000.
16. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsections 6 (4) and (5) of the *Travel Industry Act* directing that:

1. the Registrar refrain from carrying out the Proposal to Revoke Registration dated October 30, 2001;
2. the Registrant's registration is to be subject to the following terms and conditions:
 - (c) The Registrant shall file its financial statements for its fiscal year ended May 31, 2002 by August 31, 2002 and in accordance with section 24 of the Regulation or such subsequent provision as may be in force from time to time;
 - (d) The Registrant shall file its financial statements for its fiscal year ended May 31, 2003 by August 31, 2003 and in accordance with section 24 of the Regulation or such subsequent provision as may be in force from time to time; and
 - (e) If the above-noted financial statements as filed reveal a working capital shortfall or are otherwise deficient, the Registrant will have 30 days from the date of notice of the deficiency to fully and completely address the deficiency and produce proof of such correction to the Registrar. The Registrar shall send a Notice of the deficiency, if any, by courier or registered mail to the Registrant.
3. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) through (c) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.
4. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by its signature below that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED this ____ day of February, 2002

Ms Filomena Nicholas
Nicorr Investments Inc. o/a All World Travel
I have authority to bind the company

Mr. Michael Pepper
Registrar, *Travel Industry Act*

KAAFARANI, JIHAD

JIHAD KAAFARANI

APPEAL FROM A DECISION OF THE REGISTRAR OF THE
MOTOR VEHICLE DEALERS ACT

TO REFUSE A REGISTRATION

TRIBUNAL: WILLIAM MCINTOSH, Vice-Chair

APPEARANCES:

JIHAD KAAFARANI, on his own behalf
YOVANKA MCBEAN, Agent for the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: November 26, 2001 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This matter came before the Tribunal by way of a Notice of Appeal dated May 4, 2001. The Appeal was filed in response to a Notice of Proposal to Refuse Registration dated April 20, 2001. By this document the Registrar gave notice to the Applicant that his Application to become registered under the *Motor Vehicle Dealers Act*, R.S.O. 1990, c.M.42 (the "Act") was being refused.

Every person in Ontario who wishes to become an automobile salesperson must first become registered as a salesperson under the Act. The process of registration begins with an applicant filling out an Application form in the form prescribed. The form consists of a number of questions dealing with the background of the Applicant. The answers are designed to provide the Registrar with the information required to screen out inappropriate persons from entering the field. The receipt of the application form is followed by a background check. Applicants for registration are informed of the possibility of such background checks and the difficulties that will arise with their application if false information is provided. The applicant signs an acknowledgement of these provisions. Finally, the form requires a representative of a recognized dealer to sign a certificate to the effect that he or she has personally reviewed the responses to the questions with the applicant prior to signing. Both the Applicant and an authorized dealer properly executed the application form on February 1, 2001.

The Registrar upon receipt of the Applicant's application form commenced a review and responded by way of a Notice of Proposal to Refuse Registration (the "Notice") dated April 20, 2001.

The grounds for this refusal were set forth in the Notice as follows:

- the Applicant filed an application form which contained false and/or incomplete information
- a background check of the Applicant revealed that he had been convicted of fraud over \$5,000.00 and of a breach of the *Bankruptcy Act*
- the Applicant had been refused a previous application and had not appealed the refusal.

The answers to two of the questions on the Application form were of concern to the Registrar. Question 6 reads as follows:

"Are you engaged now or have you ever been involved in personal bankruptcy proceedings? If yes, attach a copy of the assignment in bankruptcy or proof of discharge."

Question 9 reads:

"Have you ever been found guilty or convicted of an offence under any law or are any charges pending?(This includes those instances where a conditional or absolute discharges been ordered). If yes, list all charges and/or convictions, and the circumstances surrounding each."

To question 6 the Applicant answered "yes" but did not provide the particulars the question demanded.

Similarly to question 9 the applicant indicated that he had a criminal record but did not provide the required details. Included in the text of question 9 is an admonition regarding false statements and a warning that the applicant is subject to background checks. It reads:

"Applicants are subject to background and criminal record searches. Submitting a false or incomplete disclosure is an offence under the MVDA and will result in disqualification. Do not assume that convictions are automatically deleted from your record. If you have any questions about the information you must disclose."

In the Notice, the Registrar informed the Applicant that in addition to the affirmative answer given regarding his criminal convictions the Applicant had been convicted of both a breach of the *Bankruptcy Act* and of Fraud over \$5,000.00.

The Notice informed the Applicant that the grounds upon which the Registration was being refused were that his conduct was sufficient for the Registrar to conclude that he would not carry on business in accordance with the objective of the Act, namely the protection of the public interest.

ISSUE:

The issue in this hearing is whether the Registrar acted unreasonably in the exercise of his discretion to refuse registration to the Applicant under the Act.

THE LAW:

The Tribunal receives its authority to adjudicate and rule upon the matter before it by section 7(4) of the Act which reads:

7(4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection 2, the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such actions as the Tribunal considers the Registrar ought to take in accordance with this Act and Regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

Section 5(1)(a) of the Act sets forth both the entitlement of Applicants to registration and the grounds upon which it can be refused. It reads:

- 5(1) An Applicant is entitled to registration or renewal of registration by the Registrar except where,
- (a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business, or
 - (b) the past conduct of the applicant affords reasonable for belief that the applicant will not carry on business in accordance with law and with honesty and integrity

In the case of a refusal of registration section 8 of the Act allows the applicant to reapply. It reads:

8 A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed.

EVIDENCE:

The witness called in support of the Registrar's position laid out the facts in support of the Registrar's position that given the evidence of the application form and background investigations of the Applicant there was a reasonable belief that the Applicant fell outside of the requirements of section 5.

Further, the Registrar took note of the fact that there had been no compliance with the order of restitution and that the bankruptcy remained undischarged.

The Applicant's indictment record dated February 4, 1998 showed a plea of guilty and a finding that the Applicant was guilty of contraventions of section 380(1)(a) of the *Criminal Code* and of section 198(h) of the *Bankruptcy and Insolvency Act*. The former involving fraud over \$5,000, the latter pledging credit within 12 months of an assignment into bankruptcy. An order of restitution was also issued.

The witness for the Registrar testified that offences of this nature for obvious reasons were of particular concern when deciding upon an applicant's fitness to deal with the public. She further produced documents from the Applicant's creditors declaring that no restitution has been received despite the fact that the Applicant was employed. That employment was as a clerk in an automobile dealership and did not yield a large income particularly for a man with children. The Registrar's position was that no attempt, however modest, to comply with the restitution order reflected badly upon the Applicant. There was in the words of the witness "no period of positive conduct" brought to the attention of the Registrar. In total the Applicant's financial position was \$1,000 in assets against \$100,000 in debt.

The Applicant testified on his own behalf. He called no other witnesses as to fact or character. He testified that he has been in this country for 10 years and was married with three young children. He is presently 24 years of age. While not trying to excuse his errant behaviour he implied that his wayward youth was now behind him and that he was seeking a "second chance". He appeared genuinely contrite. As well, he did not contest the grounds leading to his criminal record.

The *Motor Vehicle Dealers Act* requires that all persons who sell automobiles as a business to the public must be registered under the Act for the express purpose of protecting the automobile buying public. It follows that there has to be a mechanism to determine which persons are suitable candidates for registration and which are not. The Registrar has been granted that power and in the exercise of that mandate he has put in place a system by which those wishing to become registered as salespersons can apply. The application form is the first indication to the Registrar of the candidate's suitability. This being the case the Tribunal accepts the position that any dissembling on the application should be taken seriously. It is after all the first contact the Registrar has with prospective registrants and if there is an attempt to mislead the regulator at this juncture, it does not speak well of the applicant's ability to deal properly with the public.

It was pointed out to the Tribunal that section 5 which empowers the Registrar to make these decisions about suitability directs him to look at the past conduct of applicants as a predictor of future behavior.

The Tribunal is sympathetic to the plight of the Applicant and hopes the Applicant continues to improve on his record. However, that record shows relatively recent evidence of improper conduct. As there were no character witnesses called on the Applicant's behalf or any other evidence of mitigation or explanation, the only basis the Tribunal is left with is the evidence of the Registrar.

The Tribunal accepts the evidence of the representative of the Registrar that at this time the Applicant should be refused registration.

DECISION:

Pursuant to the authority vested in it under section 7(4) of the *Motor Vehicle Dealers Act*, the Tribunal directs the Registrar to carry out his proposal to refuse the registration of Jihad Kaafarani under the Act.

LICENCE APPEAL TRIBUNAL

William McIntosh, Vice-Chair

RELEASED: February 26, 2002

POWER LAND AND CATTLE DEVELOPMENT CORP.

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: MALCOLM FEALING
Presiding member

APPEARANCES: LUBA NEUWIRTH
Representative for the Registrar of Motor Vehicles

JAYSON SCHWARZ
Counsel for the Applicant

DATE OF HEARING: February 18, 2002

DECISION RELEASED: February 26, 2002 Toronto

REASONS FOR DECISION

A hearing was held on February 18, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO SET ASIDE the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Power Land & Cattle Development Corporation (the "Applicant")
Motor Vehicle:	1995 GMC SIE pickup, plate no. 2402HK (the "vehicle")
Date of Appeal:	January 31, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on February 18, 2002 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

Mr. Sorel, the driver, is a contractor , who was hired by the owner to do maintenance on its 55 industrial units located at 10, 20 & 100 Wilkinson Road, Brampton, Ontario. When hired, he advised that he did not have a licence. He was advised at that time that on the odd occasion he could use the truck for maintenance purposes on the property only. The vehicle was never to leave the property. This vehicle is kept on site for the sole purpose of snow removal and sanding during the winter months for all three industrial/commercial buildings. There is an individual hired for the sole purposes of snow removal.

This vehicle is required for this purpose, and if not returned, the owner will not be able to fulfil its obligations as landlord at these three locations. The tenants will not have proper access to their units, and will likely sue the owner for its failure to live up to the requirements of the leases of the tenants.

Mr. Sorel was instructed not to remove the truck from the commercial premises. He was not to operate it on any street, road, highway, or other public place. The owner has been given to understand that Mr. Sorel, who is of below average intelligence, decided that the truck was dirty and needed a wash, and was stopped while on his way to the car wash. While Mr. Sorel was operating the vehicle outside the parameters of the consent given, the owner does not feel he possessed the intent to commit a theft.

Under the circumstances, and in light of Mr. Sorel's personal circumstances, the owner has no wish to see him saddled with any further legal difficulties.

The owner will suffer severe financial hardship if the vehicle is not returned. The owner will ensure that there is no question but that this vehicle is not operated by anyone except a properly licenced driver in the future. Mr. Sorel will not be permitted to operate the vehicle in future.

Mr. Schwarz advised the Tribunal that he was not only representing the owner of the automobile, but he was also the chief witness. He was sworn in.

In his testimony, Mr. Schwarz stated that he is the President of Power Land and Cattle Corp. Ltd, and that Ms. Heather Welner is his partner. The truck that had been impounded was owned by the Corporation. Power Land and Cattle Corp. managed three industrial lots which occupy 250,000 sq. ft. of land space. The automobile was purchased for the sole purpose of salting the property and clearing the snow after a snowfall.

This maintenance was the responsibility of Gordon McLean. 11/2 years ago Mr. McLean hired Scott Surrel to drive the truck and clear the snow. Mr. McLean was aware that Scott did not have a driving license, and according to Mr. Schwarz, Scott had been instructed never to drive the truck off the lot.

Scott Surrel, said Mr. Schwarz is 41 years old, with an I.Q. of approximately 60. He has to be

constantly supervised. Unfortunately Gordon McLean died last year, and his responsibilities were taken over by his brother Wayne McLean. On the day the vehicle was impounded, Scott heard Heather tell Wayne that the truck should be washed. Thinking that he would please Heather, Scott took it upon himself to get the truck washed. In order to do this he had to drive the automobile off the lot. He was stopped and the truck was impounded.

The truck is used to clear snow so that a safety hazard is not created. Immediate snow removal is necessary and another vehicle is not available on a timely basis.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Scott C. Surrel;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's license of the driver was then under suspension until August 15, 2002.

The Respondent's first question to Mr. Schwarz was whether there was an alternative to the vehicle. Mr. Schwarz's response was that there was no alternative to the vehicle. He said that 72,000 square feet of the complex was vacant and that there was no cash flow to purchase a new vehicle. In any event the 45 days would soon be up so an expenditure of \$15,000.00 was not warranted. He was asked whether it would not be possible to borrow a truck. Borrowing would be next to impossible he said. His competitors would not be inclined to lend him their vehicle. Of course he could arrange to have a snow removal company clear his property after a snowfall, but Heather had looked into this and had ascertained that it would take 1½ days to have the snow cleared.

Mr. Schwarz advised that he had 40 tenants with approximately 200 employees. The complex was very busy with a great deal of daily traffic. Large transport trucks regularly drove through the property. Access to the property was off Steeles Avenue, and cornering into the property was difficult. Entering the property after a snowfall would be hazardous and for that reason it would be necessary to clear the area immediately after a snowfall. To wait 1½ days for a

contractor to come to salt the place and clear the snow would be inviting trouble.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's license of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's license of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or

to the environment or property of a community in whose service the motor vehicle is ordinarily used.

- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

Section 22 of Regulation 574 R.R.O.1990 as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor

- vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.

The Tribunal finds that there is sufficient evidence to show that in this instance exceptional hardship will result from an order to impound under section 55.1 of the Act. Section 22(1)(b) of Regulation 574 applies. If snow is not cleared promptly there is a threat to the safety of the public who use the premises. In an area as described by the Appellant, and during this time of the year, the snow removal truck is an absolute necessity and should be available at all times. In the circumstances of this case, only the impounded vehicle is available for this purpose.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal sets aside the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Malcolm Fealing, Presiding Member

RELEASED: February 27, 2002

MacDONALD, LEANNE AND 2001530 ONTARIO INC. O/A MAC MOTORS

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
LEANNE MacDONALD AND 2001530 ONTARIO INC. O/A MAC MOTORS

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATIONS
- Proposal dated: July 16, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

LEANNE MacDONALD AND 2001530 ONTARIO INC.
O/A MAC MOTORS

Applicants

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on November 19, 2001;

AND WHEREAS, upon consent of the parties, the hearing was adjourned to March 4, 2002;

TAKE NOTICE, upon consent of the parties, the Tribunal further adjourns the hearing to commence at the Frontenac Reporting Services, 308 Wellington Street, 1st Floor, Kingston, Ontario at 9:30 a.m., on Tuesday, June 18, 2002.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: February 27, 2002

MCMULLEN, MYRNA

MYRNA MCMULLEN

IN THE MATTER OF THE DECISION OF
BOARD OF TRUSTEES,
ONTARIO MOTOR VEHICLE DEALERS COMPENSATION
FUND

DECISION DATED OCTOBER 9th, 2001

TRIBUNAL: MARJORIE L. HILEY, Vice Chair

APPEARANCES: STANLEY FIENBERG, Counsel, representing the Applicant
AVIVA HARARI, Counsel, representing the Board of Trustees,
Ontario Motor Vehicle Dealers Compensation Fund

DATE OF HEARING: February 1, 2002

Toronto

REASONS FOR DECISION AND ORDER

Background:

Myrna McMullen ("the Applicant") made a claim to the Board of Trustees of the Motor Vehicle Dealers Compensation Fund. That claim was heard by the Board of Trustees on September 19, 2001. By letter dated October 9, 2001 the Board of Trustees denied the claim of the Applicant. The denial was based on three reasons:

1. The applicant had not suffered a pecuniary loss;
2. The repairs on the vehicle were routine maintenance repairs; and
3. The vehicle was sold without a warranty.

By Notice of Appeal dated October 17, 2001 with attached schedule the Applicant appealed the denial to this Tribunal. There was no prehearing. The matter was heard by the Tribunal on February 1, 2002 with all the parties in attendance.

Issue:

Were the Board of Trustees of the Ontario Motor Vehicle Dealers Compensation Fund correct in denying the claim of Myrna McMullen?

Evidence:

Testimony of Myrna McMullen:

Mrs. McMullen testified that she had purchased a 1985 Starcraft van from Traders Auto Exchange on February 20, 1999. The van had been advertised in the Auto Trader. When she went to Traders Auto Exchange she saw John, a salesman who told her that the van had 152,300 km on it before the odometer was broken. It had broken while John was driving his relatives around the area. John said the vehicle was in great shape. Mrs. McMullen was concerned about safety as she drives foster children.

Mrs. McMullen stated that she signed a vehicle purchase agreement on February 20, 1999 that had no statement of the odometer reading. John explained that he would have to change the instrument cluster. The purchase price was \$5,000.00 all inclusive.

When she returned in early March, 1999 Mrs. McMullen signed a second contract which had 278,006 km as the odometer reading. She spoke to someone she thought was John's father. She was told that the instrument cluster had been changed. She thought the mileage was a little more than 152,000, km not 278,006 km. She wanted "true mileage unknown" put on the contract. She stated that the GST and BxP stripes were not filled out on the contract when she signed it. She did not get a copy of this contract but was given a written receipt. She said that when she signed this contract only 5000 and 4500 were filled in on it.

After receiving the van, the Applicant found that the gas gauge and the speedometer were not working. Her husband took it to a mechanic suggested by Traders. That mechanic told him the original mileage was 290,000 km. The Applicant said that there were other problems as well: activating the turning blinkers made the lights go off, there was something wrong with the springs, and the vehicle would not start the day after they got it. They took the van to Georgian Pontiac Buick in Barrie and paid \$564.61 for repairs. They had some discussions with Traders while the car was at Georgian and Traders reimbursed them for over \$100.00 of the cost of the repairs that should have been fixed for safety reasons, like the springs and the rear licence plate. Georgian also said that if they had done the safety, they would have replaced two of the tires.

Mrs. McMullen testified that eventually they sold the car as it would not work most of the time. They left it sitting in their driveway when they commenced the court action. They sold it in April of 2000 to a Mr. Brandridge for \$2800.00.

There had been a loan on the vehicle, repayable \$221.00 per month from March, 1999 to April, 2000.

The Applicant obtained a Small Claims Court judgment which included \$2200.00 for loss on the resale of the vehicle, \$547.00 for repairs, \$841.00 for loss of interest and \$500.00 for loss of use. The costs consisted of \$300.00 for inconvenience, \$300.00 for counsel fee and

\$150.00 for filing fees. Although the defendant filed a statement of defence, the defendant did not show for the trial.

Mrs. McMullen stated that her evidence was the same at the court trial as it was at the hearing before the Tribunal. She stated that she would not have bought the van if she had known the mileage was 278,000 or 290,000 km.

Under cross examination, Mrs. McMullen stated that the dealer had said the odometer had broken recently. She agreed that there was no warranty on the vehicle. She had asked the dealer to fix some items such as the radio and the seat, but that was not done.

Mrs. McMullen stated that she had been registered as a motor vehicle salesperson for over ten years. She last worked in 1996 although her licence was not terminated until February 8, 1999. She stated that she did not know the meaning of the words TMU. She knew she was entitled to a copy of the bill of sale. When the dealer asked if she would be content with a receipt, she said yes. She was given the opportunity to test drive and inspect the vehicle prior to purchase. She was satisfied at that time except for some minor problems. The vehicle was plated between March, 1999 and April, 2000. She thought she would get a mechanic to inspect the car prior to going to court. There was a claim for rescission in the statement of claim but later that was dropped and the claim became only for damages.

Mrs. McMullen stated that at the beginning of April, 1999 she leased a Toyota Tercel. In the fall of 1999, she leased a GM minivan.

Mrs. McMullen agreed that the receipt for the purchase of the car by Mr. Brandridge did not mention an odometer reading. He had towed the car away after purchasing it. She did not think it odd to have signed two contracts as when she had worked as a new car salesperson she had been used to working with one contract and then having a final contract.

Testimony of Norman McMullen:

Mr. McMullen testified that he was the person who had driven the van out of the dealership. He noticed at that time wobbly movements of the tires and the back end. When he put on the turning blinkers the other lights would go off, the temperature gauge was not rising and the speedometer was not working. The test drive had been short as there was ice rain at the time.

The vehicle had electricity problems. Even though he charged the battery, the vehicle quit prior to reaching Georgian Buick in Barrie and had to be towed.

He took the vehicle back to Traders to get the speedometer and other items repaired. He went to the mechanics recommended by Trader. They took out the instrument cluster and replaced it with one that had 270,000 km on it. When he asked the mechanics to put the odometer back to its original mileage, he was told that the original mileage was 270,000 km.

Mr. McMullen stated that the transmission had problems, a spring had to be replaced and the vehicle continued to have problems with starting. He complained to Traders about the transmission and the tires but nothing was done. The whitewalls on the tires were damaged.

In cross examination, Mr. McMullen stated that though his wife did most of the negotiating he knew of the odometer problems. He saw the bill of sale as it was being signed. He agreed that he had the opportunity to take it for a test drive and to inspect it. There were some items not fixed such as the radio, the squeak in the front end and the sidewalls on the tires. He wanted Traders to take the car back.

Mr. McMullen stated that he dealt directly with Traders and did not go to the Ministry of Transportation over the deficiencies in the safety certificate. He felt Traders was responsible for the safety certificate.

Mr. McMullen stated that the speedometer was replaced on a number of occasions within a short period of time after they had purchased the car.

He stated that initially the odometer was at 152,000 km. in February, 1999. Then in March, 1999 the odometer was at 278,000 km. At one point the odometer was changed twice in one day.

Testimony of Luigi Lagana:

Mr. Lagana was the owner of Traders Auto Exchange Ltd. That company is no longer in business. He has over 23 years of experience in the motor vehicle business. He sold the 1985 van to the Applicant in February, 1999.

Mr. Lagana testified that his salesperson, John, had the keys to this van and used to drive his relatives around in it. Mr. and Mrs. McMullen had a test drive in the van. They said they had driven it on Highway 400 for twenty minutes. The original price for the van was \$5995.00. He made a deal with the McMullens to sell them the van for \$5000.00 inclusive of tax. At the time of this transaction, the odometer on the van read 152,000 km. The gas and heater gauges were not working. The mileage on the van was really 278,000 km.

Mr. Lagana stated that the first bill of sale for the van had TMU, true mileage unknown, written on it. He had the van certified. Then the McMullens had another test drive, the conditions of sale were inserted into the bill of sale and Mrs. McMullen signed it.

Mr. Lagana remembered Mr. McMullen stating that the van had got stuck. He offered to repair it but the van was already at Georgian. He did pay \$155.00 of that bill. He did have the speedometer changed on the van. Mr. Lagana drove the van and everything was working. He knows that Mr. McMullen asked Kim, his mechanic, to change the kilometres on the speedometer.

The original mileage on the van was 278,000 km. It was on the bill of sale that Mrs. McMullen

signed on March 1, 1999. Mr. Lagana stated that he gave Mrs. McMullen a copy of the March 1, 1999 bill of sale. She had copies of both bills of sale plus the yellow copy. He had wanted to sell them a warranty but Mrs. McMullen said she could not afford one.

Under cross examination Mr. Lagana stated that when he bought the van in September, 1997 it had 268,000 km on it. The van was driven for about 18 months prior to the sale and about 10,000 were put on it. The speedometer broke a couple of months prior to February, 1999, and he had changed the instrument cluster. He was there when the McMullens were discussing the van with John. He had written TMU on the first bill of sale. He did that because of the cluster being replaced. He did not tell Mrs. McMullen that the mileage was 268,000 km. when he had purchased the van.

Mr. Lagana stated that he had an agent put in a Statement of Defence to the court action by the McMullens, but he did not go to the trial as the company had closed by that time.

Testimony of Douglas Lamb:

Mr. Lamb has been a licensed technician since 1974. He has been in the motor vehicle business for 33 years. When he worked for City Buick he did all of the used car reconditioning work. The Tribunal found Mr. Lamb to be an expert in relation to safety standard certificates and work done or not done under these certificates.

Mr. Lamb testified that safety standard certificates are an indication of minimum standards at the date of inspection. The inspection relates to safety equipment. The certificate lasts for 36 days. It is a snapshot in time of the safety condition of the vehicle. It is not a warranty for the car.

Mr. Lamb reviewed the Georgian invoice for repairs of the van. There was an inspection of the steering, suspension components, electrical and exhaust systems. The car was towed to Georgian. There were repairs to the alternator. This can go at any time without prior warning. The licence plate was rewired. There was a replacement of the right side leaf spring which is an ancillary spring, not the main spring. The invoice has no mention of any problem with the tires. Mr. Lamb stated that often the sidewall outer casing of tires will crack but there would be no structural damage.

Mr. Lamb did not feel that the mileage, whether 152,000 km or 278,000 km had any relevancy to these repair items.

Under cross examination, Mr. Lamb stated that minor cracks in the sidewalls of tires are not a safety issue. If there are slices in the sidewalls, that would be considered a safety issue. Mr. Lamb thought that the repairs to the wheel stud happened when the mechanic pulled off the wheels for inspection. Regarding the alternator, he felt the mechanic had repaired parts of it which were corroded.

Testimony of Laura Gordon:

Ms Gordon has been employed by OMVIC for the past five years. Among her responsibilities is managing the Compensation Fund under the direction of its Board of Trustees. Ms Gordon indicated the various documents as found in Exhibit 4 Tab 3 which were before the Board of Trustees at the time of their decision.

Ms Gordon stated that the reasons for denial of the application were threefold: 1. There was no pecuniary loss; 2. The repairs were of routine maintenance nature; 3. There was no warranty. As well, Ms Gordon stated that from February 26, 1999 to April 20, 2000 the van was active and plated, and the McMullens would have been paying insurance on it. She does not understand why the McMullens would have kept the van active and plated for this time period.

Ms Gordon stated that under the legislation, interest charges cannot be reimbursed through the Compensation Fund. There can be reimbursement for loss of use but that would depend on the individual circumstances.

Under cross examination, Ms Gordon stated that the documents filed at the Small Claims Court dealing with mileage tampering were before the Board of Trustees. The March 1, 1999 Bill of Sale was not part of the package prepared by her office but was provided to the Board of Trustees by the dealer.

Reply by Mrs. McMullen:

In her reply evidence, Mrs. McMullen stated that Mr. Lagana had not been there in the initial part of their dealings with John and had not been there when they discussed the odometer reading. Mr. Lagana was brought in on the negotiations when it came to the part dealing with the price of the vehicle. Mr. Lagana was present during the signing of the second contract.

Closing Statements:

By Applicant:

Counsel for the Applicant stated that the statutory requirements for compensation under the Fund had been met by the Applicant. There had been a judgment, the appeal period had expired and the judgment had not been satisfied. The Board of Trustees cannot say it was not a proper claim.

The allegation of odometer tampering has been put before the Small Claims Court and this Tribunal. The Applicant purchased a van with 152,000 kms and then found out that was not the true mileage. The Tribunal needs to consider Regulation 801 section 16 (2) (0) and section 19. Mr. Lagana knew the true mileage. He cannot write mileage unknown but must make an honest disclosure of the mileage.

There is a slight discrepancy of the \$155.00 refund. The Small Claims Court judge allowed one half of the interest.

By the Registrar:

Counsel for the Registrar stated that the March 1, 1999 bill of sale was a perfect disclosure of the mileage travelled by the van. Section 16(2)(o) of Regulation 801 under the *Motor Vehicle Dealers Act* speaks of the distance travelled by the vehicle at the time of sale. The final Bill of Sale lists the mileage as 278,006 true mileage unknown.

Counsel submitted that to be paid from the Compensation Fund it is not enough to have a judgment. There has to be a pecuniary loss.

Counsel referred to the Taylor (Re) (1999) O.C.R.A.T. No. 144. In particular page 4 which discusses the Divisional Court case of The Motor Vehicle Dealers Compensation Fund v. Didaskalou (1994) 26 C.R.A.T.1034. The Divisional Court gives guidance on what constitutes a claim and a pecuniary loss under the statute.

Counsel argued that the loss of use is not a pecuniary loss. As well the repairs are not a result of the transaction and are regular maintenance for a sixteen year old vehicle. Counsel submitted that Mrs. McMullen was a salesperson registered under the Act for thirteen years. The car was not sold for another fourteen months and it would be unreasonable to expect the Fund to pay for depreciation of a used vehicle. Under Schedule A section 12(10)(b) of the Schedule to Regulation 801, no interest is to be paid by the Fund.

Reply by Applicant:

Counsel for the Applicant replied that the time lapse was due to the claim filed for rescission. This is a loss arising from the trade of a vehicle. The expenses are costs flowing from the misrepresentation of the dealer.

Legislation:

The applicable statute is the *Motor Vehicle Dealers Act*. The relevant portions are as follows:

Section 24:

The Lieutenant Governor in Council may make regulations,

...

- (o) providing for the establishment, maintenance and administration of the Motor Vehicle Dealers Compensation Fund, including prescribing provisions relating to investing and paying out of money from the Fund;

Regulation 801:

Section 16 (2) Where a used motor vehicle is sold, the sales or purchase order shall show,

...

- (o) the distance travelled by the vehicle at the time of sale;

...

Section 19 (1) Except in the case of an exchange or repair of an odometer and subject to subsection (2), no motor vehicle dealer or salesperson shall alter, adjust, or permit any alteration or adjustment to the odometer on any motor vehicle in the dealer's or salesperson's possession or control in such a manner that as a result of the alteration or adjustment the total distance indicated on the odometer is other than the total distance travelled by the motor vehicle.

(2) Where a motor vehicle dealer exchanges an odometer or effects any repairs to the odometer of a motor vehicle in the dealer's possession or control or to any other part of the motor vehicle that is directly related to the odometer, the dealer shall record in the reconditioning record of that motor vehicle the reading in miles or kilometres that was on the odometer prior to the exchange or repair and shall ensure that the identical reading appears on the odometer of the motor vehicle after the exchanges or repairs have been effected.

Schedule to Regulation 801, Terms of Compensation Fund

Section 1

"claim" means a claim for pecuniary loss arising out of a transaction involving a trade in a motor vehicle;

"participant" means a registered motor vehicle dealer who participates in the Fund;

section 12:

- (1) The Fund is established as of the 1st day of July, 1986 to stand in the place of a participant for the payment out of the fund of claims of customers of the participant where the transactions occurred during the period when the participants was registered under the Act and where the participant has refused after demand or is unable to pay the claims.
- (3) A customer may make a claim against the Fund where the customer gives written notice of the claim to the Registrar within two years of the participant's refusal or failure to pay, even if the motor vehicle dealers with respect to whom the claim is being made ceased to be a participant after the refusal or failure to pay, and where the claim meets one of the following requirements:
1. The customer has recovered in any court in Ontario a judgment in respect of the claim and the judgment has become final by reason of the expiration of time for appeal or of having been confirmed by the highest court to which an appeal may be taken and the customer makes an application, supported by the judgment and the statement of claim, for payment of the unsatisfied portion of the judgment and costs as assessed.
- (6) The Board shall determine the eligibility and the amount of any claim made by a claimant and shall direct the Trustee to pay any claim or any part of it that meets the requirements of this Schedule and, subject to section 15 of this Schedule, the decision of the Board is final.
- (10) Despite subsections (1), (2), (3), and (6) and subsection 15 (3) of this Schedule, there shall not be paid out of the Fund,
- (b) any amount for interest, including interest on a judgment or on costs;
 - (c) where there is a judgment, any amount for costs in excess of actual disbursements and fees as assessed;

section 15:

- (1) Where the Board determines that a claim or any part of it made under section 12 of this Schedule is a not a proper claim, it shall serve notice of its decision, together with written reasons, on the claimant and the notice shall inform the claimant that the claimant is entitled to a hearing by the Tribunal if the claimant mails or delivers to the Registrar and the Tribunal within fifteen days after the notice is served on the claimant, notice in writing requiring a hearing.
- ...
- (3) Where a claimant requires a hearing before the Tribunal under subsection (1), the Tribunal shall appoint a time for and hold the hearing and, after affording the claimant an opportunity to be heard, may confirm the determination of the Board or may set aside the determination of the Board with respect to all or any part of a claim and direct the Trustee to pay the amount determined by the Tribunal.

- (4) The claimant who has requested the hearing and such other persons as the Tribunal may specify are parties to a hearing before the Tribunal under this section.

Application of the law to the facts:

The Applicant brought an application before the Board of Trustees for compensation under the Motor Vehicle Dealers Compensation Fund. Her application is dated April 16, 2001. She asked for \$5,023.17, being the balance outstanding on February 9, 2001 of the judgment of February 5, 2001 of \$4088.00 plus costs and interest. She had bought a 1985 van from Traders Auto Exchange Ltd. on March 1, 1999 for a price of \$5000.00 inclusive of taxes. Traders Auto Exchange Ltd. is no longer registered as a motor vehicle dealer.

The evidence is clear that Mrs. McMullen purchased the van for \$5000.00 on March 1, 1999 and sold it for \$2800.00 in April, 2000. There was a safety standards certificate on the van dated February 25, 1999.

Mrs. McMullen commenced a small claims court action in 1999. A defence was filed at the court on June 25, 1999. Judgment was obtained on February 5, 2001. The judgment amount was \$4088.00 plus pre judgment interest of \$171.10 plus costs of \$750.00 plus \$4.07 post judgment interest plus \$10.00 for the certificate of judgment for a total of \$5023.17.

The Tribunal understands from the evidence, both verbally and in the exhibits filed that the breakdown of the judgment is as follows: \$2200.00 loss on the resale of the vehicle; \$547.00 for repairs (though the Applicant did receive \$155.00 of that repair cost back from Traders Auto Exchange), \$841.00 for interest charges due to the loan in existence for this vehicle; and \$500.00 for loss of use. The Tribunal understands that the breakdown on the costs is as follows: \$300.00 for inconvenience, \$300.00 for counsel fee and \$150.00 for filing fees.

In order for the Applicant to succeed her claim must be a claim for pecuniary loss arising out of a transaction involving a trade in a motor vehicle. The Divisional Court in Didaskalou stated that:

the Board of Trustees cannot look behind the judgment to decide whether the judge erred in awarding damages or in fixing the amount of those damages. Instead, pursuant to the definition of "claim" in section 1 of the Schedule, the Trustees are simply required to decide (a) whether the damages awarded amount to a claim for a pecuniary loss and, if so, (b) whether they arose out of a transaction involving a trade in a motor vehicle.

....

In order to amount to a pecuniary loss under s.12(3) (1) the loss must simply be one which is capable of evaluation on a monetary basis. While such a loss would not, by way of example, include damages for pain and suffering, it would,

as the tribunal found, include damages referable to the excessive price paid for a motor vehicle and the cost of repair.

However, mere pecuniary loss will not of itself lead to a successful claim under s.12(3)(1). The loss must be shown to have arisen out of a transaction involving the trade in a motor vehicle.

The Applicant alleges that her losses arose from the deception of the motor vehicle dealer in selling her a van with substantially more mileage travelled than she had been informed by the dealer. She made those allegations at the Small Claims Court and based on her evidence alone the judge did award her the cost of her losses, inconvenience, repairs and filing fees and counsel fees.

The Tribunal has sympathy for Mrs. McMullen. She bought a van with a safety certificate, found she could not use it and over a year later sold it at a loss without a safety certificate, or warranty or odometer reading. As the van is currently active and plated according to the records provided by the Registrar its current owner has obviously obtained the requisite safety certificate.

But the Tribunal cannot overlook the bills of sale signed by Mrs. McMullen for this van. The first bill of sale dated February 20, 1999 had a specific condition of sale stating the vendor is relieved of "all and any responsibility as to any problems or defects developing in the vehicle". It had no odometer reading but stated "change speedo tmu".

The safety certificate is dated February 25, 1999. In small print on the right hand bottom the certificate states "This certificate indicates that the items on the reverse side met the required...on the date of inspection and is not a warranty on the condition of the ve...". The Tribunal accepts the evidence of Mr. Lamb that the safety certificate is a snapshot of the safety items of the vehicle at the date of inspection. That is one reason why a safety certificate is only valid for 36 days for the date of inspection.

Then there is the final bill of sale dated March 1, 1999. It contains the same stamped condition of sale as on the February 20, 1999 bill of sale. Interestingly, it states "speedo has been changed". It has an odometer reading of 278006 km. The words "true miles unknown" are written under the odometer reading. Mrs. McMullen initialled both at the condition of sale stamp and under the true miles unknown handwriting. It is clear to this Tribunal that Mrs. McMullen knew at the time of the final purchase that she was buying a 14 year old van with 278,006 km and no warranty.

The evidence of Mr. and Mrs. McMullen and Mr. Lagana was that the van was test driven prior to purchase. There is no evidence that the McMullens asked to have it inspected by their mechanic or that such a request was denied by Mr. Lagana. The McMullen purchased an elderly van relying upon their own expertise. They were wrong as to its condition and their error led to considerable inconvenience and expense. But there is nothing on either bill of sale

to lead this Tribunal to believe that the McMullens were duped into purchasing this van based on its odometer reading. Whatever might have been the verbal representations, it is evident from the paperwork that the dealer was not engaged in odometer tampering. Despite what was stated by Counsel for the Applicants, the dealer has no obligation to tell purchasers what was the odometer reading when he bought the vehicle. He does have a legal obligation under section 16 (2) of Regulation 801 to specify "the distance travelled by the vehicle at the time of sale" on the bill of sale. This he clearly did by the bill of sale dated March 1, 1999.

The repair bill from Georgian Pontiac Buick GMC Inc. dated March 3, 1999 lists a number of items on it. The Tribunal accepts the evidence of Mr. Lamb as to which items would be considered under a safety certificate. The licence plate light and the right side leaf spring broken are considered safety items. But the dealer did reimburse the McMullens for those items. The other repairs on that bill are not items under the safety certificate. It should be noted that the safety certificate does not warrant that the van can be driven.

Based on the evidence before it, the Tribunal agrees that the Applicant suffered pecuniary loss as to the repairs, inconvenience, loss of use, loss in value, filing fees and counsel fees. But the Tribunal does not find that this pecuniary loss arises out of the purchase of the van on March 1, 1999 from Traders Auto Exchange Ltd. The Applicant purchased a 14 year old van without warranty and without having her mechanic check its condition. The bill of sale clearly states the last known odometer reading and states true mileage unknown. The pecuniary losses of the Applicant arise from her error in judgment in not having this van thoroughly inspected prior to purchase. Unfortunately she made a bad deal and she has had to pay the consequences of that. The Motor Vehicle Dealers Compensation Fund was not drafted to protect consumers from such errors of judgment.

Order:

Pursuant to the authority vested in it by the *Motor Vehicle Dealers Act*, in particular section 15 (3) of the Schedule in Regulation 801, the Tribunal directs the Board of Trustees of the Motor Vehicle Dealers Compensation Fund to disallow the claim of the Applicant.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley, Vice-Chair
Presiding

Released: February 28, 2002

909 - MED - DRUG

**Appeal under Section 50(1) of the Highway Traffic Act,
R.S.O. 1990, Chap. H.8 as amended, from a Decision of the
Registrar of Motor Vehicles pursuant to Section 47(1) of
that Act.**

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ROSS C. BENNETT, M.D., Presiding Member

APPEARANCES: KYLE M. BIEL,
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATES OF
HEARING: January 16, 2002 and February 20, 2002 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the "Applicant" respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

EXHIBITS:

Exhibit # 1 - Letter of Licence Suspension from the Ministry dated May 24, 2001

Exhibit # 2 - Letter of Appeal from the Applicant received at the Tribunal

Exhibit # 3 – Summary of the Applicant's file introduced by the Respondent.

Exhibit # 4 – The Applicant's driving record received from the Ministry.

Exhibit # 5 – File of six letters from Physician #1 to the Applicant introduced by the Applicant

on January 16, 2002.

PRELIMINARY MATTERS

This Appeal was opened on January 16, 2002 and proceeded for approximately three hours. The Applicant kept referring to a white binder on the table, which contained important information that would assist him, but was incomplete. He requested an adjournment for a couple of weeks to allow him to complete his brief. He argued that it would be unfair if the Tribunal would not allow him to have a fair and complete hearing.

The Tribunal granted the adjournment and requested that he have a neurological assessment and a driving examination in the interim. A date that was satisfactory for all was determined and the Appeal was adjourned until February 20, 2002. The following morning an Order stating the date, time and place of the hearing was sent to all parties.

On the morning of February 20, 2002, the Applicant called the Licence Appeal Tribunal three times requesting to speak to the Respondent. He was told the Respondent worked for the Ministry of Transportation and was given that number. He subsequently called the number twice, but failed to leave a message.

A fax was received at the Tribunal from the Applicant, which contained several duplicate reports from the original file and a hand written letter, dated 01/11/26, apparently from a Physician #2, the Applicant's family doctor. It stated that the Applicant was presently medically competent to undergo a driver's test assessment for the purpose of regaining his driver's licence. The signature was illegible and some names on the letterhead, including Physician #2, were blanked out.

At 1:30 P.M. when the Appeal was to open the Applicant failed to show. The Appeal was opened as scheduled and then recessed for thirty minutes in case the Applicant had been delayed. When he did not appear, he was contacted by phone at his home. He was advised the Tribunal would be calling back in fifteen minutes on a teleconferencing call to determine why he did not show up and to complete the Appeal.

The reason given was that his brief was not yet complete and he wanted to have an opinion on whether it could be kept confidential. He was advised that the Tribunal could not provide any opinion until the contents of the brief were known. The Applicant then asked for more time, but he could not say how long it would take. The Tribunal rejected this request. The Applicant was advised the Appeal would be completed on the teleconferencing call, and he agreed.

FACTS:

The Applicant, a 77 year old retired accountant, had his driver's licence suspended on May 24, 2001, after the Registrar received a Medical Report on March 26, 2001, from Physician #1.

Physician #1, a pain specialist, stated he had been involved in the management of this man's chronic pain condition for the past ten years. Recently his patient's medical condition has deteriorated to such an extent that Physician #1 was concerned about his fitness to drive a car. He recommended that his patient be considered unfit to drive until his condition improves and stabilizes and he is able to successfully complete a driver's assessment at the Centre or at the Driveable Assessment Program.

The Applicant had been previously assessed at the Centre in 1997 on a referral from Physician #1. He had a history of cervical spine surgery in 1979, type II diabetes, recent pneumonia and depression following the death of his wife.

The driving part of his examination was satisfactory, but a series of lessons, to ensure consistency, reliability of skills and build confidence in various multi-stimuli situations was recommended.

The cervical spine injury and subsequent surgery resulted in a spinal stenosis and left the Applicant with the chronic pain problem requiring the use of opioid therapy and constant monitoring by his physician. The long term use of MS contin (oral Morphine Sulphate), created problems between the Applicant and Physician #1, which are outlined in a series of letters (exhibit # 5), from Physician #1 to the Applicant in April 2001. These were introduced by the Applicant.

There are allegations in these letters that the Applicant had not been taking his drugs as prescribed and had been "hoarding medication". This "erratic" medication dosing causes great fluctuations in his blood levels with increased side effects, such as confusion, light-headedness and falls. Physician #1 believed this led to an admission to a local hospital for treatment of multiple rib and other fractures as well as another admission in a state of delirium.

The Applicant is also alleged to have visited multiple other physicians and hospital emergency departments in search of drugs and was noted by one physician to be in mild withdrawal one day, but not as severe as other times he had seen him. In an attempt to control the possibility of an addiction disorder, but recognizing the Applicant required pain medication, Physician #1 stopped the oral MSContin and switched to a Duragesic Patch. This is an analgesic for bone pain, which delivers stable blood levels of opioid. The Applicant was very unhappy about this change in medication and demanded the oral analgesic. Physician #1 relented and prescribed another morphine preparation, Kadian, which is long acting and taken once daily. The Applicant was also on several other drugs for diabetes, hypertension, psychosis, depression and arthritis.

The Applicant accused Physician #1 of preventing him from obtaining medical help from other physicians and emergency departments in the area, by contacting them and asking them not to prescribe analgesics to him.

Physician #1 appears to be a very caring physician, who according to his letters went far beyond the call of duty in an effort to help the Applicant, but received little co-operation. He

worked hard to find the proper drugs to alleviate the Applicant's pain and arranged for Home Care nurses to visit daily to administer the drugs as prescribed and monitor his patient.

On January 29, 2001 the Ministry of Transportation received a letter from Supervisor #1, an Acting Centre Supervisor at the B Driver Examination Centre (exhibit #3, item #5). The letter stated that the Applicant had made several attempts to pass the G2 exit test without success. He took another test at the B Centre on January 26, 2001 and was again unsuccessful. The examiner expressed concerns to Supervisor #1, that she felt the Applicant had more of an issue besides being unable to pass the road test, possibly a medical concern.

The Applicant had been issued a G1 licence to allow him to take the test, but not to drive alone. Supervisor #1 observed him leaving the office and get into a car. She went out and advised him that he was not licenced to drive alone. He told her he had a friend in a restaurant in the plaza and after a little confrontation drove off and out of the parking lot.

Following Supervisor #1's initial conversation with the Applicant, she expressed a very poignant point in her letter - "it became evident to her that the Applicant made up his own rules of the road."

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50.(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal
 - (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

The Registrar of Motor Vehicles acted appropriately in suspending the Applicant's driver's licence under Section 47(1) of the *Highway Traffic Act*, when the letter from Physician #1 was received March 26, 2001, outlining his concerns about the Applicant's fitness to drive.

Physician #1 had similar concerns in the spring of 1997 when he referred the Applicant to the Centre for testing. The Centre recommended he return for a series of lessons to improve his driving capabilities. There is no record of his attendance at the Centre for these lessons.

According to the letter of January 29, 2001 from the B Office of the Ministry of Transportation, the Applicant had attempted to pass the G2 exit test several times and had been unsuccessful. This is why the Tribunal requested that he take a driving evaluation during the adjournment of the Appeal, but he apparently failed to follow through.

Instead of obtaining a neurological assessment, as requested, he faxed a hand written letter dated November 11, 2001 with an illegible signature, indicating it was written by his family physician, Physician #2. Half of the names on the letterhead are blanked out, including Physician #2'. Furthermore the Ministry had requested an up-to-date medical assessment from a neurologist /gerontologist referencing physical, cognitive and visual function, on February 6, 2001. The request for a medical assessment was made again on May 24, 2001 and neither were received.

The Applicant is alleged to have been taking opiates for a long period of time and inappropriately. The Tribunal has no reason to disbelieve this information. These drugs alone could interfere with his driving ability and coupled with his diabetic, antiarthritic and antipsychotic medications could cause serious problems.

The Applicant's repeated refusal to co-operate with his physician, with the Medical Advisory Committee and the Tribunal does not help his cause.

The evidence presented to the Appeal supports the Registrar's decision to refuse to reinstate the Applicant's driver's licence pursuant to Section 47(1) of the *Highway Traffic Act*.

DECISION:

Upon the application by the Applicant to appeal the decision dated May 24, 2001 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

Ross C. Bennett, M.D.,
Presiding Member

RELEASED: February 28, 2002

JANKOVIC, TOMKA AND MILAN

TOMKA AND MILAN JANKOVIC

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JOHN ORT, Member

APPEARANCES: MILAN JANKOVIC, representing himself and
Tomka Jankovic
KAREN JONES, Counsel, representing
the Ontario New Home Warranty Program
KAREN VEENSTRA, Agent, Student-at-Law,
representing the Added Party, Forever
Homes Inc.

DATE OF
HEARING: January 28 & 29, 2002 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") by Tomka Jankovic and Milan Jankovic (the "Applicants") respecting a decision by the Ontario New Home Warranty Program (the "Program" or the "Respondent") dated May 17, 2001, wherein the Applicants' claim for compensation for breach of warranty was disallowed.

ISSUE:

What action should the Tribunal direct the Program to take in accordance with the *Ontario New Home Warranties Plan Act* (the "Act") and regulations under the Act? Should the Tribunal set aside, confirm, or modify the decision of the Program to disallow the Applicants' claim for compensation for breach of warranty under the Act?

FACTS:

The evidence introduced by the Applicants consisted of the testimony of the Applicant Milan Jankovic as well as documentary evidence, including a video tape, introduced through him.

TESTIMONY OF MILAN JANKOVIC:

Mr. Jankovic stated that the Applicant Tomka Jankovic signed the Agreement of Purchase and Sale with the Added Party, Forever Homes Inc., in December 1999. He testified that the Applicants moved into the house on the closing date of March 31, 2000.

During the hearing, Mr. Jankovic withdrew several claims described in the decision letter, exhibit 1, as follows:

- 5 - Water continues to leak under the faucet and into the bathroom vanity.
- 6 - The builder promised to put in a plate (balancer) in the master bedroom heating duct for control.
- 11 - The builder replaced one of the exhaust outlets with a smaller outlet.

As stated in the prehearing order at tab 27 of exhibit 3, the following claims set out in the decision letter, exhibit 1, remained:

- 1 - Hardwood floor is cracked and do not sit flat on the sub-floor.
- 2 - Creaking floor, master bedroom and east bedroom.
- 9 - There are significant cracks (up to 1 cm wide and 2m long) in the basement foundation, which will cause further leakage in the future.
- 13 - There is a crack on the east side of the family room.
- 16 - Drywall nails have to be fixed because they are becoming visible and corner holes that appeared (kitchen ceramic edges, living and other places that are visible) need to be closed in.

1. Cracks

Mr. Jankovic testified that on April 2, 2000 the Applicants noted a large crack below the window on the east side of the fourth level of the house. For convenience, throughout the hearing, this crack was referred to as crack 1.

A second crack, crack 2, was part of the Applicants' claim but the claim respecting crack 2 was settled and is not dealt with in this decision.

Mr. Jankovic stated that water came through cracks into the basement from the start. He said that in mid-April a dehumidifier was put in, that the builder took back the dehumidifier after about a month, and that a new dehumidifier was then immediately put in. Mr. Jankovic testified that the air conditioning was installed by the builder on July 4, 2000. He said that the Applicants were notified two or three days before. Mr. Jankovic stated that it is not true that he

did not want the builder to install the air conditioning sooner. Mr. Jankovic did testify that he works in the U.S.A. and that July 4 is a holiday there.

Mr. Jankovic referred to a letter at tab 5 of exhibit 3, dated July 22, 2000, addressed by him to Forever Homes, stating in part: "On July the 9th, 2000 it was raining and the water was seen on east, south and west side of the family room. The builder was informed and that night around 10 pm he came and saw it. Richard, the builder said that it is water and that he is going to fix it."

Mr. Jankovic also pointed to the letter at tab 6 of exhibit 3, addressed to Mr. and Mrs. Jankovic by Betty Tam, Forever Homes. That letter states: "On the 30th July 2000, Mrs. Jankovic reported there is a serious leaking problem leaving repeated messages, ... there was water seepage from the form ties in the family room."

Next, Mr. Jankovic referred to a letter from Joseph Brinac of Bitz, Szemenyei, Ferguson & MacKenzie, lawyer for the Applicants, to the Ontario New Home Warranty Program, dated August 4, 2000, at tab 7 of exhibit 3. That letter adds: "Our clients have encountered serious water leakage problems with respect to the premises which occurs after every rainfall. In the family room, there are currently 14 leaks from the foundation. In the basement there are 4 or 5 additional leaks. Our clients have discussed the matter with the builder Forever Homes. They have attempted some remedial measures, but after the rainfall on Sunday July 30, it is clear that these measures are not working."

Mr. Jankovic also pointed out the letter at tab 8 of exhibit 3, dated August 31, 2000, from Betty Tam, Forever Homes Inc., to ONHWP. The letter states: "As you may well know, we have had record high rain fall this year, and yes there is some water seepage from the form ties, but, they did not have standing water which can result in mould and bad odorous."

Mr. Jankovic testified that in September 2000 there was a water leak through a crack in the family room on the third level of the east side of the house. For convenience, this crack was referred to as crack 3 during the hearing. Mr. Jankovic stated that something like cement mortar was applied to the inside of the crack and to the outside of the crack from the foundation top to ground level in August of 2001.

Mr. Jankovic also referred to a letter at tab 9 of exhibit 3, dated September 14, 2000, from Mr. Jankovic to the Ontario New Home Warranty Program. An attachment to the letter entitled "Summary of Deficiencies at 694 Longworth Road London" includes the following:

1. Cracks in concrete foundation. Repairs done but still leaking at one location.
2. Multiple water leaks in family room foundation walls.

Mr. Jankovic also pointed out a work order at the end of tab 12 of exhibit 3. Entitled "Order to Comply - General Contravention, The Corporation of the City of London, Building Division", the order directed to Forever Homes Inc. describes the nature and location of the contravention as:

1. Concrete walls to be damproofed. Shall have holes and recesses resulting from the removal of form ties sealed with cement mortar or damproofing material.
2. Dampproofing material shall be applied over the parging or concrete below ground level...

This foundation's perimeter is to be completely excavated and the dampproofing and sealing of the snap-tie holes is to be completely re-done. Weeping tile system and sump pit connection to the weeping tile system is also to be re-done.

Mr. Jankovic stated that the ordered work was done.

About six months prior to the hearing, Mr. Jankovic noticed a crack above the foundation on the outside of the house in the general area of crack 1, the crack on the fourth level of the house.

Counsel for the Respondent objected that the outside crack has not been complained of. Mr. Jankovic argued that the crack on the outside of the house is an extension of crack 1. The Tribunal ruled the evidence admissible.

Mr. Jankovic testified that the outside crack extends from the fourth level of the house to above the window on the first level of the house and up to the roof. The videotape showed cracks in the mortar between bricks rather than through the bricks themselves. The position of the crack in vertical mortar joints was readily visible. The crack through horizontal mortar joints was not visible to the Tribunal. The videotape did not include a shot of the outside wall all the way to the roof. Mr. Jankovic testified that when he noted the outside crack the inside of the house was already finished except in the basement.

During cross-examination by counsel for the Respondent, Mr. Jankovic stated that he saw water leakage personally at least once and that on two occasions he saw a large amount of water in the northwest corner. Asked whether pipes in the basement were dripping with condensation soon after closing, Mr. Jankovic replied no. Mr. Jankovic stated that the dehumidifier lent to the Applicants by the builder was running on a regular basis during the week. He also stated that the fan on the furnace was regularly turned on during the week. Mr. Jankovic added that, after the work order from the city, he paid for plastic to be installed on the outside of the wall of the family room.

Asked by counsel for the Respondent whether there were no more leaks after repairs to cracks from the outside, Mr. Jankovic replied that there were no leaks through crack 3, but that there was water leakage through crack 1 about ten inches below the window in the spring of 2001.

2. Hardwood Floor

Mr. Jankovic pointed to several photographs of the hardwood floor on pages 2 and 3 of exhibit 6. Three of the photographs show a board laid across the floor with one end of the board close to the moulding. Gaps appear between the floor and the board lying across it. The floor is wavy rather than level. On another photograph, an irregular gap appears above the floor under the moulding along the wall. Again, the floor is not level.

Mr. Jankovic testified that the hardwood is cracked and that the heating register does not fit into the hardwood floor.

Mr. Jankovic argued that damage to the hardwood floor resulted from high humidity caused by water leaking through concrete, as set out in the above discussion of cracks, and by the initial absence of air conditioning.

3. Creaking Floor in Master Bedroom and East Bedroom

Mr. Jankovic testified that the floor in the bedrooms squeaks. He pointed out that the video tape shows screws coming down from the bedroom, through the subfloor, missing floor joists underneath. He stated that the top of the bedroom floor is now covered by stretched carpeting.

Mr. Jankovic argued that the bedroom floors squeak because the screws are not in the joists.

4. Drywall Nails Visible, Corner Holes

Mr. Jankovic testified that nails are becoming visible throughout the house, especially in the kitchen, the dining room, and the living room. He stated that the caps of nails are visible where they came through tape and filler.

Evidence presented by the Respondent consisted of the testimony of John Verhey and Tim Semenuk as well as documentary evidence introduced through them.

TESTIMONY OF JOHN VERHEY

Mr. Verhey testified that he has owned and operated Sacwal Flooring (London) since 1988. The business supplies and installs floor coverings, twenty per cent being hardwood. He stated that his firm does two to three hardwood jobs per week. He said that he was trained by hardwood suppliers.

Mr. Verhey stated that his firm installed the hardwood flooring in the Applicants' house. He inspected the hardwood floor on July 4, 2000. Mr. Verhey found some cracked boards in the living room and in the dining room. He says that the cracks were about the size of a grain. He testified that some of the boards were slightly raised up and some showed cupping. He stated that the raised boards were more evident along the walls.

Mr. Verhey testified that he visited the fourth level of the house below the living room and the dining room. He observed that the dehumidifier ran, stopped, and ran again. He stated that he did not see water on the floor or walls.

Mr. Verhey said that he measured the moisture in the joists and the subfloor. The reading for the hardwood floor and subfloor was 11%. Mr. Verhey stated that such a reading is high. He said that a reading of 9% is acceptable.

Mr. Verhey also measured relative humidity upstairs in the living room or dining room. The reading was 65% at 23 degrees Celsius. He testified that a reading of 45-55% is acceptable.

Mr. Verhey used a magnet to locate where the hardwood floor was nailed down. He stated that it was nailed properly.

Mr. Verhey lifted the heating register and noted that the hardwood had expanded over the register hole in excess of half an inch. He stated that this was unusual, but made sense given the high relative humidity.

Mr. Verhey opined that the main cause of the damage to the hardwood floor was high humidity. He stated that excessive moisture under the hardwood floor or above it would be needed to cause such damage. He disagreed that the damage could be due to leaks in the basement. Mr. Verhey stated that excessive humidity can be brought down by running the fan in the furnace, air conditioning, dehumidifier, or heating.

Mr. Verhey referred to the letter at tab 30 of exhibit 3, dated August 8, 2000, from Robert Woolley of Goodfellow Inc. to his firm. He stated that Goodfellow Inc. was the distributor that provided the hardwood flooring for the Applicant's house. Mr. Verhey testified that Carmen Pepe of Goodfellow Inc. examined the hardwood floor with him on July 4, 2000.

The letter from Mr. Woolley states these observations:

- (1) Wood moisture by weight 11%.
- (2) Wood floor showing cupping.
- (3) Dehumidifier was working but inadequate.
- (4) Relative Humidity 65 @ 23 degrees C.

That letter adds:

Cracks appear to be pressure fractures, because of excessive moisture being introduced to the wood floor.
cupping is caused due to a moisture imbalance from underneath the floor, causing expansion of the bottom of the floor at a higher rate than the top.

The stated conclusion is:

...we have rejected this complaint for the following reasons:

- (1) Locally caused moisture problems.
- (2) Lack of proper humidity control.

Mr. Verhey testified that he re-inspected the hardwood flooring on September 18, 2001. He stated that fifteen to twenty of the boards were severely damaged and that he could almost see open cracks in them while standing up. He also noted that some boards were squeaking. Mr. Verhey again took moisture readings of the subfloor and the joists. He claimed that he had difficulty getting a reading, because the instrument scale starts at 6%. On the other hand, Mr. Verhey's letter dated September 26, 2001, addressed to Forever Homes, set out at tab 30 of exhibit 3, states that wood moisture by weight was 8%.

In the letter of September 18, Mr. Verhey says that the relative humidity level has been reduced to 44% @ 24 degrees. He states that the moisture and relative humidity levels are acceptable. He also says: "The floor can be repaired by replacing approximately 15-20 of the more severely cracked boards and replacing the last 2-3 rows along the exterior wall. The cost for this repair would be \$450.00 plus GST."

TESTIMONY OF TIM SEMENUK

Mr. Semenuk testified that he has a Civil Engineering Technologist diploma. He stated that he worked for a consulting engineering firm from 1989 to 2001. Since 2001, Mr. Semenuk said, he is a warranty representative for the Ontario New Home Warranty Program.

Mr. Semenuk stated that he is the author of the Conciliation Inspection Report, set out at tab 17 of exhibit 3, and the Ontario New Home Warranty Program Decision Letter at tab 23 of exhibit 3.

Concerning crack 1, Mr. Semenuk testified that the concrete wall was black and moist where the insulation was removed. He attributed the black colour to mould and the moistness to condensation. He stated that the inside of the crack was dry. Regarding the width of the crack, the decision letter describes the complaint as follows: "There are significant cracks (up to 1 cm wide and 2 m long) in the basement foundation ...".

Mr. Semenuk stated that Mrs. Jankovic told him that there was no water leakage since exterior repairs were made. He said that he did not hear complaints from the Applicants about water leakage subsequently.

Mr. Semenuk claimed that the crack does not affect the weight-bearing capacity of the wall. He stated that the wall was even on both sides of the crack. Mr. Semenuk also claimed that the crack is not a defect.

He said that he first saw the crack on the outside of the house on the videotape presented by

the Applicant. Mr. Semenuk stated that it is hard for him to tell whether the outside crack is a defect without making a personal inspection. He said that the crack would be more serious if it passed through bricks instead of the mortar between bricks. He stated that such a crack would be more likely due to detachment of cladding from the structural component of the house, the wood frame. To repair the outside crack, Mr. Semenuk suggested that it be filled with mortar to improve appearance.

With respect to crack 3, Mr. Semenuk testified that he only examined the crack from the outside, because the inside was covered with drywall. He noted that parging was reapplied over the crack and that a hairline crack appeared in the parging from ground level to the brick line. He stated that he asked the Applicants whether there was any water seepage and was told that there was none.

Mr. Semenuk opined that crack 3 was caused by shrinkage, because he saw no lateral movement of the wall. Later, he stated that if the crack were widening, if the walls were settling laterally or tilting, if one side were moving down, then he would conclude that there is a problem with the footings.

On cross-examination, Mr. Jankovic drew Mr. Semenuk's attention to exhibit 8, a letter dated December 9, 2001, from Mr. Jankovic to the Ontario New Home Warranty Program to the attention of the manager. The letter states in part: "This is to inform you that the crack on the east foundation wall is showing signs of separations and extending into the brick wall above.". Mr. Semenuk stated that the letter had not come to his attention previously.

Mr. Semenuk stated that the cracks in the hardwood floor were difficult to see. He said that he saw cupping and raised boards near the corners. He saw no dislodged boards. He claims that there is no defect in installation and no defect in materials. He attributed the problem to high humidity. The decision letter states in part: "The dining room heating register was noted to not seat fully due to the misalignment of the hardwood and the ductwork. A few areas were noted to be raised off the sub floor resulting in isolated humps in the floor. The joints in the flooring are tight together, the finish is good and the humped areas are not readily visible.".

Regarding the creaking floor in the bedrooms, Mr. Semenuk stated that he did not notice excessive noise from the floor. He did hear slight noises and considered them to be within reasonable tolerance. In the decision letter at tab 23 of exhibit 3, he stated: "The floor noises detected during this visit are minor and typical of wood construction.". He said that it is typical for nails to miss joists, as seen in the video. He testified that he would expect any problems to be noted during the framing inspection that is done before flooring is applied. He claimed that there is no defect in workmanship or materials.

On cross-examination by Mr. Jankovic, Mr. Semenuk added that the hardwood floor was humped in areas. He also stated that he heard squeaks pretty uniformly distributed around the bed in the bedroom.

Concerning drywall nails and corner holes, the decision letter states: "The joint between the

baseboard and the hard surface flooring results in a hairline gap. The baseboard rests directly on top of the flooring, however irregularities and shrinkage have resulted in the reported gaps."

Evidence presented by the Added Party consisted of the testimony of Betty Tam, as well as documentary evidence introduced through her.

TESTIMONY OF BETTY TAM:

Ms. Tam testified that she and her husband, Richard Fung, are the principals of Forever Homes Inc. She stated that she completed a residential construction course. Ms. Tam said that she is involved in design, setting appointments for contractors, and on-site job supervision. She testified that the business was started in 1993.

Ms. Tam stated that the Applicants' house and a model house were the first built in the subdivision.

Ms. Tam testified that during the pre-possession inspection of the house, around 10 p.m., she told the Applicants that they need to have the furnace fan on all the time. She stated that it was cold and she said the builder will come back maybe late April to install the air conditioning. She said that during the inspection she advised the Applicants to have a dehumidifier. She also stated that she told the Applicants not to put the temperature up so high, to keep it at 20 degrees, maybe 21 degrees Celsius, because the material will dry too fast.

Later, Ms. Tam admitted that the furnace fan can be heard upstairs and is noisy.

Ms. Tam stated that during the first week of April the Applicants called regarding crack 1. She said that she saw a crack at the floor going up to the blanket insulation with a water mark where the wall met the floor. Mrs. Tam said that she told the Applicants to try a dehumidifier.

Ms. Tam said that a couple of days after closing she investigated the Applicants' complaint that the bedroom was too cold. She stated that her husband observed the temperature to be around 25 degrees Celsius and cautioned Mrs. Jankovic that the temperature was too high for a new home.

Mrs. Tam testified that, when the heating contractor came to inspect the house around the middle of April, the furnace fan was not on, the water pipes were sweating, and there was no dehumidifier. She said that the builder then lent the Applicants a dehumidifier.

Ms. Tam said that she visited the house several times between April and May. She testified that the furnace fan was not running during those visits.

Ms. Tam stated that the dehumidifier was not on when she visited the house on May 29, 2000. She said that she saw many water marks around a corner. She stated: "I would say condensation issue."

During the inspection on May 29, 2000 she said Mr. Jankovic wanted to be present when the air conditioning is installed. She said that is why the builder chose July 4, 2000 for the installation.

Ms. Tam testified that crack 1 was repaired from the outside in the summer of 2000, but that there was still water seepage afterwards.

Ms. Tam stated that crack 3 was reported in the summer of 2000. She said that the crack was repaired outside above ground only.

Ms. Tam said that in September or October of 2000 the builder dug all the way down to the footing, cleaned dirt on the face of the foundation, applied another coat of damp-proofing, and put in another weeping tile to replace the one damaged during digging. Ms. Tam said that this was done all around the house including around crack 1 and crack 3.

Ms. Tam referred to exhibit 9, a letter dated October 18, 2000, from Kevin Hewitson of Boehmers to Forever Homes. She said that Boehmers was the concrete supplier. The letter states: "On Thursday, October 12, 2000 a Schmidt Hammer was performed on the basement walls ... It was determined that the approximate compressive strength of the concrete is 22.9 mpa. The concrete supplied by Boehmers exceeds that specified strength ordered by the contractor.". Ms. Tam said that the building code requires 20 mpa.

Ms. Tam last inspected crack 1 on January 16, 2002. She testified that she saw no change in the crack since spring of 2001.

Ms. Tam also stated that cracks are usual in a foundation wall.

Concerning the hardwood floor, Ms. Tam said that she did not see any significant crack. She added that the humidity level of a house is a big issue in hardwood damage.

Ms. Tam testified that creaks in the bedrooms were first complained of around April of 2000. She said that the subfloor was attached to joists using nails by a contractor. Further, she stated that the entire floor was screwed on by her husband.

Ms. Tam said that the issue of drywall nails was first raised in the Spring of 2001. She said that she saw a little pop-up of nails with no cracks around the nails in the hallway of the bedroom level. She stated that this was usual and not significant.

Cross-examination of Betty Tam by Applicant Milan Jankovic:

Ms. Tam stated that the earth around the house is clay. She said that the builder put a fibreglass drain block on a neighbouring home because the builder finished the basement on that home and put insulation inside. Therefore, she said, the builder had to put in a drain block.

Mr. Jankovic drew the attention of Ms. Tam to the following paragraph in the letter at tab 14 of exhibit 3: "Regarding the work order from the City of London, we have materials to prove that the work order was a mistake. Our lawyer is on vacation now; I will share them with you when he comes back.". Ms. Tam was unable to provide any such information.

Ms. Tam said that the squeaking floor was usual for a wood-frame house.

Cross-examination of Betty Tam by Counsel for Respondent:

Ms. Tam stated that in the first two weeks of April of 2000 she saw no puddles in the basement, no water seeping through a crack. She said that she saw evidence of dampness in the south-east corner and in the north-west corner near the garage.

Ms. Tam testified that she saw water penetration through crack 1 and through tie holes on the third and fourth levels. She stated that she saw no pools of water on the floor, but that she did see water marks on the floor.

Ms. Tam testified that on June 24, 2000 she saw condensation and that the dehumidifier and furnace fan were both off.

Ms. Tam stated that in June of 2000, the builder excavated ten feet on each side of crack 1 to the footing. She said that the area was cleaned, damp-proofing applied, and hydraulic cement put on the crack. She also stated that a drainage board was put along the twenty feet. She admitted that the repair did not work and that she saw water going through crack 1 afterwards.

Ms. Tam referred to the letter at tab 10 of exhibit 3. The letter states that Supreme Seal verbally quoted \$400 as the cost of repairs for injection from the inside. Ms. Tam clarified that the quote was for the repair of crack 1 only.

Ms. Tam testified that in October of 2000 hydraulic cement was applied at least to crack 1, crack 3, and tie holes. She said that a drainage board was put around the entire foundation. She later added that \$1,000 was paid by the Applicants for the drainage board. Ms. Tam stated that since the repair there were no complaints about water seepage.

Ms. Tam stated that she saw crack 1 in April of 2000, March of 2001, and January of 2002. She testified that the width of the crack had not changed. Ms. Tam said that in January of 2000 the crack was dry inside.

Ms. Tam admitted that she received the letter of exhibit 8 which refers to a crack extending into the brick wall. She said that she did not check the crack on the outside of the house.

Ms. Tam testified that she was not present when the nails and the screws were put through the subfloor of the bedrooms. She claims that when she inspected the work she saw additional nails and screws, suggesting that they were put in after some fasteners missed the joists

underneath.

Ms. Tam said that on the drywall she could see little bumps, the curved heads of nails. Ms. Tam stated that she could not see the body of the nails. She claimed that this is usual and related to the drying of material.

LAW:

Section 13 of the *Ontario New Home Warranties Plan Act* states:

- 1) Every vendor of a home warrants to the owner,
 - (a) that the home,
 - (i) is constructed in a workmanlike manner and is free from defects in material,
 - (ii) is fit for habitation, and
 - (iii) is constructed in accordance with the Ontario Building Code;
 - (b) that the home is free of major structural defects as defined in the regulations; and
 - (c) such other warranties as are prescribed by regulations.
- (2) A warranty under subsection (1) does not apply in respect of, ...
 - (b) secondary damage caused by defects, such as property damage and personal injury;
 - (d) normal shrinkage of materials caused by drying after construction;
 - (e) damage caused by dampness or condensation due to failure by the owner to maintain adequate ventilation;
 - (f) damage resulting from improper maintenance; ...

Section 14(1) of the Act stated:

- (1) Where, ...
 - (b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty; or
 - (c) the owner suffers damage because of a major structural defect as defined in the regulations for the purposes of section 13, ...

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

Section 1 of Regulation 892 under the Act defines "major structural defect" for the purposes of clause 13(1)(b) of the Act as:

- any defect in work or materials,
- (a) that results in failure of the load-bearing portion of any building or materially and adversely affects its load-bearing function, or
 - (b) that materially and adversely affects the use of such building for the purpose for which it was intended,
- including significant damage due to soil movements, major cracks in basement walls, collapse or serious distortion of joints or roof structure and chemical failure of materials, but excluding

floor damage, dampness not arising from failure of a load-bearing portion of the building, damage to drains or services, damage to finishes and damage arising from acts of God, acts of the owners and their tenants, licensees and invitees, acts of civil and military authorities, acts of war, riot, insurrection or civil commotion and malicious damage;

Section 14 of Regulation 892 under the act adds:

Every vendor of a new home warrants to the owner that there will be no water penetration through the basement or foundation of the home for two years after the date upon which the home is completed for possession.

APPLICATION OF LAW TO FACTS:

Crack 1 is a major crack, both long and wide. The Tribunal finds that cracks 1 and 3 are defects and are breaches of the warranty to the owner in section 13(1)(a)(i) of the Act that the home be constructed in a workmanlike manner and be free from defects in material.

The only available estimate for repair of a crack is a verbal quotation of \$400 from Supreme Seal. Ms. Tam testified that the estimate relates to crack 1 only. However, there is significant similarity between crack 1 and crack 3 and the cost of repair should also be similar. Also, the Tribunal notes from the letter at tab 9 of exhibit 3 that the Program at one point recommended to the Applicants that they settle their claim for cracks for \$800. To cover both crack 1 and crack 3 and applicable taxes, the Tribunal orders the Program to pay \$800 to the Applicants.

Mr. Semenuk and Mr. Verhey provided expert testimony that the hardwood floor was properly installed, constructed in a workmanlike manner, and was free from defects in material, in accordance with the warranty of section 13(1)(a)(i) of the Act. No experts testified on behalf of the Applicant. Mr. Jankovic concentrated only on events after installation. He did not provide evidence that the installation of the hardwood floor or the material of the hardwood floor was defective. He argued that damage to the hardwood floors resulted from high humidity caused by water leakage in the lower floors of the house, but he did not provide any expert opinion to prove that connection.

The onus was on the Applicant to prove that the hardwood floor was not constructed in a workmanlike manner or that the material was defective. The Tribunal finds that the Applicant failed to satisfy that burden. The Tribunal confirms the program's decision to disallow the Applicants' claim for compensation for damage to the hardwood floor.

The Applicant testified that the floor in the bedrooms squeaks. Mr. Semenuk testified that he did not notice excessive noise from the floor. He said that he did hear slight noises and considered them to be within reasonable tolerance. He stated in the decision letter that the noises detected are minor and typical of wood construction. Again, no expert testimony was introduced in support of the Applicants' claim.

Mr. Jankovic provided evidence of the underside of the subfloor of the bedrooms showing that

some fasteners missed the underlying joists. Ms. Tam testified that some fasteners did pass through the subfloor into the joists. There is no evidence that the framing inspection of the area was done improperly or noted a problem.

Given conflicting testimony, the Tribunal accepts the testimony of Mr. Semenuk, the expert witness. Therefore, the Tribunal confirms the program's decision to disallow the claim of the Applicants for compensation for the creaking floor in the master bedroom and the east bedroom.

Concerning drywall nails and corner holes, there is again conflicting testimony. Mr. Jankovic testified that the caps of drywall nails are visible where they moved through tape and filler. Ms. Tam stated that she saw a little pop-up of nails with no cracks around the nails. In the decision letter, Mr. Semenuk stated: "The joint between the baseboard and the hard surface flooring results in a hairline gap. The baseboard rests directly on top of the flooring, however irregularities and shrinkage have resulted in the reported gaps.". Mr. Semenuk concludes that gap is minor in nature and does not exceed normal construction tolerances. Mr. Semenuk concluded that the damage regarding drywall nails and corner holes is the result of normal shrinkage of materials caused by drying after construction. No expert testimony to the contrary was offered on behalf of the Applicant. The Tribunal accepts the testimony of Mr. Semenuk and confirms the Program's decision to disallow the claim concerning drywall nails and corner holes.

DECISION:

Accordingly, under the authority of section 9(4) of the *Ontario New Home Warranties Plan Act*, the Tribunal directs the Ontario New Home Warranty Program to allow the Applicants' claim for cracks in the basement foundation and on the east side of the family room and directs the Program to pay to the Applicants \$800 in satisfaction of that claim. Further, the Tribunal directs the Ontario New Home Warranty Program to disallow all of the other Applicants' claims.

LICENCE APPEAL TRIBUNAL

John Ort, Presiding Member

Released: February 28, 2002

SINGH, GURNEK

GURNEK SINGH

IN THE MATTER OF THE *MOTOR VEHICLE DEALERS ACT*

AND IN THE MATTER OF A REGISTRATION OF
GURNEK SINGH

AND IN THE MATTER OF A MOTION FOR A STAY OF
THE ORDER OF THE LICENCE APPEAL TRIBUNAL
RELEASED NOVEMBER 19, 2001 UNTIL DISPOSITION
OF AN APPEAL TO THE DIVISIONAL COURT OF
THE SUPERIOR COURT OF JUSTICE

TRIBUNAL: JOHN ORT, Member

APPEARANCES: ARIF RAZA,
Counsel, representing the Applicant
MICHAEL ROTHE,
Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: February 22, 2002 Toronto

ORDER

Counsel for the Registrar, *Motor Vehicle Dealers Act* (the "Registrar") requested an adjournment of the hearing, because two affidavits of the Applicant were provided to him only on the afternoon before the hearing. Counsel for the Applicants consented to an adjournment.

Counsel for the Registrar also made a request to the Tribunal for costs of \$600 on the basis that the Applicant acted unreasonably, frivolously, or vexatiously in failing to comply in a timely manner with the disclosure requirements set out in the Tribunal's Rules of Practice. It is admitted that the two affidavits made by the Applicant were provided to counsel for the Registrar late and not in compliance with the Rules of Practice of the Tribunal. Counsel for the Registrar argued that he wasted time and effort, and his client has to pay additional fees to the Licence Appeal Tribunal, because the Applicant did not comply with the disclosure requirements of the Rules of Practice and his appearance was required before this Tribunal before the parties consented to an adjournment of the hearing of the motion.

The Tribunal makes no order as to costs. The request for an adjournment was made by counsel for the Registrar. The Applicant wants to proceed with the motion as soon as possible. Counsel for the Applicant stated that he was in court on the morning of the day of the hearing before this Tribunal and was not available to consent to an adjournment. No witness attended on behalf of the Registrar. Counsel for the Registrar only travelled to the hearing from his office in Toronto. The Tribunal finds that the Applicant did not act unreasonably, frivolously, vexatiously, or in bad faith.

On consent of the parties, the Tribunal orders the hearing in this matter adjourned to 1:30 p.m. on Friday, March 15, 2002.

LICENCE APPEAL TRIBUNAL

John Ort, Presiding Member

Released: February 28, 2002

McCONNELL, LORRAINE AND FINCH, PERCY

PREHEARING

LORRAINE McCONNELL AND PERCY FINCH

APPEAL FROM A DECISION OF THE MOTOR VEHICLE
DEALERS COMPENSATION FUND

TO DISALLOW A CLAIM

TRIBUNAL: JOHN ORT, Member

APPEARANCES:

No-one appearing for the Applicants
AVIVA R. HARARI, Counsel, representing the Motor
Vehicle Dealers Compensation Fund

DATE OF

HEARING: February 19, 2002

Toronto

ORDER

Since no one had appeared for the Applicants at the start of the prehearing at 9:40 a.m. on February 19, 2002, the Tribunal adjourned for half an hour. At the resumption of the prehearing at 10:10 a.m. no one had appeared for the Applicants and no word had been received as to their absence. The prehearing continued without the Applicants.

Counsel for the Motor Vehicle Dealers Compensation Fund (the "Respondent") made a request to the Tribunal for costs of \$800 on the basis that the Applicants acted unreasonably, frivolously, vexatiously, or in bad faith, in failing to attend the prehearing before the Tribunal or to send a representative when properly given notice, without contacting the Tribunal and other parties to the prehearing. The Tribunal declines to make an order as to costs. The Applicants could not be contacted by telephone. No explicit notice was given to the Applicants that the Respondent may make a request to the Tribunal for costs. It is not clear that the Applicants received notice of the prehearing. No witness attended on behalf of the Respondent. Counsel for the Respondent only travelled from her office in Toronto. The Tribunal finds that the applicants did not act unreasonably, frivolously, vexatiously, or in bad faith.

Following attendance at the prehearing before this Tribunal of Aviva R. Harari, counsel on behalf of the Motor Vehicle Dealers Compensation Fund;

The Tribunal makes the following Order:

- 1) The Parties to the hearing are the Applicant and the Registrar.
- 2) That there was no resolution of any of the issues between the parties.
- 3) That the parties shall fully comply with Rule 6.3 and Rule 6.4 of the Tribunal's Rules of Practice.
- 4) That the hearing of the matter shall commence at 9:30 a.m. on Friday, June 14, 2002, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

John Ort, Presiding Member

Released: February 28, 2002

LONGO, ANTHONY

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
ANTHONY LONGO

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

ANTHONY LONGO

Applicant

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

IVY GREEN HOMES INC.

Added Party

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a prehearing in the above matter on March 12, 2002;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the prehearing *peremptory against the Respondent* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Tuesday, April 23, 2002.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: February 28, 2002

BORG, EUGENE

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
EUGENE BORG

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: November 6, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

EUGENE BORG

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on March 21, 2002;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Respondent* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Wednesday, June 5, 2002.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: February 28, 2002

RAM, KRISHNAWATI AND BENNY

KRISHNAWATI AND BENNY RAM

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: F. BRUCE FITZPATRICK, Vice-Chair

APPEARANCES:

KRISHNAWATI AND BENNY RAM, Applicants
KAREN SPECTOR, Counsel representing the Ontario New Home
Warranty Program
A. JAMES YOUSIF, Student at Law, Counsel representing the added
party ROSEHAVEN HOMES LIMITED

DATES OF

HEARING: October 29 and 30, 2001: January 28, 2002 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by Krishnawati and Benny Ram (the “Applicants”) to the Licence Appeal Tribunal from a written decision of the Ontario New Home Warranty Program (the “Program”) dated June 21st, 2001 and a supplementary decision of the Program dated July 19th, 2001.

Preliminary Matters

The decision of the Program enumerated thirteen claims made by the Applicants. Prior to the commencement of the hearing, the Tribunal was advised that the parties had come to an agreement with respect to claim number one, that is water penetration of the Applicants’ basement. On the Friday proceeding the hearing on October 29th, 2001, footing and weeping tiles had been installed in an area immediately below a spot where the Applicants had been experiencing water penetration in their basement. The Tribunal was advised that a further one-year warranty from October 26th, 2001 to October 26th, 2002, had been acknowledged by the Program and by the added party Rosehaven Homes Limited (“Rosehaven”) The Tribunal accordingly treated this matter as settled for the purposes of this hearing.

In a letter dated October 5th, 2001, the Applicants, among other things, alleged that “our rights under section 1 (equality) and section 15 (equal protection) of the *Canadian Charter of Rights and Freedoms* have been vilolated (sic) by the dispute resolution process of the ONHWP.”

Counsel for the Program made a preliminary objection with respect to this allegation. The Applicants acknowledged that they had failed to give proper notice to the Attorney General for the Province of Ontario and the Attorney General for Canada pursuant to section 8 of the Tribunal's Rules of Procedure. In any event, it was the Tribunal's view, which was expressed to the parties following submissions on the point (and prior to the commencement of the hearing of evidence), that the alleged violations during the dispute resolution process had no bearing on the parties' ability to conduct the hearing and to fully make their case before the Tribunal. Accordingly, the Applicants did not argue the matter further.

Throughout the hearing it was apparent that the Applicants had failed to make timely disclosure of certain documents, particularly to Rosehaven. On an individual basis, the counsel for the Program and for Rosehaven made proper and timely objections to the evidence being admitted. The Tribunal uniformly overruled these objections on the basis that the prejudice to the respondents did not appear to outweigh the probative value of the evidence tendered. While the Tribunal certainly does not encourage late disclosure, it appeared that the particular evidence at issue (in the main, photographs), were acknowledged by the respondents to be pictures of the particular subjects at issue and were therefore helpful to the Tribunal in making its decision.

Background

This appeal involves a residential property at 10 Vitlor Drive in the Town of Richmond Hill (the "Home"). The Applicants entered into an Agreement of Purchase and Sale with Rosehaven dated August 3rd, 1999 (the "Agreement"). The Agreement was exhibited at the hearing and admitted by the parties. In terms of the Agreement, Rosehaven was to construct the Home in Richmond Hill for the consideration of \$352,000.00. The Agreement contained several schedules which contained material provisions respecting the claims at issue. The specific sections will be quoted when dealing with the individual claims.

The Applicants took possession of the Home on January 26th, 2000. Notice of claim was provided by letter received by the Program on February 9th, 2000, February 25th, 2000, March 6th, 2000, March 20th, 2000, May 1st, 2000, May 8th, 2000, October 3rd, 2000, October 12th, 2000 and November 23rd, 2000. The Program acknowledged that the claims were all properly reported within the one-year period of the statutory warranty at issue.

The Program's representative conducted an inspection of the Home on April 30th, 2001 and May 24th, 2001. As noted above, the claims were denied on June 21st, 2001 and also by way of a supplementary decision letter dated July 19th, 2001.

The Evidence of the Parties

At the commencement of the hearing, the Applicants agreed that the documents that they would be relying on, among others, were contained in two document briefs submitted respectively by the Program and by Rosehaven and entered as Exhibits 4 and 5 at the

hearing. Also, a number of photographs were presented to the Tribunal. There was some dispute concerning the actual colours of items depicted in the photographs, which was a material issue of this decision on a number of issues.

Benny Ram gave evidence on behalf of himself and his wife, the Applicants. In order to assist the Tribunal, Mr. Ram organized his evidence in accordance with the various claims that had been set out in the decision letter. The witnesses on behalf of the Program, Mr. Jim Fortune, and the witnesses for Rosehaven, Mr. Michael Puzzolanti and Ms. Laura Duhacek followed this format when giving their evidence in chief. The cooperation of the parties in this regard was helpful to the Tribunal in dealing with the case. The Tribunal will utilize that format to discuss the evidence at issue.

Claim Number 2 – Garage Drywall Poor Finish

The Applicants referenced Schedule A of the Agreement, and specifically item 20 under heading “Exterior Features” which read:

“ENTIRE GARAGE TO BE DRYWALLED, TAPED AND PRIME PAINTED – INCLUDING CEILING”.

The Applicants provided photos of the garage and their complaint can be summarized as follows:

1. That the frame of the second garage door was not painted; and
2. That a very small section of the drywall above the other garage door was defective.

The photographs submitted by the Applicants were very useful to the Tribunal in assessing the merits of this particular claim. It is evident from the photographs that the doorframe in the garage was not painted and that there were gaps in the seams of the drywall at or near a garage door opener.

Claim Number 3 – Bathtub

The parties admitted that the one bathtub (of three that are located on the second floor of the Home) was not the specific one required by the Agreement. A photograph of the bathtub was introduced as Exhibit “8”. Mr. Ram initially described the shape of the bathtub as “oblong square” but then he corrected himself to say it was more rectangular. Mr. Ram candidly admitted that the complaint in respect of this claim was as a result of the aesthetics of the tub and not with regard to its use or operation. The Agreement at Schedule “A” provided for “ACRYLIC OVAL TUB WITH SEPARATE SHOWER in ensuite bathrooms as per plan. The only plans that were attached to the Agreement were diagrams indicating where pot lights were located (Schedule X of the Agreement). On those drawings were sketches showing the three tubs.

Claim Number 4 – Wrong Backer Board in Showers

The Applicants again referred to Schedule A and specifically item 89 under the heading “Bathroom and Laundry Features”, which read as follows:

“FULL HEIGHT CEMENT WONDERBOARD BACKING on all non-glass shower enclosed areas.”

The Applicants claimed that the use of the word “wonderboard” was a very important element in their decision to buy this Home. The applicant testified that he was aware that “wonderboard” was the best cement backer board for showers as a result of previous experience he had with another home he had owned. The Applicants did not know the name of the manufacturer of “wonderboard” and did not offer any scientific evidence that the actual cement backer board installed in the showers at his Home differed in any material way from “wonderboard”. The representative of Rosehaven admitted that “wonderboard” was not used in the showers, but that a like product was utilized. Mr. Ram admitted that there had been no failure as at the date of the hearing of the shower backing material.

Claim Number 5 – Difference in the Colour of Stain between the main floor and the stairs leading to the second floor

The Applicants submitted a photograph of the stairs leading to the second floor which also indicated the colour of the wood floors in the area at the foot of the stairs. The Agreement dealt with the stain colours in a schedule to the Agreement, which was executed by the Applicants. The staircases were indicated to be “glint brown” whereas the flooring was to be “mellow”.

Again, the Applicants freely admitted that the only issue was an aesthetic one. There was otherwise no material defect in the stairs or the main floor, other than in the Applicants’ view that the colours appreciably were different. The Applicants suggested that the only appropriate repair would be to rip up the main floor (as opposed to the stairs) and then match the new floor to the stain on the stairway. No estimates of this cost were given other than Mr. Ram’s opinion that it would cost between \$5,000.00 to \$10,000.00. Mr. Fortune testified that while the photograph submitted was of the stairs and the floor, the colours in the photograph were not representative of what he witnessed when he attended at the Home. Mr. Fortune candidly admitted that if such had been the case, he would have agreed with this element of the Applicants’ claim.

Claim Number 6 – Wrong Extractor Fan

The Applicants submitted a sales brochure produced by Rosehaven, which had been used for certain Homes built by Rosehaven in the “Rouge River development”. In that sales brochure, there was an extensive list of “quality features” (some 116). One of the features of the brochure indicated as follows:

“Kitchen Features

#72 “Cypress AK9000” hood exhaust fan with six inch vent to exterior.”

The student at law representing Rosehaven objected to the introduction of this sales brochure on the basis of the parole evidence rule and the “entire agreement” clause in the agreement. The Tribunal overruled these objections and admitted the document to evidence.

In the Agreement, Schedule “A” tracked exactly the items listed in the “quality features” of the sales brochure (which was Exhibit 9). There was one exception. Number 72 in Schedule “A” of the Agreement read as follows:

“72 Coloured hood exhaust fan with six inch vent to exterior”.

Mr. Ram testified that he had gone to a model Home in the Rouge River development to look at the design of the Home, which he ultimately purchased. He claimed that a “Cypress AK9000” fan has actually two fans whereas the fan installed in his Home has only one. Rosehaven and the Program took the position that the Applicants received exactly what they bargained for in the Agreement, namely a coloured hood exhaust fan with a six inch vent to exterior. There was some dispute in the evidence as to whether or not the fan had one or two speeds. Mr. Ram claimed the fan was “noisy” and that the family could not use it at the lower speed.

Claim Number 7 – Water Ponding at “Walkup”

The parties agreed that initially the builder had recognized that a repair was necessary to the exterior landing of the patio doors at the basement of the Home. A photograph was introduced into evidence at Exhibit 10, which appeared to the Tribunal to indicate that the parging, which the builder had placed over the concrete slab had come away to a certain minimal extent. During argument, the Applicants tried to introduce a picture of the steps as they existed at the date of the argument. The Tribunal declined to accept the picture on the basis of timeliness. Mr. Ram admitted that the water no longer ponds on that section of the stairs, but submitted that the parging would simply “flake off” over time.

Claim Number 8 – Missing Header (Back Window)

A photograph of the area was introduced at Exhibit 12. Mr. Ram testified that the fact that the header is not there would cause difficulty in the future when he goes to renovate the basement. Specifically, he is concerned that a heating duct will have to drop two inches below the window and this will affect the light coming in the window. A raised wooden deck is immediately outside the window and the parties agreed that the deck would obstruct, to a certain degree, light coming through the window in any event. Mr. Puzzolanti admitted that the header does not exist as indicated, but suggested that there was no structural issue concerning the first floor.

Mr. Puzzolanti testified that the floor area does not require a header, because there is no structural beam that is penetrated by the joist system.

Claim Number 9 – Wrong Pedestal Sink

The parties agreed that following occupancy, a mirror in a bathroom on the first floor fell off the wall and damaged the original pedestal sink which had been installed beneath the mirror.

Two photographs of the sink were submitted, respectively Exhibits 13 and 14. Mr. Ram candidly admitted that the colour complaint which he was making, was not readily apparent from the photographs submitted. Mr. Ram complained that the sink is unsightly because one can see the plumbing behind the sink if one stands far enough back from the sink and outside the bathroom. Mr. Ram asserted that the replacement sink was a “lower grade” and the white did not exactly match the toilet in the bathroom. The sink was not installed in Mr. Ram’s presence. Mr. Fortune of the Program did not see the first sink that was installed and had nothing to compare it to.

Claim Number 10 – Basement not Continuously Wrapped with Waterproof Membrane

The parties agreed that two exterior “wing walls” which sit on either side of a walkout stairs leading up to grade are not wrapped with a waterproof membrane. The parties agreed that these “wing walls” are not exterior walls. However Mr. Ram complained that the detail was necessary so as to prevent the “inside” of the wing walls becoming damp when it rains. Extensive evidence was given by Mr. Puzzolanti concerning the necessity for a waterproof membrane in circumstances for a wall at and below grade.

Claim Number 11 – Ducts not Vacuumed

The Agreement provided that air ducts would be cleaned prior to occupancy. Mr. Ram claims that the heating and cold air return ducts of the Home were vacuumed, prior to occupancy but not very well and therefore not in accordance with the Agreement. He suggested that the procedure used for the duct cleaning was improper, although he did not witness it personally. He indicated that his opinion arose from his experience in his previous home. Apparently, there were no “cut ins” to the duct work, as had been the case as Mr. Ram experienced in the past. On behalf of the builder, Mr. Puzzolanti testified that the “cut in” methodology was not used in the circumstances because that method is only effective when a furnace is also being cleaned. Mr. Puzzolanti testified that the ducts, in fact, were cleaned.

Claim Number 12 – Rough and Uneven Areas on the Steps Leading up from the Basement

Photographs of this area were produced at Exhibit 15, 15A and 15B. Mr. Ram testified that initially his complaint was with respect to the “interior of the wing walls” which was duly repaired by the builder. However, Mr. Ram testified that the workmanship along the risers and each stair was rough and uneven.

Claim Number 13- Building not Graded as a “Lookout Lot”

A lot diagram was contained in Schedule “L” of the Agreement. Mr. Ram’s lot was Number 33. In handwriting on the lot diagram was the indication “L/O” for Lot 33. The parties agreed that Mr. Ram’s lot was supposed to be “a lookout lot” although the parties disagreed as to what exactly this meant in practice. Mr. Puzzolanti described it as a “marketing term” which describes a circumstance where a portion of a basement is below grade, and as such a window can be installed in the basement from which an adult person of ordinary will be able to “look out”.

Mr. Ram testified that prior to the construction of the Home, he could not tell precisely what that grade would be in the rear of his property, because there was a large pile of topsoil located there. Mr. Ram testified that he paid a premium of \$9,000.00 for a “lookout lot”. Mr. Ram expected that his first floor would be significantly higher off the ground and this is what is meant by a “lookout lot”. Practically speaking, he expected to be able to walk up three stairs from his basement door to grade, as opposed to the eight stairs that were ultimately installed at his Home given the grade. In any event, Mr. Ram believed that at the rear of his Home there would be a better opportunity for greater light infiltration as a result of the higher first floor.

The Law

The *Ontario New Home Warranties Act Plan Act* was recently amended. However, at the time of the facts material to this claim the relevant sections of the “old” Act were as follows:

Section 14 of the Act provides:

“14(1) Where,

(a) a person who has entered into a contract with a vendor for the provision of a Home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor’s failure to perform the contract;

(b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty; or”

Certain general principles concerning the jurisdiction of the Tribunal and the general purposes of the Act are relevant to the application of the law to the facts as found by the Tribunal.

While the Act gives a person (in Section 14(1)(a)) and an owner (in Section 14(1)(b)) an entitlement to seek compensation from the guarantee fund following a hearing before this Tribunal, in the event the Program denies such claims it cannot be implied from the language of the Act that the jurisdiction of this Tribunal is exclusive and a person or an owner is precluded from seeking a remedy from the vendor of a Home in another forum, namely the Ontario Court of Justice. (*Belanger vs 686853 Ontario Inc.* 74 O.R. 2nd (114)) DCO 1990,

Wright D.C.J.).

The general purposes of the Act were summarized by Judge Zalev (as he then was) in the *Ontario New Home Warranty Program v. Crown Trust Co.* (1984), 50 O.R. (2d) 588, 32 R.P.R. 214 (Co. Ct.)[affd (1985), 50 O.R. (2d) 593 (note (C.A.))], at p. 590 O.R. , p. 217 R.P.R.. Judge Zalev said;

“In my view the object of the statute is to provide the warranties set out in s. 13 of the Act to persons who first acquire a Home from its vendor for occupancy, and to protect such persons from any unscrupulous, financially irresponsible, or technically incompetent person from whom they might purchase”.

The Applicants bear the onus of proving that their situation falls within the meaning of the relevant sections.

Application of Law to the Facts

Benny Ram is an accountant who works for the Alcohol Gaming Commission of the Province of Ontario. He admitted he has no particular experience in building other than having performed some renovations to a home which he previously owned. However, during argument Mr. Ram asserted he was an “expert” on construction. The Tribunal advised Mr. Ram that it did not accept him as an expert in this area as he had not given evidence which would satisfy the Tribunal of his expertise in this area. The only witness for the Applicants was Mr. Ram. Accordingly, the Tribunal had no expert evidence on behalf of the Applicants. Further, the Tribunal had no evidence of any estimates to repair or value the matters at issue from the Applicants other than the opinion of Mr. Ram. Because Mr. Ram is not an expert in such matters, Mr. Ram’s opinion with respect to damages is not evidence on which the Tribunal can rely.

The Applicants have the burden to prove on the balance of probabilities that they have a cause of action against a builder for damages resulting the builder’s failure to perform the contract or damages resulting from a breach of warranty by the builder. Also, the Tribunal may deal only with claims to which the statute applies. Further, evidence of damages must be adduced which is credible.

In general terms, the Applicants’ most serious complaint was resolved at the beginning of the hearing. The majority of issues heard by the Tribunal were ones of aesthetics and perception insofar as they did not relate to the use, operation, efficiency or functionality of the Home. With those overall comments in mind, the Tribunal makes the following decision concerning each of the issues before it.

Claim Number 2– Garage Drywall Finish Poor

During argument, Rosehaven’s counsel indicated that they would be prepared to pay

something to paint the unpainted frame around one of the garage doors. Also, the photograph of the drywall at Exhibit 18B indicates that there is a gap between the drywall panel and the frame around the garage door. The Tribunal can understand that the Applicants would be “annoyed” at what was clearly deficient work. However, the deficiency is quite minor but not up to a workmanlike standard and represents a breach of the statutory warranty. Accordingly, the Tribunal orders that the Ram’s be compensated in the amount of \$50.00 in respect of this item.

Claim Number 3 – Wrong Bathtub

From the photographs submitted, it appears the bathtub is not “as oval” as from the pot light location diagrams at Schedule X of the Agreement but, looking at the photograph of the bathtub, the shape appeared to the Tribunal to be in the shape of an “oval” if one understands oval’s to be shaped in a manner similar to a horse racing track or a track where the Daytona 500 is held. The Tribunal therefore find that the bathtub is an oval bathtub. The bathtub functions as it was suppose to. It certainly looks like it has a lovely finish in what is otherwise a very lovely Home. The Applicants’ complaint in this regard is dismissed.

Claim Number 4 – Wrong Backer Board in Showers

The Tribunal accepts the evidence of the witness for Rosehaven, Mr. Puzzolanti, that while the product used was not “wonder board” it was equal or better quality. The shower has not failed. Accordingly, the Applicants’ complaint in this regard is dismissed.

Claim Number 5 – Different Stain on Hardwood Floor

The photograph accepted into evidence indicates a difference in colour between the stairs and the ground floor. However, the Tribunal accepts that on occasion, photographs do not accurately indicate colour. In this circumstance, the Tribunal relies on the eye witness evidence of Mr. Fortune to find that the shade difference in the colour of the stain is minor, not readily apparent and is acceptable. The Tribunal finds that this complaint does not fall within the warranties provided by the Act, and accordingly, is dismissed.

Claim Number 6 - Wrong Extractor Fan

The Applicants got what they bargained for. The Applicants had independent legal advice when reviewing the contract. From the evidence, the Tribunal finds that the Applicants were people who are very meticulous and pay close attention to detail. It is this attention to detail which founds the basis of many of their complaints. It was difficult for the Tribunal to accept what it took to be the Applicants’ submission that the Applicants failure to read the fine print is to be excused because they were simply lay people. The evidence was clear that the Applicants got what they bargained for in the contract and no evidence that was persuasive was introduced to the Tribunal to allow it to find that somehow the operation of the fan was so deficient as to materially affect the Applicants’ use of their Home.

Claim Number 7 – Water Ponding at Walkup

It appeared from the photograph of the area that the cement material that had been placed on top of the slab at this door was coming off. The Tribunal finds that this workmanship is not sufficient and awards the Applicants the sum of \$25.00 in respect of this particular item.

Claim Number 8 – Missing Header

The parties agree that the header is missing, however there was no evidence to suggest the structure of the Home was adversely affected or that this is a deficiency resulting from poor workmanship. Accordingly, the Applicants claim in this respect is dismissed.

Claim Number 9 – Wrong Pedestal Sink

The Tribunal finds that the pedestal sink as installed by the builder is “white”. There was no photograph of the toilet, preventing the Tribunal from determining if the two “whites” of these facilities actually matched. The Tribunal finds that this item is not warrantable and the Applicants’ claim is dismissed.

Claim Number 10 - Basement not Continuously Wrapped with Waterproof Membrane

The Tribunal finds in these circumstances that the wing walls do not require an air gap waterproof membrane as no interior space is affected. The Applicants’ claim in this respect is dismissed.

Claim Number 11 - Ducts not Vacuumed

Mr. Ram agreed that the ducts had been vacuumed, only not to his liking. The Tribunal prefers the evidence of Mr. Puzzolanti over Mr. Ram in this regard. Neither were present when the ducts were vacuumed. Again, the onus is on the Applicants, and they have failed to prove that this is an item that is covered by the warranty, and accordingly this element of the claim is dismissed.

Claim Number 12 – Rough and Uneven Areas Leading up from the Basement

The photograph of the area shows what appears to be a common finish for exterior stairs, particularly those that are below grade. No evidence was led as to how this alleged defect adversely affected this particular detail of the Home. Accordingly, the claim is dismissed.

Claim Number 13 – Lookout Lot

It appears from the photographs of the basement that were provided to the Tribunal that one can in fact look out from the basement to above grade. There was no evidence before the Tribunal which would allow it to determine whether or not “look out” was a building science

term or simply a marketing term. Again, the Tribunal believes that the Rams got what they bargained for in this respect. Accordingly, their complaint on this issue is dismissed.

Costs

On several occasions during the evidence, counsel for Rosehaven intimated to the panel that he would be seeking an award of costs in this case. The Tribunal was recently given the authority to award costs in certain circumstances.

In the Tribunal's view, although the Applicants were not successful in the main with respect to many of the complaints that were brought forward, this is not a situation where costs are warranted. The applicant conducted himself in an appropriate, gentlemanly and reserved manner. He certainly did not do any better or worse in presenting his evidence than did the solicitor for the Program, or the student-at-law for Rosehaven. The Tribunal believes that the costs sanctions recently enacted are meant to deal with "extreme" scenarios. In this Province, administrative Tribunals historically have had significantly more relaxed rules of procedure and approaches to adjudication of disputes than the courts. The costs provisions are to discourage those litigants who act unreasonably, frivolously, vexatiously or in bad faith. Clearly, this is not what occurred in this case, although the Tribunal could understand why an objective person may believe that bringing forward the complaints as the Applicants did, might have warranted a cost sanction were the matter adjudicated in the civil courts. Clearly, litigants do benefit when represented by counsel, both from the counsel's experience, knowledge of the law and understanding of procedure. However, in this case, while the Applicants were unrepresented, they presented their case in a useful and organized way that permitted the Tribunal understand fully the issues and the position of the Applicants. Accordingly, there is no award of costs.

Decision

Pursuant to the authority vested in it under section 16(3) of the *Ontario New Home Warranties Plan Act*, the Tribunal orders that:

1. With respect to the Applicants' claims number 2 and number 7 the Program shall forthwith pay to the Applicants the total of \$75.00 in full satisfaction of such claims; and,
2. In all other respects the Applicants claims are dismissed.

LICENCE APPEAL TRIBUNAL

F. Bruce Fitzpatrick, Vice-Chair

RELEASED: February 28, 2002

0939 - ADLS - NOMC

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: JEFFREY M. LEE, D.C.,
Presiding Member

APPEARANCES: LUBA NEUWIRTH,
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF
HEARING: January 25, 2002

Toronto

DECISION

A hearing was held on January 25, 2002, at Toronto, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee, D.C., Presiding Member

RELEASED: January 28, 2002

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: JEFFREY M. LEE, D.C.,
Presiding Member

APPEARANCES: LUBA NEUWIRTH,
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF
HEARING: January 25, 2002

DECISION
RELEASED: January 28, 2002 Toronto

REASONS FOR DECISION

A hearing was held on January 25, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on January 28, 2002, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated January 8, 2002, and was received by the Tribunal on January 8, 2002, together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

There were no preliminary matters. The documents presented to the Tribunal were entered into evidence with the permission of both parties. The hearing proceeded.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice to Registrar.
- b) Exhibit # 2 Notice of Appeal.

By the Respondent:

- a) Exhibit # 3 MTO Submissions total pages 21.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

- 50.1(1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
 - (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
 - (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

- 15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
 - (a) the name, telephone number and address, with the postal code, of the medical practitioner;
 - (b) the name, date of birth and address of the person who is the subject of the report;
 - (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

The Applicant was sworn and took the stand. He testified that on the December 27, 2001 at approximately 6:00 p.m., he was driving in Georgetown and was stopped by police. The Applicant testified that he had just completed a job estimate and was returning home when he was stopped by police. The Applicant testified that he was put into the police car in handcuffs and asked to blow into the machine. The Applicant stated that it was difficult to blow into the machine because of the pain in his back. He did not tell the officer that he was having difficulty providing the breath sample because of the pain. The Applicant testified that he was given three opportunities to provide a sample of his breath but was unable to provide them due to his back pain. The Applicant testified that he was subsequently charged and then released. The Applicant was asked if he had any previous experience in providing a breath sample. The Applicant stated that he had done this test four or five years earlier and that he knew what was required. The Applicant also testified that he had lost his drivers licence for unpaid fines. When asked by the Representative for the Respondent if he had anything to drink that day, the Applicant responded, "No, nothing." The Applicant had nothing further to add and was excused from the stand.

Police Officer # 1 was called to the stand. He was sworn and gave the following evidence. He testified that on December 27, 2001, he was working for the Halton Regional Police on the 6:00 p.m. to 6:00 a.m. shift. He was in a marked police cruiser. He testified that he observed a truck licence 7148HE approaching him at a high rate of speed. He activated his radar device and took two readings. One reading 95km /50 and the other 98km/hr in a posted 50km zone. Police Officer # 1 made a U turn and caught up to the truck. Police Officer # 1 then observed the above noted truck fail to come to a complete stop at a four way stop. Police Officer # 1 initiated a stop and pulled the truck over. The driver of the vehicle was identified as the Applicant. The officer testified that he detected an odour of an alcoholic beverage. The officer testified that he asked the driver "have you had anything of an alcoholic beverage to drink today?", the Applicant responded, "two glasses of wine". Police Officer # 1 read the demand for a breath sample to the driver. The Officer requested that the Applicant provide a breath sample into the approved road side screening device. According to the officer, the device will read either pass, 12 hour suspension or fail. Fail would indicate over 100mg of alcohol. The Applicant sat in the driver's seat of his truck and the officer produced the machine. He testified that he demonstrated how to provide the sample to which the Applicant stated that he understood. The Applicant provided a sample of his breath as requested and the Applicant failed the road side test.

Police Officer # 1 arrested the Applicant for impaired operation of a motor vehicle and place the Applicant in hand cuffs and escorted him back to his cruiser. The Applicant was transported back to the station. The Applicant, according to the officer would not answer his questions or respond to him with regard to wanting to see duty counsel. The Applicant remained silent. According to Police Officer # 1, the Applicant refused to get out of the cruiser at the police station. The Applicant was finally removed from the car and brought into the breath room. The Applicant was again cautioned about failing to provide a breath sample. According to Police Officer # 1, he did not observe the Applicant to be in any medical distress or require any medical attention. The Applicant was not short of breath, was not wheezing or

complaint of any medical condition that would have prevented him from providing a breath sample. The officer stated that the Applicant did mention that he had low back pain and took medication for that. The Applicant was given numerous opportunities to provide the sample but did not comply. In his attempt he blew air into his cheeks, thus no air entered into the machine. The Applicant was asked if he understood the consequence of not providing a breath sample and he stated that he understood. He was subsequently charged.

When asked to sign a promise to appear, he stated that he wanted an interpreter. A friend of his came down to the station and translated (according to the officer, the friend asked the same questions mostly in broken English, to which the Applicant responded). The Applicant signed the forms and was released. The Applicant was asked if he had any questions of the officer to which he replied, "no". The Tribunal indicated to the Applicant that this would be the only time that he would be allowed to ask the officer any questions about the testimony given by the officer, to which the Applicant indicated that the officer was truthful and he did not dispute any of the testimony. The officer was excused from the stand.

The Tribunal accepts the evidence presented by Police Officer # 1. The evidence presented was straight forward and well documented. The evidence presented by the Applicant was sketchy and misleading. The Applicant made no attempt to link a medical condition to his inability to provide a breath sample.

In an appeal of this nature, the onus is on the Applicant to substantiate his position. The documents submitted by the Applicant do not substantiate his claim to the effect that he had a present medical condition that precluded him from providing a breath or blood sample.

The report of Physician # 1, the Applicant's medical practitioner, fails to meet the specific requirements of Section 15(1) of Regulation 574 of the *Highway Traffic Act* respects: Physician # 1 indicates on the notice of appeal that the last visit after a fall which was a WCB related accident, the Applicant was seen monthly. There is no indication of how the WCB accident would affect the patient's ability to provide a breath sample. Physician # 1 indicates that x-rays were taken on February 27, 2001, however what area was x-rayed was not indicated nor were the results of such x-rays included. The report sheds no light on the medical condition, which is the basis of his appeal.

The report of Physician # 1 has failed to meet the requirements of section 15(1) and the Tribunal attached no weight to this report.

APPLICATION OF THE LAW TO FACTS:

Reviewing the foregoing facts, the Tribunal finds that the Applicant did not relate his medical condition to Regulation 574 and Section 50(1)(2)(b).

The evidence is clear that the Applicant refused to blow for no stated medical reason. The evidence submitted suggests the actions of the Applicant were such as to lead this Tribunal to believe that he had no intention of giving a proper breath sample. As indicated by the Applicant's testimony, he believed that the first sample provided to Police Officer # 1 was sufficient (which registered a "fail", over 100) and that he did not understand the need for a

further sample and why he was charged with failure to provided a breath or blood sample. It was explained to the Applicant that further breath was required at the police station to obtain an accurate reading as to the amount of a lcohol he had in his system. The Applicant blew into his cheeks and not the instrument as instructed and demonstrated as well as blowing around the mouth piece. These are all actions to prevent a suitable sample from being retrieved and not the action of someone having difficulty in providing a sample because of a medical condition.

The Applicant has not discharged the onus to establish a valid medical reason for his failure to provide and his refusal to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated December 27, 2001 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee, D.C.,
Presiding Member

RELEASED: February 4, 2002

FILE NAME:0939.adls.Reasons

VALIANT, EDWARD AND SUZANNE

EDWARD AND SUZANNE VALIANT

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSE OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: WILLIAM MCINTOSH, Vice-Chair

APPEARANCES:

BRUCE DRAKE, Counsel for the Applicants
KENNETH ROSENBERG AND KAREN JONES, Counsel for the
Ontario New Home Warranty Program

DATE OF
HEARING: October 10, 2001 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an Appeal by Edward and Suzanne Valiant (the "Applicants") from a decision of the New Home Warranty Program (the "Program") contained in a letter (the "Decision Letter") of January 16, 2001. The Decision Letter was in response to a claim for the loss of a \$20,000 deposit paid on account of the purchase price under an agreement of purchase and sale. The claim of the Applicants was made pursuant to the provisions of section 14(1)(a) of the *Ontario New Home Plan Warranties Act* R.S.O. 1990 chapter 31 (the "Act").

FACTS:

The Applicant, Mrs. Valiant, outlined the events leading up to the purchase. She was transferred to the Toronto office of her employer Royal Insurance ("Royal") from its Halifax branch. Royal had a transfer program whereby it would issue a cheque for the deposit monies on the purchase of new homes of transferred employees until such time as the employee's former residence was sold, at which time the company would be reimbursed out of the proceeds. The testimony of the witness called on behalf of Royal made it clear that the deposit advance was a repayable loan for which the Applicants remain liable and was not a grant.

The Applicants agreed to purchase and signed an agreement of purchase and sale ("APS")

for Lot 77 Plan 65M-3100 ("Lot 77"). They paid a \$20,000 deposit that is the basis of the claim now before the Tribunal. The Vendor was Enchanted Homes, a registrant builder under the Act at the time of the agreement. The agreed closing date was September 5, 1997.

The Valiants found that the home on Lot 77 would not be built by the September 5, 1997 closing date. As Mrs. Valiant stated in her testimony when she arrived in Toronto to take up her new position, "... there wasn't even a hole in the ground". As there was no possibility of their new home being ready, and as they had a ailing two year old child, the Applicants decided to enter into what they thought would become a new arrangement with Enchanted Homes namely an amendment to the APS for Lot 77.

After negotiations, which the Applicants thought had been finalized, the Applicants signed a document which would have given them title to a new property on Lot 68 in lieu of Lot 77, with an intervening period of leasehold on that property allowing them occupancy until the agreed closing date for Lot 68 of September 20, 1997. The Applicants forwarded the document to the Vendor expecting an acceptance for the completion of the transaction. They were given a key to the new premises by the site manager of Enchanted Homes. No completed version of the amendment to the agreement of purchase and sale was received in evidence. A possible explanation was contained in correspondence from the solicitors for Enchanted to the effect that as they did not have a copy of the attempted new agreement regarding Lot 68 as it was directly between the Applicants and the owner of Enchanted, Mr. Harry Weingarten. The rent stated in the purported amendment was to have been \$3,500.00 per month and a cheque for two months rent was drawn in favour of Enchanted Homes.

Mrs. Valiant testified that after taking occupancy of Lot 68, she found that refurbishments to Lot 68 which she had contracted for with Enchanted were not done, and she ordered a stop payment on the rental cheque. In early August, Mrs. Valiant made a detailed list of the Applicants' complaints with Lot 68 and forwarded it to their solicitors. The Applicants also forwarded \$800.00 which they considered a reasonable rental payment for the period of the actual occupancy, being part of August and part of September.

After the Applicants had occupied Lot 68, the solicitors for the Mortgagee of the property by letter dated August 6, 1997 informed the Applicants' solicitors that the Applicants were illegally in possession of Lot 68. The Applicants' solicitors responded, informing the solicitors for the Mortgagee that a representative of the builder had let the Applicants into the property, and to the Applicants' knowledge that representative had legal capacity to deal with the property. This assumption was in error as Enchanted had been placed in bankruptcy. Although a Notice of Sale Under Mortgage dated June 13, 1997 had been sent to Mr. Weingarten and others with a default date of July 19, 1997, Mrs. Valiant testified that until there was a knock on the door by a representative of the Trustee telling her to vacate, she did not know of any difficulty with the title to the property.

Mr. Weingarten did not testify at the hearing before this Tribunal.

The capacity of Enchanted to complete what the Applicants thought was an amendment to their original agreement was shown to be a false assumption when the Applicants' solicitors received notice of a transfer title of Lot 68 under a Mortgagee's Power of Sale.

The Applicants' solicitors made a claim against the Program under section 14(1)(a) of the Act by letter dated August 22, 1997. The Program responded by sending the Applicants claim forms, which were signed on September 26, 1997 and returned to the Program on October 1, 1997, along with copies of the original agreement for Lot 77, the purported amendment and a copy of the deposit cheque for \$20,000. There were a number of telephone calls between the Applicants' solicitors and the Program attempting to clarify matters. The Applicants' solicitors sent a letter March 20, 1998 to the Program informing the Program that the solicitor presumed there was a completed amendment in the hands of Enchanted's solicitors. As stated, this was not the case.

By a letter dated May 7, 1998 the Program informed the Applicants that their claim could not be processed regarding Lot 68 as the only signed agreement was for Lot 77. The Program was also concerned that there was no satisfactory explanation of the arrangement between the issuer of the deposit cheque, Royal, and the Applicants.

Mrs. Valiant testified that, due to the condition of the house, at the end of September they moved from Lot 68 to a new home unconnected to the properties in issue in these proceedings.

By letter dated December 14, 1998, the Applicants' solicitors responded to the Program's letter of May 7, 1998. They explained the loan arrangement with Royal and its transferred employees, stated the Valiants' position regarding Lot 68 due to concerns over title and the condition of the property, and explained that \$800.00 was appropriate rent for the time the Applicants spent in Lot 68 during part of August and September 1997 because the lessor failed to make agreed repairs to the premises.

The Program responded to the Applicants' letter of December 14, 1998 by letter of December 24. In that letter the Program refused to pay the claim on Lot 68 until such time as a satisfactory explanation was given regarding the deposit cheque and the fact that the only signed APS was for Lot 77. By transmission on January 25, 1999, the Applicants' solicitors forwarded material to the Program to satisfy these requests. A follow up letter was sent on March 30.

It appears from the evidence that the Program's Decision Letter was sent to the Applicants' solicitors as there was a postal receipt to that effect dated June 19, 1999. Unfortunately, the letter was undated, and the Applicants' solicitors state they never received it.

After the lapse of almost a year, the Applicants' solicitors wrote to the Program by letter of May 16, 2000 enclosing a duly executed proof of claim, this time for Lot 77 the subject property of the original APS. The Applicants' position was that the bankruptcy removed the capacity of the

vendor to complete the amendment to the APS leaving the original APS with continuing legal effect and capable of forming the basis under the Act for a return of deposit claim.

The Program responded on May 24 acknowledging the May 16 letter, stating that it was the Program's position that the claim had time lapsed and referring to the undated letter of the Program. This was countered by letter of May 29 from Applicants' solicitors, taking the position that the Decision Letter had not been received and in any event the present claim was for a different property.

Numerous exchanges of correspondence followed. The Program's September 14, 2000 letter to the Applicants' solicitors asked for particulars surrounding the Applicants' new claim regarding Lot 77. By letter of September 26, 2000 the Applicants' solicitors sent the Program an outline of the facts behind the Lot 77 claim. The Program issued its Decision Letter, dated January 16, 2001, with regard to Lot 77. On the same day the Program also sent a copy of the undated Decision Letter refusing the original return of deposit claim on Lot 68; the reasons in this Decision Letter affect the Lot 77 refusal.

The Program's Decision Letter of January 16, 2001 respecting Lot 77, the claim before this Tribunal, provides the following reasons for refusing the Applicants' claim:

1. The Applicants were not ready willing and able to close the transaction for lot 77 which was the subject of the claim, and they did not prove that either the vendor Enchanted Homes or the lien trustee was unwilling to close.
2. The Program was not satisfied that the Applicants had in fact suffered a financial loss. The actual deposit cheque was issued by Mrs. Valiant's employer, Royal Insurance. The Program was not satisfied that the Applicants were bound to indemnify Royal for the deposit amount. Unless such an obligation were shown, Royal would be the party owed the deposit monies. As Royal could not be a party under the Act, it would have no standing to make a claim.
3. In any event, the amount claimed would have to be reduced by any outstanding rent owing on the property identified as lot 68 which had been occupied pursuant to a rental agreement which formed part of an amendment or an attempted amendment to the agreement of purchase and sale for lot 77.

The Program's undated Decision Letter respecting Lot 68 provides the following reasons for refusing the Applicants' claim in that matter:

1. There was no signed agreement of purchase and sale for Lot 68. The only signed agreement is with regard to Lot 77, and the amendment thereto regarding Lot 68 was not executed.
2. There was no evidence that the \$20,000 deposit paid by Mrs. Valliant's employer Royal Insurance was repaid by her, resulting in there being no economic loss.

3. In any event, any loss was offset by unpaid rent, amounting to a total loss at best of \$13,800.

LAW:

The Applicants' claim is based on section 14(1)(a) of the *Ontario New Home Warranties Plan Act* which states:

"Where,

- (a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract,

the person or owner is entitled to be paid out of the guarantee fund the amount of such damages subject to such limits as are fixed by the regulations"

The limit to the liability of the guarantee fund is found in section 6(1) of Regulation 892:

"A purchaser who has a claim under clause 14(1)(a) of the Act in respect of a purchase agreement entered into after the 30th day of June, 1988 is entitled to be paid out of the guarantee fund an amount for damages arising from the breach of the agreement by the vendor that does not exceed \$20,000."

The Act provides that benefits received by a claimant under 14(1)(a) must be offset by any amounts provable under section 14(2) which reads:

"In assessing damages, the Corporation shall take into consideration any benefit, compensation or indemnity payable to the person or owner from any source."

The Tribunal's authority to make an order under the Act is provided by section 16(3) of the Act which states:

"Where a person or owner gives notice in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and may by order direct the Corporation to take such action as the Tribunal considers the Corporation ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Corporation."

APPLICATION OF LAW TO FACTS:

The Applicants' position is that they paid a deposit for Lot 77, that the transaction did not close due to the vendor's failure to perform the contract due to bankruptcy, and that the Applicants are entitled to return of their deposit under section 14(1)(a) of the Act.

Counsel for the Program argued that the Applicants' claim must be denied on the basis of one

or more of the following arguments. Counsel argued that the Applicants do not have a cause of action, as required by section 14(1)(a), either because they were not ready, willing and able to close, or because they abandoned and are estopped from pursuing that course of action. As to estoppel, counsel argued that the Applicants are estopped from pursuing their claim for the refund of their deposit on Lot 77 (the property that was the subject of the original Agreement of Purchase and Sale) by their first claim for relief for Lot 68 (the second property which was the subject of an attempted amendment to the original APS). If the Applicants have a cause of action, counsel for the Program argued that they should not recover because they suffered no loss, or if they did suffer a loss, it was diminished by the benefits they received from the vendor.

1. Do the Applicants have a cause of action against the vendor?

(a) Were the Applicants ready, willing and able to close?

On the evidence, The Tribunal finds that the home on Lot 77 was not to be completed by the vendor by the closing date. The actions of Mr. Weingarten to have the Applicants move into the home on Lot 68 confirms this. The Applicants were prepared to close that purchase. When that lot was not available, the Applicants were prepared to close the purchase of the house on Lot 68 but were prevented from doing so by the bankruptcy of the vendor or the inability of the trustee to complete the home by the closing date.

(b) Are the Applicants estopped?

Council for the Program argued that the Applicants abandoned and are estopped from their cause of action, and that the Tribunal must therefore dismiss their claim under section 14(1)(a).

The Program takes the position that there was an abandonment of the first APS for Lot 77 with a transfer of the deposit to the new Lot 68, the subject of an amended APS. The Applicants claimed a return of their deposit on Lot 68, as evidenced by their solicitor's letter of March 20, 1998, thereby acting as though there was an abandonment of any rights under the APS for Lot 77. Counsel argued that this extinguished their right to assert a cause of action on the original APS, and Section 14(1)(a) requires such a cause of action before there can be a claim for compensation.

The Applicants take the position that any activity subsequent to the original APS is irrelevant to their claim under 14(1)(a) unless it can be shown that such activities take them outside of the section. They only claimed under Lot 68 as they believed an enforceable contract was in existence. As there was not, the Tribunal should view the claim as though the APS for Lot 77 remained in force.

The Tribunal finds that the Applicants first claimed the return of the deposit for Lot 68 believing that after they signed the amended APS it had been executed by the vendor, that the \$20,000 deposit had been applied to the new Lot 68 property, and that the original APS was

superceded. However, there was no acceptance of the amended APS by the vendor, through lack of legal capacity or otherwise. As there was no new contract, there was no alteration in the legal relationship created by the original APS.

The following cases were put before the Tribunal for assistance.

In the case of *Re Tudale Explorations Ltd and Bruce et al.* 20 O.R. (2d) 593, cited by the Program, an appeal was brought against an order of the Mining and Lands Commissioner of Ontario holding that certain mining claims were vested in the Respondent Tudale. The Appellant, Teck Mining Group, by written agreement with Tudale had been granted the right and option for three years to explore and develop certain claims. Under the agreement, all modifications had to be in writing and the option had to be exercised within three years. It was accepted as evidence that a telephone conversation had taken place between the principals of the two companies subsequent to the signing of the contract regarding an extension of time for the exercise of the option. The details of the extension were not put in writing as required by the contract. There was no agreement as to the exact length of time of the extension. There was conduct, however, showing an intention to allow a yet to be determined amendment to the original agreement. The Respondent took the position that this subsequent conduct was not sufficient to prohibit him from insisting upon his rights under the signed contract. Teck purported to exercise the option, and in opposition Tudale applied to the Commissioner for an order vesting the claims in it. The Commissioner held for Tudale rejecting Teck's argument that the promises subsequent to the original contract were relied upon to its detriment and that Tudale was estopped from relying upon the original terms. The Court on appeal held that Tudale could not insist upon the terms of the original contract being enforceable. Grange J quoted from Snell's Principles of Equity 27th ed. (1973), p.563 to elucidate what he believed to be the rule of promissory estoppel.

"Where by his words or conduct one party to a transaction makes to the other an unambiguous promise or assurance which is intended to affect the legal relations between them (whether contractual or otherwise), and the other party acts upon it, altering his position to his detriment, the party making the promise or assurance will not be permitted to act inconsistently with it."

Wauchope v Maida et al [1972] 1 O.R. 27 dealt with an oral agreement to alter the original terms of a written agreement. The Appellants were the owners of a property which they had agreed to sell to the plaintiff pursuant to a written agreement. The contract stated that the purchaser would assume a mortgage bearing an interest rate of 10%. On receipt of the statement of adjustments the purchaser and her solicitor discovered that a mortgage had been arranged by the vendor as called for in the agreement but at 10½% not 10%. Discussions ensued and the trial judge found as a fact that a new arrangement was entered into orally whereby a new second mortgage for \$9,000 instead of the original \$10,000 would be given back, the \$1,000 difference being compensation for the ½% variation in the first mortgage rate. Despite these negotiations, the plaintiffs at closing insisted that the transaction proceed in accordance with the original agreement of purchase and sale. At trial it was held that the

alteration to the original contract was a mere “waiver” unsupported by consideration and therefore revocable provided notification was given to the defendant before he acted upon the alteration to his detriment. This not being the case, the plaintiff was excused from completing the contract on the amended terms. On appeal it was held that the plaintiff’s position was untenable. The contract was still in an executory state and in such a state a promise can be good consideration for a promise. The variation or “waiver” was therefore not a negotiation unsupported by good and valid consideration. The court continued that although not in writing and therefore offending the *Statute of Frauds*, the variation albeit oral may be used as a defence in an action for breach on the original contract. Thus in an action by the purchasers for the return of their deposit, the defendants can raise the assented to variation as a defence to such a claim. As the Appellants were ready and willing to close the transaction on the altered basis, the Respondent purchaser’s refusal to close on that same basis amounted to a repudiation and a forfeiture of their right to the return of their deposit.

In the case of *Owen Sound Public Library Board Mial Developments Ltd et al* 26 O.R.(2d) 459, the Court of Appeal had to decide when and under what circumstances legal relations between contracting parties are altered when there is evidence that the intention of the parties is to change the nature or extent of the obligations of the parties while the contract is in an executory state. The original agreement called for payment by the owners within 5 days of the issuance of an architect’s certificate authorizing such payment; if the payment was in default past 7 days of such issuance, the contractor was entitled to terminate the contract upon 5 days notice. On the occasion of one such payment authorization, the owner asked the contractor for a formally executed document from a sub contractor backing up the architect’s certificate, and the contractor agreed. The contractor did not secure the document, and when the time for payment elapsed, he attempted to terminate the contract according to its original terms. The owner sued for breach of contract and was denied in the court below and appealed, stating as grounds that the trial judge erred in finding that the intention of the promisor was a prerequisite to the invocation of the doctrine of promissory estoppel. The court was asked to conclude that the contractor’s promise to obtain the documentation requested by the owner was a sufficient basis upon which the owner could reasonably believe that its obligation to forward payment would be in abeyance until the contractor had lived up to his new undertaking. The Court of Appeal in allowing the appeal canvassed a series of cases dealing with the issue of the rights of the parties to contracts in an executory state when on the evidence adduced the terms can be said to have been altered by the conduct of one of the parties. The authorities show that the equitable defence of promissory estoppel has been available and has always centered around the requisite intention of the promisor to actually have agreed to an alteration in the terms of the contract. LaCouriere J. concluded that his review of the authorities shows that while both intention and knowledge are necessary for the operation of the doctrine of promissory estoppel, the intent to alter legal relations does not require direct statements to that effect but may be inferred through the evidence. In the case before him, there was sufficient evidence to show that an experienced contractor giving a promise to obtain a certificate had the requisite knowledge of the relationship for the court to infer that there was an intent to alter the legal relationship, respecting the time limit for authorizing payment.

In the case of *Rock v Foster* [1988] O.J. No. 1784 before Chadwick J., an action for specific performance was brought against the Defendants Foster and Ralroy Corporation. The action was based upon an agreement of purchase and sale dated September 9, 1987 with a closing date of December 18, 1987. On November 20, 1987 Ralroy entered into another agreement of purchase and sale with Horn for the same property at an increased price. The first agreement with Rock was conditional upon both the sale of the Rocks' existing property by December 4th and the Rocks satisfying themselves that a building permit and septic system were possible. Failing either condition, the agreement became void. As well, the agreement contained a stipulation that the vendors could offer the property to others and in the case of a higher offer notify the Rocks by ordinary mail or delivery of the offer, giving the Rocks 72 hours to match the new price and to waive the conditions by notice in writing. Failure to abide by this provision would result in the agreement becoming void and the deposit being returned without interest. The court accepted the evidence of the defendant Foster, the principal shareholder of the vendor Ralroy Corporation as to what the defendant Horn understood to be the conditions attached to the agreement between them, particularly the "escape clause" available to Rock. Foster was not able to deliver the "Notice of New Offer" to Rock until November 22nd. The original form of the Notice contained an expiry date for the exercise of Rock's rights of waiver of 11:59 on November 24, but because of the difficulty in delivering the Notice to Rock the vendor adjusted the time of expiry to 11:59 on November 25. This extension of time granted to Rock was conveyed to Horn. Horn upon this notification did not take issue with the alteration from the original agreement between them. In the morning of November 24, Rock called Foster informing him that the waiver would be exercised and the sale to Rock could proceed. The contract reducing this conversation to writing did not in fact take place until November 25, however the court accepted that the conversation constituted an agreement. Horn's solicitor advised Foster that as the right to waive the conditions was not exercised by 11:59 on November 24th, as stipulated in the original agreement between Rock and Foster(Ralroy), he was registering a *lis pendens* against the property. The Rocks were at all times ready willing and able to close. The Trial judge, on the basis of Foster's conversation with Horn as to the new arrangement with Rock, extending the 72 hour requirement from that set forth in the original agreement, found that Horn understood there to have been such a change and that he did not object to it. The Court also accepted the evidence of Foster that this lack of objection convinced him that it was not necessary to advise the Rocks to give them a chance to act within the originally agreed upon allotted time to exercise their waiver rights. This lack of objection by Horn was enough in the Court's mind to create a reasonable belief in Foster's mind that Horn had accepted the new time limit thereby creating an estoppel to Horn's insistence upon the original time.

The Tribunal was also referred to the case of *Robichaud v Caisse Populaire de Pokemouche Ltée*. 69D.L.R. (4th) 589. In 1983 the Caisse obtained a judgment against Robichaud in the amount of \$3,887. As well the Royal Bank brought an action against Robichaud claiming \$10,000. Mr. Robichaud informed his creditors of his financial difficulties and that he was contemplating bankruptcy. The bank and the Caisse both agreed to settle their claims against Robichaud for \$1,000 each. The Caisse through its manager confirmed the arrangement in writing. Subsequently, the Caisse's board refused to ratify the arrangement. The plaintiff

brought suit to enforce the agreement made between himself and the Caisse. The legal position taken at trial by the Caisse was that the bargain struck with the plaintiff was void for lack of consideration. The Trial Judge agreed. On appeal, the appeal court reasoned that even if the law did not permit the extinguishment of a debt for less than the amount owed, the doctrine of estoppel can be invoked. The evidence before the trial judge was that after receiving the assurance from the Caisse, the plaintiff rearranged his financial situation by hiring lawyers and mortgaging the matrimonial home. In the appeal court's opinion Robichaud had suffered the requisite detriment flowing from the promise of the promisor (the Caisse), and Rice JA held that :

..."If the principle of promissory estoppel could be invoked successfully as ground of defence in an action by the Caisse Populaire against the appellant, then considering the relations between them, to refuse its application on the pretext that it is not invoked as grounds of defence is, in my opinion untenable, and contrary to the principles of equity on which the doctrine is based. In the case at bar the appellant is merely asking that the Caisse Populaire respect the promise that it made to him and upon which he relied to his detriment"

From the foregoing court decisions, it is clear that estoppel is dependent upon the intent of the parties to effect a change in their legal relationship. In the matter now before this Tribunal, there is a mistaken belief in one party to an agreement that an alteration in the legal relationship between them had occurred. There was no alteration due to the legal incapacity of one of the parties.

In argument, counsel for the Applicants directed the Tribunal to the Reasons in the Program's Decision Letter dealing with the Applicants' claim for return of deposit on Lot 68 (the first claim). The Program refused the claim because no signed Agreement of Purchase and Sale was produced on which to ground a cause of action by the Applicants against the vendor, Enchanted Homes, under section 14(1)(a). The Reasons explained that there was a signed Agreement of Purchase and Sale for lot 77 but not a change to Lot 68. There was no disagreement that section 14(1)(a) does not operate without a breach of a duly signed APS giving rise to a cause of action through bankruptcy or failure to perform.

The evidence was that the Decision Letter dealing with Lot 68 was sent by registered mail on June 18, 1998 to the Applicants' solicitors. Future correspondence from those solicitors indicates that the Program's decision was received orally by their firm and a copy of the undated letter was forwarded to the Applicants' solicitors. A plain reading of this decision would have led the recipient to believe that it was Lot 77 that had to form the basis of a claim for return of deposit and that any claim against Lot 68 was invalid for want of a contractual nexus between vendor and purchaser. The Applicants took the further position that an appeal under the Act with regard to Lot 68 was not in order as the Program had informed them that their claim for return of deposit had been made on the wrong property. The Tribunal sees this as a reasonable interpretation. To come within the bounds of the Act, the return of deposit claim would have to be in relation to Lot 77 the property covenanted for under the signed APS.

Counsel for the Applicants also argued that it was not appropriate for the Program to deny the claim for deposit with regard to Lot 77, on the basis of an estoppel created by an ineffective attempt to amend the agreement of purchase and sale. The Program indicated that the APS for lot 77 was properly executed in its original Decision Letter. The Applicants' belief that the APS was amended to Lot 68 was incorrect, their attempt to claim against Lot 68 was to no effect, and the Program considered a claim against Lot 68 to be of no effect. Accordingly, the Program was not prejudiced by the Applicants' claim respecting Lot 68.

The Applicants' counsel also submitted that section 14(1)(a) of the Act does not require a purchaser ready willing and able to close. The Act requires a bankrupt registrant vendor. If there is no possibility of a successful closing of a real estate transaction under an agreement of purchase and sale due to the bankruptcy of the party responsible for building the home, then whether or not the purchaser is ready to close is of no relevance.

On the issue of estoppel raised by the Program, counsel argued that the doctrine should not be used to create a dilemma. If there was a contract through negotiations for Lot 77, there was no ability for the Vendor to close. If there was no new contract, there was no abandonment of the original. There may have been an attempt to change the contract, but that attempt came to nothing. It can hardly be said that the Program altered its position due to the actions of the Applicants, thereby giving rise to an estoppel if the Program assumed that due to legal incapacity no legal position was altered.

The most that could be drawn from the evidence for the benefit of the vendor is that the Applicants were willing to purchase the Lot 68 property from the vendor instead of Lot 77. Any thought that the vendor might have that the sale of Lot 77 property was revoked by the Applicants was dependent on the vendor's substitution of Lot 68 for Lot 77. Any such intention that was made orally by Mr. Weingarten must be implied to be on the condition that the Applicants bought the Lot 68 property. Lot 77 was not replaced by Lot 68. Accordingly, the Tribunal finds no intention of the parties that supports the Applicants being estopped in their cause of action against the vendor for damages for failure to close the sale of the Lot 77 property.

2. Have the Applicants suffered a loss?

On the issue of the payment of the deposit by the Applicant's employer and not Mrs. Valiant in her own name, the Tribunal accepts the evidence of Mrs. Cox from Royal Insurance that as an employee Mrs. Valiant owed the deposit amount of \$20,000 to the company. That being the case, the amount can form the basis of a claim for return of deposit.

As to the Applicants' loss being offset by rent under the rental agreement, the only evidence before the Tribunal is that the rental property remained in a state of disrepair despite promises to the contrary. The Applicants accordingly paid \$800.00 as rent as their estimate of what a fair bargain should be in the absence of the agreed upon repairs. The Tribunal accepts that

\$800.00 is the appropriate rent to be paid and that the Applicants did not receive a benefit under the rental arrangement that would reduce their claim for return of their deposit.

The Tribunal finds that at there was a valid contract for the purchase of Lot 77 by the Applicants and that the failure of the vendor through bankruptcy to perform that contract gives rise to the "cause of action" required by section 14(1)(a) of the Act for which the Applicants are entitled to their deposit of \$20,000.00.

DECISION:

Therefore, pursuant to the authority vested in it under section 16(3) of the *Ontario New Home Warranties Plan Act*, the Tribunal directs the Ontario New Home Warranty Program to allow the Applicants' claim for deposit monies in the amount of \$20,000 without reduction.

LICENCE APPEAL TRIBUNAL

William McIntosh, Vice-Chair

RELEASED: March 8, 2002

HARDCASTLE

STEPHEN AND PAULA HARDCASTLE

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE ONTARIO NEW
HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: WILLIAM MCINTOSH, Vice Chair presiding
KENNETH KOPROWSKI, Vice Chair

APPEARANCES: STEPHEN AND PAULA HARDCASTLE, Applicants
KAREN JONES, Counsel, Ontario New Home Warranty Program

DATES: July 26 and 27, and September 19 and 20, 2001 Sudbury

REASONS AND DECISION

BACKGROUND:

This matter comes before the tribunal by way of a Notice of Appeal filed by Stephen and Paula Hardcastle ("the Applicants") pursuant to the right of Appeal granted to the Applicants by section 16(2) of the *Ontario New Home Warranties Plan Act* R.S.O. 1990 chapter 31 ("the Act"). The Appeal is from a decision of the Respondent, the Ontario New Home Warranty Program ("the Program") contained in its Decision Letter issued on February 26, 2001 denying the Applicants' claim under the Act.

The Applicants bought their new home pursuant to an agreement of Purchase and Sale dated August 29, 1993 and took possession on November 15, 1993. The Applicants' complaints were directed to the builder and to the Program over several years. Most of the complaints were corrected. One exception was the problem with condensation, at times turning to ice on the interior surface of the exterior panes of the upper level windows of the house when the outside air temperature fell below -9 degrees C. It is this remaining complaint which forms the basis of this Appeal.

The position of the Program is set out in the decision letter as follows:

"The windows are installed in a workmanlike manner and are free from defects

in materials, the home is fit for habitation, there is no Ontario Building Code violation from which the owner has suffered damages, and this is not a major structural defect as defined by the *Ontario New Home Warranties Plan Act*.

The Applicants' position is that the Program is incorrect for the reasons set out in their Notice of Appeal:

1. Outer slider windows freezing shut; two year warranty item. The inability to open in the event of a fire for example, is a violation of the Ontario Building Code health and safety provisions.
2. Replacement weather stripping no longer stays in place; reported within one year of replacement.
3. Outer slider windows freezing shut. One year warranty excludes humidity problems within one year due to ONWP documents stating house drying out.
4. Outer slider windows freezing/frosting. Health and safety issues- unable to provide ventilation and restricts light.

ISSUE:

Is the complaint of persistent condensation and ice build up under the conditions described by the Applicants on the home's windows a breach of warranty under the Act?

THE EVIDENCE:

The Applicant, Mr. Hardcastle, described the history of the claim. His testimony was supplemented by photographs and a screen presentation. He testified as the homeowner and not as an expert although he stated that he held a PhD in environmental engineering with a specialty in ventilation. This was in fact the area of his employment at the mining company for which he worked.

The municipality's Certificate of Occupancy was signed on November 11, 1993. The house was described as a four level split.

From the outset of his occupancy, the Applicant testified that he noted condensation and freezing on some of the sliding aluminum windows when the outside air temperature reached around minus 9 degrees C. This could, during some winters, persist for a week or two. It also resulted in difficulty opening the slider portion of the windows to the outside. The window's construction consists of 4 panes, 3 sliders and one fixed. The Applicant stated that he was not overly concerned about the problem at the outset of the occupancy having been told that the problem would abate with the normal drying of the house during the first year after construction. After the first year, however, the problem did not abate, and in July of 1995 it was formally brought to the attention of the Program in a letter from the Applicants.

Some construction difficulties were identified as adding to the problem, such as, an

inoperative vent to the outside and a leaking range exhaust system.

To answer ongoing complaints each winter about the problem, a testing regime was established to see if air flow was the problem. As well, the weather stripping was replaced but with still no appreciable improvement. The Applicants then installed a heat recovery ventilator (HRV) which lessened the problem, but according to the Applicants there remained ice formation on the interior surface of the exterior pane during cold weather. It was this ice build up that the Applicants insist is a breach of the Ontario Building Code (the "Code") as it prevents easy opening of the slider to provide an escape route in an emergency.

David Hallock testified for the Applicants. Mr. Hallock is a graduate Engineering Technologist. On the basis of his education and his experience in residential construction, the Tribunal accepted him as an expert and allowed him to offer opinion evidence on his examination of the Applicants' home and on the provisions of the Code.

Mr. Hallock had originally been retained to carry out a pre-inspection of the property in 1993.

After receipt of the Program's Decision Letter, Mr. Hallock was again retained to assist the Applicants in the preparation of this Appeal.

Mr. Hallock's work and his findings can be summarized as follows:

1. He first examined the photographs of the condensation on the windows, as there was no direct evidence due to the time of year.
2. He removed the casing on a side of one of the windows to check the quality and integrity of the installation. As well, he removed the panes from the windows to check for problems such as dents, shrinkage or misalignment which if present could account for the problem.
3. He checked the ventilation available in the home.
4. He checked the Agreement of Purchase and Sale to confirm that the agreed upon windows had been installed. The Agreement contained the following clause:

"All windows are thermo pane and thermally broken aluminum casement and slides as per window schedule in building plan"

Mr. Hallock concluded from his inspection that the windows had been installed properly and were constructed of thermally broken aluminum frames as required.

He also testified that from his experience the windows were "low end" and more suitable for a laundry room than a bedroom.

Further, he stated that if the slider windows can not be opened when ice has formed as described by the Applicants, then the windows can not meet the Code requirements for building egress.

Mr. Hallock's essential conclusion from his observations was that excess moisture would have been the result of one or more of improper installation, excessive amounts of interior relative humidity, or improper design for the environment into which the windows were to be put in service. As there appeared to be nothing wrong with the first two, he concluded that the problem must lie in the window's design. When asked about the amount of interior moisture or relative humidity in the house being a problem, he replied in the affirmative, cautioning that the Code is usually conservative. For example, if the homeowners ran an unusual number of hot showers on cold days there would, of course, be condensation build up.

The Plans submitted to the municipality to obtain the Building Permit have a notation to the effect that the 1993 Code requirements were to be incorporated into the house. Mr. Hallock presumed that these would have to be met since the Building Permit was issued in the summer of that year. The item in question was the mandatory installation of a mechanical ventilator. The device was in fact installed sometime later. The dispute that arose was whether this device was covered by the transitional rules of the Code (Part 12) giving a grace period for contractors from the new requirements. Later evidence showed that the transition rules were in effect for the house in the present case, and the mechanical ventilator was not a requirement given the date of the issuance of the Building Permit.

Mr. Hallock agreed with the descriptions of window types and their operation as well as their testing. He agreed that the home's windows were "sliders" and to accommodate the slider mechanism there is a larger gap between the panes and therefore less thermal efficiency than with a non-slider thermal window.

He agreed that there were four essential standards applied to windows, namely: air leakage, water penetration, wind tolerance and proper glazing. He could not comment on whether these standards had or had not been met in the present case. Accordingly, he could not state whether there had been a Building Code violation of these standards.

The Tribunal summarizes Mr. Hallock's testimony as follows:

1. The installation of the windows showed no signs of poor workmanship.
2. The windows were in good shape, for a seven year installation.
3. He relied upon photographic not actual evidence of the condensation.
4. There was a visible sign of water damage such as mold formation.
5. He could not say the materials in the window installation violated the Code.
6. From the above, he concluded that the condensation and the attendant problems must lie in the window's design.

Mr. Zygmunt Zuckelkowski testified on behalf of the Program. He submitted his qualifications and report. His ability to offer expert testimony was based on the following:

1. He holds a masters degree in construction from the University of Posnan in Poland.

2. Since 1999 has had his own consulting business, testing for and advising window manufacturers.
3. His prior employment involved conformity testing for building interiors or “envelopes”.

He testified that since 1987 he has been involved in the testing of thousands of windows for the home building industry. He identified the windows in question as being manufactured by Toro and known as Thermal Broken, Aluminum Frame with Aluminum extrusion. The frames of the windows consist of an exterior extrusion, a thermal break and an interior extrusion. The interior sash creates the air barrier and has a heavier weather stripping to block air movement than the exterior sash which has a pile stripping that allows for certain air movement. The thermal break is installed in the frame to prevent heat loss. The frame is the part of the window installation that abuts the sash.

Mr. Zuckulkowski stated that these windows are installed throughout Canada including Northern Ontario and that they meet Building Code requirements. They were known in the business as a “good performing window”. He took issue with Mr. Hallock’s description of them as being low end.

Mr. Zuckulkowski was asked to perform certain tests to confirm whether the windows met the required standards. The standards are laid out in the Code:

“Window Standard. Windows shall conform with CAN/CSA-A440-M, ‘windows’ and shall meet at least a classification of A1 for air leakage, B1 for water leakage, and C1 for wind load resistance in CAN/CSA –A440-M.”

Specific to bedroom windows, the Code requires the following:

At least one outside window that can be opened from the inside without the use of tools.

When sliding windows are used the minimum dimension described in sentence one (3.8 sq ft) apply to the openable portion of the window.

He agreed with Mr. Hallock that the gap between the panes was 1 1/2 inches to accommodate the sliders as compared with the 1/2 to 5/8 gap in non-sliding window assemblies.

His tests results were reported on October 1, 1998. He found:

1. Air tightness: there are three levels of air tightness ranging from A1 the lowest performing to A3 the highest performance with the least apparent leakage. The Applicant’s windows tested A2. The testing protocol involved the measurement of a given quantity of air over a given time with a fixed pressure differential across the window assembly.
2. Water tightness: as with air infiltration, there is a scale of quality below which the

degree of water infiltration would be unacceptable for Code standards. The range for this parameter of quality was from B1 to B7. The Applicant's windows tested B3. The testing protocol involved the measurement over time at varying pressure differentials of a quantity of water to see if there was penetration.

He stated in his report that in response to the complaint of excessive condensation on the interior face of the exterior sash panel ... "the test window passed A2 and B3 ratings for air and water tightness and consequently met the performance criteria for the Sudbury area..."

He went on to state:

Possibly the thermal break is being by-passed due to the fact that the window is on the outside of the wall assembly thereby exposing the frame's interior section to the cold air cavity behind the siding.

The Applicant when given these results replied that:

1. The tests were invalid due to the improper calibration of the instruments.
2. A reduction in the interior relative humidity from the 30 to 35% to below 25% to help alleviate the problem would put the house at an acceptable comfort level.
3. The minimum dimensions of the window opening do not meet the Code when freezing occurs.
4. The thermal break was being bypassed due to the frame's interior section being exposed to the cold air cavity behind the siding.

The last point was amplified in testimony by Mr. Zuckulkowski. He stated that such thermal bridging was not occurring as it would have been evidenced by condensation on the inner panel or pane. The evidence was that the installation of the ventilation system did away with the condensation on the inner windows leaving the condensation on the interior surface of the exterior pane as the problem. On the issue of calibration, he stated that if the dates for calibration of the equipment had passed, there would not have been any significant difference in the results. If totally unexpected test results had occurred, the technician would have checked the instruments calibration.

Mr. Zuckulkowski concluded that there will always be some condensation on Northern Ontario windows in very cold weather. The Code does not contain condensation criteria. It is simply a fact of northern climates that water vapour in the interior air of homes will condense on window panes if the outside air temperature lowers the surface temperature of window panes low enough. The problem will be exacerbated the higher the interior relative humidity and the lower the outside temperature. As the latter can not be controlled, it is incumbent upon the homeowner to regulate the former. The problem can be further alleviated by ensuring air flow around the window is not impeded and proper house ventilation is maintained. Proper ventilation is enhanced by ensuring the system is balanced to ensure not too great a pressure differential over the window and therefore too great an air flow. Slightly opening the window

when very cold weather approaches can help, but this adds to fuel costs. It is necessary for the homeowner to be aware of the weather as it takes about 48 hours to stabilize the differential between the outside and inside air pressures.

Dennis Faubert also testified on behalf of the Program. Mr. Faubert is a warranty representative for the Program. Prior to his present position, he was a building inspector for 13 years. In these capacities he stated that he had inspected hundreds of homes for various reasons including ensuring compliance with the Code. His responsibility in circumstances such as the case before the Tribunal is to do an inspection in response to a complaint and then to inform the homeowner if the Program is of the opinion that there is a warrantable claim.

Mr. Faubert's inspection confirmed that the windows installed in the home were as described in the Agreement of Purchase and Sale. The description in the agreement reads: "...all windows are thermo pane and thermally broken aluminum casement and slides as per window schedule in building plan". There were similar windows in the kitchen and recreation room, but he confirmed that it was the upper floor windows which had the condensation problem.

Mr. Faubert is the author of the Conciliation Inspection Report dated February 22, 2001. He notes in his report that the date of possession was November 15, 1993. Also, a heat exchanger was installed subsequent to possession, resulting in an abatement of the condensation problem.

Mr. Faubert carried out his inspection pursuant to the 1990 version of the Code as the 1993 amendments were not in force. He explained that section 12 of the Code allows for a grace or transition period before the amendments became mandatory. In this case the effective date of the amendments was subsequent to the issuance of the Building Permit. He said that any notations to the contrary on the Building Plans would have been made without authority. The amendment required that a venting system be part of the required construction. In any event, a venting system was subsequently installed and did help the problem.

The Code sections pointed out by Mr. Faubert were:

2.2.1.1 All materials, appliances, systems and equipment installed to meet the requirements of this code shall possess the necessary characteristics to perform their intended functions when installed in a building

9.7.1.3 Bedroom Windows:

Every floor level containing bedrooms in a suite shall be provided with:

- (a) at least one outside bedroom window that can be opened to the outside without the use of tools, and
- (b) each window shall provide an individual unobstructed open portion having a minimum of 3.8 square feet

Mr. Faubert referred to section 9.9.2.4 of the Code to counter the suggestion by the Applicants that the freezing of the windows and the consequent inability to open them breached the “egress” requirements of the Code. The section reads:

- (1) Except as permitted in sentence 2 elevators, slides, escapes or windows shall not be considered as being a required means of egress(Sentence 2 deals with mercantile occupancy)

It was the conclusion of Mr. Faubert from his inspection that:

1. There were no breaches of the Building Code.
2. There no defects in workmanship. A fact confirmed by Mr. Hallock.
3. The windows were not an illegal substitution from an obligation under the Agreement of Purchase and Sale and therefore was not a breach of Regulation 892.

He testified that what was being complained of was the design of the windows themselves.

On the basis of the evidence presented, the Tribunal finds the following facts to have been established:

1. There was a build up of condensation on the upper floor windows when the outside temperature dropped to approximately minus 9 degrees Celsius. For certain periods during the winter months this could result in ice formation on the interior surface of the exterior panes resulting in difficulty in opening the sliding parts of the window assemblies.
2. The Applicants kept the relative humidity in their home at between 30 and 35% which though higher than ideal to reduce the problem was maintained for reasons of comfort. As the source of the water vapour for the condensation is the interior air of the home, the higher the moisture content of that air the more the likelihood of condensation.
3. The installation of a ventilation system in the home resulted in an abatement of the problem.
4. The installation of the windows was workmanlike with no causal connection to the Applicants complaint.
5. There was no substitution of an inferior grade of window to that agreed upon in the Agreement of Purchase and Sale.
6. The windows installed in the Applicants' home were tested and approved for use under the Ontario Building Code.

THE LAW:

To establish their claim for compensation under the *Ontario New Home Warranties Plan Act*, the Applicants must satisfy certain requirements.

Section 14(1)(b) of the Act states:

Where, ...

(b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty; ...

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulation.

Section 13 contains the warranty protection available to the Applicant homebuyers. It states:

13. (1) Every vendor of a home warrants to the owner,

(a) that the home,

(i) is constructed in a workmanlike manner and is free from defects in material,

(ii) is fit for habitation, and

(iii) is constructed in accordance with the Ontario Building Code;

Section 13(2) also contains exclusions from warranty protection. The relevant subsections read:

(2) A warranty under subsection (1) does not apply in respect of, ...

(e) damage caused by dampness or condensation due to failure by the owner to maintain adequate ventilation;

(f) damage resulting from improper maintenance;

Section 15 of Regulation 892 refers to the applicability of the Code. It provides:

15(2) Every vendor of a new home warrants to the owner,

(d) that the home is free from violations of the Ontario Building Code regulations under which the building permit was issued, affecting health and safety, including but not limited to fire safety, insulation, air and vapour barriers, ventilation, heating and structural adequacy; ...

The issue of substitutions of items agreed upon under the Agreement of Purchase and Sale is

dealt with in Regulation 892 section 19. It reads:

892(19) Every vendor of a new home warrants to the purchaser that, where the vendor makes a substitution with respect to an item that is referred to in the purchase agreement that is not an item that is to be selected by the purchaser, the item will be of equal or better quality than the item referred to in the purchase agreement.

CASES:

Several cases were referred to the Tribunal. In the case of *Maycock* (1994) 26 C.R.A.T. 439 the owner had complained of excessive amounts of condensation forming in the home even when the weather was warm and dry. The warranty representative found from his investigation that the home was well insulated. He also found the humidifier was kept running. He concluded that in well insulated modern homes a sufficient flow of ventilated air must be maintained and that a lower interior humidity must be maintained in given conditions. The Tribunal found that the homeowner's solution to high humidity in the home was to ensure proper ventilation and to turn off the humidifier when a high level of humidity existed in the home.

In the case of *Szymczakowska* (1997) C.R.A.T. (released December 4, 1997) the Tribunal had to decide whether moisture build up in a new home was the result of improper home maintenance or poor construction. The homeowner had not properly vented the dryer, resulting in a high interior relative humidity. It was a situation where the relative humidity was such that the house could not properly vent itself. If the prevailing ambient conditions allowed for the water vapour in the interior air to condense, the Tribunal found that the homeowner must maintain adequate ventilation to reduce that condensation.

In the case of *Chinnery and Jenkins* (1995) 27 C.R.A.T. 359 the Tribunal had to decide whether a condensation build up was the result of poor workmanship or the failure of the owner to maintain proper ventilation as excluded by section 13(2)(e) of the Act. The Tribunal found that the Applicants failed to show that the condensation was the result of poor workmanship. Instead, the Tribunal found that the more plausible explanation was failure to maintain adequate ventilation and the Applicants' claim respecting condensation was dismissed.

APPLICATION OF LAW TO FACTS:

The Applicants have the burden of showing that they have a cause of action under 14(1)(b) and that there has been a breach of warranty under the Act that is not excluded under 13(2)(e) or (f).

The Tribunal accepts the evidence of Mr. Hardcastle that condensation formed on the interior

surface of the exterior panes of the upper floor slider window assemblies installed in his new home when the outside air temperature fell below minus 9 degrees C. The higher the interior relative humidity and the lower the outside temperature, the more severe the condensation problem. The Tribunal also accepts the evidence that after the installation of a ventilation system the problem abated.

There was no independent verification of the complaint due to the lack of testing during the necessary ambient conditions under which the condensation occurred. However, the Applicants did produce photographs, and the Tribunal accepts the fact that for varying periods of up to two weeks each winter the ice build up on the windows could impede the opening of the slider portion. The Tribunal also accepts the expert testimony that the condensation was not the result of poor workmanship in the windows' installation. As well, there was no evidence of any physical damage to the structure of the window assembly requiring repair. The sole complaint is the condensation on the exterior window panes.

It was the position of the Applicant that in the absence of evidence of poor workmanship, the problem must lie with the design of the window. That is, windows that allow such condensation must not be suitable for installation in the Sudbury area and by extension must be below the requirements of the Code. Alternatively, the Applicants submitted that the requirements of the Code are inadequate. On either of these bases, the Applicants argued that the Tribunal should find a breach of warranty to have occurred under section 13(1)(a)(iii) of the Act.

The Program argued that the Applicants have not shown a breach of warranty and have no cause of action under section 14(1)(b). Any non compliance with the Code must be shown on the preponderance of the evidence. It can not be presumed. And in any event the ongoing problem with condensation is more consistent with the acts or omissions of the Applicants themselves thereby bringing into effect the exclusions from the warranties set out in section 13(2)(e) and (f).

The Program asserted that the evidence best supports a conclusion that the windows met the requirements of the Code. In the absence of a cause and effect grounded on poor workmanship or other bases the condensation most probably resulted from the improper maintenance of the home, more particularly too high a relative humidity with poor interior air movement. The solution lay in lowering the relative humidity when the outside air temperature dipped. The relative humidity level of 30 to 35% maintained by the Applicants was bound to result in condensation at low temperatures. While less relative humidity in the home during periods of low temperatures produces a home environment less than desirable from the Applicants point of view, the expectation of an ideal comfort level under all ambient conditions is simply an unreasonable expectation in northern climates. The Code is there to impose on builders reasonable industry standards within available technology. A home free of condensation during northern Ontario winters is not such a reasonable standard.

Failing sufficient proof that the window assemblies fall short of Code requirements, the Program submitted that the Applicants' complaints do not fall within the warranty provisions of

the Act.

As well, the Program asserted that the Applicants' claim that the provisions of the Code themselves are inadequate is beyond the jurisdiction of the Tribunal to determine.

The first matter to be dealt with is the design of the windows. The Applicants asserted that the faulty design of the window led to the build-up of condensation. The Tribunal may consider the design of the window as it does or does not conform to the requirements of the Code. The Tribunal has no jurisdiction to rule on the question whether the design approved by the Code is appropriate.

Secondly, the Tribunal finds that the windows as installed were those bargained for in the Agreement of Purchase and Sale which stipulated "...All windows are Thermo pane and thermally broken aluminum casement and slides as per window schedule in the building plan." From the evidence the Tribunal can not conclude there was a violation of Section 19 of Regulation 892 which deals with unauthorized substitutions.

The Tribunal finds that the builder complied with the correct version of the Code at the time of construction. As explained in the evidence the Building Permit was issued in the summer of 1993 and the 1993 amendments to the Code became mandatory after September of that year.

On the evidence, the Tribunal find that the Applicants have not established a breach of warranty under the *Ontario New Home Warranties Plan Act*.

DECISION:

Pursuant to the authority vested in it under section 16(3) of the *Ontario New Home Warranties Plan Act* the Tribunal directs the Program to disallow the Applicants claim under the Act.

LICENCE APPEAL TRIBUNAL

William McIntosh,
Vice-Chair, presiding

Kenneth Koprowski,
Vice-Chair

RELEASED: March 11, 2002

SINGH, GURNEK o/a SARWAN AUTO SALES

GURNEK SINGH o/a SARWAN AUTO SALES

MOTION TO CONSIDER A STAY OF AN ORDER OF THE
LICENCE APPEAL TRIBUNAL

TRIBUNAL: JOHN ORT, Member

APPEARANCES: ARIF RAZA, Counsel, representing the Applicant
MICHAEL ROTHE, Counsel, representing the
Registrar, the *Motor Vehicle Dealers Act*

DATE OF HEARING: March 15, 2002 Toronto

REASONS FOR RULING

BACKGROUND:

Gurnek Singh (the "Applicant") brings a motion to the Licence Appeal Tribunal (the "Tribunal") for a stay of the decision of the Tribunal released November 19, 2001, (the "Decision"). The Tribunal's Decision directs the Registrar under the *Motor Vehicle Dealers Act* (the "Act" and the "Respondent", respectively) to carry out his proposal dated January 23, 2001, to revoke the registration of Gurnek Singh o/a Sarwan Auto Sales as a motor vehicle dealer under the Act.

The grounds for the motion are:

1. The Applicant has made an Appeal to the Divisional Court of the Superior Court of Justice against a decision of the Order of the Licensing Appeal Tribunal released November 19, 2001.
2. There is a serious issue to be decided by the Appellate Court.
3. If a stay is not granted, the Applicant would suffer demonstrable and unusual hardship.
4. Granting a stay would not prejudice the Respondent whereas compliance with the Order appealed against would cause irreparable harm to the Applicant, and the Panel should consider the balance of convenience in favour of the Applicant.
5. There is no statutory provision prohibiting the granting of a stay pending appeal with the Divisional Court.

6. Such further and other grounds that counsel may advise and the Panel may permit.

The grounds for the appeal to the Divisional Court of the Superior Court of Justice are:

1. The Tribunal erred in finding that the Appellant's conduct is inconsistent with the intention and objectives of the *Motor Vehicle Dealers Act*.
2. The Tribunal erred in finding that the Appellant would not be financially responsible in the conduct of the business in accordance with the law and with integrity and honesty.
3. The Tribunal's decision was contrary to the evidence and the weight of that evidence.
4. Such further and other grounds as this honourable Court may allow.

ISSUE:

Should the Tribunal grant a stay until disposition of the appeal?

FACTS:

TESTIMONY OF GURNEK SINGH:

Mr. Singh testified that he understood the contents of his affidavits dated February 19, 2002, and February 22, 2002, filed as exhibits 4 and 5 respectively, that the contents of the affidavits were true and correct and that they are still correct.

Mr. Singh also stated that from May 2001 to November 19, 2001, he satisfied all the undertakings set out in exhibit 9 that he gave to the Respondent concerning the conduct of his business as a motor vehicle dealer.

LAW:

Section 7(9) of the *Motor Vehicle Dealers Act* states:

"Although a registrant appeals from an order of the Tribunal under section 11 of the *Ministry of Consumer and Commercial Relations Act*, the order takes effect immediately, but the Tribunal may grant a stay until disposition of the appeal."

RJR-Macdonald Inc. v. Canada (Attorney General), (1994) 111 D.L.R. (4th) 385, (S.C.C.), sets out a three-part test that must be satisfied for a stay to be granted:

1. A preliminary assessment must be made of the merits of the appeal to ensure that there is a serious question to be tried.

2. It must be determined whether the Applicant would suffer irreparable harm if the application were refused.

3. An assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision.

APPLICATION OF LAW TO FACTS:

Section 7(9) of the Act states in part that an order of the Tribunal takes effect immediately, but the Tribunal may grant a stay. Counsel for both parties agreed that the three-part test set out in RJR-Macdonald Inc. v. Canada (Attorney General) applies to the motion and must be satisfied for the Applicant to succeed.

Part 1 of test in RJR-Macdonald Inc. v. Canada (Attorney General)

Counsel for the Applicant argued that the Decision is based on unsubstantiated allegations contrary to the evidence submitted and referred to the following passage on page 13 of the Decision: "The second charge of conspiracy to commit a crime under section 465(1)(c) of the Code and Singh's plea of guilty and consequent conviction together with Constable Scerbovic's evidence that Singh was the leader of the conspiracy itself and the nature of the conspiracy leads the Tribunal to the conclusion that he not only planned criminal acts but caused such acts to be carried out." Counsel for the Applicant submitted that there is a justiciable question, a serious question to be tried, whether such evidence should be admitted and relied upon.

On the other hand, counsel for the Respondent argued that the Decision revokes the registration of Gurnek Singh o/a Sarwan Auto Sales as a motor vehicle dealer under the Act based on fact, not hearsay. Counsel for the Respondent referred to the following on page 13 of the Decision: "Both the convictions and the repeated non-disclosure of such convictions, affords the Registrar reasonable grounds for his belief that Singh will not carry on business in accordance with the law and with integrity and honesty as required by section 5(1)(b) of the Act."

On this motion, the Tribunal finds that there is no serious question to be tried regarding the existence of the convictions of the Applicant Singh and that the Decision properly relied on such convictions in concluding that the past conduct of the Applicant affords to the Respondent reasonable grounds for his belief that the Applicant will not carry on business in accordance with the law and with integrity and honesty as required by section 5(1)(b) of the Act. Accordingly, the Tribunal finds that the Applicant has failed to satisfy the first part of the test in

RJR-Macdonald Inc. v. Canada (Attorney General).

Part 2 of test in RJR-Macdonald Inc. v. Canada (Attorney General)

The Tribunal finds persuasive the following passage quoted by Counsel for the Respondent out of Foster v. Registrar, Motor Vehicle Dealers and Salesmen Act, April 23, 1993, (C.R.A.T.): "In that regard, there is no doubt that Mr. Foster is unable to carry on as a salesman and this is a hardship. But this is a hardship which the Legislature of the Act must have been aware when it drafted the legislation; nevertheless, it saw fit to legislate that the status quo would change, once a judgement was rendered against a registrant by this Tribunal in favour of the Registrar. And the reason for this, presumably, was that after a contested hearing on the merits, it was felt that the greater protection was now owed to the public."

The Tribunal finds that the Applicant's affidavits establish that he would suffer harm, but not irreparable harm, if the application were refused. Accordingly, the Tribunal finds that the Applicant has failed to satisfy the second part of the test in RJR-Macdonald Inc. v. Canada (Attorney General).

Part 3 of test in RJR-Macdonald Inc. v. Canada (Attorney General)

Given that there have been no recent convictions of the Applicant and that the Applicant has recently conducted his business in compliance with the undertakings set out in exhibit 9, the Tribunal finds that there is little danger of harm to the public if the Applicant is granted a stay. On the other hand, the Applicant will obviously suffer harm if the stay is not granted and he is not allowed to continue his business. Accordingly, the Tribunal finds that the Applicant has satisfied the third part of the test in RJR-Macdonald Inc. v. Canada (Attorney General).

In summary, the Tribunal finds that the Applicant has failed to satisfy all parts of the test set out in RJR-Macdonald Inc. v. Canada (Attorney General).

ORDER:

For the reasons set out above, pursuant to the authority vested in it by section 7(9) of the *Motor Vehicle Dealers Act*, the Tribunal dismisses the Applicant's motion for a stay of the Tribunal's decision of November 19, 2001.

LICENCE APPEAL TRIBUNAL

John Ort, Member

RELEASED: March 28, 2002

NOEL PARE, ANASTASIA

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
ANASTASIA NOEL PARE

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

ANASTASIA NOEL PARE

Applicant

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

DENIS CAMPEAU CONSTRUCTION INC.

Added Party

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a hearing on January 28-30, 2002 at 9:30 a.m. in Ottawa, Ontario;

AND WHEREAS, upon consent of the parties, the hearing was adjourned to March 27-28, 2002;

TAKE NOTICE, upon consent of the parties, the Tribunal further adjourns the hearing to commence at the Gillespie Reporting Services, 130 Slater Street, Suite 200, Ottawa, Ontario at 9:30 a.m., on Monday, July 8, 2002 and to continue July 9 and 10, 2002, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: March 20, 2002

ONTARIO HISTORICAL SOCIETY

APPEAL FROM A DECISION OF THE REGISTRAR OF
THE *CEMETERIES ACT* R.S.O CHAPTER C.4 AS
AMENDED

TO CLOSE A CEMETERY

TRIBUNAL: MARJORIE L. HILEY, Vice-Chair

APPEARANCES:

MELISSA BARNETT, Agent, representing the Moving Party, St. Alban's
Anglican Church and Gordon Barr

CATHERINE BRAY, Counsel, representing the Applicant, Ontario
Historical Society

JAMES STEBBING, Counsel, representing the Registrar, *Cemeteries
Act*

DATE OF
MOTION:

March 4, 2002

Toronto

ORDER

BACKGROUND:

This is a motion brought by St. Alban's Anglican Church (the "Diocese") and Gordon Barr. The moving parties are requesting that the Tribunal add them as party respondents to the appeal by the Ontario Historical Society from a decision of the Registrar, *Cemeteries Act (Revised)*, ordering a partial closure of the St. Alban's Cemetery, Palgrave, Ontario. As well, the moving parties are requesting that the Tribunal hold a further prehearing conference.

The Acting Registrar, *Cemeteries Act (Revised)*, by his order dated June 8, 2001, made a decision to partially close the St. Alban's Cemetery in Palgrave Ontario. Notice of this decision was sent to a number of organizations and individuals as specified under section 49 of Regulation 130/92 of the *Cemeteries Act (Revised)*. The Ontario Historical Society by its President filed a Notice of Appeal dated June 29, 2001. There was a prehearing on October 1, 2001 at which time the parties to the hearing were established to be the Registrar, *Cemeteries Act (revised)* and the Ontario Historical Society. Notice of this prehearing

conference was sent to a number of individuals and organizations including the moving parties in September, 2001. In attendance on the date of the prehearing, were counsel for the Registrar and for the Ontario Historical Society. The hearing dates were initially established for February 4 to 8, 2002. Upon consent of the Registrar and the Ontario Historical Society, the hearing was adjourned to the dates of April 22 to 26, 2002. The hearing will be before a three-member panel.

The Tribunal by a notice dated January 4, 2002, sent to Counsel for the Ontario Historical Society, the Registrar, *Cemeteries Act (revised)*, the Anglican Church of the Incorporated Synod of the Diocese of Toronto and Gordon Barr, established the date of March 4, 2002, for the hearing of this motion. All those parties appeared before the Tribunal on March 4, 2002. Argument was confined to written materials filed before the Tribunal and the verbal submissions of Counsel.

ISSUES:

Should the Anglican Church of the Incorporated Synod of the Diocese of Toronto and Gordon Barr be permitted to be added as party respondents?

Should there be a further prehearing for all the party respondents?

ARGUMENT:

Counsel for the Moving Parties:

Counsel stated that the Anglican Diocese and Mr. Gordon Barr wished to be added as parties to this proceeding. It was submitted that the Tribunal has the jurisdiction to add interested parties. Counsel stated that the Anglican Diocese and Gordon Barr are interested parties based on the following grounds: 1. they have a proprietary interest in the subject matter; 2. the ultimate decision by the Tribunal will affect their proprietary interest; and 3. both have been involved in the closure of the cemetery for the past six years and have an abundance of knowledge which would be of interest to the Tribunal in making its decision.

Counsel stated that a further prehearing is required to exchange information, narrow the issues and assist with any resolution of matters in dispute. To date, the moving parties have given information to the Registrar but do not know if that information has been transmitted to the Ontario Historical Society. As well, the moving parties would like the information available to the Registrar and the Ontario Historical Society.

Counsel assisted the Tribunal with a brief history of the action. The Diocese and Mr. Barr had an initial sale agreement for the St. Alban's cemetery and its church and property in 1996. This sales agreement was conditional on closure of the cemetery. In October, 1996, the

Diocese brought an application to the Registrar for closure of the cemetery. Sometime in the fall of 1996, Mr. Barr sought rezoning of the property from the Town of Caledon. In October, 1998, Mr. Barr took title of the property although there had been no decision by the Registrar on the application to close the cemetery. In March, 2000, Mr. Barr sought site plan approval from the Town of Caledon. In January, 2001, it was proposed that there be partial closure of the cemetery with a 25 square foot plot for the graves near Highway 50. In June, 2001, the Registrar ordered the partial closure of the cemetery. The Ontario Historical Society commenced an appeal. There was a prehearing on October 1, 2001, with a hearing to commence in February, 2002. That hearing was adjourned on consent to be held on April 22-26, 2002 before a three-member panel of the Tribunal.

Counsel submitted that the Tribunal has the jurisdiction to add interested parties under section 10 of the *Cemeteries Act*. There is no definition in the Act as to “interested parties”. Under the *Statutory Powers Procedures Act*, section 5 speaks of the parties entitled by law. The rules of procedure of the Tribunal, section 9.2 and 9.3 deal with the prehearing procedures.

Counsel stated that Mr. Barr, on behalf of himself and the Diocese, informed Counsel for the Registrar that they wished to be added as parties. Tab E of Exhibit #6 is a letter dated September 25, 2001, from Counsel for the Registrar to Counsel for the Ontario Historical Society and to this Tribunal, stating that Gordon Barr and his brother Glen Barr expressed their wish to be added as parties to the hearing. As well, Mr. Nemeth, architect for Mr. Barr, by letter dated September 21, 2001 to Counsel for the Registrar, stated that the original applicant wished to attend the prehearing. Counsel stated that the term “original applicant” means the Diocese, which started the original application to the Registrar for closure of the cemetery.

Counsel directed the Tribunal to her factum, in particular the case of Re Royal Commission on the Northern Environment 144 D.L.R. (3d) 416, a case of the Divisional Court dated January 26, 1983. In that case, the Divisional Court had to decide who could be added as parties. The definition under the *Public Inquiries Act*, allowed standing to “any person who satisfies it that he has a substantial and direct interest in the subject matter of the inquiry”. Counsel stated that the threshold under that Act was higher than that under the *Cemeteries Act (Revised)* which just required an “interested party”. Counsel stated that the court looked at three factors: 1. Concrete – the more specific, practical and concrete the subject of the inquiry, the more likely it would be that property rights would be affected. Here there is a specific property owned by Mr. Barr, which would be directly affected. 2. Interest in subject matter – Mr. Barr holds title to the property and the Diocese has a mortgage registered against the property. The Diocese seeks an order from the Registrar. Both Mr. Barr and the Diocese have an interest in the subject matter. They have both been involved for over five years and have vital information to provide to the Tribunal. Their participation is essential if the Tribunal is to adjudicate effectively on the issue. 3. Effect of the Tribunal's decision on the interested parties – the Tribunal's findings have the potential to seriously affect the individuals. The initial agreement of purchase and sale was conditional on an order to close the cemetery. If the order of the Registrar is not upheld, the agreement will not be completed. Mr. Barr will not have his home and the diocese will be left with future responsibilities.

Counsel stated that it is not enough to add Mr. Barr and the Diocese as witnesses as witnesses cannot call evidence or cross examine witness.

Counsel stated that the Ontario Historical Society's opposition is based on two factors, costs and delay. Neither Mr. Barr nor the Diocese wish to add to the costs of the Ontario Historical Society. They must have been contemplated as being witnesses to this proceeding. There will be less work if the diocese and Mr. Barr are allowed to prepare their own case. Both the Diocese and Mr. Barr are able to attend the trial on April 22 to 26, 2002.

At the prehearing conference of October 1, 2002, it was held that interested parties should be added within fifteen days. Counsel for the Registrar in her letter of October 2, 2001 does not mention that time frame.

The notice of motion now before the Tribunal is dated December 10, 2001. The consent of the Registrar is dated October 29, 2001. There were some delays in obtaining guidance on how to approach this motion.

In conclusion, Counsel stated that it is necessary to add the Diocese and Mr. Barr due to their proprietary interests, the direct impact on those interests by the decision of the Tribunal and the need for the Tribunal to adjudicate in a complete fashion. The moving parties have consulted experts and sought planning approvals and that information needs to be before the Tribunal.

Counsel for the Registrar:

Counsel for the Registrar stated that the Registrar has given consent to add Mr. Barr and the Diocese as parties and that a further prehearing prior to the trial would be helpful.

Counsel for the Ontario Historical Society:

Counsel stated there was a conditional agreement of purchase and sale in 1996. In 1998 Mr. Barr bought the property. He was the owner and the Church no longer owned the property. Mr. Barr knew the cemetery was on the property and that the Diocese had started the process with the Registrar and it had been proceeding for several years. He should have known that permission to close the cemetery might not happen, yet he still bought the cemetery. This is different from dealing with proprietary rights. As well, the Church had the property deconsecrated. They have the obligation to remove the bodies unless the order of the Registrar is successfully challenged.

Counsel stated that Reverend Bone says the property had historical and religious significance. But that is not enough of an interest. If Mr. Barr applied to demolish the church structure, the Diocese is not entitled to notice.

Counsel stated that the Tribunal has the discretion to add the Diocese and Mr. Barr, but it should not do so. When one becomes a party, one can cross-examine, call witnesses, and make argument, but the Diocese and Mr. Barr can have meaningful involvement as witnesses. The Registrar will advise the Tribunal on how he came to his decision. There will not be new evidence from the Diocese or Mr. Barr. The statute does not automatically make them parties.

Counsel submitted that the issue at the main hearing involves whether partial closure of the cemetery is in the public interest. Mr. Barr and the Diocese would be repeating evidence and not add anything new. The statute contemplates that the Registrar is responsible for what is in the public interest. Mr. Barr and the Registrar have a private interest.

Counsel stated that the property has been rezoned to village commercial. That means that it can only be residential if part of a commercial development. That goes to the nature of the proprietary interest. The issue is not monetary but what is best for the public interest.

Counsel submitted that there is a difference if a decision affects a benefit than if it affects a right. Here the decision is a denial of a benefit. As well, the nature of the decision must be considered. A policy decision deals with the public interest rather than someone's individual rights. A policy decision has broader implications. Under the regulations, the Ontario Historical Society is one of the parties that is to be given notice if there is an application to close a cemetery.

Counsel stated that the length of the proceeding could be affected if additional parties are included. As well, there are cost concerns. The Ontario Historical Society is a non profit charitable organization. Its input is contemplated by the regulations. A longer hearing would mean more costs to the Ontario Historical Society. As well, there will be additional costs to taxpayers if the hearing is made longer.

Counsel also stated that timing is of significance in this matter. If both the Diocese and Mr. Barr had cared, they could have done something about it long before the date of this motion. They had notice of the Registrar's order of June 8, 2001. They had notice of the appeal by the Ontario Historical Society. They could have appealed then. Indeed, Counsel for the Registrar wrote to the Diocese, Mr. Barr and a number of others by her letter of September 10, 2001 informing them of the prehearing of October 1, 2001. There were a number of documents, including the rules of procedure of the Tribunal, which informs of the times for filing. Counsel for the Registrar informed them that they had to bring a motion as soon as possible after the prehearing of October 1, 2001. They had ample opportunity to appeal or bring a motion.

Counsel stated that the case of Royal Commission on Northern Environment dealt with an inquiry on rights being affected. It can be distinguished from the current matter which deals with benefits being granted. Counsel submitted that this is not specific, practical or concrete. In that case, the public interest was broad based. The Grand Council contained a large number of people and is unlike the current matter.

Counsel submitted that if the Diocese and Mr. Barr were added as parties, there should be a prehearing as soon as possible.

Reply by Counsel for the moving parties:

There could be new information provided by Mr. Barr or the Diocese. She could not say exactly what that information would be at this time. Mr. Barr and the Diocese were not interested in appealing the order of the Registrar but are interested parties under the statute.

LEGISLATION:

The relevant legislation is the *Cemeteries Act (revised)* and its regulations.

Section 8

- (1) In this section and in sections 9, 10, 11, 12, and 13, a reference to a cemetery includes any part of a cemetery.
- (2) The Registrar may order a cemetery closed if the closing is in the public interest.
- (3) An order shall not be made under subsection (2) until.
 - (a) notice of the intention to make the order is given in the manner and to the persons prescribed; and
 - (b) interested persons are given the opportunity to make submissions to the Registrar within such time as is prescribed
- (4) Notice is not required if,
 - (a) the request is from the owner;
 - (b) no interments have been made in the cemetery to be closed; and
 - (c) the consent of all affected interment rights holders has been obtained.

Section 9

- (1) In an order to close a cemetery, the Registrar may,
 - (a) declare a cemetery or a portion thereof closed;
 - (b) require the owner to disinter all human remains therein and specify the manner of disinterment and the manner and place of reintering or dealing with the remains;
 - (c) require the owner to remove any markers and relocate them to a specified place; and
 - (d) require the owner to provide or acquire equivalent interment rights for all holders of interment rights with respect to unused lots in the cemetery.
- (2) In an order to close a cemetery, the Registrar may designate another person to do anything that the owner may be required to do.
- (3) The Registrar shall give every person who made a submission notice of the order and at the same time advise the person of the right of appeal.
- (4) Subject to subsection (5) an order to close a cemetery comes into force thirty days after it is made unless there is an appeal filed before the order comes into force or the order sets out a later date.
- (5) If submissions were made in respect of the order, the order comes into force thirty days after notice has been given to each person who made a submission unless there is an appeal filed before the order comes into force or the order sets out a later date.
- (6) An order that is appealed comes into force upon being upheld by the Tribunal.

Section 10

A person with an interest therein may appeal, to the Tribunal,

- (a) an order to close a cemetery any time before the order comes into force; or
- (b) a refusal to order a cemetery closed.

Ontario Regulation 130/92

Establishing, operating and closing cemeteries and crematoria

Section 49

- (1) For the purposes of clause 8(3) (a) of the Act, an owner who wishes to obtain an order closing a cemetery shall give notice, in accordance with this section, of the owner's intention to apply for the order.
- (2) The notice shall be published,
 - (a) once in *The Ontario Gazette*; and
 - (b) once a week for two consecutive weeks in a newspaper with general circulation in the locality in which the cemetery is located.
- (3) The notice shall be sent by registered mail to,
 - (a) each interment rights holder whose lot is situated in the portion of the cemetery subject to the order, mailed to the rights holder's last address known to the owner;
 - (b) the municipality in which the cemetery is located;
 - (c) the Local Architectural Conservation Advisory Committee, if any, established under the *Ontario Heritage Act* for the locality in which the cemetery is located;
 - (d) the Archives of Ontario, the Ontario Historical Society, the Ontario Archaeological Society and the Ontario Genealogical Society; and
 - (e) the Minister of Culture and Communications.
- (4) The notice shall be conspicuously posted on a sign at the entrance to the cemetery before publication of the first notice under clause (2)(b) and shall remain posted until the Registrar makes, or refuses to make, the order sought by the owner.

Section 50

For the purposes of clause 8(3) (b) of the Act, the time within which interested persons may make submissions to the Registrar is forty-five days after the later of,

- (a) the day on which the final notice under clause 4 (2) (b) is published; or
- (b) five days after the day on which the final notice is mailed under subsection 49 (3).

ANALYSIS:

This motion is brought by the present owner of the land upon which the cemetery is located and the mortgagor of that property. Although they have not appealed the decision of the Registrar, they now wish to be considered as parties to the proceedings. The only appeal was by the Ontario Historical Society. This matter was adjourned on consent of the parties from its original February hearing dates until those in April, 2002. It will be heard by a three-member panel.

It is agreed by the Registrar, *Cemeteries Act (revised)* and the Ontario Historical Society that the Tribunal has discretion both under the *Cemeteries Act (Revised)* and the *Statutory Powers Procedures Act* to add parties to the proceedings. Section 8 (3) of the *Cemeteries Act*

(Revised) speaks of interested parties being given the opportunity to make submissions to the Registrar and section 10 speaks of a person with an interest appealing to the Tribunal an order of the Registrar. The Tribunal agrees that it has the authority to add interested parties.

The Tribunal concurs with the submission by Counsel for the moving parties that in determining who is entitled to party standings in a proceeding the Tribunal needs to consider the factors of: 1. the subject matter of the proceeding; 2. the interest of the person in the subject matter; and 3. the effect that the decision of the Tribunal may have on that interest.

The Tribunal also agrees that as stated in the case of *Re. Ont. (Royal Commission on the Northern Environment) (1983)* 144 D.L.R. 416 of the Ontario Divisional Court "The more specific, practical and concrete the subject of any inquiry is, the more likely it would be that the property or individual rights of a person are affected and hence, he would have a substantial and direct interest."

The present owner of the property, Mr. Gordon Barr, and the present mortgagor of the property, the Anglican Diocese for Toronto, have an interest in the property and in the appeal. If the appeal by the Ontario Historical Society is successful, the cemetery will not be partially closed. Mr. Barr will have to readjust his plans for the property and the Diocese may or may not be relieved of certain obligations. It is unclear what exactly are the terms of the sale in 1998 and whether or not by this sale the original conditions imposed in 1996 are maintained. It is also unclear what are the present plans of Mr. Gordon Barr assuming that the village commercial zoning is now the current zoning permitted on this property.

The subject matter before this Tribunal is whether or not the Registrar acted reasonably in making his order to partially close the St. Alban's cemetery. His order was issued in June, 2001 after the completion of the sale to Mr. Gordon Barr by the Diocese and after the rezoning application was approved by the Town of Caledon. In making his decision, the Registrar presumably would have been considering not only the public interests but also the private interests of those who have a proprietary interest in the property.

The Tribunal in reviewing the order of the Registrar needs to balance both the public interest and the private interest in determining the reasonableness of the order. The decision by the Tribunal will have an impact on both types of interests.

The Tribunal finds that the Diocese and Mr. Gordon Barr meet the three tests stated in *RE Ont. (Royal Commission on the Northern Environment)*.

The Tribunal is cognizant of the arguments made by the Ontario Historical Society as to possible delays in the proceedings and the additional cost to the original parties if additional parties are added. The Tribunal attaches great significance to the assurances of Counsel for the moving parties that they are willing and able to participate at the dates of hearing already established by the Tribunal for April, 2002. The Tribunal also notes that time has not been of

the essence for either of the original parties as there was a consent agreement to adjourn the original dates of hearing from February to April, 2002.

Regarding additional cost, the Tribunal notes that under the Regulation notice must be given to multiple parties when closure or partial closure of a cemetery is contemplated. Accordingly, the legislators have considered that more than one party would have an interest in the closure of a cemetery and that would affect the costs of the proceeding. By having such matters dealt with by an administrative Tribunal, the legislators have also made policy decisions that benefit the non-profit or charitable organizations who wish to participate in such proceedings. This Tribunal does not anticipate that the adding of Mr. Gordon Barr or the Diocese will have a significant adverse effect from a costs perspective upon the Ontario Historical Society.

The Tribunal is also fully aware that both Mr. Gordon Barr and the Anglican Diocese of Toronto did not act as quickly as might have been expected to assert their wishes to be parties to this proceeding. But the order of the Registrar was dated June 8, 2001 and by September, 2001 there was some indication at least to Counsel for the Registrar that other parties besides the Ontario Historical Society were expressing some interest in the proceedings. The Tribunal does not feel it unreasonable that Mr. Gordon Barr and the Diocese did not appeal the order of the Registrar as they are in agreement with it. But they have shown that if there was opposition to that order, they wish to have a voice in the proceeding. There is no disagreement between the parties that there was a discussion at the prehearing as to possible other parties to the proceeding. The October 2, 2001 letter by Counsel for the Registrar speaks to that discussion even if it did not form part of the prehearing order itself. The October 29, 2001 consent of the Registrar is evidence that Mr. Gordon Barr and the Diocese had within a short time after the prehearing conference started to ask for party status.

The closure or partial closure of a cemetery by the Registrar, *Cemeteries Act (Revised)* is a complicated matter as shown by the terms of the legislation and the notice provisions of the Regulations. The Tribunal in reviewing such a decision needs to ensure that it has before it all the issues relevant to such a matter. It is not clear to this Tribunal at this point in the proceedings as to what materials, if any, will be provided by the Diocese or Mr. Gordon Barr that could not have been provided by the Registrar. But the Tribunal feels it is essential that the opportunity be given to all parties to provide relevant information at the hearing. The issues need to be examined in a thorough fashion and allowing party standing to the Diocese and Mr. Gordon Barr will permit them through their counsel to fully offer their information and perspectives to the three member panel.

The Tribunal is ordering that there be a second prehearing in this matter which will include the Registrar, *Cemeteries Act (Revised)*, the Ontario Historical Society, the Diocese and Mr. Gordon Barr. This prehearing must be held by April 12, 2002. The Tribunal expects all parties to be cooperative and flexible in the scheduling of this prehearing conference. All parties must come to the prehearing with the full authority of their clients to narrow the issues and settle issues if at all possible. All parties must come to this prehearing prepared to share all of their

proposed exhibits for the hearing and their witness lists. Expert reports and curricula vitae must have been provided to all parties by Friday, April 5, 2002.

ORDER:

The Tribunal orders the following:

1. The Anglican Church of the Incorporated Synod of the Diocese of Toronto (the "Diocese") and Gordon Barr are added as parties to this matter.
2. There will be a prehearing no later than April 12, 2002 involving the Registrar, *Cemeteries Act (Revised)*, the Ontario Historical Society, the Diocese and Gordon Barr. All proposed exhibits and witness lists will be provided to all parties at this prehearing conference. Expert reports and curricula vitae will be provided to all parties by April 5, 2002.

LICENCE APPEAL TRIBUNAL

Marjorie Hiley, Vice-Chair

Released: March 22, 2002

AUTO MART SUDBURY LTD. AND RICK TOULOUSE

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
AUTO MART SUDBURY LTD. AND RICK TOULOUSE

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATIONS
- Proposal dated: September 14, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

AUTO MART SUDBURY LTD. AND RICK TOULOUSE

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Applicant

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on January 9, 2002;

AND WHEREAS the matter was adjourned upon consent of the parties to May 27, 2002;

TAKE NOTICE, upon consent of the parties, the Tribunal further adjourns the hearing to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Wednesday, June 26, 2002.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: March 8, 2002

WELCOME TO KENNEDY SALES AND LEASING LIMITED
and RONALD KENNEDY

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
ONTARIO MOTOR VEHICLES DEALERS ACT

TO REVOKE REGISTRATION

TRIBUNAL: DOUGLAS MACKINTOSH, Vice-Chair

APPEARANCES: MICHAEL J. PRETSELL, Counsel for the Applicants
AVIVA HARARI, Counsel for the Registrar

DATES
OF HEARING: February 12 & 13, 2002 Kingston

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is a hearing before the Licence Appeal Tribunal arising out of a Proposal to refuse the registrations of Welcome to Kennedy Sales and Leasing Limited as a motor vehicle dealer and of Ronald Nelson Kennedy as a salesperson (collectively, the "Applicants"). This Proposal was issued on October 1, 2001 by the Registrar under the *Motor Vehicles Dealers Act* (the "Registrar" and the "Act", respectively).

THE ISSUE:

The issue is whether, in relying on the past conduct of the Applicants, the Registrar is justified in refusing to register Welcome to Kennedy Sales & Leasing Limited and Ronald Kennedy as a motor vehicle dealer and salesperson respectively.

THE EVIDENCE:

In May of 1997 Ronald Kennedy was registered under the Act as a salesperson. He incorporated a company, Paul Kennedy Sales and Leasing Limited, which was registered under the Act as a dealer. The business premises were situated at Highways 41 and 401, R.R. 6, Napanee, Ontario.

The information in the exhibits is summarized in the following paragraphs.

On October 13, 1998 Paul Kennedy, the son of Ronald Kennedy, was convicted on seven counts of fraud over \$5,000 involving motor vehicles (ex.1/39). He received 9 months custody as a conditional sentence.

On October 26, 1998, the Registrar issued a proposal (ex.1/9) to revoke the registrations of Paul Kennedy and Paul Kennedy Sales and Leasing Limited. The Registrar relied on Paul Kennedy's convictions and the fact that Paul Kennedy was the sole director of Paul Kennedy Sales and Leasing Limited.

The proposal was appealed to this Tribunal's predecessor, the Ontario Commercial Registration Appeal Tribunal ("CRAT"). The Tribunal made two consent orders with conditions.

The Order for the company was made on March 26, 1999. The order directed the company name to be changed to eliminate any reference to Paul Kennedy, and the name was changed to Welcome to Kennedy Sales and Leasing Limited.

The Order for Paul Kennedy was made on March 30, 1999. Paul Kennedy's registration was suspended for one year ending April 5, 2000. The Tribunal's Order restricted him from dealing in motor vehicles except for daily or short term vehicle leasing. He was not to enter the business premises of the company and he was not to work in any capacity for it or have any interest in it.

When the conditions imposed by the Tribunal on the company, Welcome to Kennedy Sales and Leasing Limited, were breached, the Registrar issued a second Proposal (ex.1/15) on October 7, 1999 to revoke the registration of the company. The Registrar cited the original grounds from the first proposal and added five new ones with a sixth concluding paragraph as follows:

- i) On or about June 30 and July 28, 1999, Paul Kennedy signed cheques on behalf of an entity known as Paul Kennedy Sales and Service. Such conduct is contrary to the terms of the consent order;
- ii) An inspector from the Registrar's office called the Dealer on August 23, 1999 (and) inquired who the general manager was. The inspector was informed that would be Mary Linda or Paul Kennedy;
- iii) On August 23, 1999, an inspector from the Registrar's Office spoke with Paul Kennedy and advised Paul that an inspection would be performed on Tuesday or Wednesday that week. Mr. Kennedy advised he was available as "he was there everyday"
- iv) On August 25, 1999 an inspector from the Registrar's Office attended at the registered premises of the Dealer and observed a mail slot for Paul Kennedy.

The receptionist paged Paul Kennedy who met with the inspector and delivered copies of bills of sale and bank records for the Dealer; and

v) On or about Friday, September 24, 1999, the Dealer allowed an advertisement to be displayed in the Napanee newspaper that demonstrated a clear association between the Dealer and the Salesperson (Paul Kennedy).

The Dealer (the company) has displayed a disregard for the Act and an order of the Commercial Appeal Tribunal.

Welcome to Kennedy Sales and Leasing Limited appealed the proposal. On March 6, 2000 (Exhibit 1/17) CRAT issued a consent Order re-affirming that Paul Kennedy was to have nothing to do with the company and in particular was not to be on its registered premises for a further 60 days. The Order for the company spelled out the proper business practices to be followed by the company. The Order also contained an automatic revocation clause to come into effect if the Registrar had evidence that the company had failed to comply.

On March 15, 2000, Welcome to Kennedy Sales and Leasing Limited was convicted of five offences. Three of the company's salespersons were convicted as co-accused on some of the same offences for misrepresentation of true distances vehicles had travelled and failing to give required information on the sale of other vehicles. The charges were withdrawn against Ronald Kennedy but the company was fined \$1,300. The three salespersons were also fined.

As a result of breaches of the second consent Order, the automatic revocation came into effect. This was established in a letter dated September 6, 2000 from the Ontario Motor Vehicle Industry Council ("OMVIC").

Ronald Kennedy indicated that he wished to appeal but then decided to make new applications for registration for himself and for Welcome to Kennedy Sales and Leasing Limited. On October 1, 2001 the Registrar issued the Proposal to refuse the applications, and this is the subject of this appeal.

On November 20, 2001 the Director, *Motor Vehicle Dealers Act* obtained a Superior Court order directed to Paul Kennedy. Amongst other conditions the Order banned him from acting as a motor vehicle dealer or salesperson and from receiving any commission directly or indirectly in the sale, transfer, purchase, lease or change in the registration of a motor vehicle. He was also prohibited from locating and/or brokering the sale of motor vehicles as a business.

The evidence presented by the witnesses is summarized in the following paragraphs.

The Registrar called three witnesses. Amanda Dempsey, the manager of inspections for OMVIC explained the role of OMVIC which, since 1997, has looked after registration, complaint mediation, inspection and investigation under the Act.

Ms. Dempsey's first contact with Welcome to Kennedy Sales and Leasing Limited was by telephone on August 20, 2000. She asked for the person in charge or the dealer and was directed to Mary Linda or Paul Kennedy. Paul booked an appointment two days later with her for August 22, 2000.

On August 22, 2000, she met with both Paul Kennedy and Ronald Kennedy individually. She asked Ron for the last 10 - 20 deals. The documents provided took a lot of unravelling. The first 10 or so transactions were for 2000 models but they were not in their garage register (required under the *Highway Traffic Act*). The Garage Register was also missing a number of entries that should have corresponded with the records in the RIN (the Registered Identity Number) data base of the Ministry of Transport ("MTO") which lists the transactions for a particular dealer.

Ms. Dempsey found other documents missing covering the transactions in the company's files. Bills of sale were absent. Vendor and purchaser signatures were absent. Warranties had not been delivered. When Ms. Dempsey questioned Ronald Kennedy about the deals on the 2000 models, he told her that he put a stop to it around February or March.

While she was at the company's premises, Ms. Dempsey took down the number of a dealer plate on the vehicle Paul Kennedy was driving, 408DHC. MTO records show this dealer plate belonging to the company. However, the MTO records also show that the vehicle he was driving belonged to 1159274 Ontario Limited o/a Thrifty Rentals, a company not owned by either Ronald or Paul Kennedy.

Ms. Dempsey explained the legal requirement that a dealer plate may only be used by the very dealer owning it and then only to buy or sell vehicles or to pick those vehicles up.

Ms. Dempsey also went across the road from the company's premises to a motel (later established to be owned by Ronald Kennedy) where she understood Paul Kennedy had an office from which he was operating. She introduced herself to him and noticed his office had the usual trappings of a car dealership.

She then returned to the company's premises and obtained a safety Standards certificate pinned to an invoice. There were irregularities in it. The certificate listed Paul Kennedy's S & S as the licensee of a 1993 Ford. The attached covering invoice was written on a form with a printed heading, "Paul Kennedy's Sales and Service" but this name was crossed out and the words "410 Auto Service" were hand-written above it.

Ms. Dempsey was further concerned about three cheques from Welcome to Kennedy Sales and Leasing Limited.

June 19, 1999	to Paul Kennedy Sales and Service	\$10,000
June 18, 1999	to Kennedy Service	\$20,000

June 29, 1999

to Kennedy Service

\$20,000

Ms. Dempsey retrieved other documents from the company. She explained how the sales of six new 2000 model cars were disguised as 6 months leases to improperly gain the large discounts which the distributors allow to organisations renting vehicles. These discounts are available only to dealers with fleet numbers and then only if the lease on a vehicle runs for at least six months before the vehicle is sold. Ms. Dempsey suggested that Paul Kennedy set up the deals, using his numbered company 1324653 Ontario Limited O/A Thrifty Car Rental ("Thrifty") which, although never registered as a dealer, had the necessary fleet rental number with which to buy vehicles and claim the discount.

Ms. Dempsey used the records she had retrieved from Welcome to Kennedy Sales and Leasing Limited and compared them to the MTO records to illustrate how the discount process worked. Since MTO records do not show the transfer of ownership from the manufacturer to the distributor, but only to the first owner, the initial MTO entry for each of the six vehicles shows ownership in the dealer, Paul's Thrifty. The next entry, done within a day or so, records ownership in the customer and, immediately after, records ownership returning back to Thrifty for the six months to disguise the scheme. At the end of the six months period, ownership is shown in the Welcome to Kennedy Sales and Leasing Limited, and, almost immediately, MTO records show ownership back with the customer.

In these transactions, Ms. Dempsey had numerous concerns. She wondered why the cars were ever in Thrifty's name, and what ownership the customer was using. She was concerned about missing documents and lack of detail in Welcome to Kennedy Sales and Leasing Limited's files and Garage Register.

The next witness for the Program was David Wagner, an OMVIC inspector. He testified that he went to Welcome to Kennedy Sales and Leasing Limited's premises on October 19, 2000. He saw five or six cars facing the road with streamers on a couple of them. Because of the way the cars were lined up with no licence plates he believed it to be a retail car outlet.

This inspector knew of an article in the Whig Standard, indicating that Paul Kennedy could conduct the business of finding cars, but he assumed it was in error as he knew Paul Kennedy's registration as a salesperson had been revoked.

David Wagner looked at a Dodge pick-up truck on display. Paul Kennedy came and spoke with the investigator for 10 minutes. Paul said the pick-up was for sale for \$32,500 with 14,000 KM and warranty still on it. The inspector asked for his business card and Paul tore off a small piece of paper on which he wrote the following down.

PAUL KENNEDY

354-4000

561-4000

Later, when Ronald Kennedy testified, he confirmed that 354-4000 had been the telephone number of Welcome to Kennedy Sales and Leasing Limited since the start up.

Another experienced OMVIC investigator, David Wilson, testified. He stated that he went to the company's premises on March 20, 2001. Although he knew Welcome to Kennedy Sales and Leasing Limited had motor vehicles on lease, he took the premises to be a used car lot.

At the time of this visit, Mr. Wilson knew the company was not registered under the Act as a dealer because of the automatic revocation which had occurred. He also knew that the CRAT Order contained a condition that the dealer was not to invite the public to deal at a place other than registered premises.

He saw signs and took the photographs which were entered as exhibits. They showed a long red-roofed building with a conspicuous sign on the roof reading KENNEDY Sales & Leasing. There were other signs. One under the peak of the roof read:

NEED A CAR?
WE FINANCE EVERYONE
NO TURN DOWN ... IF YOU WORK, YOUR
(next words obliterated)

There were signs on each side of an entrance door. In front of the signs, there were six cars and two trucks facing the road, several of them unplated. On the glass of the front door there were several stickers for credit cards for Visa, Master card, American Express, and four or five others.

Also, on that door, a sign read, "LTO customers - if closed here make payments at Napanee Inn (Motel) across the highway. Thank you". The initials "LTO" indicate Lease to Own.

The investigator looked through the office window and saw a board on the wall with three captions with the following information:

CUSTOMER	SAFETY	LENDER
THOMPSON 95 CHEV	JACKS	STATE FARM
NEHRLONG 2000 DURANGO	JACKS	ROYAL BANK
WHITE 94 CAVALIER	JACKS	CAC
SWENSON 95 AEROSTAR	JACKS	CAC
LITTLE 94 GR. VOYAGEUR	JACKS	CAC
CHARTRAND 96 TAURUS LX	JACKS	CAC
NOXWORTHY 91 ESCORT GT	JACKS	CAC
KPRNIKE		

He saw people looking at cars coming and going. While he was there on several other occasions and on February 11, 2002, the day before this hearing, he saw more cars on the lot, probably 17 of them.

David Wilson also spoke to Ronald Kennedy, who made the remark that Paul Kennedy was his son and that he could not keep him away.

Ronald Kennedy also said "If you want me to take the signs down, I will". But the inspector replied that he was not ordering him to do so.

The Applicant then called a witness Lee Anne Kennedy. She is the present wife of Paul Kennedy. She stated he was now working to sell swimming pools.

She testified that she had worked as a salesperson from June or July of 2000 until February of 2001, but that her own registration was now suspended or revoked. In addition, she admitted there are outstanding charges of stolen property (a motor vehicle) against her and against Paul Kennedy.

She stated that she had no knowledge of Paul selling cars for Welcome to Kennedy Sales and Leasing Limited. It did business both sides of the road, she said.

Although she was looking after Paul Kennedy's son Dusty, on the west side of the road where Welcome to Kennedy Sales and Leasing Limited is located, she stated that Paul Kennedy never came over the road from the east Motel side to see him. She added that Paul Kennedy ran a business under the name of Paul Kennedy Sales and Service using the premises of 401 Auto Service on the east side of the road.

There were two character witness who testified on behalf of Ronald Kennedy. Mr. Brian Wilson who has known Ronald Kennedy all his life as a neighbour. He does not socialize with Ronald Kennedy but knows Ronald Kennedy is highly thought of and never lies or cheats. The Reverend John Craig has known the family well and knows of Ronald Kennedy's reputation as a good farmer who helps with social work, for instance helping with furniture after a house fire and with finding a vehicle for someone needing transportation to get to work.

Ronald Kennedy testified. He formed Welcome to Kennedy Sales and Leasing Limited and owned all the shares. His son Paul never owned any of the shares. Petro Canada leases the present business premises to the company at the intersection of Highways 41 and 401.

Ronald Kennedy testified that after March 6, 2000 (the date of the second CRAT Order) Paul Kennedy never worked or sold for him. He said he did not trust Paul or the Company staff.

He commented on his sales manager, Brant Wilson, who was a co-accused and convicted with the Company on two counts of improper motor vehicle dealings and was fined \$550. In

spite of that, Ronald Kennedy said that Brant Wilson was the most honourable man there, and added that most of them were not.

Respecting the complaint by OMVIC over an advertisement in the Napanee newspaper on September 24, 1999, Ronald Kennedy said he was surprised by this but did not know who had put it in the paper. The advertisement carried a conspicuous photograph of Paul Kennedy, with the caption, "Welcome to Kennedy Sales and Leasing GRAND OPENING to be part of the United Way kick-off." The advertisement concluded with a special \$10 price for an oil change.

Ronald Kennedy stated that the three cheques totaling \$50,000 paid to Paul Kennedy's business were for installing a hoist.

Ronald Kennedy said that the signs which were set up on the Welcome to Kennedy Sales and Leasing Limited's premises related to the 40 cars he had. The 17 cars noted on the premises by OMVIC inspector David Wilson were half "junkies" or vehicles returned. He said the inspector told him not to take the signs down.

Ronald Kennedy stated he did not know what was going on respecting the OMVIC complaint about the safety certificate. It concerned a sale by his company, Welcome to Kennedy Sales and Leasing Limited, of a Ford. A mechanic, Charles Garrow, had issued it. The invoice covering the cost of the certificate (for \$279.81) was paid by his company to 401 Auto Service. However, he explained that Jack Dorey, the owner of 401 Auto Service, could not be called to confirm for whom the work was being done.

When asked why Lee Anne Kennedy had been driving a Winstar with Welcome to Kennedy Sales and Leasing Limited's dealer plate on it, Ronald Kennedy said he knew she had a yellow dealer's plate on the vehicle. He conceded that it was improper for him to put his plate on another vehicle. He admitted he knew dealer plates are only allowed for selling and picking up vehicles. But, he said, he had no way of knowing if the vehicle had just been picked up.

Ronald Kennedy's evidence was that when he found out about the Thrifty franchise and the scheme to obtain the fleet discount, he knew it was not legitimate and put a stop to it. He thought that there were around 40 similar deals with the bulk taking place in January and February 2001. It came to his attention in February or March 2001 when company sales of new cars suddenly showed a large increase. There were suddenly sales of 50 new cars where typically there would only have been 2 or 3.

Ronald Kennedy said he did not try to straighten out the situation by transferring the vehicles to the customers at the time that he discovered the suspicious deals in February or March, rather he decided to wait out the six months to protect the discount. The cars were paid for in January. He stated he was protecting the customer and his company.

He admitted that significant profits accrued to his company as a result of these deals. He never spoke to Trenton Chrysler, the distributor to tell them about the scheme and he testified

that there were no customer complaints.

He stated that he did not know how his son Paul made money from the scheme, although the Tribunal notes that the financing documents in Welcome to Kennedy Sales and Leasing Limited's files show discounts were made out to Paul Kennedy.

Ronald Kennedy said that Mary Linda Kemmett was the business manager and did all the transactions. He noted that he was alerted to what was going on when he noticed that she had been paid a \$10,000 commission, which was unusual. Her commission and the staff's commissions on the sales of these new cars were all paid.

He admitted his company, Welcome to Kennedy Sales and Leasing Limited, was using Paul Kennedy's company, Thrifty, to get favourable discounts and that his company paid the franchise dealer directly.

Ronald Kennedy stated that the transactions in the scheme were not in the garage register as required, because he treated them as a "lease owned", meaning the buyer leases before he or she buys.

Ronald Kennedy pointed out that he now knew he had to establish better control over his company. He had been spending 4 or 5 hours a day at the company after farming in the morning. However, he was not there every day and had roughly 20 employees who had been running the business in his absence. Now, he says, the situation is 180 degrees different as he has got rid of the staff and wants to reduce the volume of business to 10 cars a month from 50 a month.

He testified that he has been losing \$10,000 a month since September 2000 when his company's registration was suspended. All he wants, he testified, is to be able to sell 10 cars a month.

THE LAW

The sections of the *Motor Vehicles Dealers Act* relevant to this appeal are as follows:

3. (1) No person shall,

(a) carry on the business of a motor vehicle dealer unless the person is registered under this Act; or

(b) act as a salesperson of or on behalf of a motor vehicle dealer unless the person is registered as a salesperson of such dealer and such dealer is registered as a motor vehicle dealer under this Act

(3) a registered motor vehicle dealer shall not carry on business in a name other than the name in which it is registered or invite the public to deal in a place other than that authorized by the registration

4. A motor vehicle dealer shall not retain the services of a salesperson who is not registered under this act.

5. (1) An applicant is entitled to registration or renewal of registration by the Registrar except where, ...

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with the law and with integrity and honesty;

(c) the applicant is a corporation and,

(ii) the past conduct of its officers or directors affords reasonable grounds for the belief that its business will not be carried on in accordance with the law and with integrity and honesty; or

(d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

8. A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed.

FINDING OF FACTS:

The Tribunal accepts the evidence in the exhibits and the evidence from the three Program witnesses respecting the transgressions of the Act.

From the evidence gathered by the experienced investigators, the Tribunal finds the activities on the company premises were in breach of the consent orders.

Ronald Kennedy has to take responsibility for this. He was surrounded by dishonest employees which included his son. The resulting problems were partly due to Ronald Kennedy not paying enough attention to the business and partly due to his own bad judgment.

The employees' conduct led to his company, Welcome to Kennedy Sales and Leasing Limited, being convicted on five counts of making improper sales, contrary to the Act and contrary to the *Business Practices Act*. The total fines for the company were \$1,300. Three of his employees were also convicted and fined, one of them his sales manager.

In addition, in exhibit 1/34 there is one outstanding charge against Welcome to Kennedy Sales and Leasing Limited for carrying on business when not registered, between October 13, 2000 and March 20, 2001.

During the period following the CRAT orders until recently Ronald Kennedy has been unable to keep his son Paul away from the company business.

The leasing discount operation looms as the most important transgression. Ronald Kennedy stated that about 40 new cars were involved, and OMVIC has produced the records relating to 6 of them. MTO records clearly disclose how the transactions were disguised and manipulated. Paul Kennedy was obviously involved as the first buyer from the distributors as the sales are variously addressed to his company or trade name:

1324653 Ontario Ltd O/A Thrifty Car Rental
Kennedy Sales & Leasing
Kennedy Sales & Leasing/Thrifty

But when the final transfer of ownership goes to the customer from Welcome to Kennedy Sales and Leasing Limited there is no document to show how the company got its right to do so from Paul Kennedy's company, Thrifty.

None of the six bills of sale are signed by the buyers, as is required.

In the company's files, the documents relating to the financing of the cars show Paul Kennedy as the dealer entitled to get the discounts. Presumably, he collected the discounts on the six vehicles totaling \$2,544 (on financing of \$177,570). If, as related by Ronald Kennedy, there were, in fact, 40 cars sold under the scheme, Paul Kennedy would probably have collected well over \$15,000.

The Tribunal finds that the reaction of Ronald Kennedy when he found out about the leasing/discount scheme was inexcusable. By allowing the scheme to continue from February or March for the six months of the leases, he knowingly preserved the significant profit for his company. The distributors were defrauded of substantial discounts. On the six cars traced by OMVIC, there were discounts of over \$18,000. Translated into discounts for 40 cars that total could amount to over \$100,000.

The risk for the customers and financing companies is unknown.

The Tribunal finds Ronald Kennedy's conduct particularly reprehensible after the help he has received from OMVIC. In the consent orders agreed to, OMVIC showed flexibility and sympathy for Ronald Kennedy, as well as for his 20 employees. It gave Ronald Kennedy an unusual second and third chance.

APPLICATION OF THE LAW TO THE FACTS:

The leading case is Brenner v Registrar of Motor Vehicles and Salesmen 1983 19 CRAT

Divisional Court which confirms how the Act should apply:

"The effect of s. 7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the Applicant afforded reasonable grounds for the belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question. Instead the Board seems to have been pre-occupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself."

The accumulated improprieties of Ronald Kennedy and his company, before the leasing/discount scheme arose, suffice to have their registrations revoked on the basis of past conduct.

The leasing/discount scheme by itself does likewise. It was of significant proportions. Taking all these improprieties together, there is overwhelming support for the Registrar's decision to deny the Applicants registration under the Act.

DECISION:

Accordingly, by virtue of the authority vested in it under section 7(4) of the *Motor Vehicle Dealers Act*, the Licence Appeal Tribunal directs the Registrar to carry out his proposal to refuse the registrations of Welcome to Kennedy Sales and Leasing Limited as a motor vehicle dealer and of Ronald Nelson Kennedy as a salesperson under the Act.

LICENCE APPEAL TRIBUNAL

Douglas Mackintosh,
Vice-Chair

RELEASED: March 4, 2002

CHINENYE, BASIL

BASIL CHINENYE

APPEAL FROM A DECISION OF THE BOARD OF TRUSTEES OF THE
ONTARIO MOTOR VEHICLE DEALERS COMPENSATION FUND

TO DISALLOW A CLAIM

TRIBUNAL: JOHN ORT, Member

APPEARANCES:

BASIL CHINENYE, Applicant
ALMAIDA CHINENYE, Agent, representing the Applicant
URSULA BOYLAN, Counsel, representing the Board of Trustees,
Ontario Motor Vehicle Dealers Compensation Fund

DATE OF

HEARING: February 25, 2002

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") from a decision letter of the Board of Trustees, Ontario Motor Vehicle Dealers Compensation Fund (the "Respondent") dated October 9, 2001, being exhibit 1. The Respondent refused the Applicant's claim on the basis that the claim arises from a dispute over a repair invoice rather than a trade in a motor vehicle.

ISSUE:

Should the Tribunal confirm the determination of the Board or set aside the determination of the Board and allow in whole or in part the Applicant's claim for compensation under section 12(3) of the Terms of Compensation Fund Schedule of Regulation 801 under the *Motor Vehicle Dealers Act*?

FACTS:

The evidence presented by the Applicant consisted of the testimony of Basil Chinenye and Almaida Chinenye as well as documentary evidence introduced through them.

TESTIMONY OF BASIL CHINENYE:

Mr. Chinenye stated that he wanted a car for work. He testified that he purchased a 1989 Honda Accord (the "Vehicle" or the "Car") from Mr. Abdul Rahmani of Eastview Auto Sale at 1221 Queen St. East, Toronto. He referred to a bill of sale dated October 18, 2000 at tab 2 of exhibit 3, which sets out a total sale price of \$2,800 and a total including taxes of \$3,220. Mr. Chinenye testified that the total purchase price for the Vehicle was \$3,500. At page 6 of tab 3 of exhibit 3, Mr. Chinenye states: "He [Mr. Abdul Rahmani] had told me that the sum of \$280.00 he subtracts for the cost of the Car satisfaction and emission control expenses."

Mr. Chinenye also said that he purchased from Mr. Abdul Rahmani a Powertrain Plan 750 insurance policy from Autogard Warranty Corp., set out at page 10 of tab 2 of exhibit 3.

On October 19, 2000 Mr. Chinenye testified that he took delivery of the Vehicle. According to Mr. Chinenye, on the way home the Vehicle broke down. On cross-examination by Ms. Boylan, Mr. Chinenye stated that, as his wife drove the Vehicle, the car stopped suddenly and he saw smoke coming out of the hood. Mr. Chinenye testified that he then called Mr. Rahmani and told him that he was returning the Car. Mr. Chinenye stated that Mr. Rahmani told him that if it happens the next day then he should bring the Car in. Mr. Chinenye testified that he and his wife waited about twenty minutes before driving home and, even then, the Car was jerking.

Mr. Chinenye stated that his wife told Mr. Rahmani the next day that they will bring the Car back immediately. Mr. Chinenye said that Mr. Rahmani told Mrs. Chinenye that he will be abroad for about twelve days and Mr. Rahmani asked for a chance to fix the Vehicle on his return. Mr. Chinenye testified that the Vehicle was parked on his driveway and no-one used it. He stated that he and his wife started the Car a couple of times and each time the Vehicle appeared to overheat after ten to fifteen minutes.

According to Mr. Chinenye, his wife found out on November 4, 2000 that Mr. Rahmani was back at Eastview Auto Sale. He stated that on November 5 he drove the Car back to Mr. Rahmani and that the Car stopped about ten times for fifteen to twenty-five minutes each time. Finally, Mr. Chinenye telephoned Mr. Rahmani, and Mr. Rahmani towed the Car to Eastview Auto Sale.

Mr. Chinenye testified that on November 10 Mr. Rahmani telephoned him and said that he had the Car fixed at another shop. Mr. Chinenye said that he picked up the Car that same day and that it again broke down on the way home. He stated that he saw smoke come out of the Car.

Mr. Chinenye testified that he telephoned Mr. Rahmani from a telephone booth and said that he wants his money back. Mr. Chinenye stated that Mr. Rahmani answered that he will not do anything more. Mr. Chinenye stated that he then had the Car towed home. Mr. Chinenye testified that the next day his wife spoke to Mr. Rahmani at Eastview Auto Sale and asked for the money back. Mr. Chinenye stated that Mr. Rahmani refused to return the money.

Mr. Chinenye stated that a few days later he telephoned the Ontario Motor Vehicle Industry Council ("OMVIC") and spoke to Ms. Marlene Wildman. He told her that the Car is no good and that he wants his money back. Mr. Chinenye said that Ms. Wildman asked him to give Mr. Rahmani a chance to fix the Car. After a day or so, Mr. Chinenye testified, Ms. Wildman telephoned that Mr. Rahmani will look at the Car. On November 16, Mr. Chinenye testified, he had the Car towed to Eastview Auto Sale. Mr. Chinenye later added that Mr. Rahmani told him that he will receive a telephone call from Autogard Warranty Corp. that they will fix the Car. Mr. Chinenye testified that Autogard telephoned him, but that they refused to pay for the repair, and that they claimed the Car has a pre-purchase problem. Mr. Chinenye said that Ms. Wildman telephoned him about two days later and said that the Car's head cylinder is bad, that the engine is completely gone, that repairs will cost \$800, and that Mr. Rahmani is asking Mr. Chinenye to pay \$400 of the cost. Mr. Chinenye stated that Ms. Wildman told him to accept Mr. Rahmani's offer or to take any action suitable to him. Mr. Chinenye testified that he and his wife went to Eastview Auto Sale, that he offered Mr. Rahmani \$400, but that Mr. Rahmani refused to accept the money and demanded \$800. Further, Mr. Chinenye stated, Mr. Rahmani said the Car was at Weston Road and that Mr. Rahmani will not give them access to the Car unless he gets the \$800.

Mr. Chinenye testified that on December 8, 2000, he filed a claim in Small Claims Court. Mr. Rahmani did not appear at court. As set out on pages 19 and 20 of tab 2 of exhibit 3, on February 13, 2001, Mr. Chinenye recovered judgment against Abdul Rahmani and Eastview Auto Sale for \$3,917.95 and \$270 costs together with interest at 6% from November 16, 2000. Mr. Chinenye stated that \$417.95 of the \$3,917.95 was for automobile insurance.

The Small Claims Court issued a notice to Abdul Rahmani to attend a debtor examination to determine the means he has to satisfy the judgment. Mr. Chinenye testified that he mailed the notice by registered mail to Mr. Rahmani at Eastview Auto Sale. Mr. Chinenye testified that the letter came back and that, when he investigated, he found that Eastview Auto Sale had moved from 1221 Queen St. East. Mr. Chinenye also found that the telephone number of Eastview Auto Sale was out of service. He stated that Mr. Rahmani's cellular telephone was only accepting voice mail. Mr. Chinenye said that he obtained a Business Names Report from the Ministry of Consumer and Commercial Relations. He stated that he then sent a registered mail letter with the Small Claims Court notice to Mr. Rahmani at the home address shown on the Business Names Report, but the letter was returned. Mr. Chinenye also said that he asked the police to locate Mr. Rahmani. Mr. Chinenye testified that he has been unable to locate Mr. Rahmani and Eastview Auto Sale. He stated that Mr. Rahmani has failed to appear for debtor examinations at the Small Claims Court.

On May 28, 2001 Mr. Chinenye submitted an application for claim to the Motor Vehicle Dealers Compensation Fund for \$4,280 on the basis of a judgment against a motor vehicle dealer which has remained unpaid for ninety days, as set out at tab 2 of exhibit 3.

The evidence presented by the Respondent consisted of the testimony of Marlene Wildman as well as documentary evidence introduced through her.

TESTIMONY OF MARLENE WILDMAN:

Ms. Wildman testified that she has been a complaint mediator with OMVIC for two years. She stated that Mr. Rahmani told her that he was willing to resolve the matter by paying only for labour of about \$250 and having Mr. Chinenye pay \$600, not \$400, for the balance of the repair because Mr. Rahmani claimed that the overheating of the Car caused more damage to it and that he would not assume responsibility for such damage.

LAW:

Section 1 of the Terms of Compensation Fund schedule of Regulation 801 to the *Motor Vehicle Dealers Act* (the "Schedule") states:

"'claim' means a claim for pecuniary loss arising out of a transaction involving a trade in a motor vehicle".

Section 12(3) of the Schedule adds in part:

"A customer may make a claim against the Fund where the customer gives written notice of the claim to the Registrar within two years of the participant's refusal or failure to pay, even if the motor vehicle dealer with respect to whom the claim is being made ceased to be a participant after the refusal or failure to pay, and where the claim meets one of the following requirements:

"1. The customer has recovered in any court in Ontario a judgment in respect of the claim and the judgment has become final by reason of the expiration of the time for appeal or of having been confirmed by the highest court to which an appeal may be taken and the customer makes an application, supported by the judgment and statement of claim, for payment of the unsatisfied portion of the judgment and costs as assessed.".

Section 12(10) of the Schedule states in part:

"... there shall not be paid out of the Fund, ...

"(b) any amount for interest, including interest on a judgment or on costs".

APPLICATION OF THE LAW TO THE FACTS:

Mr. Chinenye testified that the Vehicle broke down on his way from Eastview Auto Sale to his home. He stated that he then called Mr. Rahmani and said that he was returning the Car. Mr. Chinenye stated that it was Mr. Rahmani who asked for a chance to fix the car.

On November 10, Mr. Rahmani claimed that the car was repaired. Mr. Chinenye testified that the Car again broke down and that he again asked for his money back. Mr. Rahmani refused.

Mr. Chinenye stated that he telephoned OMVIC and told Ms. Wildman that the car is no good and that he wants his money back. Mr. Chinenye said that it was Ms. Wildman who asked him to give Mr. Rahmani a chance to fix the car. Mr. Chinenye had the Car towed back to Eastview Auto Sale. Autogard Warranty Corp. refused to pay for the repair on the grounds that the Car had a pre-existing defect. Mr. Chinenye testified that he and Mr. Rahmani did not agree on payment for the second repair. Mr. Chinenye further testified that Mr. Rahmani then refused to give the Car back to Mr. Chinenye.

Thus, the Tribunal finds that the Car had a pre-existing defect and that Mr. Chinenye made a timely request for his money back.

Mr. Chinenye has no car. First, Mr. Rahmani refused to return his money. Then, Mr. Rahmani refused to return his Car. This is not a case of a dealership repairing a vehicle and refusing to return it to a customer until the customer pays for repairs. Mr. Rahmani refused to return the Vehicle before the second repair was done.

Eastview Auto Sale failed to deliver a car to Mr. Chinenye that is fit for the ordinary purposes for which cars are used. Mr. Chinenye clearly suffered a pecuniary loss. Any disagreement that Mr. Chinenye had with Mr. Rahmani over repair costs was only part of the greater disagreement over the purchase of the Car and Mr. Chinenye's attempt to return the Car for a full refund. Accordingly, the Tribunal finds that Mr. Chinenye does have a claim for pecuniary loss arising out of a transaction involving a trade in a motor vehicle, a claim as defined by section 1 of the Schedule.

The Tribunal must determine the proper amount of such claim. Mr. Chinenye obtained a judgment in compliance with section 12(3) of the Schedule. The total judgment is for \$3,917.95 and \$270 costs together with interest. According to the bill of sale the purchase price is \$3,220. Mr. Chinenye provided no evidence that he paid a further \$280 to Eastview Auto Sale. Mr. Chinenye also claimed damages of \$417.95 paid for insurance. Such insurance relates to the period after the trade transaction. The Tribunal declines to find that the cost of insurance is a loss arising out of a transaction involving a trade. Finally, Mr. Chinenye claims interest from November 16, 2000. According to section 12(10) of the Schedule, such amount shall not be paid out of the Fund. Therefore, the Tribunal finds that \$3,490, being the sum of the bill of sale total of \$3,220 plus \$270 court costs, is the proper amount of the Applicant's claim for pecuniary loss arising out of a transaction involving a trade in a motor vehicle.

On the facts as found, the Tribunal finds that the decision of the Respondent was in error in denying the Applicant's claim for compensation of \$3,490 under section 12(3) of the Terms of Compensation Fund Schedule of Regulation 801 under the *Motor Vehicle Dealers Act*.

DECISION:

Accordingly, under the authority vested in it under section 15(3) of Regulation 801 under the *Motor Vehicle Dealers Act*, the Tribunal directs the Board of Trustees of the Motor Vehicle Dealers Compensation Fund to allow the Applicant's claim in the amount of \$3,490.

LICENCE APPEAL TRIBUNAL

John Ort, Member

RELEASED: March 22, 2002

DAROS, LAURENCE AND GENNY

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
LAURENCE AND GENNY DAROS

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

LAURENCE AND GENNY DAROS

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and

FIELDGATE DEVELOPMENT AND CONSTRUCTION

Added Party

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter on March 4-8, 11-13, 2002;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Wednesday, May 1, 2002.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: March 15, 2002

CHRISTO, BRUCE AND ZOE

PREHEARING

BRUCE AND ZOE CHRISTO

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: F. BRUCE FITZPATRICK, VICE CHAIR

APPEARANCES:

BRUCE AND ZOE CHRISTO, the Applicants
FIL CECE and SCOTT ROWAND, Agents, representing the Ontario
New Home Warranty Program
MARY KEDDY, DANIEL BELANGER AND RICHARD
CURTIS, Counsel representing the added party Minto
Yorkville Inc.

DATE OF

PRE-HEARING: February 18th, 2002,

Toronto

ORDER

Following the attendance before the Licence Appeal Tribunal (the "Tribunal") on February 18th, 2002 at a pre-hearing of Bruce and Zoe Christo (the "Applicants") with Fil Cece and Scott Rowand for the Ontario New Home Warranty Program (the "Program") and with Mary Keddy, Daniel Belanger and Richard Curtis for Minto Yorkville Inc. (the "Added Party");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Monday April 29th, 2002 to continue if necessary on Tuesday April 30th, 2002, at the Tribunal's Chambers;

1. The parties to the hearing are the Applicants, the Program and the Added Party.
2. The Applicants' complaint to the Program was made within the time required by the Act, and the timeliness of that complaint is not in issue.

3. The Applicants took possession of their home on September 27th, 1999, and that is the agreed date the warranty at issue in this notice commenced under the *Ontario New Home Warranties Plan Act*.
4. The Applicants' claim is for compensation or repair of cupping in a hardwood floor of a living room/dining room area of their condominium, unit 512 located at 38 Avenue Road in the City of Toronto. The size of the affected area is approximately 440 square feet.
5. The Applicants, the Program and the Added Party shall exchange all documents to be relied upon at the hearing on or before April 19th, 2002, in accordance with the Tribunal's Rules of Practice.
6. The hearing is estimated to require two days.
7. The Applicants, the Program and the Added Party will cooperate to set up an appointment to view and take photographs of the area effected in unit 512, 38 Avenue Road on or before March 15th, 2002.

LICENCE APPEAL TRIBUNAL

F. Bruce Fitzpatrick, Vice-Chair

Released: March 7, 2002

RIZZO, SAVERIO AND MIRELLA

SAVERIO AND MIRELLA RIZZO

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE *ONTARIO NEW
HOME WARRANTIES PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL: JOHN ORT, Presiding
VICTOR L. DREVNIG, Q.C.

APPEARANCES: SAVERIO RIZZO AND MIRELLA RIZZO, Applicants
KAREN JONES, Counsel, representing the Ontario New Home
Warranty Program

DATE OF HEARING: February 28, 2002 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") by Saverio Rizzo and Mirella Rizzo (the "Applicants") respecting a decision by the Ontario New Home Warranty Program (the "Program" or the "Respondent") dated October 12, 2001, wherein the Applicants' claim for compensation for breach of warranty under section 14(3) of the *Ontario New Home Warranties Plan Act* (the "Act") was disallowed.

ISSUE:

What action should the Tribunal direct the Program to take in accordance with the *Ontario New Home Warranties Plan Act* and regulations under the Act? Should the Tribunal set aside, confirm, or modify the decision of the Program to disallow the Applicants' claim for compensation for breach of warranty under the Act?

FACTS:

The evidence introduced by the Applicants consisted of the testimony of the Applicants Saverio Rizzo and Mirella Rizzo as well as documentary evidence, including a videotape, introduced through them.

The parties agree that the claim for compensation is timely.

TESTIMONY OF MIRELLA RIZZO:

Ms. Rizzo testified that the outside brickwork weaves in and out of the plane of the wall on three sides of the Applicants' house. She stated that the weave cannot easily be seen when looked at perpendicularly to the wall. Ms. Rizzo said that the weave can be seen more readily at an angle and at night. She testified that the weave can be seen from across the street, about forty feet away. Ms. Rizzo stated that the weave can be seen more easily next to lines of string put up vertically along the walls by her husband. She also said that the walls are not quite vertical and referred to a deviation of the top of the walls from the lines of string.

TESTIMONY OF SAVERIO RIZZO:

Mr. Rizzo testified that he has been a plumber for about ten years. He also stated that he has done carpentry work and has assisted carpenters building new houses.

Mr. Rizzo said that he put up a line of string at various points along the walls. He stated that he used a four inch torpedo level to adjust the string so that it was vertical before attaching it to nails at the top and the bottom of each wall. Upon cross-examination by counsel for the Program, Mr. Rizzo said that he used the same level that carpenters use for their plumb lines.

Mr. Rizzo testified that he measured the weaving of the bricks at three points on each of the three walls about which the Applicants are complaining. He stated that he found deviations of one half inch to three quarters of an inch.

Mr. Rizzo also said that he measured a deviation of the top of the walls from the vertical lines of string of two inches to two and a quarter inches.

Mr. Rizzo also testified that three experienced bricklayers told him that the work is not acceptable. He said that one advised him that the only way to fix the walls is to take them down and rebuild them.

The evidence presented by the Respondent consisted of the testimony of Sherri Lumley and James Fortune as well as documentary evidence introduced through them.

TESTIMONY OF SHERRI LUMLEY:

Ms. Lumley stated that she has been a warranty representative for the Ontario New Home Warranty Program for over two years. She also testified that her previous employment included six years with a builder as a customer service manager. Ms. Lumley said that she is certified under part 9 of the Ontario Building Code, dealing with residences.

Ms. Lumley testified that she saw weaving of the walls. She stated that she did not measure the divergence of the bricks with a ruler, but she estimated the deviations to be a quarter of an inch to an inch. She stated that such deviations are acceptable. Later, she said that the weaving cannot be seen from twenty feet away from the walls.

Ms. Lumley stated that she could not say if the lines of string were vertical. She testified that one cannot tell if such lines are vertical using a torpedo level. Ms. Lumley said that she did not see the walls departing from vertical.

Ms. Lumley referred to a letter addressed to her from Andrew Kiwala of B.J. Brickwork Construction Ltd., dated October 28, 2001, found at tab 10 of exhibit 3. The letter partly states: "Although no measurements were taken it would appear that the deviations from plumb do not exceed what would be termed unacceptable by building code standards.". Ms. Lumley admitted that in a telephone conversation Mr. Kiwala told her that the walls are of poor workmanship.

TESTIMONY OF JAMES FORTUNE:

Mr. Fortune stated that he has been a customer service representative with the Ontario New Home Warranty Program for about nine years. He said that he is certified in part 9 of the Ontario Building Code and that he inspects about 80 - 100 units per year.

Mr. Fortune stated that he was asked to provide a second opinion on the walls of the Applicants' house. He testified that it is not unusual to ask a second person to provide an opinion when the item is subjective in nature. Later, he added that there is nothing in the Ontario Building Code regarding weaving.

Mr. Fortune testified that he measured brick deviations of up to 5/8th of an inch in the weaving. He stated that the weaving is not excessive, not unusual, and not a defect.

Mr. Fortune said that he could not detect that any wall of the Applicants' house was not plumb. He testified that he did not attempt to measure whether the lines of string put up by Mr. Rizzo were plumb. He did state that the only way to determine if a wall is properly vertical is to drop a plumb line, a line with a weight attached at the bottom. Mr. Fortune testified that using a torpedo level to determine whether a string is vertical is not sufficient. He also said that he would notice a one inch to two inch divergence from

vertical of a two storey wall without a plumb line. Mr. Fortune stated that there is nothing in the Ontario Building Code concerning a wall that is not plumb.

LAW:

Section 13(1)(a) of the *Ontario New Home Warranties Plan Act* states:

"Every vendor of a home warrants to the owner,

"(a) that the home,

"(i) is constructed in a workmanlike manner and is free from defects in material".

APPLICATION OF LAW TO FACTS:

The onus of proof on a balance of probabilities rests on the Applicants. There was no evidence given on behalf of the Applicants regarding damages.

There was little disagreement regarding the extent of weaving of the outside brickwork. Mr. and Mrs. Rizzo believe that the weaving is a defect.

No expert testified on behalf of the Applicants. The Tribunal gives little weight to hearsay evidence that three bricklayers stated that the work is not acceptable. Those persons did not attend the hearing and could not be cross-examined. The letter from Andrew Kiwala states that the deviations do not exceed what would be termed unacceptable. On the other hand, Mr. Kiwala told Ms. Lumley that the walls are of poor workmanship. Since there is conflicting evidence about the opinion of Andrew Kiwala, the Tribunal gives no weight to his opinion.

Mr. Fortune admitted that the weaving is an item that is subjective in nature. He stated that the weaving is not excessive, not unusual, and not a defect. Ms. Lumley said that the deviations that she observed are acceptable and are not a defect. Ms. Lumley and Mr. Fortune have extensive experience in inspecting houses; therefore, the Tribunal places greater weight on their testimony than on the testimony of Mr. & Mrs. Rizzo regarding the weaving of the brickwork. Accordingly, the Tribunal finds that the weaving of the brickwork is not a defect.

The parties disagree on whether the walls deviate from plumb. Mr. Rizzo testified that he found a divergence of the wall from the string that he put up of up to two and a quarter inches. The Tribunal finds that the top of the walls does deviate from the string put up by Mr. Rizzo. Mr. Rizzo said that he used a torpedo level to adjust the string until it was plumb. Ms. Lumley and Mr. Fortune both stated that one cannot determine whether such string is vertical using a torpedo level. Mr. Fortune said that the only way to determine if a wall is vertical is to drop a plumb line, a line with a weight attached at the bottom. Both Ms. Lumley and Mr. Fortune testified that they could not see any walls departing from vertical. Mr. Fortune stated that he

would notice a one inch to two inch divergence from vertical of a two storey wall without a plumb line. Again, no expert testified on behalf of the Applicants. The Tribunal puts greater weight on the testimony of the experts, Ms. Lumley and Mr. Fortune, than on the testimony of Mr. Rizzo, and the Tribunal finds that the Applicants failed to prove that the string put up by Mr. Rizzo is plumb. The Tribunal concludes that the deviation of walls from the lines of string does not prove that the walls are not vertical. Thus, the Tribunal does not find that the alleged deviation of walls from vertical is a defect.

Section 13(1) of the *Ontario New Home Warranties Plan Act* partly states that a vendor of a home warrants to the vendor that the home is constructed in a workmanlike manner and is free from defects in material. On the facts as found, the Tribunal finds no breach of the warranty under section 13(1) of the Act, and the Tribunal finds that the decision of the Program was not in error.

DECISION:

Accordingly, by virtue of the authority vested in it under section 16(3) of the *Ontario New Home Warranties Plan Act*, the Tribunal directs the Ontario New Home Warranty Program to disallow the Applicants' claims.

LICENCE APPEAL TRIBUNAL

John Ort,
Presiding

Victor L. Drevnig, Q.C.

RELEASED: March 20, 2002

RONCONE CONSTRUCTION LIMITED

MOTION TO CONVERT AN IN PERSON PRE-HEARING TO AN
ELECTRONIC PRE-HEARING ON SHORT NOTICE UNDER THE
ONTARIO NEW HOME WARRANTIES PLAN ACT RESPECTING
AN APPEAL TO A PROPOSAL

TO SUSPEND REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

FRANCESCO RONCONE, agent representing the Applicant
CAROL STREET, Counsel, representing the Registrar, Ontario New
Home Warranties Plan Act

DATE OF
MOTION:

March 22, 2002

By Teleconference

ORDER

An electronic hearing was held on March 22, 2002 to consider the Motion of the Ontario New Home Warranty Program to convert an in-person pre-hearing to an electronic pre-hearing in the appeal of Roncone Construction Limited to a proposal brought under the Ontario New Home Warranties Plan Act. The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL ORDERS that the pre-hearing in this matter, scheduled to proceed on March 28, 2002 at 9:30 a.m. in London, Ontario be rescheduled to proceed as an electronic hearing (telephone conference) on the same scheduled date and at the same scheduled time.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: March 22, 2002

RONCONE CONSTRUCTION LIMITED

MOTION TO CONVERT AN IN PERSON PRE-HEARING TO AN
ELECTRONIC PRE-HEARING ON SHORT NOTICE UNDER THE
ONTARIO NEW HOME WARRANTIES PLAN ACT RESPECTING AN
APPEAL TO A PROPOSAL

TO SUSPEND REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

FRANCESCO RONCONE, agent representing the Applicant
CAROL STREET, Counsel, representing the Registrar, Ontario New
Home Warranties Plan Act

DATES OF

MOTION: March 22, 2002

By Teleconference

ORDER AND REASONS FOR ORDER

BACKGROUND

Ronccone Construction Limited (the "Applicant") appeals the Notice of Proposal ("the Proposal") to suspend its registration as a builder/vendor under the *Ontario New Home Warranties Plan Act* (the "Act"). The Proposal issued by the Ontario New Home Warranty Program (the "Program") is dated October 31, 2001.

Following service of the Proposal on the Applicant, the Applicant filed a Notice of Appeal with the Tribunal and pursuant to provisions of the Act a hearing of the Applicant's appeal is to be heard in London, Ontario on May 13, 14 and 15, 2002.

By notice of the Tribunal dated January 7, 2002 sent to the Applicant and the Program, an in person pre-hearing was set down for hearing in London, Ontario for March 28, 2002 at 9:30 am. This pre-hearing was called pursuant to Section 9 (4) of the Act in response to the Applicant's request for such pre-hearing.

By Notice of Motion dated March 13, 2002 the Program now moves for an order that the in person pre-hearing scheduled to be heard in London, Ontario be rescheduled to proceed electronically, by teleconference, at the same scheduled time and date, namely 9:30 a.m. on March 28, 2002. The Applicant opposes the granting of such order.

POSITIONS OF THE PROGRAM

The Program filed an affidavit by Netanus Rutherford ("Rutherford") in support of its motion.

Rutherford states as follows on her affidavit:

1. She is the Manager, Dispute Resolution and Counsel of the Program.
2. The Applicant, when filing its appeal, requested a pre-hearing in person to which the Program agreed as long as it could be done in a cost-efficient and time-efficient manner. It is her understanding that when an Applicant resides a significant distance from Toronto, the Tribunal's general practice is to conduct pre-hearings by teleconference so as to save the time and expenses of travel by the parties and the Vice-Chair. Accordingly, the Program's position, outlined by it in a letter to the Tribunal, is that a pre-hearing in this matter should be held by teleconference if it is not to be held in Toronto.
3. The Applicant took the position that it would not agree to the pre-hearing being conducted by teleconference but gave no reasons whatsoever for its refusal.
4. The Tribunal by notice dated January 7, 2002 advised the parties that the pre-hearing was scheduled to be held at London, Ontario on March 28, 2002.
5. The Program has retained Toronto Counsel in this and eight other similar matters and Netanus Rutherford goes on to state:
 - i. The Program has retained Toronto Counsel in this and eight similar matters referred to below. The Program has selected this Counsel for her expertise in both the *Ontario New Home Warranties Plan Act* and the *Canadian Charter of Rights and Freedoms*, as well as her availability on the dates scheduled for both the pre-hearings and hearings in all nine matters. To send Counsel to London, ONHWP will incur an expense for round-trip train fare. In addition to expense, the travel time for Counsel will be about 6 hours (including check-in) for the round trip. This will grossly exceed the time actually spent in the pre-hearing itself, which will likely last less than an hour.
 - ii. The Applicant's reasons for requesting a hearing are identical to those of eight other Applicant builders with hearings pending before the Tribunal. All nine Applicants, including the Applicant, have refused to sign the new Vendor and Builder Agreements; all nine Applicants have as a result received Notices of Proposal from ONHWP; and all nine appealed at about the same time and filed identical grounds for appeal. All nine allege that the new Agreements contravene the *Canadian Charter of Rights and Freedoms*, but fail to include any section numbers or other particulars. Given the identical wording of the grounds for appeal, it appears that these Applicants are

working together as a group or under a common advisor.

- iii. Pre-hearings have already taken place with respect to a number of this group. In every case that is proceeding further, the presiding Vice-Chair has obtained approval from the parties as to certain agreed facts and set out a schedule for disclosure of the Charter arguments and responses.
- iv. The Program, will seek substantially the same order at the pre-hearing in this matter. That is, the Program will seek a schedule for disclosure of the Charter argument by the Applicant, well in advance of the hearing.
- v. There is no reason why the pre-hearing must proceed in person in London rather than by teleconference.
- vi. On the contrary, there are several reasons why a teleconference pre-hearing would be more appropriate than an in-person pre-hearing in London:
 - a) the lack of prejudice to the Applicant;
 - b) the cost required to travel to London for a short pre-hearing
 - c) the time required to travel to London for a short pre-hearing
 - d) the Tribunal's own practice of conducting "long-distance" pre-hearings by teleconference rather than in person;
 - e) the fact that the pre-hearing is necessitated by the Applicant's own conduct in failing to include the necessary particulars in its Notice of Appeal;
 - f) most importantly, the existence of pre-hearing orders made in two identical cases, and the desirability of consistent case management for all common appeals.

Counsel for the Program, in her submissions to the Tribunal, reviewed the affidavit of Ms. Rutherford and submitted that Rule 10.2, of the Tribunal's Rules of Practice permit the Tribunal holding a hearing in an electronic form and that "a hearing" includes a pre-hearing conference.

She further submitted that Rule 10.2.1 of the Tribunal's Rules of Practice state, that in deciding whether to hold an electronic hearing, the Tribunal may consider the cost, efficiency and timeliness of such proceedings. Counsel further submitted that there would be no prejudice to the Applicant for the pre-hearing taking place by teleconference, particularly as the date and time proposed for the pre-hearing by teleconference is the same date and time as that scheduled for the in person pre-hearing in London, Ontario.

POSITION OF THE APPLICANT

By letter dated March 21, 2002 addressed by the Applicant to the Tribunal and received by the Tribunal at 8:30 a.m. on March 22, 2002, the Applicant's representative Mr. Francesco Roncone stated that the Applicant objected to the pre-hearing taking place electronically. He

also stated that “due to the extremely short time given of this notice, I will be unavailable on Friday, the 22nd day of March 2002 commencing at 9:30 a.m.”

Stacy Murphy of the Tribunal, testified at the hearing of this motion that she telephoned and spoke with Francesco Roncone at 8:25 a.m. on Friday March 22, 2002. Ms. Murphy stated that she advised Mr. Roncone that he would again be telephoned at 9:30 a.m. so as to join in and participate in the teleconference call in regard to the Motion. Ms. Murphy was informed by Mr. Roncone that he was not available and would not participate in the teleconference call. Ms. Murphy advised Mr. Roncone that if he did not attend on the teleconference call at 9:30 a.m. the motion would proceed in his absence and an order may then be made. At 9:30 a.m. and again at 9:40 a.m., Ms. Murphy attempted to communicate telephonically with Mr. Roncone for the purpose of the teleconference but on both occasions the telephone was not answered. The hearing of the motion was proceeded with the absence of the Applicant.

THE LAW

Section 25.1 (1) of the statutory Powers Procedure Act R.S.O states:

“A Tribunal may make rules governing the practice and procedure before it.”

Section 5.2 (1) of the Statutory Powers Procedure Act R.S.O states:

“A Tribunal whose rules made under section 25.1 deal with electronic hearings may hold an electronic hearing in a proceeding.”

Section 5.2 (2) of the Statutory Powers Procedure Act R.S.O states:

“The Tribunal shall not hold an electronic hearing if a party satisfies the Tribunal that holding an electronic rather than an oral hearing is likely to cause the party significant prejudice.”

Rule 9.2 of the Rules of Practice of the Tribunal states:

“The Tribunal on its own initiative or in response to a motion by one of the parties may direct the parties to participate in a pre-hearing conference.....”

Rule 10.2 of the Rules of Practice of the Tribunal states:

“ The Tribunal may, in accordance with these rules and subject to the Act under which the proceeding arises, hold an electronic hearing.”

APPLICATION OF LAW TO FACTS

The Program seeks an Order that the pre-hearing conference in this matter, scheduled to

proceed on Thursday March 28, 2002 at 9:30 a.m. in London, Ontario be rescheduled to proceed electronically at the same scheduled time and date.

The Applicant opposes the Motion but did not partake in the Motion hearing and accordingly made no submissions. The hearing of the Motion proceeded in the absence of the Applicant and the Tribunal after hearing the Program's submission issued an Order, with reasons to follow, that the pre-hearing scheduled to proceed on March 28, 2002 at 9:30 a.m. in London, Ontario be rescheduled to proceed electronically on the same date and time. The Tribunal's reasons for its Order follow.

The Tribunal, in terms of Rule 10.2 of its Rules of Practice, may hold an electronic hearing. A hearing shall, in the Tribunal's opinion, include a pre-hearing.

In considering whether to hold an electronic hearing the Tribunal may, in terms of Rule 10.2.1, consider any relevant factors, including the cost, efficiency and timeliness of proceedings. The Tribunal may, in its discretion, order an electronic hearing. It would be both fair and reasonable that in this instance an electronic pre-hearing be ordered. An electronic pre-hearing is a cost efficient manner of dealing with the pre-hearing. By requiring a party or parties to travel for some distance over a period of many hours, so as to attend a pre-hearing conference, would be unreasonable and uneconomic when an equally efficient and more economic method could be used, such as teleconference. There would be no disadvantage or prejudice to the Applicant if a teleconference pre-hearing were to be held.

The expense and time of the Program's Counsel's travel to an in-person pre-hearing in London, Ontario is not called for when a teleconference could adequately, efficiently and economically take the place of such in person pre-hearing. There would be no change as to the time and date of the pre-hearing and there is no prejudice to the Applicant in regard to that aspect. A teleconference pre-hearing would allow the Applicant to remain at its office in Sarnia and would also save the Applicant the time and cost involved in travelling to and from London, Ontario. It is therefore to the advantage of the Applicant to have the pre-hearing by teleconference.

Having regard to the facts that have been placed before the Tribunal, there is no reason to believe the Applicant will suffer prejudice in the event of a pre-hearing being conducted by teleconference. The Applicant's representative declined to offer convincing evidence of any prejudice.

DECISION AND ORDER

It is therefore ordered that the pre-hearing in this matter, scheduled to proceed on Thursday March 28, 2002 at 9:30 a.m. in London, Ontario be rescheduled to proceed electronically at the same scheduled time and date.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: March 25, 2002

JOHN GERBER CONSTRUCTION LTD

MOTION TO CONVERT AN IN PERSON PREHEARING TO
AN ELECTRONIC PRE HEARING ON SHORT NOTICE UNDER
THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*
RESPECTING AN APPEAL OF A PROPOSAL

TO SUSPEND REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

JOHN GERBER, Agent, representing the Applicant
CAROL STREET, Counsel, representing the Registrar,
Ontario New Home Warranties Plan Act

DATE OF
MOTION:

March 22, 2002

By Teleconference

ORDER

WHEREAS the Registrar under the Ontario New Home Warranty Program ("Respondent") issued a proposal dated October 31, 2001 to suspend the registration of John Gerber Construction Limited (the "Applicant") under the *Ontario New Home Warranties Plan Act*;

AND WHEREAS the Applicant requested a prehearing and a hearing before the Licence Appeal Tribunal to appeal the above noted proposal;

AND WHEREAS the Tribunal scheduled a prehearing and a hearing of this matter to commence in person at London, Ontario;

AND WHEREAS there was a motion brought by the Respondent to convert an in person prehearing to an electronic prehearing on short notice;

AND WHEREAS both parties consented to convert the in person prehearing to an electronic prehearing.

NOW THEREFORE this Tribunal orders that the prehearing in this matter shall proceed as an electronic hearing (telephone conference) on Thursday March 28, 2002 at 1:30 p.m.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: March 22, 2002

749459 ONTARIO LIMITED o/a KATMIC CONSTRUCTION

MOTION TO CONVERT AN IN PERSON PREHEARING TO
AN ELECTRONIC PRE HEARING ON SHORT NOTICE UNDER
THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*
RESPECTING AN APPEAL OF A PROPOSAL

TO SUSPEND REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

MICHEL BELANGER, Agent, representing the Applicant
CAROL STREET, Counsel, representing the Registrar,
Ontario New Home Warranties Plan Act

DATE OF
MOTION:

March 25, 2002

By Teleconference

ORDER

WHEREAS the Registrar under the Ontario New Home Warranty Program ("Respondent") issued a proposal dated October 29, 2001 to suspend the registration of 749459 Ontario Limited o/a Katmic Construction (the "Applicant") under the *Ontario New Home Warranties Plan Act*;

AND WHEREAS the Applicant requested a pre-hearing and a hearing before the Licence Appeal Tribunal to appeal the above noted proposal;

AND WHEREAS the Tribunal scheduled a pre-hearing and a hearing of this matter to commence in person at Sudbury, Ontario;

AND WHEREAS there was a motion brought by the Respondent to convert the in person pre-hearing to an electronic pre-hearing on short notice;

AND WHEREAS both parties consented to convert the in person pre-hearing to an electronic pre-hearing.

NOW THEREFORE this Tribunal orders that the pre-hearing in this matter shall proceed as an electronic hearing (telephone conference) on Friday, April 12, 2002 at 11:00 a.m.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: March 25, 2002

MENDELL, PAUL L.

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
PAUL L. MENDELL

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATION
- Proposal dated: October 31, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

PAUL L. MENDELL

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Paul L. Mendell, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: March 27, 2002

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road, Suite 110
Toronto, Ontario M2P 2E9

Licence Appeal Tribunal
One St. Clair Avenue West
12th Floor
Toronto, ON M4V 1K6

FROM: Paul Mendell
58 Dunkleman Dr., Box 1095
Balfour Beach, ON L0E 1P0

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereinafter the "Act") the parties to the proceeding, Paul Mendell (hereinafter referred to as "the Applicant"), and the Registrar, *Motor Vehicle Dealers Act* (hereinafter the "Registrar") waive the requirement of a hearing and hereby consent to an Order of the Licence Appeal Tribunal based on the following terms and conditions:

1. The Applicant will not conduct any purchases with anyone who is in the business of buying and selling motor vehicles without confirming that they are registered as a Dealer under the Motor Vehicle Dealers Act.
2. The Applicant agrees to make arrangements, satisfactory to the Toronto Auto Auction, for the repayment of all monies owing with regard to the 1993 Infinite (VIN JNKNG01C9PM224394) within 60 days of the date of having his registration reinstated pursuant to this Order.
3. The Applicant warrants that all documents submitted to the Receiver and Trustee in Bankruptcy are complete and accurate in all material respects. The Applicant further acknowledges that the Registrar is relying upon the accuracy of the disclosure provided by the Applicant to the Registrar in entering into these terms and conditions.
4. The Applicant agrees not to be a partner, shareholder, officer, director or sales manager of a motor vehicle dealership.
5. The Applicant agrees to provide the Registrar with proof of his/her Discharge From Bankruptcy, immediately upon being discharged.
6. The Applicant agrees not to transfer his/her registration as a motor vehicle salesperson to another dealer without having first obtained the prior written consent of the Registrar.
7. The Applicant acknowledges and understands that his registration will not be used to buy or sell motor vehicles where the Applicant knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
8. The Applicant agrees to provide full and accurate disclosure on any applications, documents, statements or other form of communication/information provided to the Registrar or her authorized representatives regardless of previous disclosure.
9. The Applicant agrees that he is under a positive obligation to disclose all material facts in writing about the vehicles he sells to his customers. Material facts include but are not limited to salvage, previous

salvage, frame and unibody damage, rebuilt, accident repair, theft recovery, prior use as a police cruiser or taxicab and branded vehicles.

10. The Applicant agrees that where a vehicle's odometer reading is unknown the Applicant is under a positive obligation to disclose in writing the last known mileage and that the true mileage is unknown. The Applicant's further agrees that if he exchanges or repairs an odometer he will do so in accordance with the Motor Vehicle Dealers Act and ensure that the identical reading appears on the new odometer.
11. The Applicant will comply with the Ontario Motor Vehicle Industry Council's Code of Ethics and Standards of Business Practice as may be amended from time to time.
12. The Applicant agrees that he will not be involved with the buying and selling of motor vehicles without the benefit of registration.
13. The Applicant agrees to immediately enrol in the Ontario Motor Vehicle Industry Council's Automotive Certification Course and to be responsible for all fees in relation to enrolment. The Applicant further acknowledges that he will pass the certification course within 60 days of having his registration reinstated pursuant to this Order.
14. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred in the past or that may occur in the future related to his financial circumstances and his honesty and integrity.
15. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.
16. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
17. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
18. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
19. The Applicant hereby acknowledges that he have obtained or have had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of Toronto this day of March, 2002.

Paul Mendell (signature)

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Date:

Carl Compton
Registrar

JOHNSTONE, CRAIG AND MARGARET

PREHEARING

CRAIG AND MARGARET JOHNSTONE

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, VICE-CHAIR

APPEARANCES:

CRAIG AND MARGARET JOHNSTONE, appearing on their own behalf
FIL CECE, Agent, representing the Ontario New Home Warranty
Program
JEFFREY J. BRANDWEIN, Agent, representing Lakeside Community
Inc., the Added Party

DATE OF

PREHEARING: March 12, 2002

Toronto

ORDER

Following the attendances on March 12, 2002 at a prehearing before this Tribunal of Craig and Margaret Johnstone, appearing on their own behalf (the "Applicants"), and Fil Cece, Agent on behalf of the Ontario New Home Warranty Program (the "Program") and Jeffrey J. Brandwein, Agent on behalf of Lakeside Community Inc. (the "Added Party");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Monday June 10, 2002 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario and to continue, if necessary, on June 11 and June 12, 2002 at the Tribunal's above chambers;

- 1) The Parties to the hearing are the Applicants, the Program and the Added Party;

- 2) The parties agreed that the following facts enumerated under the heading “The Facts” on pages 2 and 3 of the Program’s decision letter dated November 7, 2001, are correctly described:

Facts

Number 2
Number 3
Number 4
Number 5
Number 6
Number 7
Number 8
Number 10
Number 14
Number 15
Number 16

- 3) With respect to the matters enumerated under the heading “The Facts” on pages 2 and 3 of the Program’s decision letter dated November 7, 2001, the parties agreed as follows:

Number 1 The Agreement of Purchase and Sale was entered into on October 20, 1999.

Number 9 The conciliation report that is disputed by the Applicants is not dated October 4, 2001, but is dated June 26, 2001.

Number 11 Craig Johnstone representing the Applicants confirmed that he called the Program to cancel the conciliation inspection, but he was not able to confirm or deny that he called on August 10, 2001.

Number 12 The Applicants were unable to confirm what attempts, if any, the Program made to contact them to establish a date for the conciliation reinspection.

Number 13 On August 29, 2001 Craig Johnstone met with the Program’s Charlie Spillane at the Program’s Offices in Newmarket and confirmed September 24, 2001 as the date of the reinspection of the Applicants’ home.

- 4) The Applicants shall permit both the Program and its experts and the Added Party and their experts to inspect the Applicants’ home to assess the condition of the home and to inspect the alleged deficiencies therein. The Program and/or the Added Party shall communicate with the Applicants by telephone as to a time and date for such

inspection(s) and shall confirm to the Applicants the date(s) and time(s) of the inspection(s) by way of fax at least 5 days prior to such inspection/ inspections.

- 5) All parties to the hearing shall fully comply with the requirements of disclosure of documents or things as set forth in Rule 6.3 of the Rules of Practice of the Tribunal. All parties shall also fully comply with the disclosure requirements set forth in Rule 6.4 of the Rules of Practice of the Tribunal dealing with expert witnesses.
- 6) Notwithstanding the paragraph above, by no later than March 28, 2002 the Applicants shall deliver to the Program copies of the reports of the following persons who they intend to have testify as experts on the Applicants' behalf at the hearing. These reports were shown to the agents of the Program and the Added Party at the pre-hearing.
 - (i) The written report dated March 7, 2001, of Eldon Hung of Durham Engineering which consisted of 4 typed pages and 8 colour photographs.
 - (ii) The written report dated November 9, 2001, of George of Mr. Rooter Plumbing written on invoice 21222 of Mr. Rooter Plumbing.
 - (iii) The letter dated January 14, 2002, signed by Doug McNeill of NEXFOR and addressed to the Applicants to which was attached a 3 page document from the National Oak Flooring Manufacturers Association.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: March 15, 2002

620773 ONTARIO LTD. O/A CLASSIC CADDIES CARS

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
620773 ONTARIO LTD. O/A CLASSIC CADDIES CARS

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATION
- Proposal dated: November 6, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

620773 ONTARIO LTD. O/A CLASSIC CADDIES CARS

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by 620773 Ontario Ltd. o/a Classic Caddies Cars, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: March 11, 2002

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road, Suite 110
Toronto, Ontario
M2P 2E9

Licence Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1K6

From: 620773 Ontario Limited o/a Classic Caddies Cars
PO Box 30
Utterson, ON P0B 1M0

620773 Ontario Limited o/a Classic Caddies Cars
Lot 17, Conc. 4
Stephenson Township, ON P0B 1M0

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the Motor Vehicle Dealers Act, (hereafter the "Act") the parties to the proceeding, 620773 Ontario Limited o/a Classic Caddies Cars, (hereafter the "Dealer"), and the Registrar, Motor Vehicle Dealers Act, (hereafter the "Registrar") waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions to its registration as a motor vehicle dealer:

1. The Dealer acknowledges and understands that it will not retain the services of a salesperson unless the salesperson is registered as a salesperson to the Dealer. In particular the Dealer will not retain Donald Horton in any capacity at the Dealership, unless Donald Horton is registered as a salesperson under the Act.
2. The Dealer agrees not to allow its registration to be used to facilitate conduct which would violate the Motor Vehicle Dealers Act. In particular the Dealer will not allow any other person to use the dealer number or dealer registration.
3. The Dealer further acknowledges that the restrictions concerning the activities of salespersons referred to in these terms and conditions, applies to both buying and selling on behalf of a dealer. "Buying and selling" refers to showing a vehicle to a prospective purchaser or any form of negotiation concerning the purchase or sale of a vehicle and is not limited to the signing of contracts. This further includes attendance at auctions on behalf of the Dealer.
4. The Dealer agrees to maintain a garage register in accordance with the Highway Traffic Act and will maintain all books and records as required by the Motor Vehicle Dealers Act. The Dealer further agrees to store its books and records at the location approved by the Registrar.

5. The Dealer will ensure that all advertisements placed by or on behalf of the Dealer will identify its registered name and the address of the location approved by the Registrar.
6. The Dealer agrees not to invite the public to deal at a place other than its approved location.
7. The Dealer agrees to operate exclusively from the registered premises approved by the Registrar. The Dealer agrees to apply for the Registrar's approval, by way of prior written notice, of any change in registered premises address in the form required by the Registrar.
8. The Dealer will not conduct any purchases or sales with anyone who is in the business of buying and selling motor vehicles without confirming that they are registered as a dealer under the Motor Vehicle Dealers Act.
9. The Dealer will ensure that any vehicles sold are registered in the name of the purchaser before releasing the vehicle to the purchaser.
10. The Dealer will not purchase vehicles without ensuring that the vehicle is registered to the seller.
11. The Dealer agrees to register all vehicles purchased within 6 days in accordance with the Highway Traffic Act.
12. The Dealer agrees that it is under a positive obligation to disclose, in writing, all material facts about the vehicles it sells to its customers. Material facts include, but is not limited to disclosure of salvage, previous salvage, accidented and repaired, frame damage and unibody damage. The Dealer agrees to make reasonable efforts to research the history of all vehicles prior to sale to ensure all material facts are disclosed. The Dealer agrees that should any information come to light, which the Registrar deems to be a material fact concerning a vehicle the Dealer has sold, the Dealer will comply with all reasonable requests made by the Registrar to provide compensation to the purchaser.
13. The Dealer agrees to comply with the Code of Ethics and Standards of Business Practice
14. The Dealer agrees to comply with all of its obligations pursuant to the Retail Sales Tax Act.
15. The Dealer acknowledges and understands that its registration will not be used to buy or sell motor vehicles where the Dealer knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
16. The Dealer acknowledges that the Registrar may take further administrative action, including a proposal to revoke its registration, arising from any matters that have occurred or may occur related to honesty and integrity or financial position.
17. The Dealer hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
18. The Dealer agrees and acknowledges that should it breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.

19. The Dealer hereby withdraws its appeal to the Licence Appeal Tribunal.

20. The Dealer acknowledges that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out herein.

Signed in the City of _____, this _____ day of _____ 2002.

620773 Ontario Limited o/a Classic Caddies Cars
I have authority to bind the corporation.

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton, Registrar.

Date:

CONTINENTAL LEASING SERVICES INC. AND PETER CARL VERBEEK

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
CONTINENTAL LEASING SERVICES INC. AND PETER CARL VERBEEK

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATIONS
- Proposal dated: August 3, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

CONTINENTAL LEASING SERVICES INC. AND PETER CARL VERBEEK

Applicants

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on March 19, 2002;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicants* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Thursday, June 20, 2002.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: March 15, 2002

SAMUEL, BRIAN M.

PREHEARING

BRIAN M. SAMUEL

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: SHEENA MacASKILL, VICE-CHAIR

APPEARANCES:

BRIAN M. SAMUEL, representing himself
AL STEVENSON, Agent, representing the Ontario New Home Warranty
Program
LESLIE YAGER, Agent, representing Redpath Residences Corp., the
Added Party

DATE OF
PREHEARING: March 6, 2002 Toronto

ORDER

Following the attendances before the Licence Appeal Tribunal (the "Tribunal") on March 6, 2002, 2002 at a prehearing of Brian Samuel, appearing on his own behalf (the "Applicant"), and Al Stevenson, representing the Ontario New Home Warranty Program (the "Program") and Leslie Yager, Agent, representing Redpath Residences Corp. (Plazacorp) (the "Added Party");

The Tribunal makes the following Order:

- 1) The Parties to the hearing are the Applicant, the Program and the Added Party;
- 2) No settlement was arrived at in regard to any or all of the issues;

- 3) That the parties shall fully comply with Rules 6.3, 6.4 and 6.6 of the Tribunal's Rules of Practice.
- 4) The parties agree that access to 188 Redpath Avenue, Suite 709, Toronto, Ontario M4P 2K6 was requested by the Added Party for the purposes of inspection and possible repair prior to the hearing but such request was refused by the Applicant.

LICENCE APPEAL TRIBUNAL

Sheena MacAskill, Vice-Chair

Released: March 7, 2002

TOROK, ROSE AND JOSEPH

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
ROSE AND JOSEPH TOROK

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

ROSE AND JOSEPH TOROK

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and

STEVE CUS CONSTRUCTION INC.

Added Party

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter on March 25-27, 2002;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicants* to commence at the Middlesex County Building, North Room, 399 Ridout Street, London, Ontario, at 9:30 a.m., on Monday, July 22, 2002 and to continue July 23 and 24, 2002, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: March 21, 2002

**HIGHWAY TRAFFIC ACT
R.S.O. 1990, CHAP. H.8 AS AMENDED, SECTION 50(1)**

IN THE MATTER of an application by the Applicant to appeal the decision of the Registrar of Motor Vehicles pursuant to section 32(12)(b)(i) of the *Highway Traffic Act*;

AND IN THE MATTER of

Applicant

APPLICANT

and

REGISTRAR OF MOTOR VEHICLES

RESPONDENT

ADJOURNMENT

WHEREAS an oral hearing in the above matter was scheduled to be held on Wednesday, January 16, 2002, at Toronto, Ontario;

AND WHEREAS the Applicant's counsel requested an adjournment of the hearing to permit his client to confer and obtain further evidence from his Cardiologist;

AND WHEREAS upon consent of the parties the hearing was adjourned to Wednesday, February 6, 2002;

AND WHEREAS the Applicant's counsel requested a further adjournment of the hearing as they are still waiting to hear from the Cardiologist, Dr. #1;

AND WHEREAS upon consent of the parties the hearing was further adjourned to Wednesday, March 20, 2002;

AND WHEREAS the Applicant's counsel requested a further adjournment of the hearing as they are still waiting for information from the Cardiologist, Dr. #1, on his further testing of the Applicant;

TAKE NOTICE, upon consent of all parties, the Tribunal Orders:

- (1) this matter is adjourned;
- (2) the appeal shall be heard at 1:30 p.m. on Wednesday, May 22, 2002 at the Tribunal's Chambers, 1 St. Clair, Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

RELEASED: March 19, 2002

OLYMPIC HOLIDAYS LTD.

PREHEARING

OLYMPIC HOLIDAYS LTD.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
TRAVEL INDUSTRY ACT, R.S.O. 1990, CHAPTER T.17 AS
AMENDED

TO REVOKE REGISTRATION

TRIBUNAL: JOHN ORT, Member

APPEARANCES:

GERALD HEIFETZ, Counsel, representing the Applicant
TREVOR BRANION, Counsel, representing the Registrar, *Travel
Industry Act*

DATE OF
HEARING: March 18, 2002 Toronto

ORDER

Following attendances on March 18, 2002, at a prehearing before the Licence Appeal Tribunal (the "Tribunal") of Gerald Heifetz, Counsel, representing the Applicant, Olympic Holidays Inc., and Trevor Branion, Counsel, representing the Registrar, *Travel Industry Act* (the "Registrar");

The Tribunal makes the following Order:

1. The parties to the hearing are the Applicant and the Registrar.
2. The parties recorded that there had been no resolution of any of the issues in this matter.

3. The parties shall comply fully and in a timely manner with the disclosure requirements as required by Rule 6 of the Tribunal's Rules of Practice.
4. The hearing will commence at 9:30 a.m. at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, on Thursday, July 18, 2002, and continue on Friday, July 19, 2002, if necessary.

LICENCE APPEAL TRIBUNAL

John Ort, Member

RELEASED: March 22, 2002

0940 - MED - DIAB

Appeal under section 50(1) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Minister pursuant to section 32(12)(b)(i) of that Act.

**TO CHANGE THE CLASS OR CLASSES OF
MOTOR VEHICLE IN RESPECT OF WHICH
THE LICENCE WAS ISSUED**

TRIBUNAL: ROSS BENNETT, M.D., Presiding Member

APPEARANCES: LUBA NEUWIRTH
Representative for the Registrar of Motor Vehicles

Applicant,
By written submissions only

DATE OF
HEARING: March 14, 2002 Written

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Minister (the "Respondent") pursuant to section 32(12)(b)(i) of the *Highway Traffic Act* (Ontario).

EXHIBITS:

- 1) Notice of Appeal, filed by the Applicant, January 1, 2002.
- 2) Notice of downgrading of Applicant's Licence, dated December 10, 2001 from the Ministry of Transportation.
- 3) Medical Advisory Committee ("MAC") Case Study dated November 7, 2001.
- 4) Letter from Applicant's endocrinologist dated February 14, 2002.

- 5) Letter from Applicant's endocrinologist dated March 7, 2002.
- 6) Summary of the evidence prepared by the Respondent.
- 7) National Safety Code sections on Metabolic Diseases Diabetes Mellitus, Thyroid Disease

FACTS:

The Applicant is a 54-year-old truck driver, who had his driver's licence downgraded from Class "ACM" to a Class "GM" on December 10, 2001. This was a recommendation from the Medical Advisory Committee (Exhibit #3), after monitoring the Applicant's medical reports, received from his endocrinologists, Doctor #1 and Doctor #2.

As a result of the most recent report, the MAC did not feel the Applicant had insight into his condition, in that he was on a high dose of insulin, instead of improving his diabetic diet and losing weight. His self-monitoring of his blood sugars was only every few days and it was felt the risk of hypoglycemic reactions was high. The MAC determined his diabetes was not well controlled for a commercial licence and he should be disqualified as per National Safety Code 8.2(3)(3,4,5).

The Applicant has had a Class "A" licence, since 1992. At that time, he had been diabetic for six years and was well controlled on 30 units of Humulin-N insulin and weighed 230 pounds. He also has hypothyroidism and a history of hypertension, but both are well controlled.

Since his licence was downgraded, he has instituted regular blood glucose monitoring 2-4 times daily and is closely followed by a diabetic teaching nurse and a dietician at the Diabetic Teaching Centre. According to his endocrinologist, he has made significant lifestyle improvements with normal blood sugars. He has experienced mild hypoglycemia with a feeling of diaphoresis, weakness and tremor, relieved by taking adequate carbohydrate. He has never had an episode of severe hypoglycemia.

The Applicant's endocrinologist further states he is on a moderate dose of insulin and has improved his dietary compliance significantly. With his current blood sugar control, he does not have any symptoms of hyperglycemia either and in Doctor #2's opinion, he is "unequivocally safe to operate a commercial vehicle."

ISSUES:

Should the decision of the Minister to change the class or class of motor vehicles in respect of which the licence is issued in accordance with the result of the examination be varied, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffer from any mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Regulation 340/94, Section 17 and 18 states:

- 17. (1) Qualifications required by an applicant for a holder of a Class A, B, C, D, E or F driver's licence are that the applicant or holder,
 - (a) has no history or clinical diagnosis of diabetes that requires insulin for control;
 - (b) is not taking any drug that could, in the dosage prescribed or in the dosage recommended by the manufacturer, impair his or her ability to drive a motor vehicle of the applicable class safely;
 - (c) has no established medical history of myocardial infarction, angina pectoris, coronary insufficiency or thrombosis;
 - (d) has no established medical history of heart disease including arrhythmia or of respiratory dysfunction likely to interfere with the safe driving of a motor vehicle of the applicable class;
 - (e) is not suffering from an aortic aneurysm, whether resected or not;
 - (f) is not suffering from hypertension accompanied by postural hypotension resulting in giddiness when under treatment;
 - (g) has no established medical history of loss of consciousness or awareness due to a chronic or recurring condition;
 - (h) has no established medical history of a disorder of the musculoskeletal or nervous system that may interfere with the safe

driving of a motor vehicle of the applicable class;

- (i) has no established medical history of an intractable psychotic or psychoneurotic disorder, having particular regard for sustained hostile, aggressive, paranoid, suicidal or other destructive tendencies or depression unless it is medically determined that the condition from which the person has suffered is corrected or controlled;
 - (j) has a visual acuity by Snellen Rating, with or without the aid of corrective lenses, no poorer than 20/30 in the better eye and 20/50 in the weaker eye; and
 - (k) has a horizontal visual field of at least 120 degrees in each eye as measured by confrontation tests.
- (2) An applicant for or a holder of a Class A, B, C, D, E or F driver's licence who fails to meet the qualifications referred to in clauses (1)(a) to (i) may, despite the failure, qualify for the class of licence applied for or held if he or she demonstrated the ability to drive a motor vehicle in the applicable class as safely as any person who meets those qualifications.
- (3) An applicant for or a holder of a Class D driver's licence who fails to meet the qualification referred to in clause (1)(c) may, despite the failure, qualify for that class of licence if it is medically determined that he or she has made a full recovery and there is no established history of a second occurrence of myocardial infraction, thrombosis or recurring angina pectoris.
- (4) An applicant for or a holder of a Class B, C, E or F driver's licence whose hearing in one ear is better than in the other must be able to perceive in the better ear, with or without a hearing aid, a forced whisper at a distance of 1.5 metres or, if an audiometer is used to test the person's hearing, must not have a loss in the better ear of more than 40 decibels at 500, 1,000 and 2,000 hertz.
- 18. An applicant for or a holder of a G, G1, G2, L, M, M1, M2, or R driver's licence must have,
 - (a) in the case of a person whose vision in one eye is better than in the other, visual acuity in the better eye that is no poorer than 20/40 as measured by Snellen Rating; and
 - (b) a horizontal visual field of at least 120 degrees as measured by confrontation tests.

Section 32(12)(b)(i) states:

- 32 No person shall drive a motor vehicle on a highway unless the motor vehicle is within a class of motor vehicles in respect of which the person holds a driver's licence issued to him or her under this Act.
- (12) An applicant for a driver's licence or a person who holds a driver's licence shall submit to the examinations that are authorized by the regulations relating to this section and required by the Minister at the time and places

that the Minister may require and the Minister may,

- (b) in the case of a person who holds a driver's licence,
 - (i) impose or remove the conditions or endorsements authorized by the regulations or change the class or classes of motor vehicles in respect of which the licence is issued in accordance with the result of the examinations, or

Section 50 states:

50(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.

(2) The Tribunal may confirm, modify or set aside the decision of the Minister or Registrar.

APPLICATION OF THE LAW TO FACTS:

When the Medical Advisory Committee recommended that the Applicant's driver's licence be downgraded, the Minister acted in accordance with the *Highway Traffic Act*, Regulation 340/94 Section 14(a) and Sections 17 and 18 in downgrading his driver's licence from an "ACM" to a "GM".

The Applicant, according to his endocrinologist, was then not following the accepted monitoring procedures and although he had not suffered a hypoglycemic reaction, he was a high risk for one. The Applicant immediately attended a diabetic clinic, improved his diet, began regular monitoring of his blood sugars and visiting his endocrinologist on a regular basis. The same endocrinologist, who reported him initially, stated in a letter of March 7, 2002 (exhibit #5), "in my opinion as an endocrinologist he is unequivocally safe to operate a commercial vehicle".

The MAC based its recommendation on the National Safety Code for Motor Carriers 8.2(3) (3,4,5). The first section 8.2(3) states:

"The major concern in diabetes and driving is hypoglycemia, particularly if there is a lack of awareness of warning symptoms. Type II diabetics treated with insulin are less prone to hypoglycemia because they are relatively resistant to insulin. ----- Diabetic individuals treated with injectable insulin are eligible for class 5 licence, if they are not subject to hypoglycemia and do not have disqualifying cardiovascular, neurologic (sic) or ophthalmic disease.

The Canadian Diabetes Association has recommended that diabetics treated with injectable insulin who hold commercial licences observe the following guidelines for driving:

- 1) the driver must at all times while driving carry self-monitoring equipment, a source of rapidly

absorbable glucose on his person, and insulin and shringes/pump/injector;

- 2) the blood glucose concentration must be tested within an hour before driving and every 4 hours while driving. Driving must be stopped if the blood glucose value is less than 6 mmol/l, until the glucose level has risen by food ingestion;
- 3) driving should be limited to a maximum period of 12 hours in a day, with a maximum of 6 consecutive hours between meals.

May be considered for class 1,2,3,4 only if the following conditions are met:

- 1) No episode of hypoglycemia requiring the need for intervention by an outsider for correction within the previous 2 years;
- 2) No evidence of hypoglycemia unawareness;
- 3) The diabetes is well controlled;
- 4) Self-monitoring is adequate-a verifiable log is maintained;
- 5) Knowledge of the disease and causes, symptoms and treatment of hypoglycemia is adequate;
- 6) No other disqualifying complications."

Section 8.3 states:

Hypoglycemia

Standard: Individuals subject to spontaneous attacks may not operate any type of motor vehicle until the condition is treated and the cause eliminated.

Section 8.4 states:

Thyroid Disease

Individuals with marked hyperthyroidism cannot operate any type of motor vehicle safely because of the frequent coexistence of cardiac problems and emotional disturbances.

Standard; not permitted any class of licence until the condition has been medically treated and controlled.

This is not applicable as the Applicant has hypothyroid disease controlled with Thyroxin.

The Tribunal does not find that any of these sections from the National Safety Code for Motor Carriers pertains to the Applicant's diabetic or hypothyroid conditions. As confirmed by Doctor #2 medical reports (exhibits # 4 & 5), the Applicant's diabetes is well controlled on his present regime and he has never experienced a severe hypoglycemic attack. He admits to mild hypoglycemia with adequate warnings of diaphoresis, weakness and tremor relieved by ingesting carbohydrates.

Once Doctor #2 brought the Applicant's poor self-monitoring and general diabetic control to his attention, the Applicant rectified his protocol immediately and has followed through with continued attendance at the diabetic clinic, regular blood glucose testing and maintaining a log. He has made significant lifestyle changes and has good insight into his medical condition. He is self-employed so he is able to modify his hours of work as required.

The Tribunal did not find that the evidence presented at the hearing is sufficient to support the Minister's decision to downgrade the Applicant's driver's licence from an "ACM" to "GM".

DECISION:

Upon the application by the Applicant to appeal the decision dated December 10, 2001 of the Minister to change the class or classes of motor vehicle in respect of which the licence was issued pursuant to Section 32(12)(b)(i) of the *Highway Traffic Act*, and having considered the evidence filed with the Tribunal, and the submissions of the Respondent and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Minister be set aside.

LICENCE APPEAL TRIBUNAL

Ross Bennett, M.D.,
Presiding Member

RELEASED: March 22, 2002

GHANDOUR, ALI M.

ALI M. GHANDOUR

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
MOTOR VEHICLE DEALERS ACT

TO REFUSE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

ALI M. GHANDOUR, Applicant, appeared on his own behalf
YOVANKA McBEAN, Agent, representing the Registrar under the
Motor Vehicle Dealers Act

DATES OF
HEARING:

March 14 and 15, 2002

OTTAWA

DECISION AND ORDER

BACKGROUND:

Ali M. Ghandour (the "Applicant") appeals the Proposal of the Registrar of the *Motor Vehicle Dealers Act* (the "Act") to refuse the Applicant's registration as a salesperson of motor vehicles. The Proposal was issued on November 6, 2001 in terms of s. 7.(1) of the Act and the Registrar bases his Proposal on s. 5 (1) (a) and (b) of the Act.

The Registrar takes the position that the Applicant's registration should be refused as the Applicant's past conduct affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty; further the Applicant cannot be reasonably expected to be financially responsible in the conduct of business.

The reasons given by the Registrar in his Proposal for his refusal to register the Applicant are as follows:

The intention and objective of the Act is to protect the public interest. The requirements of the Act include that Registrants be financially responsible in the conduct of business and that Registrants carry on business in accordance with the law and with integrity and honesty. The Applicant's past conduct is inconsistent with the intention and objective of the Act, and therefore warrants disentitlement to registration under the Act. Therefore, the Registrar is unwilling to register Ali Mohamad Ghandour under the *Motor Vehicle Dealers Act*.

The Registrar's Proposal gives the following particulars regarding the reasons for his Proposal:

- 1) The Applicant applied for registration as a motor vehicle salesperson on October 4, 2001. He proposes to work for Youssef Akil Abdul-Hussein o/a Express Auto Sales.
- 2) The Applicant failed to disclose his previous employment at A1 Tire Centre.
- 3) Mohamed Ahmed Tirani O/A A1 Tire Centre was a registered motor vehicle dealer whose registration was revoked on June 24, 2000.
- 4) On or about January 29, 1998, Ali Ghandour completed an application for registration as a salesperson under the Act and the sponsoring dealer was Mohamed Tirani O/A A1 Tire Centre. In response to question 6 on the application, which asks if the Applicant has ever been involved in personal bankruptcy proceedings, Mr. Ghandour answered "no".
- 5) The Applicant had declared personal bankruptcy on October 22, 1997.
- 6) The Applicant failed to provide full disclosure to the Registrar on his January 29, 1998 application for registration.
- 7) On or about March 7, 2000, Ali Ghandour purchased a 1989 Honda Civic (VIN 2HGED6303KH006917) on behalf of Mohamed Tirani O/A A1 Tire Centre. The odometer reading at the time of Mr. Ghandour's purchase of the vehicle was 253,997 kilometres.
- 8) On or around June 2000, the 1989 Honda was the subject of an insurance claim filed by Ali Ghandour with Wawanesa Insurance. Wawanesa Insurance consequently sold the vehicle as salvage on or about July 5, 2001. The odometer reading at the time of sale by Wawanesa was 162,977 kilometres.
- 9) On or about September 9, 1998 Ali Ghandour purchased a 1992 Pontiac Bonneville (VIN 1G2HX53LXN1295678). The odometer reading at the time of Mr. Ghandour's purchase was approximately 291,000.
- 10) On or around June 2000, the 1992 Pontiac Bonneville was also the subject of an insurance claim filed by Ali Ghandour with Wawanesa Insurance. Wawanesa Insurance consequently sold the vehicle as salvage on or about July 10, 2001. The odometer reading at the time of sale by Wawanesa was

141,119 kilometres.

11) The Applicant has provided false information on previous applications submitted to the Registrar.

12) Ali Ghandour O/A All Star Auto Sales submitted an application for registration as a motor vehicle dealer on or about September 8, 2000.

13) The Applicant had his application for registration as a motor vehicle dealer refused on April 19, 2001.

14) The Applicant has failed to comply with the Act, in particular with Section 5.
[Exhibit 1, Tab 1]

THE EVIDENCE:

The evidence for the Registrar consisted of documents as well as the testimony of Andrew Michael Lloyd and Mary Jane South. The evidence of the Applicant consisted of the testimony of the Applicant himself.

Testimony of Andrew Michael Lloyd

Andrew Michael Lloyd ("Lloyd") stated that he is a field adjuster with Wawanesa Mutual Insurance Company ("Wawanesa") in Ottawa. In his capacity as adjuster he addresses insurance claims made against Wawanesa. In February 2000, he received the file of the Applicant with the purpose of adjusting the file in regard to a claim made by the Applicant.

Lloyd testified that the Applicant, whose 1989 Honda Civic DX was insured with Wawanesa, reported that on June 19, 2000 his motor vehicle had been involved in a collision. The Applicant had reported that this Honda vehicle, then driven by the Applicant, had been stationary behind another vehicle at a traffic light. When the light turned green, the vehicle in front of him reversed into the Honda instead of proceeding forward. The vehicle that collided with the Applicant's Honda then sped off and the Applicant tried to follow but was not successful in stopping the other car which was then lost in traffic, without the Applicant being able to obtain the vehicle's registration number.

Pursuant to the Applicant's report of the collision, an in-house appraiser inspected the Honda and determined that it had been damaged to the extent that the cost of repairing it exceeded the vehicle's cash value immediately before the collision. It was accordingly deemed a "salvage" vehicle and Wawanesa decided to pay out the Applicant for the value of the vehicle prior to the collision. Wawanesa offered the Applicant \$2700.00, less the Applicant's deductible of \$300.00, for a net payment of \$2400.00 including P.S.T. The Applicant rejected this offer claiming the Honda was worth some \$5,000.00, having been repainted at a cost of \$1,300.00 a month prior to its collision. Negotiations for an acceptable settlement ensued with

the Applicant and eventually the Applicant accepted a settlement in the sum of \$3,930.00 after the \$300.00 deductible has been factored in.

In the course of settlement negotiations, Wawanesa had obtained certain documentation relative to the Honda vehicle which indicated that at the time it was involved in the collision, on June 19, 2000, it had an odometer reading of 162,977 kilometres. This was considered a low kilometre reading for a 1989 Honda. Normally a Honda of 1989 vintage would, on average, have a 15% higher odometer reading. In valuing the Honda for the purpose of settlement of the Applicant's claim, the low odometer reading was taken into account and Wawanesa increased its offer and ultimately settled with the Applicant.

(Exhibit 1, Tab 13, Pages 1 – 32)

Lloyd proceeded to deal with another claim made against Wawanesa by the Applicant arising out of a collision involving a 1992 Pontiac Bonneville motor vehicle ("Pontiac"). This vehicle was owned by the Applicant and insured with Wawanesa. The collision involving this vehicle occurred on July 10, 2000 some 19 days after the collision involving the Applicant's Honda. The Applicant had stated in his report of the collision that he was driving the Pontiac at the time of the collision and that he was following a car which kept slowing down. The driver of the vehicle he was following gave no signals and the Applicant decided to pass this vehicle. While doing so, the vehicle he was passing made a sudden turn in order to enter a parking lot and in doing so, collided with the Applicant's Pontiac. The collision was reported to the police by the Applicant and the driver of the other vehicle. After speaking with the Applicant, Wawanesa communicated with the insurer of the vehicle with whom the Applicant had collided and ascertained that the collision had in fact taken place and that the vehicle with whom the Applicant collided was insured. That insurer confirmed that its insured driver had been charged with making an unsafe turn but was contesting this charge.

Lloyd stated that the odometer reading of the Pontiac, upon inspection after the collision, was observed to be 141,119 kilometres. The Pontiac was also determined to have been damaged in the collision to such an extent, that the cost of repairing it exceeded the vehicle's cash value immediately before the collision. Accordingly, it was deemed "salvage" and Wawanesa decided to pay out the market value of the vehicle to the Applicant. In assessing the value of the Pontiac prior to the collision, Wawanesa determined that the low kilometres registered on its odometer had to be taken into account. 141,119 kilometres was considered by Wawanesa to be 14% lower than the average distance traveled by a 1992 motor vehicle. Accordingly, in assessing the market value of the Pontiac, Wawanesa added \$630.00 to the base value to compensate the Applicant for the low distance registered on the odometer. After negotiating with the Applicant, the latter and Wawanesa settled on a figure of \$7,626.00 which was paid to the Applicant by Wawanesa.

Testimony of Mary Jane South

Mary Jane South ("South") stated that she is the Deputy Registrar, appointed under the Act,

and is employed by the Ontario Motor Vehicle Industry Council ("OMVIC"). OMVIC is a non-profit organization which is empowered to administer the Act and its regulators and to ensure compliance with the Act and regulations by the Motor Vehicle dealers and salespersons appointed as such under the Act.

Ms. South reviewed section 5 of the Act and stated that such section reflects the consumer protection nature of the Act.

Ms. South further stated that the Applicant is not registered as a motor vehicle salesperson under the Act. She went on to refer to the Applicant's written application for registration as a salesperson dated January 29, 1998. (Exhibit 1, Tab 8). In that application, the Applicant answered "No" to two questions. One of such questions asked whether the Applicant was then or had ever been involved in personal bankruptcy proceedings. The other question asked if the Applicant had any unpaid judgements outstanding against him.

(Exhibit 1, Tab 8)

When this application was received by OMVIC it was reviewed. It was decided that the Applicant would be refused registration due to Applicant's outstanding debts and his bankruptcy. However, before a Proposal could be issued by the Registrar, the Applicant abandoned his application for registration.

On September 8, 2000, OMVIC received a further application from the Applicant for registration as a motor vehicle salesperson. This application was dated September 7, 2000. In this application, the Applicant answered "No" to questions 6 and 8. Question 6 asked whether the Applicant was then engaged or had ever been involved in personal bankruptcy proceedings. Question 8 asked if there were any unpaid judgements outstanding against the Applicant. In this application, the Applicant also stated that he was employed by Blue Line Taxi, as a taxi driver, from April 1996 to August 2000.

(Exhibit 1, Tab 19)

After receipt of this application, Ms. South wrote the following letter, dated October 31, 2000 to the Applicant.

"This is further to your application for registration as a new motor vehicle dealer.

This is to advise you that, on October 7, 2000, we received an anonymous complaint concerning you. Among other things, the complaint alleged that you sold a number of vehicles without the benefit of registration. This causes me concern particularly, in light of a conversation that my colleague Janet Currah advised me she had with you. She indicated to me that you disclosed in a telephone conversation with her that you were already selling vehicles using someone else's name while awaiting approval of your application.

As a result of this complaint, I ran a credit check on you. Your credit report indicates your current employment as 'A1 Tire' and shows your previous employment as 'A G Auto'. Could you please confirm whether you have been employed, in any capacity, with either one of these dealerships and advise me why this was not disclosed on your original application. The credit

report also shows that you declared bankruptcy in 1997. Could you please confirm whether this is accurate and advise me why this was not disclosed on your application for registration. I would also appreciate your explanation as to the circumstances leading up to your bankruptcy. Also, your credit report shows that there is an outstanding judgement against you in the favour of the Trans Canada Credit Corp in the amount of \$5,940. Could you please advise me what this is about and why it was not disclosed on your application.

Your written response to this letter would be appreciated.”

(Exhibit 1 Tab 20)

In response to Ms. South's letter of October 31, 2000 the Applicant, on November 6, 2000, replied as follows:

“This is further to your letter of October 31, 2000 with respect to the above-noted subject.

I was extremely surprised regarding the issues raised in your letter. The facts are as follows:

- I did not call or speak to your colleague Janet Currah.
- I did not sell or participate in the sales of cars. I do not have any business activities. My effort was to comply with OMVIC requirements to obtain my dealer permit. The anonymous caller is not telling the truth and obviously trying to hurt me.
- With respect to A1 Tire, it is true that I did work for them for a short period of time in the repair area. I was not a car salesman.
- With respect to A G Auto, I never heard this name before and I don't know why this Company was listed as my employer at the credit bureau.
- In 1997, I had some financial difficulties and filed bankruptcy accordingly. The application was prepared by a consulting firm. I provided them with the list of information they requested. I was not aware that this information is needed on the application form. I was discharged long time ago. The debt amount of Canada trust was before the bankruptcy. Please note that the omission of this fact on my application was not intentionally. I relied on the Consulting firm for its completion.

Would you please consider the foregoing is the truth. I am willing to take an oath and sign an affidavit accordingly concerning this matter.

If you require any further information, please feel free to call me at (613) 299-7222. Thank you for your understanding.”

(Exhibit 1, Tab 22)

On November 27, 2000, the Registrar issued a Notice of Proposal to Refuse the Applicant's registration as a motor vehicle salesperson and amplified the proposal by a Notice of Further and other Particulars dated April 3, 2001.

(Exhibit 1, Tab 23 and Tab 24 respectively)

The Applicant failed to exercise his right to a hearing before this Tribunal, in terms of section 7.(2) of the Act. The Registrar accordingly gave the Applicant written notice, pursuant to section 7.(3) of the Act, that he was carrying out his Proposal to Refuse the Applicants

registration as a motor vehicle salesperson.

(Exhibit 1, Tab 25)

Ms. South stated that by written application dated October 2, 2001 the Applicant once again applied for registration as a motor vehicle salesperson. In this application, the Applicant stated he was employed as a taxi driver by "Taxi Blue Line" from May 1990 to the present. Further, the Applicant now answered "Yes" to the question asking whether he was then or ever had been involved in personal bankruptcy proceedings. He again answered "No" to the question of whether there were any unpaid judgements pending against him. Attached to the application was a copy of a completed statement of affairs under the *Bankruptcy and Insolvency Act*, signed by the Applicant, in which the Applicant had stated that he had been unemployed in the last five years and that his monthly income included \$1392.00 from Social Assistance. This statement of affairs was dated October 22, 1997. Ms. South also stated that the Applicant's statement of affairs contained a statement that he was unemployed in the five years before October 22, 1997. This was inconsistent with his statement in his application of October 2, 2001 that he worked for "Taxi Blue Line" from May 1990 to "present".

(Exhibit 1, Tab 4)

Ms. South further stated in her testimony that the Applicant's statement on his September 2000 application for registration (Exhibit 1, Tab 19 Section D), that he was employed by Blue Line Taxi from April 1996 to August 2000, was inconsistent with his statement in his statement of affairs signed on October 22, 1997 that he had been unemployed for "the last 5 years". (Exhibit 1, Tab 4). She also stated that the Applicant's statement in his September 2000 application for registration (Exhibit 1, Tab 19) that he was employed by Blue Line Taxi from April 1996 to August 2000 was inconsistent with the Applicant's statement in his statement of affairs that he was not employed for "the last 5 years" prior to his signing that statement of affairs on October 22, 1997.

She also stated that the Applicant's denials regarding his bankruptcy and the judgement were false and inconsistent with the fact he had been declared a bankrupt and had an unsatisfied judgement registered against him.

Ms. South also stated that the 1989 Honda Civic, that was involved in a collision and was declared "salvage" by Wawanesa, was purchased for \$759.70 at an auction conducted by Winchester Auto Auctions on March 7, 2000. The buyer's name is shown on the auction bill of sale as "A-1 Tire Centre" of Ottawa. The buyer's signature is unclear on the bill of sale. Written in ink under the buyer's name and address are the words "Ali Mohamad" which words, Ms. South claims, indicate that the buyer's representative at the auction was the Applicant. On the bill of sale the odometer reading of the Honda is stated to be 253,997 Kilometres.

(Exhibit 1, Tab 10)

Ms. South referred to the extract from the Ministry of Transportation's records that indicated that Mohamed Tirani, operating as A-1 Tire Centre, became the registered owner of the Honda on March 8, 2000 and that ownership of the vehicle passed to the Applicant on March

18, 2000.

(Exhibit 1, Tab 12)

Ms. South also referred to the 1992 Pontiac Bonneville motor vehicle which was also owned by the Applicant and was written off as "salvage" following the collision previously referred to. She referred to documentation, placed before the Tribunal, that indicated that the Pontiac was sold on September 3, 1998 at an auction in Ottawa conducted by ADESA auctions. The auction bill of sale reflects the purchaser of the Pontiac to be "A-1 Tire Centre," with an illegible signature of the purchaser's representative appearing at the foot of the bill of sale. The odometer reading of the Pontiac is shown on the bill of sale as 292, 670 Kilometres.

(Exhibit 1 Tab 15)

An extract from the records of the Ministry of Transportation indicated that Mohamed Tirani became the registered owner of the Pontiac on September 9, 1998 and that on October 28, 1998 the Applicant became the next registered owner of the vehicle.

Ms. South states that when OMVIC wrote to the Applicant on October 31, 2000 enquiring of the Applicant if he had been employed by "A1 Tire," the Applicant replied by letter dated November 6, 2000 in which he stated that he did work for "A1 Tire" for a short period of time in the repair area, but not as a car salesperson. Based upon this statement of the Applicant, Ms. South stated " it is reasonable to assume the Applicant therefore spun the odometers."

Testimony of the Applicant

The Applicant testified that he did work intermittently for Blue Line Taxi but was unable to say when he did so. He stated that he obtained and forwarded to OMVIC, together with his September 2000 application for registration, a letter from Blue Line Taxi, dated August 22, 2000 in which letter that taxi firm confirmed that the Applicant worked for Blue Line taxi as a self employed taxi driver, from April 3 1996 to March 31, 2000. His earnings could not be confirmed by Blue Line Taxi as he was self-employed and Blue Line Taxi has no record of his earnings.

(Exhibit 1, Tab 19)

The Applicant denied responsibility for tampering with the odometers of either the 1989 Honda Civic or the 1992 Pontiac Bonneville. He also denied that his signature appears as the purchaser's representative on either of the auction bills of sale regarding both vehicles.

He stated that his signature appeared on all his applications for registration sent to OMVIC.

He also stated that he knew Mohamed Ahmed Tirani for five or six years although he has not seen him over the last two years. He worked for Mohamed Tirani as a mechanic for a short time although he was unable to say exactly when he worked for Tirani or for how long.

FACTS FOUND PROVEN:

The following were the facts that were found proven in this matter.

1. The Applicant is not presently registered as a motor vehicle dealer under the Act.
2. The Applicant made application for registration as a motor vehicle salesperson on January 29, 1998, which application was not granted.
3. In the Applicant's application of January 29, 1998 the Applicant answered "no" to questions whether he had ever been involved in personal bankruptcy proceedings, and whether there were any unpaid judgements outstanding against him.
4. The Applicant filed an assignment into bankruptcy on October 23, 1997. The Applicant completed and signed a statement relating to his affairs dated October 22, 1997 in terms of which he acknowledged he was then unemployed and had not been self-employed in the prior five years.
5. In or about October 1997 a judgement was obtained against the Applicant at the instance of Trans Canada Credit Corporation Ltd. in an amount of \$ 5,940.00 which judgement has not been satisfied.
6. In the Applicant's January 29, 1998 application, the Applicant stated that in the three years preceding January 29, 1998 he was in Lebanon between February 1995 and August 1996 and was not working from February 1996 to January 1998.
7. On September 7, 2000 the Applicant made a further application for registration as a motor vehicle salesperson in terms of the Act. The Applicant did not obtain registration pursuant to this application.
8. In the Applicant's September 7, 2000 application, the Applicant answered "no" to questions whether he had ever been involved in bankruptcy proceedings, and whether there were any unpaid judgements outstanding against him.
9. In the Applicant's September 7, 2000 application, the Applicant stated that he was employed as a taxi driver from April 1996 to August 2000.
10. The Applicant made a further application for registration as a motor vehicle salesperson by way of written application dated October 2, 2001.
11. In the Applicant's application of October 2, 2001, the Applicant denied there were any unpaid judgments registered against him.
12. In the Applicant's application of October 2, 2001, the Applicant stated he was

employed as a taxi driver with "Taxi Blue Line" from May 1990 "to present".

13. The Applicant worked for Mohamed Ahmed Tirani operating as "A-1 Tire Centre" as a motor mechanic.
14. "A-1 Tire Centre" purchased a 1989 Honda Civic DX at an auto auction on September 7, 2000 at which time the odometer reading of the Honda registered 253,997 Kilometres.
15. Mohamed Tirani operating as "A-1 Tire Centre" became the registered owner of the above Honda Civic DX motor vehicle on March 8, 2000 and thereafter on March 18, 2000 transferred its ownership to the Applicant.
16. On or about June 19, 2000, the aforesaid Honda Civic DX, while being driven by the Applicant, was involved in a collision. Pursuant to that collision the Applicant was paid out by its insurer, Wawanesa, the sum of \$4,000.00. The odometer reading of the Honda Civic, at date of collision, was 162,977 kilometres upon which reading Wawanesa based its pay out figure of \$4,000.00.
17. "A-1 Tire Centre" purchased a 1992 Pontiac Bonneville at an auto auction on September 3, 1998 at which time the odometer reading of the Pontiac was 292,670 kilometres.
18. Mohamad Ahmed Tirani operating as "A-1 Tire Centre" became the registered owner of the Pontiac motor vehicle on September 9, 1998 and transferred its ownership to the Applicant on October 28, 1998.
19. On or about July 10, 2000, the aforesaid Pontiac motor vehicle, while being driven by the Applicant, was involved in a collision. Pursuant to that collision, the Applicant was paid out by the insurer of the vehicle, Wawanesa, the sum of \$7,626.00. The odometer reading of the Pontiac at the date of collision was 141,119 kilometres upon which reading Wawanesa based its pay out figure of \$7,626.00.

THE LAW:

Section 7.(1) and 7.(2) of the Act states:

7.(1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the Registrar shall serve notice of the proposal, together with written reasons therefor, on the applicant or registrant.

(2) A notice under subsection (1) shall state that the applicant or registrant is entitled to a hearing by the Tribunal if the applicant or registrant mails or delivers, within fifteen days after

service of the notice under subsection (1), notice in writing requiring a hearing to the Registrar and the Tribunal, and the applicant or registrant may so require a hearing.

Section 5.(1) of the Act states:

5. (1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

(a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or

(d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

Section 6.(1) of the Act states:

6. (1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section

DECISION AND REASONS:

The onus of proof rests upon the Registrar to prove the past conduct of the Applicant affords him reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.

The grounds upon which the Registrar basis his Proposal are:

- (a) Tampering with the odometer readings relating to a 1989 Honda Civic DX motor vehicle and a 1992 Pontiac Bonneville motor vehicle.
- (b) Non disclosure in the Applicant's applications for registration in regard to his bankruptcy and an outstanding judgement registered against him.

In *Brenner v. Ontario (Registrar of Motor Vehicle Dealers and Salesman)* [1983] O.J. No.1017, April 7, 1983, it was clearly stated that the Tribunal should only refuse to direct the Registrar to carry out his proposal if it thinks the Registrar was in error in concluding that the past conduct of the Applicant affords reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty. To overrule the decision of the Registrar, the Tribunal must conclude that he was wrong in his decision and that the conduct of the Applicant does not afford reasonable grounds for belief that the

Applicant will in the future carry on activities in contravention of the Act and its Regulations.

The Tribunal's conclusions and the reasons for its conclusions, based upon the evidence, follow.

ODOMETER TAMPERING

The evidence placed before the Tribunal indicates that in relation to the purchase at the auction sales of both the Honda and the Pontiac motor vehicles, the Purchaser was A-1 Tire Centre which was then owned and operated by one Mohamad Tirani.

(Exhibit 1 Tab 10 and Tab 15)

There was no evidence from the Registrar to show that the Purchaser of either vehicles at the auction sales was other than A-1 Tire Centre. The Applicant, in his testimony, denied that he had attended either of those auction sales or purchased the vehicles on behalf of A-1 Tire Centre.

The only evidence the Registrar introduced at the hearing to implicate the Applicant in the Honda auction sale were the words "Ali Mohamed Gam" that appeared in ink in some unknown person's handwriting on the copy of the auction bill of sale. (Exhibit 1 Tab 10). These words were written next to the Purchaser's name and do not appear as a signature of the Purchaser or his duly authorized representative. There was no other evidence to link the Applicant to either his attendance at the auction sale or having acted as representative of the Purchaser at the auction sale.

As to the allegation of odometer tampering regarding the Pontiac Bonneville, again there is no evidence before the Tribunal from the Registrar to indicate that the Applicant was at the auction sale when A-1 Tire Centre purchased the Pontiac motor vehicle. The signature on the bill of sale is not decipherable and was not shown to be that of the Applicant.

In both instances of the Honda and Pontiac purchases, there is no evidence to show that the Applicant was aware of either vehicle's odometer readings at the time of purchase by A-1 Tire Centre. Further, there was no evidence that showed that either odometers were tampered with by the Applicant himself after A-1 Tire Centre came into possession of the vehicles. The fact that both vehicles' odometers had in all likelihood been tampered with at some time after the auction sales and prior to the time of the collisions, does not in any way prove that the Applicant was responsible for the tampering. That the Applicant admitted working for some two weeks for A-1 Tire Centre at some unclear and unproven date or dates is by no means evidence that proves the Applicant's involvement in any odometer tampering.

The Tribunal was troubled by the Applicant's evasive answers to many questions put to him during his cross-examination. He repeatedly answered questions put to him by saying that he was not able to remember events and showed himself to be unnecessarily argumentative and combative. His repeated evasiveness did not imbue a sense of confidence in the Tribunal as

to his veracity. However, it was not incumbent on the Applicant to assist the Registrar in proving the Registrar's case by providing the necessary evidence to prove the Registrar's case.

Accordingly, the Tribunal finds that in both instances relating to the Honda and Pontiac, the Registrar has not proven that the Applicant was involved in, or responsible for, the tampering with either vehicle's odometer.

NON-DISCLOSURE

The Applicant made written application to the Registrar for registration as a motor vehicle dealer on three separate occasions since 1998. The first of the three applications was made in January 1998, the second application was made in September 2000 and the most recent application was made in October 2001.

The Registrar has alleged that in all three applications the Applicant has failed to make full and honest disclosure and that the Registrar, who should be able to rely on the veracity and the completeness of all answers given by the Applicant, has been misled by the untrue and incomplete answers given by the Applicant. The Registrar argues that the repeated dishonest conduct of non-disclosure by the Applicant is justification for the Registrar's reasonable belief that the Applicant will in the future not carry on business in accordance with law and with integrity and honesty.

Having regard to the Applicant's January 1998 application, it becomes clear that the Applicant failed to disclose his bankruptcy and the judgment registered against him.

Again, in regard to the Applicant's September 2000 application, he clearly failed to disclose his bankruptcy and the judgment registered against him.

The Tribunal finds that the non-disclosure of Applicant's bankruptcy and the judgment registered against him were material non-disclosures. The questions posed to the Applicant in the application, regarding bankruptcy and judgments, were important questions that related to whether the Applicant was financially stable and responsible and could safely be registered to conduct business. The Applicant was sufficiently knowledgeable in the English language to answer all questions in the application forms. His excuse for not truthfully answering the two material questions relating to his bankruptcy and judgment was not that he did not understand the questions, but that he made a mistake with his answers. The Applicant's statement that he made a mistake is not believable and not acceptable by the Tribunal which is of the view that he did not wish to truthfully disclose the bankruptcy and the judgment for fear that such disclosure would prejudice his registration.

Only in the Applicant's third application for registration in October 2001 did he disclose his bankruptcy, but he still denied a judgment had been registered against him. In disclosing his bankruptcy, the Applicant forwarded to the Registrar a copy of his signed Statement of Affairs

which he had filed in October 1997 with his Trustee in bankruptcy. This statement of affairs revealed that he claimed to be a recipient of monthly social assistance payments of \$1392.00 and that he was unemployed and had, within the previous five years, not been self employed. Such statements are inconsistent with the Applicant's statement in his September 2000 application that he had been employed as a taxi driver with Blue Line Taxi from April 1996 to August 2000, which is inconsistent with his statement in his October 2001 application that he worked for "Taxi Blue Line" as a taxi driver from May 1990 to "present".

The Tribunal finds that the past conduct of the Applicant in not disclosing his bankruptcy and judgment, his inconsistent statements in his applications, and his general demeanor and of evasiveness under cross-examination, affords the Registrar with reasonable grounds for his belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.

DECISION:

Pursuant to the authority vested in it by section 7(4) of the *Motor Vehicle Dealers Act*, the Tribunal directs the Registrar to carry out his Proposal dated November 6, 2001 to refuse the registration of the Applicant as a motor vehicle salesperson under the *Motor Vehicle Dealers Act*, as amended.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: March 27, 2002

0959 - MED - SEIZ

**Appeal under Section 50(1) of the Highway Traffic Act,
R.S.O. 1990, Chap. H.8 as amended, from a Decision of the
Registrar of Motor Vehicles pursuant to Section 47(1) of
that Act.**

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ROSS BENNETT, M.D., Presiding Member

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles

Agent for Applicant

DATE OF
HEARING: February 28, 2002 Hamilton

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") to suspend the Applicant's driver's licence pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

EXHIBITS:

- (1) The Applicant's notice of Appeal received at the Tribunal January 18, 2002.
- (2) The Ministry's Order of Suspension dated February 18, 2000.
- (3) Summary of the evidence introduced by the Respondent.
- (4) Indexed file compiled by the Ministry.

FACTS:

The Applicant, a 57-year-old landscaper had his driver's licence suspended on February 18, 2000. The Ministry had received a medical report on February 2, 2000 from a neurologist, Doctor #1, reporting that the Applicant had suffered a seizure on December 12, 1999. It was possibly alcohol related and presented a serious road safety risk. He also stated the Applicant had two previous seizures of unknown etiology three and nine years ago.

The Applicant had been on an "all inclusive vacation" in Mexico and is reported to have partied too much one night and laid out in the sun the following day. During dinner he suffered a seizure and was unconscious for approximately four to five minutes. On awakening he was confused for several minutes and had bitten his tongue.

The Applicant was taken to a hospital and kept overnight. He had a CT Scan and an EEG and were both reported as normal. He was discharged the following day with a small number of Dilantin tablets. On his return home he was examined by Doctor #1 and had a second EEG, also normal.

Doctor #1 stated in a letter to the Ministry on April 19, 2000 that the Applicant probably had an alcohol withdrawal seizure. He recommended a full year seizure-free and abstinence from alcohol before driving, because of the possibility of seizure recurrence. The Applicant and his two daughters, who were present at Doctor #1's office, did not believe it was an alcohol-related seizure. The doctor assured them that any other form of syncope would not have produced this duration of convulsive activity and post ictal confusion.

The Applicant has remained seizure-free since December 12, 1999 and has continued to drink intermittently, but less than before the incident. He has been examined by Doctor #1 on three occasions, visited his family doctor a few times and attended an addiction assessment centre (ADAPT) in Burlington on two occasions.

Doctor #1 last saw the Applicant on February 8, 2001 at which time he stated in a letter to the Ministry that he was ordering an EEG and if it is normal he could clear the Applicant neurologically for seizure risk. The Applicant actually had two EEG's and both were reported normal.

Doctor #1, however, was unsure about a possible relapse to alcohol consumption. He recommended that his family physician Doctor #2, refer the Applicant to an addiction assessment centre at the Credit Valley Hospital and also ensure monthly MCV and GGT tests are carried out. Unfortunately, there is not a notation on this letter that a copy was being sent to Doctor #2.

The Applicant gave evidence that he could not go to the Credit Valley Hospital because it would take him two hours on public transportation. Instead he went to ADATP in Burlington.

There were no records entered regarding the blood tests.

The Applicant said that he stopped drinking for about four months after the incident and then would have 4-5 bottles of beer on a weekend. He believes the seizure was a result of dehydration after being out in the sun all day. In the fall of 2001 the Applicant stopped drinking again, for another four months. He could not give a reason why he stopped or restarted drinking.

The Applicant denies having any previous seizures and does not know where Doctor #1 got that information.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;

- (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

The Registrar of Motor Vehicles acted in compliance with the *Highway Traffic Act*, Section 41(1) in suspending the Applicant's driver's licence after receiving Doctor #1's medical report stating that the Applicant's seizure presented a serious road safety risk.

This incident occurred December 12, 1999 in Mexico so he has been seizure-free for 31/2 years. During this time he has been drinking moderately, but remained abstinent for two four month periods. Doctor #1 cleared him for neurological risk in February 2001 and he now has been stable for another year.

The Applicant has been to a neurologist several times, has a CT Scan, several EEG's, attended an addiction centre twice and followed up with his family physician. Unfortunately there appears to be a communication breakdown somewhere. No one has provided the information requested by the Medical Assessment Committee, such as, an Alcohol Assessment Report and laboratory blood test results, including MCV and GGT markers.

The fact remains that the Applicant has been symptom-free since the incident in December 1999 and has not been drinking enough to cause any problems or to be a threat to road safety. Based on this the Tribunal does not find that the evidence presented supports the Registrar's refusal to reinstate the Applicant's driver's licence.

DECISION:

Upon the application by the Applicant to appeal the decision dated February 27, 2000 of the Registrar of Motor Vehicles to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act*, and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar to suspend the Applicant's driver's licence be set aside.

LICENCE APPEAL TRIBUNAL

Ross Bennett, M.D.,
Presiding Member

RELEASED: March 5, 2002

SISTERS MOVING SYSTEM INC.

PREHEARING

SISTERS MOVING SYSTEM INC.

IN THE MATTER OF an application by Sisters Moving Systems Inc. dated January 25th, 2002 for a hearing before the Licence Appeal Tribunal pursuant to section 50(1) of the *Highway Traffic Act*, to consider the appeal of the Notice of Refusal to issue a Commercial Vehicle Operator's Registration Certificate by the Registrar of Motor Vehicles dated November 9th, 2001;

AND IN THE MATTER OF the *Motor Vehicle Transport Act*, 1987, S.C. 1987, Chapter 35, as amended by R.S. 1989, Chapter 29 and the *Truck Transportation Act*, R.S.O. Chapter H.8 as amended;

AND IN THE MATTER OF an Application for Operating Licence by Sisters Moving System Inc;

AND IN THE MATTER OF the *Highway Traffic Act*, R.S.O. Chapter H.8 as amended;

AND IN THE MATTER OF an Application by Sisters Moving System Inc. for a Commercial Vehicle Operator's Registration Certificate.

TRIBUNAL: STUART CORK, Presiding Member

APPEARANCES: MURRAY FORBES, Counsel for the Respondent
JUAN ESTABLE, Counsel for the Applicant

DATE OF
PRE-HEARING: March 13th, 2002

Toronto

ORDER

A Pre-hearing between the parties was held on March 13th, 2002 in Toronto at 1 St. Clair Avenue West, 12th Floor as set forth in the Tribunal's Notice of Pre-hearing Conference dated February 15, 2002.

The Tribunal makes the following Orders respecting the hearing:

1. The hearing dates have been set for 9:30 a.m. commencing on **June 17, 18 and 19th, 2002**, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.
2. It was determined that the filing dates with the Tribunal of submissions and documents to be used in the hearing by both parties would occur **on or before June 6th, 2002**.

Both parties will file five copies with the Tribunal and deliver one copy to all parties. It was confirmed that the Tribunal requires full disclosure 10 days prior to the hearing.

3. The Respondent will present evidence and testimony from one witness, Carrier Safety Rating Administrator Bunny McKenna. Ms. McKenna will provide evidence of all the Applicant's records and information, including notes taken at a show cause meeting on November 28th, 2001, an analysis of how the Applicant relates and is connected to two other companies, AAA Safe and Private Storage, and Cyrus Moving Systems Inc. CVOR summary for the Applicant as of November 2, 2001, Articles of Incorporation (Corporate Profile Report) for the Applicant, Cyrus Moving Systems and AAA Safe and Private Storage, CVOR summary and record for Cyrus Moving Systems Inc., MTO enforcement officer reports, CVIR reports relating to out of service rates, mechanical inspections with supporting CVIR's for both the Applicant and Cyrus Moving Systems.

Further evidence will include ICON reports for unpaid fines, vehicle registrations systems inquiries, warning letter issued to the Applicant and the CVOR record and summary that gave rise to the warning, and filled applications for CVOR certificates.

Ms McKenna will also provide general information regarding the operation of the CVOR system, and will introduce the CVOR handbook. Ms. McKenna will also describe the connections between the Applicant and another company that had been previously sanctioned.

4. The Applicant will present evidence and testimony from up to five witnesses: Owner of Sisters Moving Inc., Fariba Rezvanian, possibly her brother Cyrus Rezvanian, as well as three drivers for the Applicant: Ali Krodan, Karman Zia Terighat, and Behrooz Aghazadeh.

The witness for the Applicant will present the documentation they produced for the show cause hearing, invoices and advertising copy paid for by the Applicant.

The three truck drivers will testify that they have only dealt with Fariba Rezvanian and Sisters Moving Inc, and have only been paid and contracted by her.

5. Among the issues to be raised by the Respondent will be whether there is sufficient evidence to support the Registrar's November 9th, 2002 Notice of Refusal.
6. Among the issues to be raised by the Applicant will be that they were dealt with unfairly at the show cause meeting, that they have not been given adequate reasons for the Refusal and that the Director did not give adequate reasons for the Director's decision, further, the Applicant is concerned that the Director fails to acknowledge the independence between the Applicant and Cyrus Moving Systems and that the safety record of Cyrus Moving Systems should have no bearing upon that of the Applicant.
7. It was outlined at the Prehearing Conference that:

The Registrar has issued a Notice of Refusal to issue a Commercial Vehicle Operator's Registration Certificate dated November 9th, 2001, pursuant to section 17 of the *Highway Traffic Act*, for Sisters Moving System Inc.
8. The parties present at the prehearing recorded that there was no resolution of the issues between the parties.
9. The Applicant will provide if necessary, at its own expense, a Certified Court Interpreter who is accredited through the Provincial Court System, to provide translation services.
10. At the hearing of this matter, the Tribunal will be asked to review in detail the time period from when the Applicant filed its application for a CVOR certificate on August 8th, 2001, until the date of the Notice.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

RELEASED: March 21, 2002

PREHEARING

IN THE MATTER OF an application by RTS Transport Ltd. dated January 31st, 2002 for a hearing before the Licence Appeal Tribunal pursuant to section 50(1) of the *Highway Traffic Act*, to consider the appeal of the Suspension and Seizure Order of the Registrar of Motor Vehicles dated January 28th, 2002;

AND IN THE MATTER of the Commercial Vehicle Operator's Registration
CVOR # 135-802-571 issued to RTS Transport Ltd;

AND IN THE MATTER of the safety record of RTS Transport Ltd.

APPEARANCES: PATRICK MOORE, Counsel for the Respondent
Patrick Di Monte, Counsel for the Applicant

ORDER

A Pre-hearing between the parties was held on March 6th, 2002 in Toronto at 1 St. Clair Avenue West, 12th Floor as set forth in the Tribunal's Notice of Pre-hearing Conference dated February 13th/2002.

The Tribunal makes the following Order respecting the hearing:

1. The hearing date has been set for 9:30 a.m. on May 30, 31 and June 3, 2002, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.
2. It was determined that the filing dates with the Tribunal of submissions and documents to be used in the hearing by both parties would occur **on or before May 17th, 2002.**

Both parties will file five copies with the Tribunal and deliver one copy to all parties. It was confirmed that the Tribunal requires full disclosure 10 days prior to the hearing.

3. The Respondent will present evidence and testimony from one witness, Carrier Safety Rating Administrator Bernadette McKenna. Ms. McKenna will provide evidence of all the Applicant's records and information, including the Applicant's CVOR and analysis, safety record, accident reports, show cause meeting, correspondence regarding fleet size, and the Applicant's activities in the United States including "SAFER" Reports. Ms McKenna will provide general information regarding the operation of the CVOR system, and will introduce the CVOR handbook. Ms. McKenna will also describe the connections between the Applicant and another company that had been previously sanctioned.
4. The Applicant will present evidence and testimony from two witnesses: Mr. Daman Grewal, who is the Safety manager for the Applicant and a part time dispatcher, and Mr. Gurpinder Pandher, one of the two brothers who own RTS Transportation. The Applicant may bring a witness to counter evidence regarding any evidence brought forward by the Respondent with respect to other carrier companies previously sanctioned and related to the Applicant.

The witnesses for the Applicant will provide evidence relating to all relative safety and mechanical issues, driver safety issues, driver histories, information and files, accident files, and details. The witnesses for the Applicant will also introduce the safety manuals and instructions set up by the Applicant, including on and off site inspection systems, and information from an official United States government audit.

5. Among the issues to be raised by the Respondent will be the safety record of the Applicant as the basis of the Registrar's January 28th, 2002 Order.
6. Among the issues to be raised by the Applicant will be the point weighting of the accidents, the calculation of the fleet size for the purposes of the CVOR, the lack of preparedness of the Applicant for the Show Cause meeting of January 2002, and that the suspension is harsh and unwarranted, and will result in the Applicant being put out of business.

7. It was outlined at the Prehearing Conference that:

The Registrar has issued a 30 day Suspension and Seizure Order dated January 28th, 2002, pursuant to section 50(1) of the *Highway Traffic Act*, as February 5th, 2002, for RTS Transport Ltd.

8. The parties present at the prehearing recorded that there was no resolution of the issues between the parties.
9. The Applicant will provide if necessary, at its own expense, a Certified Court Interpreter who is accredited through the Provincial Court System, to provide translation services.
10. At the hearing of this matter, the Tribunal will be asked to review in detail a time period from when the CVOR was first issued to the Applicant in June of 2000, until the date of the Order.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

RELEASED: March 15, 2002

VORKAPIC, VERDJINIA VORKAPIC O/A GINA'S AUTO SALES

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
VERDJINIA VORKAPIC O/A GINA'S AUTO SALES

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: January 25, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

VERDJINIA VORKAPIC O/A GINA'S AUTO SALES

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Verdjinia Vorkapic o/a Gina's Auto Sales, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: March 5, 2002

TO: The Registrar
Motor Vehicle Applicants Act
Ontario Motor Vehicle Industry Council
36 York Mills Road, Suite 110
Toronto, Ontario M2P 2E9

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Gina Verdjinia Vorkapic
o/a Gina's Auto Sales
213 King Street West
Hamilton, ON L8P 1A6

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereinafter the "Act") the parties to the proceeding, Gina Verdjinia Vorkapic o/a Gina's Auto Sales (hereinafter referred to as "the Applicant"), and the Registrar, *Motor Vehicle Dealers Act* (hereinafter the "Registrar") waive the requirement of a hearing and hereby consent to an Order of the Licence Appeal Tribunal based on the following terms and conditions:

1. The Applicant acknowledges and understands that she will not retain the services of a salesperson unless the salesperson is registered as a salesperson to the Applicant.
2. The Applicant acknowledges that Sasa Vorkapic will in no way, either directly or indirectly be involved with the operation or financing of the business. However, Sasa Vorkapic will be permitted to effect repairs to vehicles purchased by the Applicant. The Applicant further acknowledges and understands that Sasa Vorkapic will not be permitted on the Applicant's registered premises or to have any contact either directly or indirectly with the customers of the Applicant.
3. The Applicant further acknowledges that the restrictions concerning the activities of a salesperson referred to in these terms and conditions applies to buying, selling and leasing on behalf of a dealer. "Buying, selling and leasing" refers to showing a vehicle to a prospective purchaser or any form of negotiation concerning the purchase, sale or lease of a motor vehicle and is not limited to the signing of contracts. This further includes attendance at auctions on behalf of the Applicant.
4. The Applicant agrees to operate exclusively from the location approved by the Registrar. The Applicant agrees to apply for the Registrar's approval, by way of prior written notice, of any change in location in the form required by the Registrar.
5. The Applicant agrees not to invite the public to deal at a place other than her approved location.
6. The Applicant will not conduct any purchases with anyone who is in the business of buying and selling motor vehicles without confirming that he or she is registered as a Dealer under the Motor Vehicle Dealers Act.
7. The Applicant will ensure that all advertisements placed by or on behalf of the Applicant will identify her registered name and the address of the location approved by the Registrar.
8. The Applicant will ensure that any vehicles sold are registered in the name of the purchaser before releasing the vehicle to the purchaser.

9. The Applicant will not purchase vehicles without ensuring that the vehicle is registered to the seller.
10. The Applicant agrees to register all vehicles purchased within 6 days in accordance with the Highway Traffic Act.
11. The Applicant acknowledges and understands that her registration will not be used to buy or sell motor vehicles where the Applicant knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
12. The Applicant agrees to provide full and accurate disclosure on any applications, documents, statements or other form of communication/information provided to the Registrar or his authorized representatives regardless of previous disclosure.
13. The Applicant agrees that she is under a positive obligation to disclose all material facts in writing about the vehicles she sells to her customers. Material facts include but are not limited to salvage, previous salvage, frame and unibody damage, rebuilt, accident repair, theft recovery, prior use as a police cruiser or taxicab and branded vehicles. The Applicant agrees to make reasonable efforts to research the history of all her vehicles prior to sale to ensure all material facts are disclosed. The Applicant agrees that should any information come to light, which the Registrar deems to be a material fact concerning a vehicle the Applicant have sold, the Applicant will comply with all reasonable requests made by the Registrar to provide compensation to the purchaser.
14. The Applicant agrees that where a vehicle's odometer reading is unknown the Applicant's are under a positive obligation to disclose in writing the last known mileage and that the true mileage is unknown. The Applicant further agrees that if she exchanges or repairs an odometer she will do so in accordance with the Motor Vehicle Dealers Act and ensure that the identical reading appears on the new odometer.
15. The Applicant will comply with the Ontario Motor Vehicle Industry Council's Code of Ethics and Standards of Business Practice.
16. The Applicant agrees to maintain a garage register in accordance with the Highway Traffic Act and will maintain all books and records as required by the Motor Vehicle Dealers Act. The Applicant agrees that all books and records relating to motor vehicles sold or leased by or on behalf of the Applicant before and after registration shall be kept at the Dealer's registered premises and be readily available for inspection. The Applicant further agrees to provide free access to her books and records to any authorized representative of the Registrar without any prior notice being given.
17. The Applicant agrees that she will not be involved with the buying and selling of motor vehicles without the benefit of registration.
18. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke her registration as a motor vehicle salesperson arising from any matters that have occurred in the past or that may occur in the future related to her financial circumstances and her honesty and integrity.
19. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from her actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.
20. The Applicant agrees and acknowledges that should she breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.

21. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
22. The Applicant hereby withdraws her appeal to the Licence Appeal Tribunal.
23. The Applicant hereby acknowledges that he have obtained or have had the opportunity to obtain independent legal advice with respect to her consent to the terms and conditions set out in this document.

Signed in the City of Hamilton this day of 2002.

Gina Verjinia Vorkapic
o/a Gina's Auto Sales (signature)

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Date:

Carl Compton
Registrar

BONDI PRODUCE CO. LTD.

**Appeal under section 50.2 of the *Highway Traffic Act*,
R.S.O. 1990, Chap.H.8 as amended (the “Act”), from
the Order of the Registrar of Motor Vehicles
pursuant to section 55.1(3) of the Act.**

**TO APPEAL AN ORDER TO IMPOUND A MOTOR
VEHICLE ISSUED BY THE REGISTRAR OF MOTOR
VEHICLES**

TRIBUNAL: ALAN HOLBROOK
Presiding member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

GEORGE H. CANCELLA
Solicitor for the Applicant

DATE OF HEARING: February 28, 2002

DECISION RELEASED: March 4, 2002 Toronto

REASONS FOR DECISION

A hearing was held on February 28, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Bondi Produce Co. Ltd. (the "Applicant")
Motor Vehicle:	1995 Freightliner Conventional Tractor Plate no. 6193KJ (the "vehicle")
Date of Appeal:	February 7, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the driver's licence was not under suspension and the vehicle owner exercised due diligence (i.e. all reasonable efforts) to determine that the driver's licence was not suspended as provided in sections 50.2(3)(b) and (c) of the Act.

This matter came before this Tribunal on February 28, 2002 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

Kim Beintema, Representative for the Registrar of Motor Vehicles asked that the Original Certified Copies of the Respondent's submissions be placed into evidence. Both parties agreed and they were marked as Exhibit #3.

George H. Cancilla, Solicitor for the Applicant noted he had two witnesses and his second witness, Mr. Bondi, was waiting outside the Hearing Room. The Tribunal agreed with the voluntary exclusion of the second witness during the first witness's testimony.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

The owner had been previously made aware that the driver had lost his driving privileges by reason of a prior conviction for impaired driving. The owner was advised by the driver personally, and as a result the owner employed the driver in a non-driving capacity as a warehouse worker at 879 Islington Avenue, Toronto. The driver advised the owner that he had pleaded guilty to the impaired driving offence and lost his driving privilege for a period of 1 year as a result, his driving privileges were re-instated in the month of October 2001. The driver produced at the request of the owner, his new photo ID licence which he states was received from the Ministry of Transportation and Communications in the month of October 2001. the owner took a photocopy of the re-instated licence of the driver for the company file. The driver advised the owner he had received no notice whatsoever of any additional suspension.

On the 3^d day of February 2002 while the driver was driving the owners 1995 Freightliner tandem vehicle to Hamilton he was stopped by Burlington OPP Officer Sobilo, 8528 who advised that the driver was under suspension and the vehicle was impounded. At all material times the owner and the driver were acting in the belief that the driver had a valid driver's licence. The owner prevented the driver at all times from driving its vehicle until such time as the driver produced a valid authorized driver's licence.

The first witness for the applicant was Mr. Francesco (Frank) Chiarella. Mr. Chiarella was sworn in and took the witness stand. Mr. Chiarella testified he was 38 years old and employed by Bondi Produce as a warehouseman for approximately 4 years. He lived at 237 Melrose St. Apt 2 in Etobicoke. He has known Mr. Bondi for approximately 20 years as a friend. In August 1998 he was charged with driving with more than 80mgs. of alcohol in his blood. His trial for the charge was heard two years later in August of 2000. He plead guilty and received 14 days in jail and a one year suspension of his driver's licence under the *Criminal Code of Canada*. He informed his employer Mr. Bondi and was employed as a warehouseman after serving his sentence of 14 days. At the time of his conviction he surrendered his wallet portion of his driver's licence.

In October 2001 Mr. Chiarella received the wallet portion of his driver's licence, which he had

surrendered at his trial, by mail. The issue date on the licence is June 28th 2000. The expiry date is May 6th 2005.

Mr. Chiarella believed his driving privileges had been restored and informed his employer, Mr. Bondi, it was legal for him to drive again. Mr. Bondi made a photocopy of the licence for his files and returned it to Mr. Chiarella.

On Sunday, February 3rd, 2002 Mr. Bondi assigned him to drive a company truck to deliver produce in Hamilton Ontario. The Ontario Provincial Police, because of missing signage, stopped the 1995 Freightliner and carried out a check of the related paper work. The investigation revealed the one-year suspension of Mr. Chiarella's driver's licence under the *Criminal Code of Canada*, which was completed. The investigation also revealed a three-year suspension under the Ontario *Highway Traffic Act*. The Ontario *Highway Traffic Act* suspension had approximately two more years until it was complete. Mr. Chiarella was charged with driving while disqualified and the truck was impounded. Mr. Chiarella stated he intends to plead not guilty to the charge because he believes he is qualified to drive.

The witness was then cross examined by the Representative for the Respondent, Ms. Beintema.

Mr. Chiarella couldn't remember if he had signed a Prohibition Order on his driver's licence at the conclusion of his trial in August 2000. He stated he knew only that he was sentenced to 14 days in jail and a one-year suspension of his driver's licence.

Ms. Beintema asked that a "Notice of Suspension" issued by the Ministry of Transportation be entered as evidence. Mr. Cancilla, Solicitor for the Applicant, objected on the basis that the Order should have been included in Pre Hearing Submissions according to the Licence Appeal Tribunal's Rules of Practice section 6.3.

Ms. Beintema argued that the rules allowed her to tender the document during cross-examination.

The Tribunal ruled the document would not be allowed as evidence due to the fact it was not tendered with the rest of the Respondent's Submissions prior to the hearing as set out in the Rules of Practice. Ms. Beintema was allowed to refer to the document solely for the purpose of cross-examination. Ms. Beintema confirmed with the witness his home address had not changed and explained the document in question would have been mailed to him.

Mr. Chiarella denied ever having received or seeing the Notice of Suspension.

Mr. Chiarella was asked why he did not call the Ministry of Transportation about his licence in August 2001 when the one-year suspension would have been completed. He replied he did not need it for work, he did not own a car and he walked to work.

When asked why the dates on the licence he received in the mail did not cause him concern, he replied he assumed the Ministry had simply returned the original licence he had surrendered.

Mr. Gus Bondi was then called as the second witness for the Applicant. He was sworn and took the witness stand.

Mr. Bondi testified he was the owner of Bondi Produce. He had run the company for ten years. The business operates a fleet of nine trucks and supplies produce to retail stores, hotels and restaurants. Mr. Bondi has known Mr. Chiarella for twenty years as a friend and hired him as a warehouseman four years ago. He never had reason to doubt Mr. Chiarella's truthfulness. He was aware of Mr. Chiarella's driving record, conviction and suspension, but was not concerned because Mr. Chiarella was not employed as a driver. Mr. Bondi knew Mr. Chiarella as a capable truck driver because on occasion he had witnessed him backing in trucks for outside drivers who had trouble getting in to the company loading docks.

On Sunday February 3rd, 2002 Mr. Bondi asked Mr. Chiarella to replace a truck driver that had not reported for work.

Mr. Bondi believed Mr. Chiarella was now qualified to drive because the Ministry of Transportation had returned his licence to him and his suspension had been served.

The Ontario Provincial Police stopped the company truck because of signage problems and discovered Mr. Chiarella's licence was suspended according to their records. A charge of driving while disqualified was laid against Mr. Chiarella and the company truck impounded.

The witness was then cross-examined by Ms. Beintema.

Mr. Bondi testified the company had 16 employees. Nine were required to drive, and 3 were warehousemen who may be asked to drive occasionally if needed.

Mr. Bondi stated when hiring someone he did not know, he would demand a driver's abstract and forward the name and driver's information to his insurance broker who would investigate the driver's record.

Mr. Bondi felt it was insulting to demand an abstract from a friend. He would simply take the employee's/friend's word that the licence was valid and submit the information to the insurance broker.

Mr. Chiarella had never been asked for a driver's abstract and his name and information had not been sent to the insurance broker since he was employed as a warehouseman. Mr. Bondi believed Mr. Chiarella was qualified based on Mr. Chiarella's word and having seen the wallet portion of his licence. Mr. Chiarella was only asked to drive because no other class 'A' driver was available. It was a Sunday so no checks with the insurance broker could be made.

The Tribunal found both witnesses to be credible and had no reason to doubt the testimony they provided. Both witnesses believed Mr. Chiarella was qualified to drive and held a valid driver's licence. The wallet document had been returned to Mr. Chiarella by mail approximately two months after the one-year suspension had ended. Neither was aware of any other suspension orders against Mr. Chiarella's licence. They stated in testimony a "Notice of Suspension" was never received regarding an additional period of suspension.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Francesco Chiarella;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Blood/Alcohol Content in Excess of .08 under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until August 15, 2003.

The Respondent relied only on written documents filed with the Tribunal prior to the Hearing, and cross-examination. The Respondent called no witnesses.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(b) and (c).

With respect to an appeal under subsection 50.2(3)(b) alleging that the driver's licence of the driver driving at the time of the impoundment order was not under suspension, section 55.1(2) of the Act states:

Where a police officer or officer appointed for carrying out the provisions of this Act is satisfied that a person was driving a motor vehicle on a highway while his or her driver's licence is under suspension under section 41 or 42 or 43, even if it is under suspension at the same time for any other reason, the officer shall,

- (a) notify the Registrar of the fact or cause the Registrar to be notified; and
- (b) detain the motor vehicle that was being driven by the person whose driver's licence is under suspension until the Registrar issues an order under subsection (3).

Section 41 of the *Highway Traffic Act* identify the type of appeals for which a licence is suspended in sections 41(1)(a), (b), (c), (d), and (e) and 41(7) and 42(1) and 42(5) as follows:

Section 41(1) Subject to subsections 41.1 (1), (2) and (3), the driver's licence of a person who is convicted of an offence,

- (a) under section 220, 221 or 236 of the *Criminal Code* (Canada) committed by means of a motor vehicle or a street car within the meaning of this Act or a motorized snow vehicle within the meaning of *Motorized snow vehicle Act*;
- (b) under section 249, 252, 253 or 255 of the *Criminal Code* (Canada) committed while driving or having the care, charge or control of a motor vehicle or street car within the meaning of this Act or a motorized snow vehicle within the meaning of the *Motorized Snow Vehicles Act*;
- (c) under subsection 254 (5) of the *Criminal Code* (Canada) committed in relation to the driving or having the care, charge or control of a motor vehicle or street car within the meaning of this Act or a motorized snow vehicle within the meaning of the *Motorized Snow Vehicles Act*;
- (d) under a provision that is enacted by a state of the United States of America and that is designated by the regulations; or
- (e) referred to in a predecessor to this sub-section, is thereupon suspended

Section 42.(1) The driver's licence of a person who is convicted of an offence under subsection 259 (4) of the *Criminal Code* (Canada) or under a provision that is enacted by state of the United States of America and that is designated by the regulations is thereupon suspended for a period of,

- (a) upon the first conviction, one year; and
- (b) upon a subsequent conviction, two years,

in addition to any other period for which the licence is suspended and consecutively there to.

- (4) This section applies in the same manner as if a person were convicted of an offence if the person pleads guilty to or is found guilty of an offence referred to in subsection (1) and,
 - (a) an order directing that the accused be discharged is made under section 730 of the Criminal Code (Canada) or under a provision that is enacted by a state of the United States of America and that is designated by the regulations; or
 - (b) a disposition is made under section 20 or sections 28 to 32 of the *Young Offenders Act* (Canada), including a confirmation or variation of the disposition. R.S.O. 1990, c.H.8, s.42 (1-4).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of “due diligence” as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. *Law.* The attention and care due from a person in a given situation....

Also, “due diligence” in Black’s Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

APPLICATION OF LAW TO FACTS:

Having received the wallet portion in the mail and having not seen the “Order Of Suspension” Mr. Chiarella and Mr. Bondi believed the licence was not suspended.

As to whether Mr. Chiarella’s licence was NOT under suspension at the time of the impoundment order the evidence presented by the Respondent established that it was under suspension under the *Highway Traffic Act*.

As to whether the Applicant exercised due diligence (i.e. all reasonable efforts) to determine that the driver's licence was not suspended, the Tribunal found that Mr. Chiarella had made no attempt to verify his licence was valid before or after he received the wallet portion in the mail. He assumed it was valid.

Mr. Bondi, on behalf of the Applicant, relied solely on Mr. Chiarella's wallet portion of the licence as proof of validity. Mr. Bondi's usual practice of checking a person's driver's licence was not followed. No checks were made through the Ministry of Transportation or through Mr. Bondi's insurance broker prior to Mr. Chiarella being assigned to drive a company vehicle. Such a check would have revealed the suspension on the Ministry of Transportation records. Failure to make these inquiries is not due diligence.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Alan Holbrook, Presiding Member

RELEASED: March 4, 2002

VISCONTI, MABEL E.

MABEL E. VISCONTI

**Appeal under section 50.2 of the *Highway Traffic Act*,
R.S.O. 1990, Chap.H.8 as amended (the "Act"), from
the Order of the Registrar of Motor Vehicles
pursuant to section 55.1(3) of the Act.**

**TO APPEAL AN ORDER TO IMPOUND A MOTOR
VEHICLE ISSUED BY THE REGISTRAR OF MOTOR
VEHICLES**

TRIBUNAL: ALAN HOLBROOK
Presiding member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

MABEL E. VISCONTI, Applicant
unrepresented

DATE OF HEARING: February 27, 2002

DECISION RELEASED: March 1, 2002 Toronto

REASONS FOR DECISION

A hearing was held on February 27, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Mabel E. Visconti (the "Applicant")
Motor Vehicle:	1995 Nissan 240, plate # AMEH 161 (the "vehicle")
Date of Appeal:	February 8, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence to determine that the driver's licence was not suspended as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on February 27, 2002 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

The Respondent asked that the copies of their submissions be replaced with the Original Certified Copies prior to being entered as evidence. Both parties agreed and the Originals were marked as Exhibit #3. There were no other preliminary matters, and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

- 1) This is my car
- 2) Nor the driver or myself has any notice of his drivers licence was suspended.
The proof is he had in is posession a valid drivers licence.
I beieve this is a court's clerk error, from Nov 29/01

Ms. Visconti (The Applicant) chose not to give sworn evidence as a witness. She presented her appeal as her own representative. Ms. Visconti called no witnesses on her behalf. She stated that on November 22nd 2001, her son Cleaudio Roberto Negrette appeared in court and was convicted of driving with more than 80mgs of alcohol in his blood. Ms. Visconti talked to her son's lawyer after the trial and was informed of the sentence Mr. Negrette received, but she states he did not inform her of a licence suspension and she did not ask specifically about a suspension. She further stated that no notification of a suspension came to her attention from the Court or the Ministry of Transportation. Ms. Visconti stated that Mr. Negrette told her he had received no such notification of a suspension of his drivers licence and that he still held a valid drivers licence. Ms. Visconti stated she was unaware a driver's licence suspension would automatically follow a conviction of this type.

Ms. Visconti told the Tribunal that on February 5th 2002 Mr. Negrette asked to borrow the car. When asked by the Tribunal if she attempted to verify he held a valid licence, she answered she had viewed the wallet portion Mr. Negrette carried, but had not checked the dates on it.

Mr. Negrette and Ms. Visconti live at the same address.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;

2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Cleaudio Roberto Negrette;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver, at the time of impoundment, had been convicted of the offence of Driving with more than 80 mgs alcohol in blood under the *Criminal Code of Canada*, pursuant to which the driver's licence of the driver was then under suspension until November 22, 2004.

The Respondent relied on written the submissions as their only evidence and did not cross-examine because Ms. Visconti chose not to be sworn as a witness.

The Tribunal asked for a brief oral review of Mr. Negrette's Extended Driver Record Search for Criminal Code Convictions, as found in Exhibit #3. The Driver Record shows three criminal code convictions, two for Driving with more than 80 mgs alcohol in blood under the *Criminal Code of Canada*, and one for driving while disqualified for a criminal code conviction. As well the record shows other charges and convictions under the Highway Traffic Act of Ontario. The Tribunal also reviewed the Notice Of Suspension of Driver's Licence dated, November 20th, 2001 for Mr. Negrette.

Ms. Kim Beintema, Representative for the Registrar of Motor Vehicles, stated that the portion of the licence Mr. Negrette possessed should have been turned into the Ministry Of Transportation as the result of an earlier charge and suspension order under the HTA but was not. In fact the licence in question was suspended on November 7th 2001 for violation of novice driver conditions, a suspension that predated Mr. Negrette's Criminal Code conviction on November 22nd 2001.

Ms. Beintema also stated that possessing the wallet portion of the drivers licence is not proof the licence is valid.

Ms. Beintema stated that the Ministry's documents showed a copy of the suspension order for the November 22nd 2001 conviction was mailed to Mr. Negrette's last known address.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to

- determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(c).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. Law. The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

APPLICATION OF LAW TO FACTS:

As to the issue of a clerk's error in not notifying the respondent of the suspension of Mr. Negrette's driver's licence, the evidence established that a suspension order was issued and dated November 29th 2001.

Ms. Visconti did not enquire as to the status of the Mr. Negrette's driver's licence, other than to ask him. She made no other inquiries.

Ms. Visconti indicated during the Appeal that she was aware of Mr. Negrette's driving record including past suspensions. This alone should have prompted her to exercise more care in determining the true status of his driver's licence.

The Tribunal found that Ms. Visconti did not exercise "due diligence" in trying to establish the status of Mr. Negrette's driver's licence prior to allowing Mr. Negrette to drive her motor vehicle.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Alan Holbrook, Presiding Member

RELEASED: March 1, 2002

IBL TRANSPORT CO. LTD.

PREHEARING

IBL TRANSPORT CO. LTD.

IN THE MATTER OF AN APPLICATION BY IBL TRANSPORT CO. LTD. DATED FEBRUARY 11, 2002, FOR A HEARING BEFORE THE LICENCE APPEAL TRIBUNAL PURSUANT TO SECTION 50(1) OF THE *HIGHWAY TRAFFIC ACT*, TO CONSIDER THE APPEAL OF THE SUSPENSION AND SEIZURE ORDER OF THE DEPUTY REGISTRAR DATED JANUARY 28, 2002;

AND IN THE MATTER OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, CHAPTER H.8, AS AMENDED;

AND IN THE MATTER OF THE COMMERCIAL VEHICLE OPERATOR'S REGISTRATION (CVOR) CERTIFICATE 106-998-851 ISSUED TO IBL TRANSPORT CO. LTD.;

AND IN THE MATTER OF THE NOTICE OF SUSPENSION AND SEIZURE DATED DECEMBER 12, 2001, ISSUED TO IBL TRANSPORT CO. LTD.;

AND IN THE MATTER OF THE SAFETY RECORD OF IBL TRANSPORT CO. LTD.

TRIBUNAL: JOHN ORT, Member

APPEARANCES:

JAMES F. LEE, Agent, representing the Applicant

PATRICK MOORE, Counsel, representing the Registrar of Motor Vehicles

DATE OF

PRE-HEARING:

March 22, 2002

Toronto

ORDER

Following attendances on March 22, 2002, at a pre-hearing before the Licence Appeal Tribunal (the "Tribunal") of James F. Lee, Agent, representing the Applicant IBL Transport Co. Ltd. (the "Applicant"), and Patrick Moore, Counsel, representing the Registrar of Motor Vehicles (the "Registrar");

The Tribunal makes the following Order:

1. The parties to the hearing are the Applicant and the Registrar.
2. The Applicant concedes that the Registrar's audit results respecting the Applicant are correct. The parties recorded that there had been no resolution of any of the other issues in this matter.
3. The parties shall comply fully and in a timely manner with the disclosure requirements as required by Rule 6 of the Tribunal's Rules of Practice.
4. The hearing will commence at 9:30 a.m. at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, on June 25, 2002, and continue on June 26, 2002, if necessary.

LICENCE APPEAL TRIBUNAL

John Ort, Member

RELEASED: March 28, 2002

1008 - ADLS - NOMC

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: KENNETH W. KOPROWSKI
Presiding Member

APPEARANCES: KYLE M. BIEL
Representative for the Registrar of Motor Vehicles

Applicant
by written submissions only

DATE OF HEARING: March 14, 2002
Written

REASONS FOR DECISION

A hearing was held on March 14, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of a written hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated February 15, 2002, and was received by the Tribunal on February 19, 2002, together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

There were no preliminary matters.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice to Registrar dated January 13, 2002
- b) Exhibit # 2 Notice of Appeal

By the Respondent:

- a) Exhibit # 3 Materials and Submissions of Respondent

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath because he was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

- 50.1(1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
 - (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
 - (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

- 15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
 - (a) the name, telephone number and address, with the postal code, of the medical practitioner;
 - (b) the name, date of birth and address of the person who is the subject of the report;
 - (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.

- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

On January 12, 2002, the Applicant, who is 68 years old, had been driving a van on a road named Middle Line, at Four Rod Road, in the municipality of Chatham-Kent. In his cruiser, at about 11:32 p.m., police constable Constable #1, of the Chatham-Kent Police Service, approached the Applicant's vehicle from behind, following at the same speed of 45 km/hour. Despite the fact that Constable #1 activated his emergency lights, the Applicant's vehicle did not stop, but weaved from the centre line onto the shoulder of the road, then back to the centre line. Only after Constable #1 activated his siren did The Applicant stop his vehicle on the right shoulder of the road.

The Applicant was the only occupant of the van. On speaking to the Applicant through the open driver's window of the van, Constable #1 could immediately smell an odour of an alcoholic beverage on the breath of the driver. The Applicant was slumped forward in the driver's seat of the van, and his eyes were glossy and red. Constable #1 arrested the Applicant for impaired driving.

Constable #1 drove the Applicant to the Chatham-Kent Police Headquarters. Constable #2, a qualified breath technician, asked the Applicant to perform a breath test on an Intoxilyzer 5000C unit. Constable #2 noticed that the Applicant was "very, very intoxicated". In response to questions from Constable #2, the Applicant said that he was not ill, had been taking a lot of medication, and had no physical handicaps and was not injured.

The Applicant was given seven opportunities to provide a proper breath sample. On three of those attempts, the Applicant was able to obtain enough pressure to obtain a tone in the Intoxilyzer; however, a sufficient breath sample was never obtained. At no time during the process did the Applicant demonstrate any coughing or wheezing, nor did he indicate that he was suffering from a medical problem. The Applicant was charged with refusing to provide a breath sample, resulting in a 90-day suspension of his driver's licence.

The Applicant appeals the suspension of his licence on the ground that the inability to provide a breath sample was because of a medical reason. In support of this argument, there is attached to the Applicant's Notice of Appeal, Exhibit 2, three reports. One is a report dated September 7, 2001 (approximately 18 weeks before this incident occurred on January 12, 2002) from Doctor #1, an internal medicine specialist. A second report is an undated report

from the Department of Diagnostic Imaging at Chatham-Kent Health Alliance, St. Joseph's campus, referring to X-rays taken on March 23, 1998. A third report is a Discharge Summary dated August 20, 2001, in which there is a list of all the medication that the Applicant must take.

APPLICATION OF THE LAW TO FACTS:

The Diagnostic Imaging Report and the Discharge Summary say nothing whatsoever about The Applicant's ability to provide a breath sample, with the result that they add nothing to support The Applicant's argument.

The report of September 7, 2001, does, in fact, refer to the Applicant having been admitted to hospital with an exacerbation of chronic obstructive lung disease; however, the report goes on to say that the Applicant himself stated that "he has improved very significantly". Even aside from the fact that this report is dated about 18 weeks before the Applicant had been arrested, nothing is said in it, however, about his inability to provide a breath sample. Nor does the report comply with any of the requirements of section 15 of Regulation 574 (amended), referred to earlier in these Reasons.

As far as the events of January 12, 2002, are concerned, all the evidence that this Tribunal has before it for consideration in this appeal is the affidavit of Constable #1 and the affidavit of Constable #2, the salient portions of which I have outlined at the beginning of these Reasons. I have no reliable medical evidence, nor even any evidence from the Applicant himself, about his medical condition on January 12, 2002. This is significant because, as already stated, it is the Applicant who has the onus to establish the merit of his appeal. The lack of evidence requires that this Tribunal conclude that the Applicant has failed to meet this onus.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated January 13, 2002 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Kenneth Koprowski,
Presiding Member

RELEASED: March 15, 2002

HETU, SARA

SARA HETU

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: NEIL MacPHEE
Presiding member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

SARA HETU, Applicant
unrepresented

DATE OF HEARING: March 8, 2002

DECISION RELEASED: March 19, 2002 Windsor

REASONS FOR DECISION

A hearing was held on March 8, 2002, at Windsor, Ontario, to consider the Applicant’s appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Sara J. Hetu (the "Applicant")
Motor Vehicle:	Chevrolet Pick-up, plate 4935JT (the "vehicle")
Date of Appeal:	February 17, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on March 8, 2002 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

The hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

Dear Sir / Madame:

The reason for this letter is because I would like to file an appeal to get my vehicle out of impoundment.

I would like to do it in writing because I don't have the ability to get to a hearing. Also, I don't have the money to pay for a ride to the hearing.

The grounds that I am appealing is that it is causing exceptional hardships. This is because I am a young mother with one child and I need to be able to take her to her doctor appointments that are in Sarnia, Ontario. Also, I need the vehicle to get to my doctor's appointments, also in Sarnia, Ontario. It is also difficult to get groceries due to having no vehicle.

The last reason for my appeal is that I started a job that requires a vehicle. I am an independent consultant with Partylite so that I can earn some money to provide for my child.

In conclusion, I would appreciate it if you would take my reasons into consideration for appealing the impoundment of my vehicle.

I would like to thank you in advance.

Sincerely,
"Sara Hetu"
Sara Hetu

Regarding Partylite, if you have any questions please call Shirley Wood, 1-519-683-6007

The Applicant, Sara Hetu, testified that she is 22 years of age and lives in Wallaceburg, Ontario, with her daughter who is 9 ½ months old and her boyfriend Laird Caron who is 23 years of age and was the driver of her automobile when it was impounded. The Applicant stated that her daughter's doctor and her doctor and dentist have their offices in Sarnia, which is about a ½ hour drive from Wallaceburg and that she requires her motor vehicle to get to appointments there. The daughter has no particular health problems and sees the doctor every month for a check-up. The Applicant testified that there are doctors in Wallaceburg and one hospital. She testified that she has no health problems at the time but she does have asthma which is controlled with inhalers. She has used the walk-in medical clinic in Wallaceburg on occasion. She testified that there was no public transportation system in Wallaceburg but there were taxicabs available. The Applicant has recently worked for Partylite which involves putting on shows for the purpose of selling the products. She testified that she could probably borrow a car either from her mother or from her boyfriend's relatives if she asked them. For the shows for Partylite, she testified that she could take a taxicab but she does not have much money.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Caron M. Laird.
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until December 14, 2002.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
 - (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
- (b) financial or economic loss to any person;
- (c) loss of employment or employment opportunity to any person; or
- (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
- (b) the loss will be immediate, significant and lasting;
- (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
- (d) the impact of the loss,

- (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The grounds for the Appeal are that the impoundment of her vehicle will result in exceptional hardship to the Applicant and her daughter. For this to succeed the Tribunal must find that there is no alternative to the impounded vehicle. Based on the facts and evidence, the Tribunal finds that the Applicant does in fact have alternative transportation to the impounded vehicle. But if the Tribunal did not so find, the Tribunal finds also find that the Applicant has not brought herself within the circumstances set out in Ontario Regulation 574, Section 22(2) and (3).

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Neil MacPhee, Vice-Chair

RELEASED: March 19, 2002

REJAK, WLODZIMIERZ

WLODZIMIERZ REJAK

**Appeal under section 50.2 of the *Highway Traffic Act*,
R.S.O. 1990, Chap.H.8 as amended (the "Act"), from
the Order of the Registrar of Motor Vehicles
pursuant to section 55.1(3) of the Act.**

**TO APPEAL AN ORDER TO IMPOUND A MOTOR
VEHICLE ISSUED BY THE REGISTRAR OF MOTOR
VEHICLES**

TRIBUNAL: JEFFREY LEE, D.C.
Presiding member

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles

WLODZIMIERZ REJAK, Applicant
Unrepresented

DATE OF HEARING: March 7, 2002

DECISION RELEASED: March 14, 2002

REASONS FOR DECISION

A hearing was held on March 7, 2002, at London, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Wlodzimierz Rejak (the "Applicant")
Motor Vehicle:	1987 Plymouth Voyager, plate # ZDF 739 (the "vehicle")
Date of Appeal:	February 19, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence to determine that the driver's licence was not suspended as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on March 7, 2002 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

I would like to appeal because I did not know that Mr. W. Gicele had his driver's licence suspended. That night I was leaving bar in order to take a taxi cab because I had a few drinks when I met Mr. W. Gicele (I know Mr. Gicele very little, he sometimes buys antiques from me) and he told me that leaving my car here for a whole night it is not good idea because of a bad area and also he offered me that he drive me to his house (400 m), so I could leave my car on his driveway and take the taxi from there.

I own small business (Antiques and refinishing) and my car is very important to this business. I also have part time job, (delivering flyers) so because of impoundment I will lose this job. Please review my case carefully because my car is very important for my job.

The Applicant was called to the stand. He was sworn in and gave the following testimony. He testified that on the evening of the impoundment he had gone to a bar. At the end of the evening, he decided to leave his vehicle at the bar as he had consumed too much alcohol in his opinion to operate his vehicle safely. He was in the company of Mr. W. Gicele. Mr. Gicele told the Applicant that it probably was not a good idea to leave his vehicle at the bar as the area that the bar was in was less than desirable. Mr. Gicele offered to let the Applicant park his vehicle in his driveway. He also offered to drive the Applicant's vehicle. It was on the way home that they were stopped by police. It was ascertained by police that the driver, Mr. Gicele, was under suspension, and the vehicle which he was operating was impounded.

The Applicant testified that he had seen Mr. Gicele drive a vehicle before and had assumed that he was in possession of a valid driver's licence. When asked if he had asked to see Mr. Gicele's driver's licence, he responded, "no." The Applicant felt that he exercised good judgement in allowing Mr. Gicele to drive his vehicle as he was unable to operate his vehicle due to alcohol ingestion. In the Applicant's opinion, he felt it was safe and it was only for a short distance that Mr. Gicele drove his van.

The representative for the Respondent asked the Applicant if he had relied on the impounded vehicle for his full and part time business. The Applicant replied that he has been able to borrow a vehicle when needed and as far as his part time job as courier was concerned, he was able to borrow a vehicle. The Respondent again confirmed that the Applicant did not see the driver's licence of Mr. Gicele and that the Applicant took no other steps to see if the driver of the impounded vehicle was a suspended driver.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Wojciech Gicala;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Fail to Provide Breath or Blood Sample under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until August 29, 2003.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(c).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. Law. The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

APPLICATION OF LAW TO FACTS:

There was only one issue to be considered in this appeal and it is dealt with hereunder.

Due Diligence:

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order to impound was made was not then under suspension as per section 50.2 (3) (c)?

The evidence before the Tribunal is that Mr. Gicele's driver's licence was under suspension at the time of the impoundment and that he was driving the Applicant's vehicle at that time. The Tribunal heard testimony from the Applicant that he believed that because Mr. Gicele had his own vehicle and he was seen driving it, it was assumed that he had a valid driver's licence. The Applicant felt that he was being responsible to let his friend drive as he had consumed too much alcohol and that it was also not wise to leave his vehicle at the bar over night.

The Applicant admitted that he never asked to see Mr. Gicele's driver's licence. The Tribunal finds that the Applicant made little or no effort to determine if the Applicant had a valid driver's licence. Accordingly, the Applicant has not shown that he exercised due diligence in determining the status of Mr. Gicele's driver's licence before allowing him to drive his vehicle.

The Tribunal therefore can find no evidence that the Applicant exercised due diligence as required by subsection 50.2(3)(c) of the *Highway Traffic Act*.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Jeffrey Lee, D.C., Presiding Member

RELEASED: March 14, 2002

1011 - MED - DOWN

Appeal under section 50(1) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Minister pursuant to section 32(12)(b)(i) of that Act.

TO CHANGE THE CLASS OR CLASSES OF MOTOR VEHICLE IN RESPECT OF WHICH THE LICENCE WAS ISSUED

TRIBUNAL: ROSS BENNETT, M.D., Presiding Member

APPEARANCES:

MURRAY FORBES
Counsel for the Registrar of Motor Vehicles

Applicant
Counsel for Applicant

DATE OF HEARING: March 22, 2002 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Minister (the "Respondent") pursuant to section 32(12)(b)(i) of the *Highway Traffic Act* (Ontario).

EXHIBITS:

- 1) Notice of Appeal filed by the Applicant February 2, 2002
- 2) Notice of downgrading of Applicant's Licence, dated January 30, 2002 from the Ministry of Transportation.
- 3) Applicant's File, prepared by his Counsel

- 4) Copy of the National Safety Code introduced by Respondent
- 5) Copy of Introduction to the National Safety Code. Introduced by the Applicant's Counsel

FACTS:

The Applicant is a 51-year-old truck driver, who had his driver's licence downgraded from Class "AZ" to a Class "GM" on January 30, 2002, after receiving a Cyclical Medical Report, dated June 15, 2001, from the Applicant's family physician, Physician #1. The Ministry requested additional information from the Applicant's cardiologist and received a copy of a letter to Physician #1, dated October 11, 2001 from Physician #2. A follow-up Medical Waiver Certificate from Physician #2 was received on December 5, 2001.

The reports indicated the Applicant underwent septal ethanol ablation for obstructive hypertrophic cardiomyopathy in December 1999. The procedure was successful and a permanent pacemaker was inserted. Physician #2 stated in the Waiver, that the Applicant was medically fit and able to function normally, taking into account the stability of his condition, physical, mental and emotional status and the pressure associated with driving a large tractor-trailer.

The Medical Advisory Committee's (MAC's) Case Study stated "the driver has defibrillator and therefore does not qualify for classified – NSC (National Safety Code) 3.5.9– no longer meets CCS standards".

This decision by the "MAC" created confusion because the Applicant has a permanent Pacemaker, but does not have a defibrillator.

ISSUES:

Should the decision of the Minister to change the class or class of motor vehicles in respect of which the licence is issued in accordance with the result of the examination be varied, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffer from any mental, emotional, nervous or physical disability likely to significantly

interfere with his or her ability to drive a motor vehicle of the applicable class safely;
and

- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Regulation 340/94, Section 17 and 18 states:

- 17. (1) Qualifications required by an applicant for a holder of a Class A, B, C, D, E or F driver's licence are that the applicant or holder,
 - (a) has no history or clinical diagnosis of diabetes that requires insulin for control;
 - (b) is not taking any drug that could, in the dosage prescribed or in the dosage recommended by the manufacturer, impair his or her ability to drive a motor vehicle of the applicable class safely;
 - (c) has no established medical history of myocardial infarction, angina pectoris, coronary insufficiency or thrombosis;
 - (d) has no established medical history of heart disease including arrhythmia or of respiratory dysfunction likely to interfere with the safe driving of a motor vehicle of the applicable class;
 - (e) is not suffering from an aortic aneurysm, whether resected or not;
 - (f) is not suffering from hypertension accompanied by postural hypotension resulting in giddiness when under treatment;
 - (g) has no established medical history of loss of consciousness or awareness due to a chronic or recurring condition;
 - (h) has no established medical history of a disorder of the musculoskeletal or nervous system that may interfere with the safe driving of a motor vehicle of the applicable class;
 - (i) has no established medical history of an intractable psychotic or psychoneurotic disorder, having particular regard for sustained hostile, aggressive, paranoid, suicidal or other destructive tendencies or depression unless it is medically determined that the condition from which the person has suffered is corrected or controlled;
 - (j) has a visual acuity by Snellen Rating, with or without the aid of corrective lenses, no poorer than 20/30 in the better eye and 20/50 in the weaker eye; and
 - (k) has a horizontal visual field of at least 120 degrees in each eye as measured by confrontation tests.
- (2) An applicant for or a holder of a Class A, B, C, D, E or F driver's licence who fails to meet the qualifications referred to in clauses (1)(a) to (i) may, despite the failure,

qualify for the class of licence applied for or held if he or she demonstrated the ability to drive a motor vehicle in the applicable class as safely as any person who meets those qualifications.

- (3) An applicant for or a holder of a Class D driver's licence who fails to meet the qualification referred to in clause (1)(c) may, despite the failure, qualify for that class of licence if it is medically determined that he or she has made a full recovery and there is no established history of a second occurrence of myocardial infraction, thrombosis or recurring angina pectoris.
- (4) An applicant for or a holder of a Class B, C, E or F driver's licence whose hearing in one ear is better than in the other must be able to perceive in the better ear, with or without a hearing aid, a forced whisper at a distance of 1.5 metres or, if an audiometer is used to test the person's hearing, must not have a loss in the better ear of more than 40 decibels at 500, 1,000 and 2,000 hertz.
- 18. An applicant for or a holder of a G, G1, G2, L, M, M1, M2, or R driver's licence must have,
 - (a) in the case of a person whose vision in one eye is better than in the other, visual acuity in the better eye that is no poorer than 20/40 as measured by Snellen Rating; and
 - (b) a horizontal visual field of at least 120 degrees as measured by confrontation tests.

Section 32(12)(b)(i) states:

- 32 No person shall drive a motor vehicle on a highway unless the motor vehicle is within a class of motor vehicles in respect of which the person holds a driver's licence issued to him or her under this Act.
- (12) An applicant for a driver's licence or a person who holds a driver's licence shall submit to the examinations that are authorized by the regulations relating to this section and required by the Minister at the time and places that the Minister may require and the Minister may,
 - (b) in the case of a person who holds a driver's licence,
 - (i) impose or remove the conditions or endorsements authorized by the regulations or change the class or classes of motor vehicles in respect of which the licence is issued in accordance with the result of the examinations, or

Section 50 states:

- 50(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.
- (3) The Tribunal may confirm, modify or set aside the decision of the Minister or Registrar.

APPLICATION OF THE LAW TO FACTS:

Section 32(12)(b)(i) states:

- 32 No person shall drive a motor vehicle on a highway unless the motor vehicle is within a class of motor vehicles in respect of which the person holds a driver's licence issued to him or her under this Act.
- (12) An applicant for a driver's licence or a person who holds a driver's licence shall submit to the examinations that are authorized by the regulations relating to this section and required by the Minister at the time and places that the Minister may require and the Minister may,
- (b) in the case of a person who holds a driver's licence,
- (i) impose or remove the conditions or endorsements authorized by the regulations or change the class or classes of motor vehicles in respect of which the licence is issued in accordance with the result of the examinations, or
-

The Minister followed this legislation to downgrade the Applicant's Driver's Licence after receiving medical reports from Physician #1 and Physician #2 reporting that the Applicant had undergone surgery for Hypertrophic Cardiomyopathy.

The "MAC" Case Study supported a downgrading of the Applicant's licence on the basis that the driver had a defibrillator and therefore does not qualify as classified and no longer meets the CCS standards.

However, the Tribunal finds that the Applicant has a pacemaker but not a defibrillator and this makes him eligible for Class 1,2 3, and 4 licences.

The Applicant's cardiologist, who is an Assistant Professor of Medicine in the Department of Cardiology at the University of Toronto, signed a Medical Waiver Certificate stating that the Applicant is medically fit and able to drive a tractor-trailer. The Applicant's surgery was deemed successful by his cardiologist and his family doctor. He is able to function normally without any restrictions and was driving following recovery from his surgery in December 1999, until his licence was downgraded in January 2002.

The Tribunal did not find that the Ministry of Transportation presented enough evidence to justify the Minister's decision to downgrade the Applicant's driver's licence from the Class "AZ"

DECISION:

Upon the application by the Applicant to appeal the decision dated January 30, 2002 of the Minister to change the class or classes of motor vehicle in respect of which the licence was issued pursuant to Section 32(12)(b)(i) of the *Highway Traffic Act*, and having considered the evidence filed with the Tribunal, and the submissions of the Respondent and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Minister to change the Applicant's driver's licence from Class "AZ" be set aside.

LICENCE APPEAL TRIBUNAL

Ross Bennett, M.D.,
Presiding Member

RELEASED: March 28, 2002

1342630 ONTARIO LTD.

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: MALCOLM FEALING
Presiding member

APPEARANCES: DAVID MILNER
Representative for the Registrar of Motor Vehicles

A. SALEEM NASEER,
Agent for Applicant

DATE OF HEARING: March 18, 2002

DECISION RELEASED: March 25, 2002 Toronto

REASONS FOR DECISION

A hearing was held on March 18, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. The order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	1342630 Ontario Ltd. (the "Applicant")
Motor Vehicle:	2000 Ford Cube Van, plate 9853JP (the "vehicle")
Date of Appeal:	February 25, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on March 18, 2002 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

Dear Sir/ Madam,

I would like to appeal the Order of Impound for my vehicle V.I.N. IFDE45F5YHB27775 Registered to 1342630 Ontario Ltd.

I am one of the owners of 1342630 Ontario Ltd.

We are a small company who recently hired one employee in January of 2002. All other persons working with me are called in whenever I have extra work and need additional labour.

The only person that drives my truck other than myself is Shayne Todd who sometimes comes to help me when required.

With my truck impounded for the 45 days, this will cause my company severe financial burden. I am a very small company with one commercial vehicle, which is the basis for this appeal. I cannot afford to rent a truck for 45 days as well as the added burden of impound fees and fines.

I have never authorized Angad Persaud to drive my vehicle. He is a general labourer only. His responsibility is general work in our shop and occasionally install on site.

My company is used generally as a labour company hired to provide services to large exhibit builders. We use our truck to transport our tools and equipment as well as small prefab exhibits. Without my vehicle I have no way to continue conduction business.

It is for this reason I am appealing the length of duration of the impound. I trust you will take all of these circumstances into consideration and look favorable upon my appeal.

I thank you in advance for your consideration.

"Salem Naseer"
Salem Naseer
Exhibit Installation Services.
7720 Kimbel Street Unit 12-13
Mississauga, ON
L5S 1A6

Tel: (905) 673-2108
Fax: (905) 673 6259

Friday Feb. 22/2002-02-22

To whom it may concern,

I, Shayne Todd, am a lead hand contracted by E.I.S., Mr. Naseer had me doing some finishing touches on the V.W. of America early Saturday morning. I had a pick-up on the loading dock at the SkyDome, it can be a bit confusing with traffic going from one loading dock to another, so I had asked Angad to drive us over. I was working extra long hours that night to have all of the exhibit ready for that mornings' opening, Feb16th.

A buddy was tagging along for the ride over to the other loading dock. After this particular drop off of tools for Mitsubishi and articles to be taken back to the shop in Brampton, I was done until the next day. We were pulled over by the M.T.O. for what, they did not say and thought initially it was for seatbelt violations but still did not say. Angad had told the officer that he did not have his licence on him, I had not realized the importance for myself to stick around (at the most a fine or to show I.D. within a 24 hr.period), I had a call back to the M.T.C.C. booth and told my friend to hang and I would either meet him at the docks or right where I left the truck.

After a half hour had past I made my way to the docks and then to the truck spot, my cell was dead and had no communication with me. At the top of the hour there was at least 3-4 cruisers there when I arrived and was not sure if I should investigate but the client needed some things done and that involved the companies' bread and butter (the truck). There were contracts on the line here and wanted to clear up whatever motivated this situation, remember the M.T.O. did not say what it was (reason) that prompted the pullover.

There were at least a hundred persons on the road lining up for tickets to the auto show and I had told security that and borrowed their phone to call Mr.Naseer and tell him about my problem with the truck, left a message about maybe it was about the trucks' log book not being in the new cube trucks' cab, I had filled one or two out last year.

I had made my way through the crowd, cut across the path of a cruiser that was now protecting the throng of persons from a very busy intersection and walked 200 feet to the Overly protected cube truck (I had initially thought that maybe the driver was a wanted terrorist, I'm from Ottawa and hear about the cities new security format). After being told of what actually was wrong I upset with my new help and offered to take the truck and to leave Angad behind to deal with his problem, which became mine and E.I.S's. This is not fair to me, for sure, for I am a contractor from out of town and need the work as does E.I.S and it's employee's. We are forward thinking people I hope, and do not believe in crossing my fingers.

Sincerely,
S.Todd
"Shayne Todd"

Statement

February 18st 2002

On the morning of 16 February 2002, we were finishing up the VW exhibit at the auto show, I was asked by Shane Todd a supervisor contracted by A. Saleem Naseer to show him where the Skydome loading docks were. I told him I could drive him over. He asked me if I had a driver' licence, I told him I did.

Shane is from Ottawa and does not know the areas around the skydome very well. I knew my license was suspended but since it was less than 2 blocks I was going I thought I would be ok.

We were stopped by the MTO at around 9:30 am. They asked for my license; I told them that I forgot it at home. While the MTO was questioning me Shane had to go to check out the materials we had to pick up at the skydome. He left me there to talk to the MTO. When he came back he was told that my license was suspended and the vehicle was impounded.

I am a sub-contractor to Mr. Naseer, I am only a general labour, and I have never been asked to drive by Mr. Naseer before. I taught by showing how useful I can be he might hire me full time. I am sorry this happened. I need a job; the only person to blame is me for all of this. Mr. Naseer cannot be blamed for this he had no knowledge of me driving.

Angad Persaud
"Angad Persaud"
18/02/02

In his testimony, Mr. Naseer said that Shayne Todd helps him when he has a large exhibit to set up. On the day the vehicle was impounded, Shayne wanted to get to the Sky Dome loading docks. Shayne resides in Ottawa, and only comes to Toronto four or five times a year to assist Mr. Naseer when he has a large exhibit to set up. Mr. Naseer said that he hires Mr. Todd because there are not many people experienced in setting up large exhibits.

Todd did not know how to get to the loading docks, so he asked Angad how to get there. Angad did not say that he was under suspension when he offered to drive the truck to the docks.

The truck is used to carry tools and ladders to exhibits. The company does a lot of its work for Rogers, as well as other companies such as Telus. Mr. Naseer is afraid that he will lose his contacts if the company cannot fulfil its obligations. He has already incurred \$2725.00 in rental fees, and his truck has been out of his possession for less than a month. He estimates that including the towing and impound fees, he is already out of pocket in the amount of \$5525.00. Mr. Naseer claimed that his Credit Cards are at their limits, and he has lost income because he does not have a truck at his disposal. At the moment, he rents an automobile from Hertz in Brampton when he needs one.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;

2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Angad Persaud;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension for life.

In response to Mr. Milner's questions, Mr. Naseer said that he had been in business for two years. He took over the company 1½ years ago. The previous owner had been using a red van, but since it was not suitable for carrying long ladders and heavy loads, the Cube truck was purchased. Most of the work done is for Rogers within the Metropolitan area. The company charges a flat rate per job. For example a job in Oshawa is \$350.00, while one in Barry would be \$400.00. Gross weekly revenues from Rogers would be about \$2000.00. This work would be supplemented by jobs for other companies such as Telus.

Mr. Nasser employs only one full time staff. The company does not generate sufficient income to employ more than one person. Todd Shayne and Angad Persaud are only employed when their services are required.

He said that having to rent a vehicle is a great hardship to the Company. His costs will have to be defrayed over time.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
 - (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
- (b) financial or economic loss to any person;
- (c) loss of employment or employment opportunity to any person; or
- (d) loss of education or training or of an educational or training opportunity to any person.

- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

As to the issue of exceptional hardship, the evidence established that section 22(1) of Ontario Regulation 632/98 Amending Reg. 574 of R.R.O. does not apply. Not having a vehicle will not result in:

- (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or,
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.

Mr. Naseer has advised that he rents a vehicle when one is needed. He therefore has an alternative to the impounded vehicle.

Section 22(2) of Regulation 632/98 states that in determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not consider whether the impoundment will result in inconvenience to any person, and will not consider financial or economic loss unless the criteria of section 22(3) are met which includes that there is no alternative available to the impounded vehicle. Here, there is an alternative to the impounded vehicle. The Applicant has rented another vehicle when required.

It is unfortunate that Mr. Persaud misled Mr. Todd when asked whether he had a licence. Mr. Todd was in charge of the vehicle on the day it was impounded. As such he was representing the company. The resulting impoundment therefore falls on the company.

Mr. Naseer is, thus far, able to obtain an alternative vehicle, and the impact of the loss will not be lasting. He can defray his costs over time.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Malcolm Fealing, Presiding Member

RELEASED: March 25, 2002

PORKOLAB, ZSOLT

ZSOLT PORKOLAB

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding member

APPEARANCES: MURRAY FORBES
Counsel for the Registrar of Motor Vehicles

ZSOLT PORKOLAB, Applicant
unrepresented

DATE OF HEARING: March 15, 2002

DECISION RELEASED: March 19, 2002 Toronto

REASONS FOR DECISION

A hearing was held on March 15, 2002, at Toronto, Ontario, to consider the Applicant’s appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO SET ASIDE the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Zsolt Porkolab (the "Applicant")
Motor Vehicle:	GMC Safari Van, plate 5051KD (the "vehicle")
Date of Appeal:	February 25, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on March 15, 2002 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

The Counsel of the Ministry provided the Tribunal with two documents from Abrams Towing Services Ltd.

The Applicant objected to the documents from Abrams Towing Services Ltd., on the grounds that the documents suggest that the Applicant was the individual driving while under suspension.

The Respondent's Counsel acknowledged that the Applicant is not the suspended driver and explained that the documents are standard, and would have little bearing on the Applicant's case.

The Applicant's objection and the Respondent's counsel's comments having been noted the documents in question were entered as Exhibits # 4 and # 5.

There were no other preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

It is a working vheicle which I depend on for work and income. Also it is the only vheicle that I own. I use for transpotation, as well as pricing jobs. It carays the company logo all over it. With out it I can not work all my tools and equipment are stored inside it, which is crucial for considering the situation. A part of my life is in your hands and I mean it, so please help me out comaity. yours truly.

At the hearing, the Applicant explained that, on the night the car was impounded, he had gone to a party and had a few too many drinks, and did not feel safe driving home. When another guest offered to drive, the Applicant accepted, not knowing the individual's driver's licence had been suspended.

Both in evidence-in-chief and in cross-examination, the Applicant testified that he has not been able to honour his contracts since the day of the impoundment, approximately "fifteen days ago". The Applicant has been unable to work because, not only is the impounded vehicle the Applicant's only means of transportation, but also all the Applicant's tools and equipment are stored inside the impounded vehicle.

The Applicant made enquiries into the possibility of renting a car, and was quoted \$400.00 a week, which he cannot afford. Also, the rental company would not let him place his equipment, including a ladder, in or on the rental vehicle because of potential damage to the rental vehicle. There is no possibility of borrowing another vehicle.

As to the other two vehicles registered to the Applicant's address, both are registered to and

belong to the Applicant's brother. The Applicant's brother is a Courier and needs to drive the van. The other car is a Mustang with a standard gearshift, which the Applicant is unable to drive, and is not suitable for the Applicant's business. The Applicant stated that the Mustang is too small to accommodate the big ladders and the number of paint cans the Applicant has to carry.

In closing, the Applicant re-iterated his comments with respect to the need for the car. Without his vehicle the Applicant stated that he is unable to meet his debts, as he is unable to work.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Derek William Lambe;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until September 8, 2002.

The Respondent's counsel referred to the Applicant's testimony and the documents filed with the Tribunal.

In closing, the Respondent's counsel asked the Tribunal to confirm the Registrar's decision, and quoted the various clauses of section 22 of the Act to substantiate the argument.

The Respondent's counsel argued that the impoundment may be inconvenient to the Applicant, but that inconvenience is not grounds for reversal.

The Respondent's counsel contended that financial loss or economic loss cannot be considered, as the Applicant has made no attempts to mitigate his losses. The Applicant has two other alternate vehicles, owned by his brother, available to him but has chosen not to use them. The Respondent's counsel further submitted that the Applicant has not demonstrated why he is not able to rent another vehicle, or drive with any one else.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons

are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to

impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,

- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.

(2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,

- (a) inconvenience to any person;
- (b) financial or economic loss to any person;
- (c) loss of employment or employment opportunity to any person; or
- (d) loss of education or training or of an educational or training opportunity to any person.

(3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,

- (a) no alternative to the impounded motor vehicle is available;
- (b) the loss will be immediate, significant and lasting;
- (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
- (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).

(4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The onus is on the Applicant to establish the exceptional hardship ground of appeal as provided in subsection 50.2 of the Act.

Subsection 22 (2) Regulation 574 as amended by O. Reg. 632/98 provides that for the purposes of considering exceptional hardship, inconvenience cannot be considered, and financial loss, loss of employment or opportunity for employment cannot be considered unless there is no alternative vehicle and that loss is immediate, significant and long lasting, impact of loss is on a person ordinarily transported in the vehicle and other than the suspended driver.

The Tribunal will address each point separately.

Is there no alternative to the impounded vehicle?

Subsection 22(3)(a) Regulation 574 as amended by O. Reg. 632/98 provides that this Tribunal may not consider financial or economic loss as a ground of appeal unless no alternative to the impounded vehicle is available.

The Respondent's counsel referred to the above mentioned section and emphasized that financial loss or economic loss cannot be considered in the event an Applicant has an alternate mode of transportation. In this case, the Respondent's counsel asserts that the Applicant has two other alternate vehicles at his disposal. The Applicant assured the Tribunal that neither car is available to him. The Applicant's brother uses the van for his own business. The Applicant cannot drive a vehicle with a standard transmission and even if he could, a Mustang is not a useful vehicle for his type of business. Also, both cars are the property of his brother.

The Tribunal is aware that financial loss is not to be taken into consideration if an alternate vehicle is available. However, in this particular case the Tribunal finds for the Applicant. There is no doubt that the two other vehicles registered to the Applicant's address are registered in his brother's name. Further, the Tribunal found the Applicant to be a credible witness. The Tribunal accepts the Applicant's statements as to why the vehicles are not accessible to him and finds the Applicant's explanations to be reasonable.

The Respondent's counsel suggested that the Applicant has not established the reasons for not being able to rent another vehicle. The Applicant testified that he made enquiries into the possibility of renting but found the cost to exceed his means and being unable to rent an alternative vehicle, the Applicant does not have access to such a vehicle. The Tribunal found that the Applicant gave his testimony in a forthright manner.

The Tribunal accepts the Applicant's testimony and finds that the Applicant made an effort to mitigate his losses, as required by the Act, but after investigating, the Applicant found the cost of renting to be prohibitive, and therefore renting was not an option.

Accordingly, the Tribunal finds that there is no reasonable alternative vehicle to replace the impounded vehicle.

Is the loss immediate, significant and lasting?

This Tribunal further finds that the Applicant has met the criteria of O. Reg. 632/98, subsection 22(3)(b) which provides that economic loss may be regarded if the loss is immediate, significant and lasting.

The Applicant testified that he has lost work and income due to the impoundment of his vehicle. The Applicant uses the vehicle for transportation as well as for storage of tools and equipment and advertising. According to the Applicant's written submissions and his viva voce evidence, the vehicle has "... the company logo all over it...", not being able to drive it curtails the Applicant's ability to advertise and therefore attract further business. The Tribunal finds the Applicant's loss of income to be immediate, with significant and long lasting cumulative effects.

Is the loss upon a person ordinarily transported in the motor vehicle?

The evidence indicates that the impact of the loss will be borne by the owner of the vehicle, not the suspended driver. Therefore, the requirements under O. Reg. 632/98, Subsection 22(3)(c) are met.

Is the loss upon a person other than the driver of the motor vehicle and not a result of that driver's loss?

O. Reg. 632/98, Subsection 22(3)(d)(i)(ii), amending Regulation 574, provides that this Tribunal may not consider economic loss unless the owner demonstrates that:

d) the impact of the loss,

i) will be upon a person other than the person whose driving while his or her driver's license was under suspension resulted in the order to impound the motor vehicle and...

ii) will not be a result of a loss by the suspended driver of the type set out in clause 2(b)(c) or (d).

The Applicant meets the requirements of Subsection 22(3)(d)(i) as the loss of the impounded vehicle is upon the vehicle owner who is a person other than the suspended driver.

The Applicant has met the requirements of section 22(3)(d)(i)(ii). The economic losses incurred by the Applicant are not "... a result of a loss by the suspended driver of the type set out in clause 2(b)(c) or (d)".

After assessing the evidence presented, the Tribunal finds the Applicant has met all the criteria of Subsection 22(3) of Ontario Regulation 574 as amended by Ontario Regulation 632/98, and finds that the Applicant will suffer exceptional hardship as a result of the impoundment.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal **sets aside** the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: March 19, 2002

BALTZER, CLARENCE

CLARENCE BALTZER

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: NEIL MacPHEE,
Presiding member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

SHIRLEY BALTZER,
Agent for Applicant

DATE OF HEARING: March 8, 2002

DECISION RELEASED: March 19, 2002 Windsor

REASONS FOR DECISION

A hearing was held on March 8, 2002, at Windsor, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Clarence A. Baltzer (the "Applicant")
Motor Vehicle: 1996 Dodge Dakota pickup, plate 8408AF (the "vehicle")
Date of Appeal: February 26, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on March 8, 2002 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

On Feb.21, 2002 my husband was arrested for driving our family vehicle while under suspension. This has caused a great hardship upon our family. (We have 3 children, one of whom is pregnant). I (Shirley Baltzer) have just started a new job with a commute of 50

minutes to get to work. If we do not get the truck back as quickly as possible I will lose my job. My husband is still in jail and no other income is coming into the household. We cannot afford to be without the vehicle.

I would greatly appreciate an emergency hearing as soon as possible.

Shirley Baltzer, wife of the Applicant and acting as his agent testified that she resides in the City of Windsor with her 19 year old daughter and a teenage son. The 19 year old daughter is pregnant and is not employed, and the son works at Red Lobster. The witness works at a restaurant in Leamington and commenced employment there on February 21, 2002. She works four to five hours a day at different times of the day. She states that her daughter has to go to the doctor for regular check-ups for which she needs the subject automobile and she also drives her son to and from work at Red Lobster. She testified that the bus does not go often from Windsor to Leamington, maybe once a day, and that it would cost \$20 to \$25 per day for this type of transportation. She testified that if she does not get the Applicant's truck back, she will lose her job. She states that her mother lives in Windsor and owns a car and that she has borrowed it on occasion but can not do this frequently as her mother is on disability. She further testified that friends have an automobile which she has used in the past, but before she can use it on a regular basis, the brakes will have to be fixed.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Clarence Baltzer;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until July 18, 2002.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the

Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or

- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The grounds for this appeal are that the impoundment of her husband's vehicle will result in exceptional hardship to Mrs. Baltzer and her family. For this to succeed, the Tribunal must find first that there is not an alternative to the impounded vehicle. Based on the facts in evidence, the Tribunal finds that Mrs. Baltzer does in fact have alternative transportation to the impounded vehicle. But if the Tribunal did not so find, the Tribunal also finds the Applicant has not brought herself within the circumstances set out within Ontario Regulation 574, Section 22(2) and (3).

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Neil MacPhee, Presiding Member

RELEASED: March 19, 2002

TELECOMMUNICATIONS SANS FIL (TSF) INC.

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: SIMON DANN,
Presiding member

APPEARANCES: JOHN PETROSONIAK,
Representative for the Registrar of Motor Vehicles

RICK PEISTER.
Agent for the Applicant

DATE OF HEARING: March 19, 2002

DECISION RELEASED: March 21, 2002 ***By Teleconference***

REASONS FOR DECISION

A hearing was held on March 19, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Telecommunications Sans Fil (TSF) Inc. (the "Applicant")
Motor Vehicle:	Ford DRW Pickup (the "vehicle")
Date of Appeal:	February 27, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence (i.e. all reasonable efforts) to determine that the driver's licence was not suspended and the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(c) and (d) of the Act.

This matter came before this Tribunal on March 19, 2002 and proceeded as an electronic hearing.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

TRYLON TSF
ISO 9001 Registered
21 Southfield Drive, PO Box 186, Elmira, Ontario, N3B 2Z6 - Tel: (519) 669-5421 - Fax (519)-669-8912
Website: www.tryon.com

February, 14 / 2002

Attachment to: Page 2 of 2 Notice of Appeal

We appeal for the release of our vehicle for the following reason: Please find the ownership and valid insurance certificate attachment.

1. The Trylon TSF Ford F350 vehicle has no mechanical defects and had not been reported as stolen.
2. The infraction committed by the employee (Doug Rhijnsburger) at the time, which resulted in our vehicle being impounded, was that of driving while under suspension.
3. This infraction led to his immediate dismissal from the company. Please see the attached letter of termination.
4. The results of Mr. Rhijnsburger's infraction has left us short of a work vehicle and we have had to lay off 3 employees as a result. They are now collecting UIC.

Please contact Mr. Rick Peister (Director of Finance) @ 519-669-5421 X 257 as the TSF contact person.

Sincerely,
"Rick Peister"
Rick Peister
Director of Finance
Trylon TSF

The Applicant's representative, Mr. Peister, confirmed the details stated in the appeal and added the following information:

- While the company has two policy checks in place to confirm that new employees have valid driver licences, Mr. Rhijnsburger's licence was not checked when he was first employed (about two years ago) as he was not hired to work in a position where he might be driving a company vehicle; as a result, the company did not have an interest in examining Mr. Rhijnburger's driver's licence status;
- Mr. Peister confirmed that when Mr. Rhijnsburger was promoted to a position where he would be driving company vehicles, the company did not carry out a driver's licence

check and did not apply the company's stated policies;

- The Applicant confirmed that while the loss of the impounded vehicle had resulted in the lay-off of the work crew that used that truck, the company had not lost any work or contracts as it had been able to move vehicles and crews from other regions (specifically from Quebec where the company was not as busy) to meet its project obligations; in addition, the company had also been able to extend the work schedule of other local crews over the seven day week instead of the regular work week;
- Mr. Peister also confirmed that based on prior experience the company had not examined a short-term vehicle rental as a practical option due to cost and vehicle equipment.

Mr. Peister also confirmed that as a result of the company's experience it had now instituted a new policy which would require quarterly driver licence abstracts to be obtained on all drivers.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Doug John Rhijnsburger;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offences of Impaired Driving and Fail or Refuse to Provide Breath or Blood Sample under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension for life.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which

- (d) the order was made was not then under suspension; or
that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(c) and (d).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of “due diligence” as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. Law. The attention and care due from a person in a given situation....

Also, “due diligence” in Black’s Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

To succeed in this appeal, the Applicant must establish either due diligence in determining the validity of the driver's licence under section 50.2(3)(c) or exceptional hardship under section 50.2(3)(d) of the Act.

As to the Applicant's appeal to have the impounded vehicle returned on the basis that the loss of the vehicle will result in exceptional hardship, the evidence established:

- (i) the company failed to follow its policy requirements and exercise its own policy of due diligence at the time the driver of the impounded vehicle was promoted to driver status,
- (ii) the company had been able to reschedule other crews and vehicles to continue to meet its contractual obligations,
- (iii) the company had not lost any contracts or work due to the loss of use of the impounded vehicle,
- (iv) there was no evidence to show the company had suffered financial hardship,
- (v) the company had not sought out alternate vehicle rental arrangements as it was able to bring in needed vehicular equipment from another operating region (Quebec).

This evidence does not establish either due diligence or exceptional hardship as required under section 50.2(3) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Simon Dann, Presiding Member

RELEASED: March 21, 2002

THORNE, GREG

GREG THORNE

**Appeal under section 50.2 of the *Highway Traffic Act*,
R.S.O. 1990, Chap.H.8 as amended (the "Act"), from
the Order of the Registrar of Motor Vehicles
pursuant to section 55.1(3) of the Act.**

**TO APPEAL AN ORDER TO IMPOUND A MOTOR
VEHICLE ISSUED BY THE REGISTRAR OF MOTOR
VEHICLES**

TRIBUNAL: ALAN HOLBROOK
Presiding member

APPEARANCES: DAVID MILNER
Counsel for the Registrar of Motor Vehicles

No one appearing on behalf of the Applicant

DATE OF HEARING: March 20, 2002

DECISION RELEASED: March 25, 2002 London

REASONS FOR DECISION

A hearing was held on March 20, 2002, at London, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Greg Thorne (the "Applicant")
Motor Vehicle:	1997 Ford COF, Licence Plate 9601EH (the "vehicle")
Date of Appeal:	March 1, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on March 20, 2002 and proceeded as an oral hearing.

The hearing was scheduled to commence at 1:30 p.m. At 1:45 p.m., neither party had arrived. The Tribunal recessed until 2:00 p.m. Counsel for the Respondent was present at that time, but not the Applicant.

The hearing was adjourned until 2:45 p.m. to give the Applicant more time to arrive.

At 2:45 p.m., the hearing was commenced in Mr. Thorne's absence.

The Tribunal asked the counsel for the Respondent if he wished to make any submissions prior to the Tribunal commencing the hearing. The counsel for the Respondent, Mr. Milner, asked to file the original certified copies of the Ministry of Transportation submissions. They were marked as Exhibit #3 and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal reviewed the written material given in support of the Applicant and the Respondent.

Evidence for the Applicant

The material filed by the Applicant for this hearing refers to the Applicant's dire financial situation.

The Applicant's written submission filed with the Tribunal in support of appeal states:

I AM SENDING THIS NOTICE OF APPEAL DUE TO THE CIRCUMSTANCES OF A FORE CLOSURE ON MY MORTGAGE OF MY HOUSE. I HAVE BEEN TRYING TO SELL THE VEHICLE FOR SOME TIME FOR A RESONIBLE PRICE TO CATCH UP ON THE MORTGAGE. I AM COLLECTING UNEMPLOYMENT INSURANCE AND MONEY IS TIGHT. MY NAME IS NOT THE ONLY NAME ON THE MORTGAGE. THIS PERSON CREDIT FOR SOMETHING THAT IS NOT HER FAULT. I HAVE TALKED TO A DEALER ABOUT THE SALE OF THE VEHICLE. I'M SURE IF THIS APPEAL IS APPROVED THE VEHICLE WILL BE SOLD IMMEDIATELY. I APOLOGIZE FOR SENDING THIS LATE BECAUSE I COULD NOT PAY FILING FEE TILL THE WEEK OF FEB. 24/02. ALSO THERE IS A LOAN ON THE VEHICLE IN MY PARENTS NAME THAT THEY HAVE BEEN PAYING SINCE I HAVE BEEN UNEMPLOYED. THE VEHICLE HAS TO BE SOLD TO PAY OFF THE LOAN.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Gregory Thorne.
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of driving with more than 80 mgs. of alcohol in the blood under the *Criminal Code of Canada*

pursuant to which the driver's licence of the driver was then under suspension until August 1, 2002.

The Respondent called no witnesses and relied only on the written submissions.

In summation, Mr. Milner pointed out that the owner and the driver of the impounded motor vehicle was Mr. Thorne. There was no evidence put forth to indicate that there would be any hardship suffered by anyone other than the suspended driver of the impounded vehicle.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

“Owner” means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar’s order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver’s licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver’s licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of section 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
 - (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
 - (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
 - (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

As to the issue that the loss of the vehicle will result in exceptional hardship, the Applicant's

evidence failed to establish the criteria set out in section 22(1) of Regulation 574 of either,

(a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or

(b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.

Further, the Applicant's evidence did not establish the criteria set out in section 22(3) that:

(a) no alternative vehicle was available.

(b) the loss will be immediate, significant and lasting

(c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and

(d) the impact of the loss,

(i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and

(ii) will not be a result of a loss by the suspended driver of the type set out in clause (2) (b), (c) or (d).

Accordingly, the Tribunal finds that the Applicant has failed to establish exceptional hardship as required under section 50.2 of the *Highway Traffic Act*.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Alan Holbrook, Presiding Member

RELEASED: March 25, 2002

MEGAN, MYRNA

MYRNA MEGAN

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: NIVES MONTANO
Presiding member

APPEARANCES: MURRAY FORBES
Senior Counsel for the Registrar of Motor Vehicles

MYRNA MEGAN, Applicant
unrepresented

DATE OF HEARING: March 21, 2002

DECISION RELEASED: March 26, 2002 Toronto

REASONS FOR DECISION

A hearing was held on March 21, 2002, at Toronto, Ontario, to consider the Applicant’s appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Myrna Megan (the "Applicant")
Motor Vehicle:	1997 Ford F150 Pick Up, plate 6181HH (the "vehicle")
Date of Appeal:	March 1, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on March 21, 2002 and proceeded as an electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #3) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

- 1) I need my truck to take my daughter (Katelin Gagnon) to her appointment in Thunder Bay March 14/02 at 10:00 AM
- 2) Katelin Gagnon My daughter has another appointment in Toronto on April 3/02 I need my vehicle to take her to these appointment
- 3) Also my son (Darius) has a hockey tournament in thunder, Bay Ont. March 10 to 16
- 4) I also need it to take my children to sitters when I go to work, and hockey practise

The following is a summary of the Applicant's affirmed testimony.

The Applicant is a married mother of five children who resides with her five children and her husband, Bernard Gagnon, the driver of the impounded vehicle, on a reserve in Aroland which is approximately 20 minutes from Nakina, Ontario (about four hours north of Thunder Bay). She is employed as a full-time office administrator (bookkeeper, receptions, etc.) at ARO-FOR, a logging company four blocks from home. One of her duties includes bank deposits and cheque certification. The closest daily-operating bank is 80 kilometres away in Geraldton. The bank in Nakina is only open two days a week and has no overnight deposit box.

With respect to the circumstances surrounding the impoundment, the Applicant testified that she was aware of her husband's suspension. Since a new motor was put in the vehicle that day, the Applicant, together with some friends, asked her husband, Mr. Gagnon, to test drive the vehicle as he had a better understanding on how vehicles ran.

The Applicant testified that they were stopped in Nakina near a restaurant in which there are always OPP monitoring the area. No charges were laid, but the vehicle was impounded.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows (Exhibits 4-11):

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Bernard Gagnon;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the

time of impoundment had been convicted of the offence of blood/alcohol content in excess of .08 under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until August 30, 2004;

5. Certified copies of Driver's Abstracts for Trevor (brother), Tommy (uncle), Roger (uncle), Charles (father), Alexander (cousin) and Andy Megan (uncle), all relatives of the Applicant.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant has requested an appeal on the grounds of “exceptional hardship” under section 50.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the criteria the Applicant must meet to determine if “exceptional hardship” will result from the impoundment. The Applicant in this case has argued that the impoundment will result in hardship as described by section 22(2). In order for her claim to be considered under section 22(2), the Applicant must have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered for an alternative to the impounded vehicle.

Since the Applicant lives in a remote part of Ontario and this location is not 911 accessible. The nearest hospital is approximately 1 hour away.

The Tribunal may consider the criteria set out in clause (2) (b), (c) and (d) if the owner demonstrates that,

- (a) no alternative to the impounded motor vehicle is available;
- (b) the loss will be immediate, significant and lasting;
- (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
- (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).

These criteria are cumulative. That is, all of these criteria must be met before the Tribunal may consider the ground of "exceptional hardship" under section 50.2(3)(d). On the evidence, none of the above-mentioned criteria have been met.

(a) **“no alternative to the impounded motor vehicle is available”**

- (i) The nearest town in which to rent a vehicle is 80 kilometers away. There is no public transit and/or taxis on the reserve. The Applicant has testified that she has been walking to work.
- (ii) The Applicant lives in a tight-knit community wherein since her marriage to Mr. Gagnon, she is now related to almost everyone on the reserve. As noted above, Exhibits 6 through 11 are persons in her immediate family who own vehicles.
- (iii) The Applicant's mother, on occasion, has provided the Applicant with a vehicle so that she could transport her children to their appointments.
- (iv) The Applicant's employer has 3 extra vehicles for his employees to bring them to the job sites. Should the Applicant require a vehicle to carry out her duties for her

- employer, the Tribunal is of the opinion that her employer would permit the Applicant to use one of the company's fleet vehicles.
- (v) There is also the possibility of obtaining a ride from someone on the reserve or walking to her place of employment which is only 4 blocks away.

In Exhibit 2, Owner's Position in Appeal, points 1 and 3 read as follow:

1. I need my truck to take my daughter (Katelin Gagnon) to her appointment in Thunder Bay March 14/02 at 10:00 AM; and
3. Also my son (Darius) has a hockey tournament in thunder, Bay Ont. March 10 to 16

In her testimony, the Applicant borrowed her mother's vehicle to drive to Thunder Bay to keep her daughter's March 14th appointment and remained for the duration of her son's hockey tournament.

The Tribunal finds that alternatives to the Applicant's vehicle are available, although inconvenient.

(b) "**the loss will be immediate, significant and lasting**" The Applicant testified that:

- (i) 3 children has been able to get to school, which is also 4 blocks away from home, without any time missed due to the impoundment;
- (ii) 2 children have been able to get to the sitter;
- (iii) the Applicant has not missed any days off work due to the impoundment, but only has been late for work;
- (iv) there is no threat of loss of employment;
- (v) she has been able to get to work by walking;
- (vi) no doctors' appointments have been missed; and
- (vii) Mr. Gagnon, the Applicant's husband and driver of the impounded vehicle, has been able to get to work by carpooling with others.

Although the Applicant's son is schedule for dental surgery on March 28, 2002, and the Applicant's daughter is scheduled for a follow-up cardiological appointment in Toronto on April 5, 2002, the Tribunal is of the opinion there are a number of vehicles available to the Applicant so that she and her children could be transported to Thunder Bay to (1) keep her son's dental appointment; and (2) to board a flight departing in Thunder Bay for Toronto.

After considering the above requirement, the Tribunal finds that the Applicant albeit inconvenient, has alternatives to the impounded vehicle and the impact of the loss will not be immediate, significant and lasting as required by section 22(3) of Regulation 574 as amended by Regulation 632/98.

Accordingly, after considering the criteria set out in section 22(3) and (4) of Regulation 340 as

amended by Ontario Regulation 632/98, the Tribunal finds the Applicant has not established exceptional hardship as set out in section 50.2(3)(d) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Nives Montano, Presiding Member

RELEASED: March 26, 2002

EXCLUSIVELY YOURS LEASING INC., EXCLUSIVE AUTO MARKETING INC. AND
JEFFREY GELLER

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario, 1990, Chapter M.42

IN THE MATTER of the REGISTRATIONS of
EXCLUSIVELY YOURS LEASING INC., EXCLUSIVE AUTO MARKETING
INC. AND JEFFREY GELLER
as motor vehicle dealers and salesperson

AND IN THE MATTER OF the PROPOSAL of the
Registrar under the *Motor Vehicle Dealers Act*
made pursuant to section 7 of the *Motor Vehicle Dealers Act*

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

EXCLUSIVELY YOURS LEASING INC., EXCLUSIVE AUTO
MARKETING INC. AND JEFFREY GELLER

Applicants

-and-

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Motor Vehicle Dealers Act*, R.S.O. 1990, Chapter M.42 as amended (the "Act"), Exclusively Yours Leasing Inc., Exclusive Auto Marketing Inc. and Jeffrey Geller (the "Applicants") initiated an appeal under section 7(4) of the proposal of the Registrar under the Act, dated January 25, 2002 in terms of which the Registrar proposed to revoke registrations of the Applicants as motor vehicle dealers and salesperson;

AND WHEREAS, the Applicants have failed to pay the filing fee for this proceeding before the Tribunal, required pursuant to section 7 of the *Licence Appeal Tribunal Act*, 1999;

AND WHEREAS, the Applicants have not responded to the Tribunal's Notice of Intent to Dismiss Proceedings sent to the Applicants pursuant to section 4.6 of the *Statutory Powers Procedures Act*, R.S.O. 1990, Chapter S. 22 as amended, and Rule 2.10 of the Rules of

Practice of the Licence Appeal Tribunal, whereby a proceeding before this Tribunal may be dismissed without a hearing for failure to pay the required filing fee;

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers and Procedures Act*, as amended, this proceeding, initiated by the Applicants' request for a hearing before this Tribunal, is dismissed;
2. Pursuant to the authority vested in it under section 7 of the *Motor Vehicle Dealers Act*, this Tribunal directs the Registrar, *Motor Vehicle Dealers Act* to carry out his proposal dated January 25, 2002 to revoke the registrations of Exclusively Yours Leasing Inc., Exclusive Auto Marketing Inc. and Jeffrey Geller.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

Released: March 18, 2002

627416 ONTARIO INC. O/A ROSEDALE HOMES

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *ONTARIO
NEW HOME WARRANTIES PLAN ACT*

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: TERENCE A. WARDROP Q.C., Vice-Chair

APPEARANCES:

BRIAN CAMPBELL, counsel for the Applicant, 627416 Ontario Inc.,
o/a Rosedale Homes,
MICHAEL BADER Q.C., counsel for the Ontario New Home Warranty
Program

DATES OF August 8 to 11 (inclusive), 2000, September 11 to 14 (inclusive),
HEARING: 2000, January 9 and 10, 2001, May 1 to 3 (inclusive), 2001, June 5,
2001, August 21, 2001, November 27 and 28, 2001, at Windsor; and
January 4 and 14, 2002, at Toronto; in all, 19 days of Hearings.

REASONS FOR DECISION AND ORDER

BACKGROUND:

This hearing arises from a Notice of Proposal dated November 9, 1999, (the "Original Proposal") issued by the Registrar of the Ontario New Home Warranty Program (the "Registrar") to refuse to renew the registration of 627416 (Ontario) Inc., operating as Rosedale Homes (the "Applicant"), as a vendor or a builder under the provisions of Section 8(2) of the *Ontario New Home Warranties Plan Act* R.S.O. 1990. Ch. 0.31 (the "Act").

The Registrar is appointed by Ontario New Home Warranty Program, the corporation designated to administer the Act pursuant to Section 2 thereof (the "Program") and is charged with the duties and required to exercise the powers given to the Registrar by the Act.

The Registrar issued a Supplemental Notice of Proposal dated November 29, 2001, (the "Supplemental Proposal") which, by adding information and statements supplemental to the Original Proposal, had the effect of making the Original Proposal current as at the date of the Supplemental Proposal. This hearing dealt with the Original Proposal and the Supplemental Proposal together, as a single proposal (collectively the "Proposal").

The Registrar bases the Proposal on the provisions of Section 8 of the Act, as read together with Section 7 of the Act.

The Applicant by a notice dated November 23rd, 1999, (the "Appeal"), requested a hearing before the Commercial Registration Appeal Tribunal which, as of April 1, 2000, is known as the Licence Appeal Tribunal (the "Tribunal") respecting the Proposal and bases its claim on the provisions of Section 9(2) of the Act.

At the commencement of these hearings, Counsel for both the Applicant and the Respondent requested that, as the issues to be determined in this case were based upon the evidence of the same witnesses as those called to give evidence in the case of a notice of proposal issued by the Registrar to refuse to renew the registration of Rosedale Homes (1996) Inc., and since the facts in each case were similar and the principles of each of the applicants were common to both cases, it would be expedient and a saving of time and costs to conduct the hearings of both cases together simultaneously. Counsel for the applicants in both cases urged, however, that although many of the issues in each case were identical, the facts were similar ***but not*** identical, and as such, were peculiar to each case and would require separate decisions dealing with the particular matters of each case respectively, and independently from each other. With this caveat, this Tribunal agreed to hear both cases together and simultaneously. It is notable that the principles of both Applicants are related to each other and common to both cases although in differing capacities except as to the personal cross-guarantees. Counsel for the Respondent concurred but stressed that the inter-connected Applicants were so identical in purpose and common business undertakings that for all practical purposes or reasons, including the cross-guarantees and the inter-relationships, they can both be considered as a single enterprise.

ISSUES:

During the early part of the hearing, evidence was given by way of documentation that the Applicant was no longer in existence due to its dissolution and, as such, the renewal application, being the subject matter of the Proposal and Appeal, was a nullity. Counsel for the Applicant argued that the Applicant could be revived retroactive to the date of its dissolution by way of an application by any "interested person" pursuant to Section 241(5) of the Business Corporations Act R.S.O. 1990. Ch. B.16. The Tribunal, at the request of both Counsel and due to the fact that the case respecting Rosedale Homes (1996) Inc. with similar issues would be proceeding in any event, agreed to reserve its decision on this particular issue until the end of

the hearing and/or pending the decision of Counsel for the Applicant as to whether an application for such a revival would or would not be commenced by his client.

The Tribunal thence continued to hear the evidence and argument respecting this case, and the concomitant case respecting Rosedale Homes (1996) Inc., since it would be a saving of time and expense to proceed with both cases subject only to the decision of the Tribunal with respect to **this issue in this case.**

FACTS:

This Tribunal finds as a fact that the Applicant was dissolved on or prior to November 9, 1999, and as such, the application for renewal of registration of the Applicant as a builder was a nullity as at that date and the Proposal of no purpose.

THE LAW:

The Applicant having been dissolved on or prior to November 9, 1999, its registration as a builder under the Act is extinguished as at the date of its dissolution and any application for a renewal of such registration before or after the date of dissolution is a nullity, subject only to a retroactive revival of the Applicant at the discretion of the Director appointed pursuant to the Business Corporations Act R.S.O. 1990. Ch. B.16 (the "Business Corporations Act"). Section 241(5) of the Business Corporations Act provides for the revival of dissolved corporations, as follows:

"241(5) Where a corporation is dissolved under subsection (4) or any predecessor of it, the Director on the application of any interested person, may, in his or her discretion, on the terms and conditions that the Director sees fit to impose, revive the corporation; upon revival, the corporation, subject to the terms and conditions imposed by the Director and to the rights, if any, acquired by any person during the period of dissolution, shall be deemed for all purposes to have never been dissolved. 1999,c.12,Sched. F,s.9."

DECISION:

As no application has been made by any interested person to the Director appointed pursuant to the Business Corporations Act for revival of the Applicant under Section 241(5) as at this date, there is neither an Applicant nor an application for a renewal of any registration before this Tribunal at this time and the Appeal is therefore dismissed.

LICENCE APPEAL TRIBUNAL

Terence A. Wardrop, Q.C.
Vice-Chair, Presiding

RELEASED: March 20, 2002

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

ONTARIO HISTORICAL SOCIETY

PREHEARING

THE ONTARIO HISTORICAL SOCIETY

APPEAL FROM A DECISION OF THE REGISTRAR OF THE
CEMETERIES ACT R.S.O., 1990 CHAPTER C. 4, AS AMENDED

TO CLOSE A CEMETERY

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

CATHERINE BRAY, Counsel, representing the Applicant, Ontario
Historical Society

JAMES STEBBING, Counsel, representing the Registrar, *Cemeteries
Act*

MELISSA BARNETT, Counsel, representing the Anglican Church of the
Incorporated Synod of the Diocese of Toronto and Gordon Barr

DATE OF

PREHEARING: April 5, 2002

TORONTO

ORDER

FOLLOWING attendances on April 5, 2002 at a pre-hearing before this Tribunal of Catherine Bray, Counsel on behalf of the Ontario Historical Society (the "Applicant"), and James Stebbing, Counsel on behalf of the Registrar, *Cemeteries Act* (the "Registrar") and Melissa Barnett, Counsel on behalf of the Anglican Church of the Incorporated Synod of the Diocese of Toronto (the "Diocese") and Gordon Barr ("Barr") (the "Added Parties");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Monday, April 22, 2002 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario and to continue if necessary on April 23, 24, 25 and 26, 2002 at 9:30 a.m. at the Tribunal's above chambers;

1. The Parties to the hearing are the Applicant, the Registrar and the Added Parties.
2. The Applicant's Counsel advised the Tribunal that the Applicant intends to have the following persons testify at the hearing as expert witnesses:

Marjorie Stuart
Dianne Clendenan
Patricia Neal

The aforesaid parties' curricula vitae shall be furnished by the Applicant to all other parties by no later than April 5, 2002.

The Applicant's Counsel indicated to the Tribunal that the Applicant intends to call a Land Use Planner to testify at the hearing, and the Applicant was ordered to furnish such person's curriculum vitae as soon as such person is retained by the Applicant.

3. The Registrar's Counsel advised the Tribunal that the Registrar intends to have the following persons testify at the hearing as expert witnesses:

David Osler or Brian Lauder regarding the zoning by laws of the Town of Caledon
Michael D'Mello the Registrar (Acting) *Cemeteries Act* (Revised)

The Registrar will not rely on or refer to written reports of the above persons at the hearing but shall, by no later than April 10, 2002, provide to the Applicant and the Added Parties the curricula vitae of the such parties.

In addition to the foregoing persons, the Registrar, at the hearing, intends to rely on or refer to the evidence of the following persons as expert witnesses:

Bonnie Glencross author of a document titled *The St. Alban's Anglican Church and Assessment Report* dated December 1996 which report has already been disclosed by the Registrar to the Applicant and Added Parties, and
Heather Broadbent

At the hearing the Registrar shall not rely on or refer to any written report of Heather Broadbent but shall, by not later than April 10, 2002, provide the Applicant and the Added Parties such persons' curricula vitae.

4. The Added Parties' Counsel advised the Tribunal, that the Added Parties intended to have the following persons testify at the hearing, as expert witnesses:

Harry Huskins
Dr. Ron Williamson
Brian Gilchrist

Counsel for the Added Parties advised the Tribunal that the Added Parties shall not, at the hearing, rely upon or refer to written reports of the above three persons.

The Added Parties shall by not later than 5:00 p.m. on April 5, 2002 fully comply with the requirements of Rule 6.4 (1)(b) and (c) of the Rules of Practice of the Tribunal.

5. At the hearing:

(a) OPENING STATEMENTS

An opening statement shall be presented by the Parties in the following sequence:

- (i) the Registrar
- (ii) the Anglican Church of the Incorporated Synod of the Diocese of Toronto (the "Diocese")
- (iii) Gordon Barr ("Barr")
- (iv) the Applicant

(b) WITNESSES

The Parties' witnesses shall be presented in the following sequence:

- (i) the Registrar's witnesses
- (ii) the Diocese witnesses
- (iii) Barr's witnesses
- (iv) the Applicant's witnesses

(c) REGISTRAR'S WITNESSES

Each of the Registrar's witnesses after giving evidence in chief, may be asked questions of clarification, if any, by the Added Parties followed by cross examination by the Applicant, followed by re-examination, if any, by the Registrar's Counsel.

(d) DIOCESE WITNESSES

Each of the Diocese's witnesses after giving evidence in chief, may be asked questions of clarification, if any, by the Registrar and Barr, followed by cross

examination by the Applicant, followed by re-examination, if any, by the Diocese's Counsel.

(e) BARR'S WITNESSES

Each of Barr's witnesses after giving evidence in chief, may be asked questions of clarification, if any, by the Registrar and the Diocese, followed by cross examination by the Applicant, followed by re-examination, if any, by Barr's Counsel.

(f) APPLICANT'S WITNESSES

Each of the Applicant's witnesses after giving evidence in chief, may be cross examined by the Registrar, then by the Diocese, then by Barr, followed by re-examination, if any, by the Applicant's Counsel.

6. Counsel for the Registrar estimated that the testimony of the Registrar's witnesses should take approximately three days to complete.
7. Counsel for the Applicant estimated that the testimony of the Applicant's witnesses should take between approximately six and ten days to complete.
8. Counsel for the Added Parties estimated that the testimony of the Added Parties should take approximately two days to complete.
9. There was no settlement of any or all of the issues.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: April 8, 2002

ABBOTT, ANDY AND ALANDY AUTO SALES LTD.

ANDY ABBOTT AND ALANDY AUTO SALES LTD.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: MARJORIE HILEY, Vice Chair

APPEARANCES:

ANDY ABBOTT, Applicant, representing himself
MICHAEL ROTHE, Counsel, representing the Registrar, *Motor Vehicle Dealers Act*

HEARING: March 5, 2002 Toronto

DECISION AND ORDER

BACKGROUND:

The Registrar, *Motor Vehicle Dealers Act*, issued a Notice of Proposal dated September, 6, 2001 by which he sought to revoke the registration of Andy Abbott as a motor vehicle salesperson and Alandy Auto Sales Ltd. as a motor vehicle dealership. The reasons for his proposal are based on section 5 of the Act and in particular: 1. The dealer was evicted from his premises in August, 2000 for non-payment of rent; 2. The premises of the dealer as of November, 2000 lacked municipal approval and had not been approved by the Registrar; 3. The dealer had failed to comply with the requirements of the *Retail Sales Tax Act* and owed over \$28,000.00 to the Ministry of Finance; 4. The dealer did not maintain his books and records at the registered premises.

Mr. Abbott, on behalf of himself and the dealership, filed his Notice of Appeal dated September 21, 2001. He disputed most of the particulars as set out in the Proposal of the Registrar. He did not dispute that the dealership, Alandy Auto Sales Ltd. was registered as a motor vehicle dealership on April 12, 1996 nor that Andy Abbott was the operating mind of the said corporation.

There was no prehearing. The matter was scheduled for hearing on March 5, 2002. At that time all parties were in attendance. Mr. Abbott represented himself and the dealership.

ISSUES:

Did the Registrar, *Motor Vehicle Dealers Act*, act reasonably in revoking the registration of Andy Abbott as a motor vehicle salesperson under the Act?

Did the Registrar, *Motor Vehicle Dealers Act*, act reasonably in revoking the registration of Alandy Auto Sales Ltd. as a motor vehicle dealership under the Act?

EVIDENCE:

Opening Statements:

By Counsel for the Registrar:

The Registrar wishes to revoke the registration of Mr. Abbott and the corporation because under section 5(1) of the Act: 1. The premises are not maintained, nor the books and records; 2. The financial position of the corporation and the past conduct of Mr. Abbott shows a disregard for honesty, integrity, and acting in accordance with the law.

By Mr. Abbott:

He has been a registered salesperson under the Act for over twenty years. He tried to act within the *Motor Vehicle Dealers Act* and had never run away from his responsibilities. There were circumstances beyond his control. He was trying to make amends. The motor vehicle industry is the only business where he is capable of working.

Testimony of Bob Walraven:

Mr. Walraven is a field collection officer with the Ministry of Finance. He has worked for nineteen years with the Collections Branch. He has also worked as a loans officer at a Trust company. It is his responsibility to bring resolution to tax issues not previously resolved. He acts as a witness at various hearings.

Mr. Walraven stated he was familiar with the registrants. The file had been assigned to him, and he had undertaken a review of the file. The dealership was on the collection side of the Ministry of Finance from 1997 to present. The Ministry of Finance requested of the Ontario Motor Vehicle Industry Council ("OMVIC") that they revoke the licence of the dealership.

In May, 1997 the Collections Branch was in contact with the registrant who was supposed to remit sales tax on a monthly basis, but there were problems. In 1999 there was a formal agreement to pay \$500.00 per month for the arrears plus keep current with the monthly payments. That agreement has been broken three times since that time. The Collections Branch has tried to seize funds in the bank account of the registrant, and in January, 2001

there was an execution by the Sheriff of Durham to attend at the premises of the dealership and seize the inventory. That execution was unsuccessful as the inventory had been moved. Currently, the arrears totals over thirty thousand dollars.

Mr. Walraven testified that the dealership filed active returns to April, 2000 but there have been no returns since then. Mr. Walraven stated that the dealership was not collecting sales tax after that time. Although there had been a formal payment agreement since 1999, the registrant could not pay on it. In 1998 there was payment of \$15,955.00; in 1999 payment of \$1500.00; in 2000 payment of \$1000.00 and in 2001 payment of \$1300.00. The arrears schedule of the Ministry of Finance takes into account these payments.

Mr. Walraven stated that the *Retail Sales Tax Act* deals with sales tax charged at the point of sale. Vendors are required to make remittances on the sales tax that they have collected. If there is no business, then they can say so. The Ministry of Finance allows the vendors to deduct 5% off the sales tax collected. The taxes collected are deemed to be trust funds and do not belong to the vendor. Mr. Walraven stated that \$21,228.40 of sales tax was collected but not remitted to the Ministry of Finance.

In determining what is in the best interests of the Ministry of Finance, they have to find a reasonable prospect of recovery. They would want monthly remittances and to have the arrears decreased. Otherwise they can look at recovery through the director personally.

Mr. Walraven stated that he did a full print-out of the collection history of the dealership and had personally reviewed every entry going back to 1997. There were 21 periods of default between 1998 and April, 2000. The returns were not filed on a monthly basis but in groups of 4 to 8 at a time. The arrears balance continued to accrue.

Under cross-examination, Mr. Walraven stated that he had first looked at the collection history of the company approximately two weeks prior to the hearing. The file had shown that Mr. Abbott was involved in litigation with his landlord. At first the amount in dispute was \$100,000.00, then \$80,000.00 and finally for \$40,000.00. This history does not indicate why the registrant could not maintain the agreement. The Collection Branch officials had spoken to both Mr. Abbott and his wife. There had also been an issue with a bookkeeper and then the computer hard drive had crashed.

Mr. Walraven agreed that there had been attempts to pay the arrears. \$1,300.00 had been received after the Ministry had released a lien on a car so Mr. Abbott could sell it. There were 21 periods where the company received sales tax but did not remit it to the Ministry of Finance.

Mr. Walraven stated that the Ministry of Finance would have to look at what is reasonable under all the circumstances. There would have to be a quick solution. In 1998 to 2000 the Ministry had been looking at due diligence against the corporation's director.

Evidence of Louise Gingras:

Ms. Gingras is an inspector with OMVIC. She has held that position since early 1997. It is her responsibility to inspect motor vehicle dealers. The *Motor Vehicle Dealers Act* is a public protection act. It has four functions: 1. Registration of salespeople and dealerships; 2. Deal with complaints from the public; 3. Investigations; and 4. Inspections.

Ms. Gingras testified that she is familiar with the Notice of Proposal issued by the Registrar. Mr. Abbott was first registered as a motor vehicle salesperson in February, 1982. The corporation, Alandy Auto Sales Ltd., was first registered as a motor vehicle dealership on April 12, 1996. Mr. Abbott is the registered salesperson for that dealership.

Ms. Gingras stated that early in October, 2000 OMVIC received information that the dealership had been evicted from its premises by its landlord for non payment of rent. As well, OMVIC had received information that the dealership was now in some premises which was not approved by the municipality and therefore not in compliance with the legislation. OMVIC was not aware of the premises from which the corporation was operating from November, 2000 until January, 2002.

Ms. Gingras stated that in August, 2000 Ms Elizabeth Browning of OMVIC had inspected the premises of Alandy Auto Sales Ltd. Initially there was no one there, but Mr. Abbott arrived as Ms. Browning was leaving a written message for him. Mr. Abbott felt he could refuse Ms. Browning's request to inspect his books and records unless it was a written request from the Registrar. Accordingly, the lawyer for OMVIC, Mr. Goldbloom, wrote to Mr. Abbott on August 31, 2000 telling him OMVIC wanted to inspect his books and records. That never happened as when Ms. Pauline Williams from OMVIC went back to the premises on September 6, 2000 Mr. Abbott was not present. Then in February, 2002 Ms. Williams attended at 796 Simcoe Street, which was a site provided by Mr. Abbott. At that time the dealership was just getting settled in at the site and there was construction going on at the time. Mr. Abbott requested time to get organized and Ms. Williams agreed to an extension of time for the inspection.

Ms. Gingras testified that a premises is required under the legislation. There needs to be an office to conduct the business of the dealership which has been approved by the Registrar. This office must be in compliance with the local bylaws. Customers need to know that this is the business office, and the books and records need to be available there for inspection.

Sales tax is collected by the dealer to remit to the Ministry of Finance. Ms. Gingras said that this is trust money. Motor vehicle dealers are selling an expensive product, and they must deal with their financial obligations in an honest way. They have a responsibility for their financial transactions.

Under cross-examination, Ms. Gingras stated that OMVIC had telephoned the City of Oshawa and asked if the premises complied with the bylaws. OMVIC was told by someone at the City

of Oshawa that the premises were not in compliance with the bylaws. The City of Oshawa had laid charges against the dealership, but they were later dropped when the dealership moved from those premises.

Regarding the complaint about the dealership being evicted, Ms. Gingras was not aware of what actions were taken by OMVIC to validate that complaint.

Ms. Gingras stated that Mr. Abbott had refused to allow inspection of the books and records at the August 22, 2000 site visit. She understood that after that time a number of letters sent by OMVIC to the dealership were returned to OMVIC as not being capable of delivery.

Ms. Gingras agreed that the books and records under the Act did not have to be at the registered premises, but when an inspector came to the registered premises, the books and records had to be available for inspection.

Testimony of Andy Abbott:

Mr. Abbott testified that he had been in the motor vehicle industry for many years starting when he was young and his uncle was a motor vehicle dealer. After a stint in the armed forces, Mr. Abbott was registered as a motor vehicle salesperson in 1982. He worked for a number of dealers as a salesperson and ultimately as a sales manager. Then he worked for a year at a factory but he was injured at that workplace. In 1996 Alandy Auto Sales Ltd. was registered as a motor vehicle dealership. He had registered that company with the province many years ago and after he paid the fees due to the province from 1984 until 1996, he was permitted to use that corporation and to register it as a dealership.

The first premises for his dealership were 146 Brock Street North. The lady who owned the premises died and he then dealt with her estate. Problems arose and ultimately he sued the estate. The matter has been set down for trial just recently.

In 1997 he moved to 792 Simcoe Street South. He had anticipated buying the property, and his lawyer did a lien search and found no liens. But they did not know of the certificate of pending litigation that had been filed against the property in January, 1994. The offer to purchase that he had made in April, 1997 could not close and he never got clear title to the property. The payments he was making on the property were supposed to be mortgage payments not rental payments.

Mr. Abbott testified that on August 31, 2000 he surrendered 792 Simcoe Street South and rented a lot to store his remaining vehicles and his trailer. He was not in business and did not remit sales tax.

The City of Oshawa laid two charges against him, but due to utilization of a grandfather clause they were obliged to withdraw the charges.

Mr. Abbott testified that he informed OMVIC and they inspected his premises in February, 2002. The City of Oshawa had approved his business licence. His last one expired in December, 2001.

Mr. Abbott explained that due to personal problems and health problems, he could not keep his agreement with the Ministry of Finance. As well, he was not in business for a period of time.

Mr. Abbott examined the particulars as set out in the Notice of Proposal by the Registrar. He stated that OMVIC had nothing to prove that he had been evicted. Regarding the lack of municipal approval, Mr. Abbott stated that there had been no investigation to show he was not in compliance with the bylaws. He stated that he attempted to make restitution and hoped to have some more funds available for this purpose soon. He was unsure if he owed as much as stated, that being over \$28,000.00. He always had his books available for inspection. He disagreed with the testimony of Ms Gingras who stated that Ms. Browning had not inspected his books. She had inspected his books at the time of her inspection. He did want a request for inspection of his books to be in writing.

Mr. Abbott stated that due to his problems, his money had gone on other things such as bank charges. From August, 2000 until February, 2002, he did not have a business location and his vehicles were in storage. He was not in business during that time period. There were circumstances beyond his control, such as the time frame for his litigation. He stated that he had never run away from his responsibilities, and he would pay the Ministry of Finance.

Under cross-examination, Mr. Abbott stated that he was registered as a salesperson from 1982 and had the dealership registration from 1996. He had his corporation revived by going to the government and asking how to do that. From 1996 until August, 2000 he operated the dealership. He was in a new location at 796 Simcoe Street as of February, 2002. He knew of some of the requirements under the *Motor Vehicle Dealers Act*. He stated that his record was clean and there were no consumer complaints against his dealership.

Mr. Abbott agreed that there was a trade freeze imposed by OMVIC in November, 2000. At that time he spoke to someone at OMVIC, and he had about thirty-five cars. There was a 1946 Ford which he sold to Bowen and from which sale he paid the Ministry of Finance \$1,300.00. The following cars were all lease ends: 1989 GMC van, 1987 Olds, 1985 Cadillac, 1989 Caravan, 1946 Ford and a Caprice car. Mr. Abbott agreed that he only submitted money to the Ministry of Finance for one car, the 1946 Ford.

Mr. Abbott testified that in 1998 he changed the location of his dealership. He went into collections with the Ministry of Finance in April, 1998. He had made an agreement with the Ministry of Finance in May, 1999. Mr. Abbott agreed that the figure for the amount of arrears,

that being \$28,000.00, was not a totally unreasonable figure. He knew that he had to remit the sales tax and that he was behind in his remittances after April, 1998.

Mr. Abbott stated that he was renting at 146 Brock Street, but the landlord died and the agreement with her estate fell apart in early 1997. He had wanted to purchase 792 Simcoe Street though it was to be in his wife's name in April, 1997. Due to the certificate of pending litigation, he could not get clear title of the property, and the money paid should have been considered as mortgage payments, rather than rental payments. He said he did not have documents to prove it was for mortgage payments but litigation on this matter was started in 1997. His wife's company, JVK Enterprises, was to purchase the property, and he would lease from her company.

Regarding the lease end vehicles, Mr. Abbott stated that the lease payments were sold to other companies with the car still being in his name. The buy-out cost \$101.00. That was the amount of the residual. The car was then transferred out of his dealership's name, thereby avoiding the transfer fees.

Reply evidence of Ms Gingras:

Ms Gingras stated in her reply evidence that there were three complaints listed against the dealership. The first dealt with a dispute over repairs whereby a car was repaired for \$2200.00 without the authorization of the owner. OMVIC never heard back from that consumer. The second dealt with a cheque that bounced, but the consumer was paid back by Mr. Abbott. The third complaint dealt with a lien on a vehicle, the 1946 Ford purchased by Bowen. The Ministry of Finance did lift the lien on that vehicle. Ms. Gingras stated that a dealer is not to sell a motor vehicle if it has a lien against it.

Under cross-examination Ms Gingras stated that when OMVIC receives a complaint from a consumer, they first contact the dealer. Complaints are registered against the dealer whether or not the complaint is a valid one.

Closing Statements:

By the Registrar:

There are two problems with this dealership and salesperson. One deals with the premises and the other with financial responsibility, honesty and integrity and acting in accordance with the law. The *Motor Vehicle Dealers Act* is a public protection statute which requires that the Registrar look at past conduct.

Regarding the premises, Counsel submitted that under section 13(4) of Regulation 801, the dealership must operate from premises approved by the Registrar. Here, the premises were

not in compliance with the Act. As well, the dealership was being operated without being in proper premises.

Counsel referred to the case of Markview Auto Sales Ltd. (re) (1998) O.C.R.A.T.D. No.170 where at paragraph 32 the Tribunal states: "The absence of books and records at the registered place of business, and the storage of these books and records at the home of the Registrant, is clear and convincing evidence that Markview is not managing and controlling its business from its approved premises, as required by paragraph (a) of subsection 14(4) of Regulation 801 made under the Act". Counsel stated that the books and records of the dealership have not been inspected and there is a need for such access as this is a disclosure-based industry.

Regarding the second point, Counsel stated that under section 22 of the *Retail Sales Tax Act*, money collected is trust monies. Mr. Abbott has agreed that the amount of arrears being stated as \$28,000.00 is a fair assessment. Mr. Abbott has made four payments in four years, the last payment being done to remove a lien against a vehicle. He has abrogated the terms and conditions of his agreement with the Ministry of Finance three times during its time frame.

Counsel stated that the excuses being offered now by Mr. Abbott are not sufficient. He cannot now on the eve of losing his registration state he wants to make some deal with the Ministry of Finance. There is no evidence to prove any of the outside circumstances mentioned by Mr. Abbott.

Counsel referred to the case of 1213127 Ontario Inc. (c.o.b M.H.D. Towing and Cars Trading (re)) (1999) O.C.R.A.T.D. No.291 at paragraph 7 where the Tribunal states: "Under section 22 of the *Retail Sales Tax Act* the tax money is trust money. By failing to make payments, the Applicant has breached that trust. Under section 20 of the same Act, the assessment is conclusive and is not open to question by this Tribunal. The purpose of the hearing is not to appeal the assessment, but to establish if the Registrar has reasonable grounds to believe that the applicant is not financially responsible."

Counsel stated that the dealership should be revoked as for the past four years it has been in arrears on its remittances to the Ministry of Finance.

Counsel stated that if the Tribunal were to consider permitting Mr. Abbott to keep his registration as a salesperson, which Counsel opposes, then it should be based on conditions. Counsel stated that Mr. Abbott should be obliged to make fast settlement of the outstanding monies to the Ministry of Finance. As well, Mr. Abbott needs to be properly supervised which means he should not work at a small dealership or for a friend. Mr. Abbott should take the certification course offered by OMVIC. Mr. Abbott should not be the final signatory on a bill of sale or have signing authority for a bank account nor be an officer or director of a dealership.

Counsel stated that Mr. Abbott should be revoked of his registration as a salesperson at this time. It is not a lifetime ban. But this is a regulated industry, and at this time Mr. Abbott should not be permitted to work in this particular industry.

By Mr. Abbott:

Mr. Abbott stated that everyone makes mistakes. People live their lives. The Ministry of Finance does not want to renegotiate the agreement.

Mr. Abbott submitted that he is not denying that he did not pay the retail sales tax. But everything else was done properly. There is nothing to suggest he was not a good salesperson.

LEGISLATION:

The relevant legislation is that of the *Motor Vehicle Dealers Act*.

Section 5

- (1) An applicant is entitled to registration or renewal of registration by the Registrar, except where,
 - (a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
 - (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or
 - (c) the applicant is a corporation and,
 - (i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, or
 - (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or
 - (d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.
- (2) A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant, imposed by the Tribunal or prescribed by the regulations.

Section 7

- (4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes

the Tribunal may substitute its opinion for that of the Registrar.

(5) The Tribunal may attach such terms and conditions to its order or to the registration as it considers proper to give effect to the purposes of this Act.

Section 10

- (1) The Registrar or any person designated by him or her in writing may at any reasonable time enter upon the business premises of the registrant to make an inspection to ensure that the provisions of this Act and the regulations relating to registration and the maintenance of trust accounts are being complied with.

Section 11

- (1) Upon an inspection under section 9 or 10, the person inspecting,
(a) is entitled to free access to all books of account, cash, documents, bank accounts, vouchers, correspondence and records of the person being inspected that are relevant for the purposes of the inspection; and

and no person shall obstruct the person inspecting or withhold or destroy, conceal or refuse to furnish any information or thing required by the person inspecting for the purposes of the inspection.

Regulation 801

Section 13 (4) It is a condition of registration as a motor vehicle dealer that the motor vehicle dealer

- (a) operates from premises located in Ontario that are approved by the Registrar;
 - (b) has an office for the conduct of business at each premises where the motor vehicle dealer operates; and
 - (c) has erected at each premises where the motor vehicle dealer operates, a sign that is clearly visible to the public that identifies the motor vehicle dealer's registered name.
- (5) Every motor vehicle dealer shall, within five days after the event, notify the Registrar in a form provided by the Minister of any change in the location of the dealer's place or of any of the dealer's places of business.

ANALYSIS:

The Registrar in his Notice of Proposal has requested that the registration of Mr. Abbott as a salesperson and that of Alandy Auto Sales Ltd. as a dealership be revoked. At the conclusion of the hearing on March 5, 2002, the Tribunal had stated that it would be revoking the registration of Alandy Auto Sales Ltd. as a dealership and that it would be providing the parties with a written decision outlining its reasons for that revocation and as well stating whether or not it agreed with the Notice of Proposal to revoke the salesperson registration for Mr. Abbott.

The Tribunal decided to revoke the registration of Alandy Auto Sales Ltd. based on the evidence as to the arrears owed to the Ministry of Finance for failure to remit retail sales tax.

The evidence of Mr. Walraven was of considerable importance to the Tribunal as he outlined not only the amount of arrears owed to the Ministry of Finance but the history of the Collections branch with Alandy Auto Sales Ltd. Within two years of operation as a dealership, Alandy Auto Sales Ltd. had failed to make proper remittances to the Ministry of Finance on retail sales tax that it had collected from consumers when they purchased or leased motor vehicles. The Ministry of Finance has never recovered those arrears except for four payments made over a period of four years from 1998 to 2001. It is agreed by the parties that the amount owing to the Ministry of Finance exceeds \$28,000.00. It is also agreed by the parties that though there was an agreement made by Alandy Auto Sales with the Ministry of Finance in 1999, it has been breached at least three times since its inception. Mr. Walraven outlined the extraordinary steps taken by the Collections branch to attempt to obtain these arrears, including liens on vehicles and an attempt to seize assets by the Sheriff of Durham.

Mr. Abbott's explanations as to why his dealership could not make these payments were insufficient in the opinion of this Tribunal. When a company collects retail sales tax, it is acting as a Trustee on behalf of the Ministry of Finance. The money collected from the consumer were trust funds which were to be remitted on a monthly basis to the Ministry of Finance less 5% which the company is permitted to keep as its collection fee. Alandy Auto Sales Ltd. willfully kept the retail sales tax for a number of months. It has never paid back the arrears despite an agreement to do so made with the Ministry of Finance. This is an example of extreme financial irresponsibility contrary to section 5 (1) (c) of the Act. Mr. Abbott has explained that there were circumstances beyond his control such as litigation with two of his landlords. He provided little in the way of information on these matters, and in any event they fail to explain why the company could not remit the sales tax. They collect it directly from the consumer and just need to send it on to the Ministry of Finance. There is no need for the monies to come out of the profits of the company or its operating expenses. It is a flow-through transaction.

The corporate applicant made an agreement and failed to honour it. There has been no evidence of any serious attempts by the corporate applicant to negotiate with the Ministry of Finance based on changed circumstances. The Ministry of Finance is under no obligation at this late date to agree to any proposals being made by the corporate applicant, particularly when those proposals are speculative at best. Mr. Abbott has stated that he hopes to win a lawsuit in the near future. Even if that does occur, securing a judgment and then collecting on a judgment are two distinct activities. It could be years before Mr. Abbott and his company collect any funds from the unsuccessful defendant. The scenario is too speculative to be given any credence by this Tribunal.

The Registrar had also based his case on the issue of problems with the premises. The Tribunal finds that there has not been sufficient evidence presented on this matter. The Applicant has explained that the City of Oshawa did drop the charges based on a grandfather clause in the bylaws. The Applicant has explained that he did not owe money in rent but that the allegations were due to a conflict between him and the landlord which has resulted in a

second piece of litigation.

Regarding the inspection of books and records the Tribunal does find that the Applicant was somewhat uncooperative in allowing the inspector to view his books. Based on the information before it, that being the inspection notes of Ms Browning, Ms Williams and the letter of August 31, 2000 from Mr. Goldbloom, the Tribunal concludes that the books and records were not inspected by September 6, 2000. Though Mr. Abbott states that his company was not in operation from August 31, 2000 until February, 2002, there was his verbal evidence that he did transfer ownership of a number of vehicles during that time frame when they reached the end of the lease agreement. Technically, those actions show the company to be still in operation. Accordingly, OMVIC would have wanted to review the books and records during this time frame. It would appear that Mr. Abbott was cooperative with the inspector in February, 2002 and though books and records were not inspected at this time, it was a mutual arrangement between the Applicant and the inspector based on the agreed factual situation that the company had just moved to new premises and construction was still being done on those premises. Based on the above evidence, the Tribunal would not have found the lack of inspection of the books and records to have been a serious enough breach of the Act to have caused the revocation of the registration of Alandy Auto Sales Ltd.

Regarding the registration of Andy Abbott, the Tribunal will permit him to keep his registration as a motor vehicle salesperson but only under stringent conditions. In doing so, the Tribunal is fully aware of the position of the Registrar that Mr. Abbott should have his licence revoked. As well, the Tribunal, in accordance with the Brenner 19 (1983) CRAT 58 decision, understands the test to be applied is whether the Registrar was in error in concluding that the past conduct of the Applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Tribunal realizes that Mr. Abbott was the controlling mind of the corporation, Alandy Auto Sales Ltd., and that Alandy Auto Sales Ltd. has lost its registration based on its collections history with the Ministry of Finance. That conduct by Mr. Abbott is why the Tribunal wishes to have conditions put on his registration as a sales person.

The Tribunal does not feel that Mr. Abbott should have any positions of responsibility within a dealership, as he has shown that he can be tempted into actions of financial irresponsibility. But the Tribunal does not feel that the Registrar acted reasonably in revoking his salesperson licence when Mr. Abbott has been a salesperson for almost twenty years and has had no proven problems with OMVIC, its predecessor the Ministry of Consumer and Commercial Relations or consumers during the time period when he was not in charge of a dealership. The level of responsibility to be exhibited when in charge of a dealership is higher than when one is a salesperson, in the opinion of this Tribunal. The Tribunal does not find the history of complaints regarding Mr. Abbott to be of significance in this matter, particularly as Ms Gingras has testified that it is the policy of OMVIC to register complaints against a dealership/salesperson whether or not the complaints are valid ones. The Tribunal is not satisfied that sufficient efforts were made to investigate the complaints and accordingly is

treating them as unvalidated or pro forma type complaints.

The Tribunal is aware of its responsibility and of the responsibility of the Registrar to protect the motor vehicle buying public from those who do not act with honesty, integrity and in accordance with the law. There is no doubt that Mr. Abbott, as the controlling mind of Alandy Auto Sales Ltd., erred in not remitting the retail sales tax to the Ministry of Finance. There is no doubt that Mr. Abbott's past history as the controlling mind of a dealership shows that he is not equal to the pressures of such a position. Accordingly, while Mr. Abbott will be permitted to retain his salesperson licence, he is not permitted to hold any positions of authority, such as being a sales manager, for at least two years from the date of the release by the Tribunal of this decision. In the meantime, Mr. Abbott needs to take a number of measures in order to improve his conduct within the industry. The conditions to be imposed upon him will suffice to protect the public while permitting him to work within a regulated industry. As was stated to him at the hearing, no one is forcing him to work within a regulated industry. If you so choose, then you must abide by the rules and regulations of that industry to the satisfaction of the industry regulator, which in this case is the Ontario Motor Vehicle Industry Council.

This Tribunal has stated at the hearing how impressed it has been with the efforts of the OMVIC since its inception to educate those working within the motor vehicle industry so that those registered will show integrity, honesty and act in accordance with the law. There are now certification courses for those new to the industry. OMVIC provides guidance to those registered under the *Motor Vehicle Dealers Act* through its publications and policies. Its efforts are having a positive effect on the motor vehicle industry. In drafting the conditions of registration, this Tribunal has attempted to protect the public, permit Mr. Abbott to work within the industry if he complies with the conditions and not to overburden the limited resources available to OMVIC in its responsibilities of registration, complaints, investigations and inspections.

Besides Mr. Abbott not being in a position of responsibility for the next two years, the Tribunal wishes him to take the certification course offered by OMVIC at the earliest opportunity, to work at a dealership where the sales manager can properly supervise his work, not to be an officer or director of a dealership, and to have all bills of sale signed by his sales manager without exception. Besides Mr. Abbott finding a job in compliance with section 13(10) of Regulation 801 (transfer of registration within 60 days), he must make realistic plans for the payment of the over \$28,000.00 that his former company owes to the Ministry of Finance. The Tribunal noted the comment made by Mr. Walraven of the Collections Branch of the Ministry of Finance that they can look for recovery through the director of the corporation in that director's personal capacity. While Mr. Abbott awaits the results of his litigation against his former landlords, he needs to make a payment plan with the Collections Branch which he can honour through his earnings as a motor vehicle salesperson. The Tribunal expects that there will be some reduction made in the arrears owing to the Ministry of Finance within the next year through a monthly payment plan, though this will not be a condition of the registration.

ORDER:

Pursuant to the authority vested in it by section 7(4) of the *Motor Vehicle Dealers Act*, the Tribunal directs the Registrar to carry out his Proposal dated September 6, 2001 as against the Applicant, Alandy Auto Sales Ltd. The Tribunal directs the Registrar to register Andy Abbott as a salesperson under the *Motor Vehicle Dealers Act* with the following conditions:

1. Within one year from the date of this decision, Andy Abbott will take the certification course offered by OMVIC,
2. For two years from the release of this Tribunal's decision, Andy Abbott will not be permitted to be an officer or director of a motor vehicle dealership.
3. For two years from the date of this decision, Andy Abbott will not be permitted to have a position of authority in a motor vehicle dealership, such as, a sales manager position,
4. For one year from the date of this decision, all bills of sale of motor vehicles involving Andy Abbott will require the signature of his sales manager who has responsibility to supervise the work of at least two salespersons.

LICENCE APPEAL TRIBUNAL

Marjorie Hiley, Vice-Chair

Released: April 2, 2002

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

RONCONE CONSTRUCTION LIMITED

PREHEARING

RONCONE CONSTRUCTION LIMITED

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

DARIO RONCONE, Agent representing the Applicant
CAROL STREET, Counsel, representing the Ontario New Home
Warranty Program

DATE OF

PREHEARING: March 28, 2002

By teleconference

ORDER

FOLLOWING attendances on March 28, 2002 at a teleconference pre-hearing before this Tribunal of Dario Roncone, Agent, appearing on behalf of Roncone Construction Limited (the "Applicant"), and Carol Street, Counsel on behalf of the Ontario New Home Warranty Program (the "Program");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Monday, May 13, 2002 at the Middlesex County Building, North Room, 399 Ridout Street, London, Ontario and to continue if necessary on May 14 and 15, 2002 at the above address;

1. The Parties to the hearing are the Applicant and the Program.
2. Attached to this Order is a Statement of Facts marked "B". This was presented subsequent to the pre-hearing by Carol Street, Counsel for the Program. Both the Program and the Applicant agreed that the facts enumerated in paragraphs 1 through 11 inclusive, are facts that the parties have agreed upon.

- 3.a) The Applicant must serve the Program and the Attorneys General of Ontario and of Canada, and file with the Tribunal, on or before April 10, 2002 the following:
- i) The particular provisions of any legislation, regulations, bylaws, and/or the impugned Vendor and Builders Agreements that the Applicant says infringes the Charter.
 - ii) The sections of the Charter that the Applicant says are infringed, and how they are infringed.
 - iii) The evidence, in affidavit form, that the Applicant relies upon in support of i) and ii);
 - iv) The remedy the Applicant seeks from the Tribunal;
 - v) A statement of issues, fact and law that summarizes the Applicant's Charter challenge.
3. b) The Program must serve the Applicant, the Attorneys General of Ontario and of Canada and file with the Tribunal on or before April 23, 2002 the following:
- i) The evidence, in affidavit form, on which the Program relies in defending the Applicant's Charter challenge;
 - ii) A statement of issues, fact and law that summarizes the Program's response and defence to the Applicant's Charter challenge.
3. c) Either party may cross-examine the deponents of the opposing party's affidavits. These cross-examinations must take place between April 24 and May 3, 2002 inclusive. Transcripts of the cross-examinations must be provided to opposing counsel and filed with the Tribunal on or before May 10, 2002. No viva voce evidence will be heard by the Tribunal at the hearing with respect to Charter issues unless permitted by the Tribunal.
3. d) If either party fails to comply with paragraphs 3(a) through 3(c) above, the Tribunal will not hear submissions from such party regarding the Charter issues.
4. All parties to the hearing shall fully comply with the requirements of disclosure of documents or things as set forth in Rule 6.3 of the Rules of Practice of the Tribunal. All parties shall also fully comply with the disclosure requirements set forth in Rule 6.4 of the Rules of Practice of the Tribunal dealing with expert witnesses.

5. There was no settlement of any of the issues dealt with in the Registrar's Notice of Proposal and those issues remain to be decided at the hearing.
6. The Tribunal noted at this prehearing that the Applicant made reference to possible further reasons for appeal. The Tribunal urged the Applicant to advise the Program of any such reasons well in advance of the hearing to avoid objections being raised by the Program.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: April 4, 2002

JOHN GERBER CONSTRUCTION LIMITED

PREHEARING

JOHN GERBER CONSTRUCTION LIMITED

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

JOHN GERBER and ROGER GERBER,
Agents representing the Applicant
CAROL STREET, Counsel, representing the Ontario New Home
Warranty Program

DATE OF

PREHEARING: March 28, 2002

By teleconference

ORDER

FOLLOWING attendances on March 28, 2002 at a teleconference pre-hearing before this Tribunal of John Gerber and Roger Gerber, Agents, appearing on behalf of John Gerber Construction Limited (the "Applicant"), and Carol Street, Counsel on behalf of the Ontario New Home Warranty Program (the "Program");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Monday, May 6, 2002 at the Middlesex County Building, North Room, 399 Ridout Street, London, Ontario and to continue if necessary on May 7 and 8, 2002 at the above address;

1. The Parties to the hearing are the Applicant and the Program.
2. Attached to this Order is a Statement of Facts marked "B". This was presented at the prehearing by Carol Street, Counsel for the Program. Both the Program and the

Applicant agreed that the facts enumerated in paragraphs 1 through 12 inclusive, are facts that the parties have agreed upon.

- 3.a) The Applicant must serve the Program and the Attorneys General of Ontario and of Canada, and file with the Tribunal, on or before April 8, 2002 the following:
 - vi) The particular provisions of any legislation, regulations, bylaws, and/or the impugned Vendor and Builders Agreements that the Applicant says infringes the Charter.
 - vii) The sections of the Charter that the Applicant says are infringed, and how they are infringed.
 - viii) The evidence, in affidavit form, that the Applicant relies upon in support of i) and ii);
 - ix) The remedy the Applicant seeks from the Tribunal;
 - x) A statement of issues, fact and law that summarizes the Applicant's Charter challenge.
3. b) The Program must serve the Applicant, the Attorneys General of Ontario and of Canada and file with the Tribunal on or before April 17, 2002 the following:
 - iii) The evidence, in affidavit form, on which the Program relies in defending the Applicant's Charter challenge;
 - iv) A statement of issues, fact and law that summarizes the Program's response and defence to the Applicant's Charter challenge.
3. c) Either party may cross-examine the deponents of the opposing party's affidavits. These cross-examinations must take place between April 18 and April 26, 2002 inclusive. Transcripts of the cross-examinations must be provided to opposing counsel and filed with the Tribunal on or before May 3, 2002. No viva voce evidence will be heard by the Tribunal at the hearing with respect to Charter issues unless permitted by the Tribunal.
3. d) If either party fails to comply with paragraphs 3(a) through 3(c) above, the Tribunal will not hear submissions from such party regarding the Charter issues.
4. All parties to the hearing shall fully comply with the requirements of disclosure of documents or things as set forth in Rule 6.3 of the Rules of Practice of the Tribunal. All parties shall also fully comply with the disclosure requirements set forth in Rule 6.4 of

the Rules of Practice of the Tribunal dealing with expert witnesses.

5. There was no settlement of any of the issues dealt with in the Registrar's Notice of Proposal and those issues remain to be decided at the hearing.
6. The Tribunal noted at this prehearing that the Applicant made reference to possible further reasons for appeal. The Tribunal urged the Applicant to advise the Program of any such reasons well in advance of the hearing to avoid objections being raised by the Program.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: April 4, 2002

PARWAZ TRAVEL & TOURISM INC. O/A PTT PARWAZ TRAVEL & TOURISM

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
PARWAZ TRAVEL & TOURISM INC. O/A PTT PARWAZ TRAVEL & TOURISM
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: October 30, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

PARWAZ TRAVEL & TOURISM INC. O/A PTT PARWAZ
TRAVEL & TOURISM

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

PURSUANT to the provisions of the *Travel Industry Act* R.S.O. 1990, Chapter T. 19 (the "Act"), Parwaz Travel & Tourism Inc. o/a PTT Parwaz Travel & Tourism (the "Applicant") appealed a proposal of the Registrar under the Act dated October 30, 2001 in terms of which the Registrar proposed to revoke the registration of the Applicant as a travel agent;

AND WHEREAS, following the attendance on March 8, 2002, at the hearing before the Licence Appeal Tribunal of Trevor Branion, Counsel for the Registrar, *Travel Industry Act* (the "Registrar"), the parties had come to an agreement to settle prior to the hearing today, with an order to issue on consent with terms and conditions agreed to in Schedule "A";

AND WHEREAS having reviewed the written settlement signed by the Applicant and the Registrar as to the disposition of further proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Richard Delaney, Member

Released: April 9, 2002

LICENCE APPEAL TRIBUNAL

BETWEEN:

PARWAZ TRAVEL & TOURISM INC.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

BACKGROUND

1. Parwaz Travel & Tourism Inc. (hereinafter referred to as the "Registrant") has been registered as a travel agent (registration number 4671533/R) under the *Travel Industry Act*, R.S.O., c. T-19, as amended (hereinafter referred to as "the Act") since June 25, 1999. The Registrant has a fiscal year end of April 30th.

FINANCIAL STATEMENTS – GROUNDS FOR THE PROPOSAL

2. Subsection 25(1) of Regulation 806/93 made under the Act ("the Regulation") states that a registrant shall maintain a minimum working capital of \$5,000.00 if the registrant had sales in Ontario of less than \$1.5 million during the previous fiscal year.

3. The Registrant's financial statements for its fiscal year ended April 30, 2001 revealed a working capital shortfall of \$5312.00 based on the Registrant's reported gross sales of \$112,713.00.
4. By letter dated October 9, 2001, the Travel Industry Council of Ontario ("TICO") advised the Registrant of its working capital shortfall and told the Registrant to address the shortfall by October 25, 2001.
5. On October 18, 2001, Mr. Mirza Alamgir Beg, the Registrant's manager advised TICO that the Registrant did not have funds available at that time to address the working capital shortfall.
6. By October 30, 2001, the Registrant had failed to address its working capital shortfall. On that date, the Registrar issued a Proposal to Revoke the Registrant's licence.
7. On December 14, 2001, the Registrant presented evidence that it had injected \$4069.07 to partially address its working capital shortfall.
8. On January 7, 2002, the Registrant issued an NSF cheque to TICO for \$28.75 to pay for its contribution to the Compensation Fund. The monies injected on December 14, 2001 were no longer in place.
9. By letter dated January 15, 2002, TICO advised the Registrant of its NSF cheque.
10. On January 25, 2002, the Registrant replaced the NSF cheque.
11. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsections 6 (4) and (5) of the *Travel Industry Act* directing that:

1. the Registrar refrain from carrying out the Proposal to Revoke Registration dated October 30, 2001;
2. the Registrant's registration is to be subject to the following terms and conditions:
 - (a) The Registrant shall provide TICO with a statement of its working capital position as at February 28, 2002, which shall be certified by a licensed public

accountant, by April 15, 2002. If the statement reveals that the Registrant does not have sufficient working capital as at February 28, 2002, the statement shall be accompanied by evidence to the satisfaction of the Registrar that the Registrant has corrected any and all working capital deficiencies. The Registrant shall at all times thereafter maintain the minimum working capital as required by section 25 of the Regulation or such subsequent provision as may be in force from time to time; and

(b) The Registrant shall file its financial statements for its fiscal year ended April 30, 2002 by July 31, 2002 and in accordance with section 24 of the Regulation.

3. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) and (b) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.
4. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by its signature below that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED this ____ day of March, 2002

Ms Miriam Beg
Parwaz Travel & Tourism Inc.
I have authority to bind the company

Mr. Michael Pepper
Registrar, *Travel Industry Act*

ROBERT, RICHARD J.

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
RICHARD J. ROBERT

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: December 3, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

RICHARD J. ROBERT

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Richard J. Robert, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: April 4, 2002

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
North York, ON, M2P 2E9

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON, M4V 1K6

FROM: Richard J. Roberts
28 Jeffrey Street
Box 615
Tilbury, ON N0P 2L0

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereinafter the "Act") the parties to the proceeding, Richard Roberts (hereinafter referred to as the "Applicant"), and the Registrar, *Motor Vehicle Dealers Act* (hereinafter the "Registrar") waive the requirement of a hearing and hereby consent to an Order of the Licence Appeal Tribunal (hereinafter the "Consent Order") based on the following terms and conditions to their registrations as a motor vehicle salesperson:

1. The Applicant agrees not to be involved in the process of buying or selling motor vehicles without the benefit of registration.
2. The Applicant agrees not to invite the public to deal at a place other than his employer's registered premises.
3. The Applicant will not use nominees for the purpose of acquiring motor vehicles.
4. The Applicant confirms that his signature on a retail bill of sale confirms that he has personally witnessed the consumer's signature.
5. The Applicant will not be involved in arranging for the delivery or delivering any vehicles sold by his sponsoring dealer to anyone other than the consumer indicated in the dealer's books and records. If the Applicant has reason to believe that any vehicle sold by the dealership is being delivered to anyone other than the customer indicated on the dealer's books and records, the Applicant will forthwith notify his sponsoring dealer.
6. The Applicant will not receive any form of compensation in relation to his activities as a motor vehicle salesperson except from his sponsoring dealer.
7. The Applicant will disclose to the seller the purpose of acquiring a vehicle including, but not limited to, that the vehicle is being purchased for the purpose of export. The Applicant further agrees to disclose to the seller the identity of the purchaser.
8. The Applicant agrees not to create books and records, which are misleading as to the nature of a transaction involving the purchase, sale or lease of a motor vehicle.
9. The Applicant acknowledges and understands that his registration will not be used to buy or sell motor vehicles where the Applicant knows or ought to know that the purchase or sale of those motor vehicles

will facilitate an illegal or unethical practice.

10. The Applicant agrees that he is under a positive obligation to disclose all material facts about the vehicles he sells to his customers. Material facts include but are not limited to salvage, previous salvage, frame and unibody damage, rebuilt, accident repair, theft recovery, prior use as a police cruiser, taxicab or daily rental and branded vehicles. The Applicant agrees to make reasonable efforts to research the history of all vehicles he sells prior to sale to ensure all material facts are disclosed in writing to the purchaser.
11. The Applicant agrees not to be the final signatory on any sales contracts on behalf of the dealer.
12. The Applicant shall within five days after the event, notify the Registrar, in writing of any commencement or termination of his or her employment.
13. The Applicant agrees to immediately enrol in the Ontario Motor Vehicle Industry Council Certification Course and to be responsible for all fees in relation to enrolment. The Applicant further acknowledges that enrolment in the course entitles him to a sixty (60) day conditional registration period that allows for his successful completion of the course (including passing the exam).
14. The Applicant agrees that his registration will not prevent the Registrar from taking administrative action, including a proposal to revoke his registration, arising from matters that may have occurred or may occur in the future related to his financial circumstances and honesty and integrity.
15. The Applicant acknowledges that his registration as a motor vehicle Salesperson will not prevent the Registrar from taking legal action, including a Provincial Offences prosecution, arising from matters that may have occurred or that may occur in the future.
16. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
17. The Applicant will provide a copy of this order to his employer forthwith.
18. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
19. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
20. The Applicant acknowledges that he has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____, this _____ day of _____ 2002.

Richard Roberts (Signature)

These Terms and Conditions are accepted by the Registrar, *Motor Vehicle Dealers Act*.

Carl Compton
Registrar
Motor Vehicle Dealers Act

HIGHWAY TRAFFIC ACT
R.S.O. 1990, CHAP. H.8 AS AMENDED, SECTION 50(1)

IN THE MATTER of an application by the
Applicant to appeal the decision of the Minister of
Transportation pursuant to section 32(12)(b)(i) of
the *Highway Traffic Act*;

AND IN THE MATTER of

APPLICANT

APPLICANT

and

MINISTER OF TRANSPORTATION

RESPONDENT

ADJOURNMENT

WHEREAS an oral hearing in the above matter was scheduled to be held on Friday, April 19, 2002, at Sudbury, Ontario;

AND WHEREAS the Applicant requested an adjournment of the hearing as she/he is about to undergo a medical procedure and would like to have his/her case dealt with after the results of that procedure are clear;

TAKE NOTICE, upon consent of all parties, the Tribunal Orders:

- (1) this matter is adjourned;
- (2) the appeal shall be heard at 1:30 p.m. on Wednesday, August 28, 2002 at the Sudbury Court House, Courtroom G, 155 Elm Street, Sudbury, Ontario.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

RELEASED: April 10, 2002

ANDERSON, KENNETH A.

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
KENNETH A. ANDERSON

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATION
- Proposal dated: January 11, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

KENNETH A. ANDERSON

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Kenneth A. Anderson, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: April 9, 2002

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
North York, ON, M2P 2E9

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON, M4V 1K6

FROM: Kenneth Anderson
47 Carter Crescent
Orillia, ON L3V 7S2

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereinafter the "Act") the parties to the proceeding, Kenneth Anderson (hereinafter referred to as "the Applicant"), and the Registrar, *Motor Vehicle Dealers Act* (hereinafter the "Registrar") waive the requirement of a hearing and hereby consent to an Order of the Licence Appeal Tribunal (hereinafter the "Consent Order") based on the following terms and conditions to their registrations as a motor vehicle salesperson:

- 1) The Applicant agrees that if he is criminally charged or convicted in the future, he will immediately notify his employer in writing of the charges or convictions against him and provide a copy of the notification signed by his employer to the Registrar, giving the particulars of the charges or convictions.
- 2) The Applicant agrees that if he is convicted under the Criminal Code or convicted of any industry specific offences under any Statute in the future, he will be automatically revoked.
- 3) The Applicant agrees to provide full and accurate disclosure on any applications, documents, statements or other form of communication/information provided to the Registrar or his authorized representatives regardless of previous disclosure.
- 4) The Applicant acknowledges that the Registrar is relying upon the accuracy of the disclosure provided in entering into these terms and conditions.
- 5) The Applicant agrees that he will provide written notification from his employer forthwith, stating that the Applicant has disclosed to them his criminal convictions.
- 6) The Applicant agrees not to be a partner, shareholder, officer or director of a dealership.
- 7) The Applicant agrees not to be the final signatory on any sales contracts on behalf of the dealer.
- 8) The Applicant agrees not to transfer his registration as a motor vehicle Salesperson to another dealer without having first obtained the prior written consent of the Registrar.
- 9) The Applicant agrees not to be involved in the process of buying or selling motor vehicles without the benefit of registration.
- 10) The Applicant agrees to enrol in the Ontario Motor Vehicle Industry Council Certification Course and to be responsible for all fees in relation to enrolment. The Applicant further acknowledges that enrolment in the course entitles him to a sixty (60) day conditional registration period that allows for his successful completion of the course (including passing the exam).

- 11) The Applicant agrees not to drive in test drives while he does not have a valid drivers licence.
- 12) The Applicant acknowledges and understands that his registration will not be used to buy or sell motor vehicles where the Applicant knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
- 13) The Applicant agrees that his registration will not prevent the Registrar from taking administrative action, including a proposal to revoke his registration, arising from matters that may have occurred or may occur in the future related to his financial circumstances and honesty and integrity.
- 14) The Applicant acknowledges that his registration as a motor vehicle Salesperson will not prevent the Registrar from taking legal action, including a Provincial Offences prosecution, arising from matters that may have occurred or that may occur in the future.
- 15) The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
- 16) The Applicant will provide a copy of this order to his employer forthwith.
- 17) The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
- 18) The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
- 19) The Applicant acknowledges that he has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____, this _____ day of March 2002.

(Signature) Kenneth Anderson

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Date:

Carl Compton
Registrar
Motor Vehicle Dealers Act

999 - MED - SEIZ

**Appeal under Section 50(1) of the *Highway Traffic Act*,
R.S.O. 1990, Chap. H.8 as amended, from a Decision of the
Minister of Transportation pursuant to Section 32(12)(b)(i)
of that Act.**

TO APPEAL A DOWNGRADED LICENCE

TRIBUNAL: ROSS C. BENNETT, M.D., Presiding Member

APPEARANCES: MURRAY FORBES, Counsel for the Minister of Transportation
Applicant
Counsel for the Applicant

DATE OF HEARING: March 27, 2002 Ottawa

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Minister of Transportation (the "Respondent") pursuant to section 32(12)(b)(i) of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8 ("HTA").

EXHIBITS:

- Exhibit #1 Notice of Appeal by the Applicant, dated February 8, 2002
- Exhibit #2 Notice of licence downgrading from "AZ" to a "G", dated January 30, 2001.
- Exhibit #3 Tabulated File (1-28) compiled by the Ministry.
- Exhibit #4 Letter to the Applicant from his neurologist, Physician #1, dated February 12, 2002.

FACTS:

The Applicant, a 58 year old farmer and truck driver, had his driver's licence suspended on October 7, 1999 under Section 47(1) of the *Highway Traffic Act*. The Ministry had received an unsolicited Medical Condition Report from a neurologist, Physician #2, that the Applicant had suffered a seizure on September 2, 1999. A second Report was received at the Ministry November 9, 1999 from a Physician #3 at the Ottawa General Hospital, also reporting a seizure. The Applicant's licence was later downgraded from an "AZ" to a "G" on January 30, 2001.

Physician #2 referred the Applicant to a cardiologist, Physician #4 for a Holter test, to rule out any cardiac involvement, but the examination was negative.

Physician #4, in a letter to Physician #3 (sic) dated September 19, 1999, describes what appeared to be a full-blown grand mal seizure the Applicant suffered at home, with his wife as a witness. The Applicant was taken to the Winchester Hospital and then transferred to the Ottawa General.

A skull xray was negative, but an EEG disclosed a mild intermittent slow disturbance of cerebral activity in the left temporal region. No clear epileptiform features were seen.

On October 6, 1999 a CT Scan disclosed a large left Middle Cerebral Artery Aneurysm and a small right Middle Cerebral Aneurysm. The left aneurysm was clipped on December 13, 1999. The right one was considered clinically important, but left to be followed, for any change in size. While the Applicant was in the recovery room he had two small seizures. A postoperative CT Scan on December 17, 1999 did not disclose any evidence of postoperative infarction.

An EEG on January 9, 2001, showed intermittent and at times persistent slowing of cerebral activity in the left temporal and frontotemporal area, but no evidence of seizure activity.

Physician #1, the Applicant's pre and postoperative neurologist, stated in a letter of January 22, 2001, "in his opinion the Applicant has a risk of sudden incapacitation that is higher than that of the normal population, but his risk is acceptable to be considered fit for a class G operator's licence". He recommended neurological follow-ups every 6 months and an agreement to report any changes in his neurological status during that time.

Physician #1's diagnosis, in a letter dated September 25, 2001, is that the Applicant suffered the seizure in September 1999 probably due to cortical irritation from the MCA aneurysm. There is no evidence that the right MCA aneurysm is clinically important at this time, but needs to be followed for changes in size.

In a Medical Condition Report dated August 1, 2001, Physician #1 states the seizure in September 1999, was due to an aneurysm, which was surgically repaired and he has not had

a seizure since and should not have any more.

In a letter dated September 25, 2001, Physician #1 mentions the two small seizure-like events in the recovery room, but otherwise his recovery was uneventful. He further states, "the lifetime risk of a recurrence of seizure is in the order of 8-10% given his adherence to diet and sleep hygiene. This risk is based on his seizures in pre and perioperative period, his EEG and lack of cortical damage from the original ruptured aneurysm and subsequent surgery."

"The ongoing risk of the rupture of the second aneurysm is in the order of 0.3 to 0.5 of 1% per year depending on the size of the neck. Careful monitoring with yearly angiographic information will further refine this risk."

Physician #1 also repeats in his September letter that "in his opinion this man has a risk of sudden incapacitation that is higher than that of the normal population due to two separate disease processes. Since his two conditions are not dealt with specifically by the CMA guidelines, it is my opinion, with careful monitoring and follow-up, his risk is acceptable to be considered for a class "A" licence, if he remains seizure free for two years from the perioperative period and that there be no change in size of the remaining cerebral aneurysm.'

In a letter dated February 12, 2002 (exhibit #4), Physician #1 states that in his opinion the Applicant is acceptable to be considered for a class "A" licence with the careful follow-up outlined in his previous correspondence.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffer from any mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Regulation 340/94, Section 17 and 18 states:

17. (1) Qualifications required by an applicant for a holder of a Class A, B, C, D, E or F driver's licence are that the applicant or holder,
- (a) has no history or clinical diagnosis of diabetes that requires insulin for control;
 - (b) is not taking any drug that could, in the dosage prescribed or in the dosage recommended by the manufacturer, impair his or her ability to drive a motor vehicle of the applicable class safely;
 - (c) has no established medical history of myocardial infarction, angina pectoris, coronary insufficiency or thrombosis;
 - (d) has no established medical history of heart disease including arrhythmia or of respiratory dysfunction likely to interfere with the safe driving of a motor vehicle of the applicable class;
 - (e) is not suffering from an aortic aneurysm, whether resected or not;
 - (f) is not suffering from hypertension accompanied by postural hypotension resulting in giddiness when under treatment;
 - (g) has no established medical history of loss of consciousness or awareness due to a chronic or recurring condition;
 - (h) has no established medical history of a disorder of the musculoskeletal or nervous system that may interfere with the safe driving of a motor vehicle of the applicable class;
 - (i) has no established medical history of an intractable psychotic or psychoneurotic disorder, having particular regard for sustained hostile, aggressive, paranoid, suicidal or other destructive tendencies or depression unless it is medically determined that the condition from which the person has suffered is corrected or controlled;
 - (j) has a visual acuity by Snellen Rating, with or without the aid of corrective lenses, no poorer than 20/30 in the better eye and 20/50 in the weaker eye; and
 - (k) has a horizontal visual field of at least 120 degrees in each eye as measured by confrontation tests.
- (2) An applicant for or a holder of a Class A, B, C, D, E or F driver's licence who fails to meet the qualifications referred to in clauses (1)(a) to (i) may, despite the failure, qualify for the class of licence applied for or held if he or she demonstrated the ability to drive a motor vehicle in the applicable class as safely as any person who meets those qualifications.
- (3) An applicant for or a holder of a Class D driver's licence who fails to meet the qualification referred to in clause (1)(c) may, despite the failure, qualify for that class of licence if it is medically determined that he or she has made a full recovery and there

is no established history of a second occurrence of myocardial infraction, thrombosis or recurring angina pectoris.

- (4) An applicant for or a holder of a Class B, C, E or F driver's licence whose hearing in one ear is better than in the other must be able to perceive in the better ear, with or without a hearing aid, a forced whisper at a distance of 1.5 metres or, if an audiometer is used to test the person's hearing, must not have a loss in the better ear of more than 40 decibels at 500, 1,000 and 2,000 hertz.
- 18. An applicant for or a holder of a G, G1, G2, L, M, M1, M2, or R driver's licence must have,
 - (a) in the case of a person whose vision in one eye is better than in the other, visual acuity in the better eye that is no poorer than 20/40 as measured by Snellen Rating; and
 - (b) a horizontal visual field of at least 120 degrees as measured by confrontation tests.

Section 32(12)(b)(i) states:

- 32 No person shall drive a motor vehicle on a highway unless the motor vehicle is within a class of motor vehicles in respect of which the person holds a driver's licence issued to him or her under this Act.
- (12) An applicant for a driver's licence or a person who holds a driver's licence shall submit to the examinations that are authorized by the regulations relating to this section and required by the Minister at the time and places that the Minister may require and the Minister may,
 - (b) in the case of a person who holds a driver's licence,
 - (i) impose or remove the conditions or endorsements authorized by the regulations or change the class or classes of motor vehicles in respect of which the licence is issued in accordance with the result of the examinations, or

Section 50 states:

- 50(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or Registrar.

APPLICATION OF THE LAW TO FACTS:

Section 47(1) of the *Highway Traffic Act* unquestionably empowered the Registrar of Motor

Vehicles to originally suspend the Applicant's driver's licence on October 7, 1999 on receiving two Medical Condition Reports from Drs. #2 and #3 informing the Ministry of the Applicant's seizure on September 2, 1999.

On January 30, 2001, the Applicant's driver's licence was downgraded from "AZ" to "G" under Section 32(12)(b)(i) of the *HTA*. Under that particular section, the holder of a driver's licence "shall submit to the examinations that are authorized by the regulations relating to this section and required by the Minister at the time and places that the Minister may require..." Following this, "..... the Minister may... change the class of motor vehicle in respect of which the licence is issued in accordance with the results of the examinations". The downgrade of the licence was in accordance with the basic medical standards found in Regulation 340/94 under the *HTA*. The Registrar relied on section 17(1)(g)(h) of that Regulation which states that:

" the applicant for or the holder of a Class A, B, C, D, E or F driver's licence are that the applicant or holder has no established medical history of loss of consciousness or awareness due to a chronic or recurring condition and has no established medical history of the musculoskeletal or nervous system that may interfere with the safe driving of a motor vehicle of the applicable class."

The medical evidence presented by the Applicant's counsel does not support a downgrade, but instead supports the Applicant's retention of his "A" licence. The Applicant's primary neurologist, Physician #1, maintains in two separate letters, sixteen months apart that the Applicant is acceptable to be considered for a class "A" licence. Physician #1 also signed a Medical Waiver, which stated "I have considered the medical condition of the individual taking into account the stability of his condition, physical, mental and emotional status and the stresses associated with driving a large truck It is my opinion that this individual is medically fit and able to function normally."

Counsel for the Applicant disputed the allegation that the Applicant had a chronic or recurring condition, in that he only had a single seizure and the cause was eliminated by surgery. The two events in the recovery room were described by Physician #1 to be seizure- like.

The Tribunal believes that the attending neurologist, who had an in-depth knowledge of the Applicant's medical history and progress, is more qualified to determine his present status and predict the future than the MAC, who only have a few medical reports and most of them are Physician #1's, to make a judgement

The Applicant's work involves driving a dump truck and farm vehicles in a rural area. The Tribunal found him to be a quiet, sensible type of person, who has a clean driving and work record.

The Tribunal finds that the evidence presented does not support the Respondent's position, but supports the Applicant's position that he should retain his Class "A" licence and not be downgraded to Class "G" Licence.

DECISION:

Upon the application by the Applicant to appeal the decision dated January 10, 2001 of the Minister to downgrade his driver's licence pursuant to Section 32(12)(b)(i) of the *Highway Traffic Act*, and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Minister to change the Applicant's class of driver's licence from class "A" be set aside.

LICENCE APPEAL TRIBUNAL

Ross C. Bennett M.D., Presiding Member

RELEASED: April 3, 2002

HIGHWAY TRAFFIC ACT
R.S.O. 1990, CHAP. H.8 AS AMENDED, SECTION 50(1)

IN THE MATTER of an application by the
Applicant to appeal the decision of the Minister of
Transportation pursuant to section 32(12)(b)(i) of
the *Highway Traffic Act*;

AND IN THE MATTER of

APPLICANT

APPLICANT

and

MINISTER OF TRANSPORTATION

RESPONDENT

ADJOURNMENT

WHEREAS a written hearing in the above matter was scheduled to be held on Friday, April 5, 2002, by the Tribunal;

AND WHEREAS the Applicant requested an adjournment of the hearing to obtain additional medical information from his cardiologist;

TAKE NOTICE, upon consent of all parties, the Tribunal Orders:

- (1) this matter is adjourned;
- (2) the Applicant's submissions are due May 28, 2002;
- (3) the Respondent's response is due June 7, 2002;
- (4) the Applicant's reply is due June 18, 2002;
- (5) the written appeal shall be heard on Wednesday, June 19, 2002 by this Tribunal.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

RELEASED: April 5, 2002

T & R AUTO SERVICE CENTRE INC. AND NASEEM JAMIL

PREHEARING

T & R AUTO SERVICE CENTRE INC. AND NASEEM JAMIL

APPEAL FROM A NOTICE OF THE DIRECTOR OF VEHICLE INSPECTION STANDARDS
ISSUED PURSUANT TO THE CLAUSES 91(8) (a), (b) and (e) AND CLAUSES 93(a),
(b) and (c) OF THE HIGHWAY TRAFFIC ACT R.S.O.1990, CHAPTER H.8 AS
AMENDED

TO REVOKE T & R AUTO SERVICE CENTRE INC. LICENCE AS A MOTOR
VEHICLE INSPECTION STATION AND NASEEM JAMIL'S REGISTRATION AS A
MOTOR VEHICLE INSPECTION MECHANIC

TRIBUNAL: ALAN HOLBROOK, Member

APPEARANCES:

DAVID M. CLANCY, Representative for the Applicant
NASEEM JAMIL, Applicant
PATRICK MOORE, Counsel representing the Director of Vehicle
Inspection Standards

DATE OF
PRE-HEARING: March 27, 2002

ORDER

Following attendances, on March 27, 2002, at a pre-hearing before this Tribunal, David M. Clancy representing T & R Auto Service Inc. and Jamil Naseem, Jamil Naseem (the Applicants) and Patrick Moore, Counsel on behalf of the Director of Vehicle Inspection Standards ("the Director");

The Tribunal makes the following Order respecting the hearing scheduled to commence at the Cindy Jones Verbatim Reporting Service, 1 King Street, West, Suite 1504, Hamilton, Ontario at 10:00 a.m. on Thursday, July 4, 2002 and to continue if necessary on Friday, July, 5, 2002

1. The parties to the hearing are:

- a) T & R Auto Service Inc.
- b) Jamil Naseem (the Applicant)
- c) The Director Of Motor Vehicle Inspection Standards

2. It was determined that the filing dates with the Tribunal, of submissions and all documents to be used in the hearing by both parties, would occur by June 18, 2002, at least 10 days prior to the hearing with the disclosure of expert's reports complying with the additional requirements of Rule 6.3 of the Tribunal's Rules of Practice. Both parties will file five copies with the Tribunal and deliver one copy to all parties.
3. The parties present at the pre-hearing agreed that there is no resolution of the issues raised in the Director's Notice of Proposal.
4. The Applicant will call three witnesses; Mr. Naseem Jamil, one other witness and an expert witness. The nature of their testimony and names will be included with submissions 10 days prior to the hearing.
5. The Director will call 5 witnesses; M.T.O. Officers Horton, Grimaldi, Greybar, Smith, and former M.T.O. Officer Rutherford. All five are licenced mechanics and some will be called as expert witnesses. They will give evidence on the issues stated in the Director's Notice of Proposal.
6. The Applicants intend to challenge the validity of allegations, made by the Director, in which no convictions resulted and whether or not they are relevant or prejudicial to the Applicants at the Hearing.
7. The Applicant intends to establish that the Director's records showing allegations brought against other licencees that were associated with the Applicants in the past are not relevant to this hearing.

LICENCE APPEAL TRIBUNAL

Alan Holbrook, Member

RELEASED: April 2, 2002

1029 - MED - CARD

Appeal under section 50(1) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Minister pursuant to section 32(12)(b)(i) of that Act.

TO CHANGE THE CLASS OR CLASSES OF MOTOR VEHICLE IN RESPECT OF WHICH THE LICENCE WAS ISSUED

TRIBUNAL: ROY MELVIN, M.D., Presiding Member

APPEARANCES: JOHN PETROSONIAK, Counsel for the Minister
Applicant, unrepresented

DATE OF HEARING: March 28, 2002 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Minister (the "Respondent") pursuant to section 32(12)(b)(i) of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8 ("HTA").

FACTS:

The Applicant, is a 62-year-old truck driver with a 30-year record of driving various sized vehicles without mishap.

In 1995, he suffered a myocardial infarct and was admitted to hospital. He was treated by coronary angioplasty and made a complete recovery. A medical report to the Ministry of Transportation ("Ministry") in 1996 revealed this history of cardiovascular disease. On the basis of regulation 340/94 section 17(1)(c) of the *Highway Traffic Act*, his ability to maintain a

class "A" driver's licence came into question. A medical waiver certificate was submitted by his cardiologist in February 1997 stating that he was asymptomatic, taking maintenance medication and had no alarming physical or laboratory findings. The Ministry accepted this waiver and has apparently renewed this acceptance until the latest medical report from his current cardiologist Physician #1 of Barrie, Ontario on September 2001. This reveals a positive stress EKG by way of chest discomfort at the five minute mark with slight S.T. depression on the EKG tracing.

Physician #1 reports that this indicates some degree of progression of his coronary disease but clinically he remains stable and asymptomatic on medication. On January 2, 2002 the Medical Advisory Committee at the Ministry of Transportation denied this waiver but would reconsider pending further medical reports to demonstrate improvement. He was granted a "G" licence instead.

ISSUES:

Should the decision of the Minister to change the class or class of motor vehicles in respect of which the licence is issued in accordance with the result of the examination be varied, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffer from any mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Regulation 340/94, Section 17 and 18 states:

- 17. (1) Qualifications required by an applicant for a holder of a Class A, B, C, D, E or F driver's licence are that the applicant or holder,
 - (a) has no history or clinical diagnosis of diabetes that requires insulin for control;
 - (b) is not taking any drug that could, in the dosage prescribed or in the dosage recommended by the manufacturer, impair his or her ability to drive a motor vehicle of the

applicable class safely;

- (c) has no established medical history of myocardial infarction, angina pectoris, coronary insufficiency or thrombosis;
 - (d) has no established medical history of heart disease including arrhythmia or of respiratory dysfunction likely to interfere with the safe driving of a motor vehicle of the applicable class;
 - (e) is not suffering from an aortic aneurysm, whether resected or not;
 - (f) is not suffering from hypertension accompanied by postural hypotension resulting in giddiness when under treatment;
 - (g) has no established medical history of loss of consciousness or awareness due to a chronic or recurring condition;
 - (h) has no established medical history of a disorder of the musculoskeletal or nervous system that may interfere with the safe driving of a motor vehicle of the applicable class;
 - (i) has no established medical history of an intractable psychotic or psychoneurotic disorder, having particular regard for sustained hostile, aggressive, paranoid, suicidal or other destructive tendencies or depression unless it is medically determined that the condition from which the person has suffered is corrected or controlled;
 - (j) has a visual acuity by Snellen Rating, with or without the aid of corrective lenses, no poorer than 20/30 in the better eye and 20/50 in the weaker eye; and
 - (k) has a horizontal visual field of at least 120 degrees in each eye as measured by confrontation tests.
- (2) An applicant for or a holder of a Class A, B, C, D, E or F driver's licence who fails to meet the qualifications referred to in clauses (1)(a) to (i) may, despite the failure, qualify for the class of licence applied for or held if he or she demonstrated the ability to drive a motor vehicle in the applicable class as safely as any person who meets those qualifications.
- (3) An applicant for or a holder of a Class D driver's licence who fails to meet the qualification referred to in clause (1)(c) may, despite the failure, qualify for that class of licence if it is medically determined that he or she has made a full recovery and there is no established history of a second occurrence of myocardial infarction, thrombosis or recurring angina pectoris.
- (4) An applicant for or a holder of a Class B, C, E or F driver's licence whose hearing in one ear is better than in the other must be able to perceive in the better ear, with or without a hearing aid, a forced whisper at a distance of 1.5 metres or, if an audiometer is used to test the person's hearing, must not have a loss in the better ear of more than 40 decibels at 500, 1,000 and 2,000 hertz.

18. An applicant for or a holder of a G, G1, G2, L, M, M1, M2, or R driver's licence must have,
- (a) in the case of a person whose vision in one eye is better than in the other, visual acuity in the better eye that is no poorer than 20/40 as measured by Snellen Rating; and
 - (b) a horizontal visual field of at least 120 degrees as measured by confrontation tests.

Section 32(12)(b)(i) states:

- 32 No person shall drive a motor vehicle on a highway unless the motor vehicle is within a class of motor vehicles in respect of which the person holds a driver's licence issued to him or her under this Act.
- (12) An applicant for a driver's licence or a person who holds a driver's licence shall submit to the examinations that are authorized by the regulations relating to this section and required by the Minister at the time and places that the Minister may require and the Minister may,
- (b) in the case of a person who holds a driver's licence,
 - (i) impose or remove the conditions or endorsements authorized by the regulations or change the class or classes of motor vehicles in respect of which the licence is issued in accordance with the result of the examinations, or

Section 50 states:

- 50(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.
- (3) The Tribunal may confirm, modify or set aside the decision of the Minister or Registrar.

APPLICATION OF THE LAW TO FACTS:

The Ministry's decision is based on Regulation 340/94 section 17(1)(c) to downgrade the Applicant's driver's licence from "A" to "G" because of his history of myocardial disease. However, regulation 340/94 section 17(2) allows for the Applicant to hold his class "A" licence if he demonstrates the ability to drive a motor vehicle of this class as safely as any person who meets the qualifications.

The Applicant has demonstrated this ability. His cardiologist is of the opinion that his cardiac condition is stable and would approve of a medical waiver. It would appear from his report that

the likelihood of sudden incapacitation significant enough to cause loss of vehicle control is remote. Regulation 340/94 section 14(a) does not apply in that the disability is not likely to significantly interfere with his ability to drive a motor vehicle of the applicable class safely.

DECISION:

Upon the application by the "Applicant to appeal the decision of the Minister ("Respondent") to change the class or classes of motor vehicle in respect of which the licence was issued pursuant to Section 32(12)(b)(i) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Respondent and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Minister to change the Applicant's class of driver's licence from class "A" be set aside.

LICENCE APPEAL TRIBUNAL

Roy Melvin, M.D.
Presiding Member

RELEASED: April 3, 2002

1033- ADLS - NOMC

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: JEFFREY LEE, D.C.
Presiding Member

APPEARANCES: PATRICK MOORE
Counsel for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF HEARING: March 21, 2002 Toronto

DECISION

A hearing was held on March 21, 2002, at Toronto, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Jeffrey Lee, D.C.
Presiding Member

RELEASED: March 25, 2002

1033- ADLS - NOMC

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: JEFFREY LEE, D.C.
Presiding Member

APPEARANCES: PATRICK MOORE
Counsel for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF
HEARING: March 21, 2002

DECISION
RELEASED: March 25, 2002 Toronto

REASONS FOR DECISION

A hearing was held on March 21, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on March 25, 2002, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated March 4, 2002, and was received by the Tribunal on March 4, 2002, together with the prescribed fee of \$100.00, paid by cash.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

It was noted that Mr. Moore, counsel for the Respondent, objected to the statements of the Applicant that the Applicant was only prepared to answer questions relating to his health and nothing else that had to do with the circumstances surrounding the incident which resulted in the laying of the charges of failing to provide a breath or blood sample upon request. The Applicant, stated that this position was on the advice of his solicitor. The objection was so noted and the hearing proceeded. The Applicant asked the Tribunal to allow further medical information into the record. There was objection from the counsel for the Respondent. Mr. Moore also requested that the true and certified copies of the following documents, namely the Notice to Registrar, Driver vehicle record and driver's licence abstract be added to the MTO submissions. There was no objection from the Applicant and the documents were added.

Submissions of Written Material

By the Applicant:

a)	Exhibit # 2a	Notice of Appeal Form received by the Tribunal, March 4, 2002
b)	Exhibit # 2B	Initial Consultation form signed by Physician #1, dated February 7, 2000

- c) Exhibit # 2C Note on Prescription Pad of Physician #1, unsigned & undated
- d) Exhibit # 2D Medical Letter from Physician #2 to Physician #3, dated May 17, 2000
- e) Exhibit #2E Surgical Final Report, Printed "26 Sep 1997"
- f) Exhibit #2F Record of Operation dated "24 Nov 1997"
- g) Exhibit #2G Medical Letter from Physician #4 to Physician #5, dated September 28, 2000
- h) Exhibit # 2H Letter from Physician #5 to Physician #3

By the Respondent:

- a) Exhibit # 3 MTO Submissions, 18 pages

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath because he was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

- 50.1(1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
 - (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
 - (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

- 15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
 - (a) the name, telephone number and address, with the postal code, of the medical practitioner;
 - (b) the name, date of birth and address of the person who is the subject of the report;
 - (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

The Applicant was sworn and took the stand. He stated that he was unable to provide a breath sample because of a medical reason. The Applicant testified that he suffered from a chronic throat problem and had surgery in 1997 because of this problem. The Applicant stated "because of my medical condition, I did not blow, I was afraid that I would get something from the machine." When asked if he even attempted to provide a sample, the Applicant responded "no". The Applicant stated that the medical notes he provided indicated that he was not in the best of health and suffered from chronic throat problems.

The Applicant was asked why the back of the Notice of Appeal was left blank. This side would have to have been completed by his physician to supply information in support of his appeal.

The Applicant replied that he did not have time to get it filled in and had only been able to get copies of the medical letters provided with his Notice of Appeal. On cross-examination, the Applicant was asked if he told either officers that he had a fear of contracting AIDS from the mouth piece. The Applicant responded that he told both police officers that he suffered from throat problems and that one of the officers, Officer #1 saw a note in his documents that indicated that the Applicant also suffered from arthritis. The Applicant was asked how many times the demand for a breath sample was made. The Applicant responded, "one time". The Applicant responded that he was not going to provide a sample as he "needed more information about the machine and the mouth piece and since neither of the officers, were doctors, he was not going to blow into the machine." The Applicant proceeded to go through the documents which were entered as exhibits. The Tribunal asked that the Applicant to indicate where on these "letters" the physician(s) had indicated how his "condition" would have precluded him from providing a breath sample. After looking through the documents, the Applicant was not able to answer the question.

The Applicant had nothing further to add and was excused from the stand.

Officer #2 was called to the stand and was sworn. She testified that on the 16th of February 2002, she was working with her partner, Officer #1, when they received a call about a possible impaired driver. The vehicle was described as a white GMC van bearing Ontario licence plate number XXXXX. The vehicle was spotted and Officers #1 and #2 proceeded to observe the vehicle. According to Officer #2, she observed the vehicle weaving to the shoulder and onto the roadway again. The subject vehicle was stopped. Officer #1 approached the driver's side of the vehicle and asked to see the driver's documents. Officer #1 told Officer #2 that he detected an odor of an alcoholic beverage on the driver's breath. Officer #2 ordered another vehicle to the scene which would be able to provide the approved road side screening device. Officer #2 testified that she also detected the odor of an alcoholic beverage when she spoke with the driver. The driver was asked to exit his vehicle and sit in the rear of the police cruiser which he did. Officer #2 read the demand for breath from her notebook. The Applicant stated that he understood what she was demanding. However, the Applicant told Officer #2 "I know the AIDS you can get, I know because I am a master plumber". Officer #2 indicated to the Applicant that the mouthpieces were in sealed bags and had never been used before. The Applicant responded, "I don't care, are you a doctor?" The Applicant was cautioned about not providing a breath sample and that if he continued to refuse, he would be charged under Section 254 of the *Criminal Code* with failure to provide. According to Officer #2, she cautioned the Applicant on three separate occasions. When told he was finally going to be charged, the Applicant responded, "do whatever you want". According to Officer #2, the Applicant, again, told her "I told you, I am not blowing into anything!" At approximately 3:48 a.m., the Applicant was arrested for refusal to provide a breath sample. The forms were prepared and the Applicant refused to sign them. The officer asked if the Applicant wished to speak with duty counsel. The Applicant did speak with counsel and then signed the papers. The Applicant was subsequently released. Officer #2 had nothing further to add and was excused from the stand.

Officer #1, badge number xxx took the stand and was sworn. Officer #1's testimony confirmed the testimony of Officer #2. Both Officer #2 and Officer #1 both testified that the Applicant did not exhibit any medical condition that would have required immediate attention. Both officers have stated that they are not medical doctors but are trained observers and are trained in first aid and would be able to recognize a situation that would require emergency treatment. Officer #1 was excused from the stand.

The Tribunal accepts the evidence of Officer #2 and Officer #1.

The evidence presented by the Applicant is quite clear. He simply refused to provide a sample. His reason was that he was afraid he would contract AIDS.

In an appeal of this nature, the onus is on the Applicant to substantiate his position. The documents submitted by the Applicant do not substantiate his claim to the effect that he had a present medical condition which precluded him from providing a breath or blood sample.

The Notice of Appeal form (Exhibit # 2a) is very specific in the respect to the information required to be provided from the Applicant's medical practitioner. This form was not filled out. When asked why, the Applicant responded, "I did not have time to get it filled out". The other medical evidence submitted by the Applicant, (Exhibits b-h) fail to meet the specific requirements of Section 15(1) of Regulation 574 of the *Highway Traffic Act*.

The Tribunal can attach no weight to any of the "reports" submitted. None of the "reports" submitted by the Applicant sheds any light on a purported medical condition which is the basis of his appeal.

APPLICATION OF THE LAW TO FACTS:

After reviewing the foregoing facts, the Tribunal finds that the Applicant did not relate his medical condition to Regulation 574 and Section 50 (1)(2)(b) of the *Highway Traffic Act*. The onus pursuant to Section 13 of Regulation 574 to establish the merit of the appeal is upon the Applicant.

The parties do not dispute that the Applicant refused to give a breath sample when requested. The Applicant argues that he suffers from a medical condition which prevented him from providing a breath sample. The documents submitted by the Applicant do not substantiate his claim to the effect that he had a present medical condition which precluded him from providing a breath sample.

The Tribunal can only conclude, based on the evidence presented, that the actions taken by the Applicant were not those of someone who was unable to provide a sample, but rather the actions of someone who was unwilling to provide the sample because of the negative

consequences of providing that sample.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated February 16th, 2002 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Jeffrey Lee, D.C.
Presiding Member

RELEASED: April 2, 2002

1037 - ADLS - NOMC

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: JEFFREY LEE, D.C.
Presiding Member

APPEARANCES: DAVID MILNER
Counsel for the Registrar of Motor Vehicles

Applicant
Counsel for the Applicant

DATE OF HEARING: March 27, 2002 Toronto

DECISION

A hearing was held on March 27, 2002, at Toronto, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Jeffrey Lee, D.C.
Presiding Member

RELEASED: March 28, 2002

1037 - ADLS - NOMC

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: JEFFREY LEE, D.C.
Presiding Member

APPEARANCES: DAVID MILNER, Representative for the Registrar of Motor Vehicles
Solicitor for Applicant

DATE OF
HEARING: March 27, 2002

DECISION
RELEASED: March 28, 2002 Toronto

REASONS FOR DECISION

A hearing was held on March 27, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on March 28, 2002, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that her appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated March 6, 2002, and was received by the Tribunal on March 8, 2002, together with the prescribed fee of \$100.00, paid by cash.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

Counsel for the Applicant provided an enlarged copy of a letter written by Physician #1. This letter was already in the file and simply added to the documents to be entered. There were no other preliminary matters and the hearing proceeded.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice to Registrar, dated February 9, 2002
- b) Exhibit # 2 Notice of Appeal
- c) Exhibit # 4 Prescription Receipt, dated February 13, 2002

By the Respondent:

- a) Exhibit # 3 MTO Submissions

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath because she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

- 50.1(1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
 - (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
 - (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

- 15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
 - (a) the name, telephone number and address, with the postal code, of the medical practitioner;
 - (b) the name, date of birth and address of the person who is the subject of the report;
 - (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon

the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;

- (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

The Applicant was sworn and took the stand. The Applicant testified that on the evening of February 8, 2002, she and two of her friends went to Berlin Night Club located at Yonge Street and Sheppard Avenue, Toronto, arriving at approximately 10:00 p.m. She testified that she consumed only one drink, a Singapore Sling, and this was at approximately 10:05 p.m. She testified that she had nothing further to drink that evening and left the nightclub at about 1:30 a.m.

While driving on Eglinton Avenue East, the Applicant testified that she came upon a R.I.D.E. spot check. The officer, identified as Officer #1, approached the Applicant's vehicle and asked her if she had anything of an alcoholic nature to drink that evening. The Applicant testified that she responded "yes". The officer asked her to come into the booth and blow into a machine. The officer demonstrated how to provide the breath sample and provided a new mouthpiece which was placed in the instrument to which the Applicant was instructed to continue to blow until told to stop. The attempt did not provide a reading. According to the Applicant, she tried to blow many times and 'blew until she gagged'. The Applicant testified that she has had no prior experience with the device and has had trouble in her tonsils. She testified that she has had trouble with her tonsils since the age of 20. She is now 46 years old, so for the past 26 years she has had "trouble with her tonsils", whereby she claims that she requires antibiotics every three months. The Applicant testified that she did not inform the officer of her throat problems. The Applicant testified that at the beginning of the "tests" she was not experiencing any problems with her throat but as the testing continued, she began to develop soreness in her throat and began choking.

The Applicant testified that she has never seen a specialist, only Physician #1 for her throat

condition. She also testified that she saw Physician #1 on Monday, February 11, 2002 and had her prescription filled on February 13, 2002. The Applicant had nothing further to add and was excused from the stand.

The counsel for the Applicant, called Witness #1 to the stand. Witness #1 is the son of the Applicant. He is 27 years of age. He testified that he saw his mother the day following the incident and recalls that she was very distraught and that she could barely talk to him. Witness #1 testified that he observed there to be "puffiness" around her throat and that she could barely speak." He claims that he has never seen her like this before. He had nothing further to add and was excused from the stand.

Counsel for the Respondent called Officer #1 to the stand. She testified that on the evening of February 8, 2002, she was working a R.I.D.E. detail set up on Eglinton Avenue at the D.V.P. At approximately 2:13 a.m. on February 9, 2002, she approached a red Dodge vehicle which had come upon the spot-check. Officer #1 asked the driver of the vehicle, who was identified as the Applicant, if she had anything to drink that evening. Officer #1 notes that the Applicant responded and answered "two drinks, about a half hour ago." At 2:15 a.m., Officer #1 read the demand for a breath sample from the back of her notebook.

The Applicant accompanied the officer and proceeded to attempt to provide a sample of her breath. According to Officer #1, she detected the odour of an alcoholic beverage on her breath yet did not believe that the Applicant was in fact impaired. According to Officer #1, the Applicant only blew for a short period of time, providing only puff blows to a maximum of three to four seconds. The officer did comment that the Applicant did in fact create a tight seal with her lips around the mouthpiece, however she would not provide a breath of sufficient length to obtain a satisfactory reading.

The officer testified that at no time did the Applicant exhibit any shortness of breath, gasping for air or choking. At one point, the Applicant stated " I am choking" however, according to the officer, the Applicant did not exhibit any sounds or actions of someone choking. The officer stated that she is not a medical doctor but that she is a trained observer and has received first aid training. In her professional capacity as a police officer, Officer #1 felt that if someone was in need of medical attention, she would have called an ambulance to the scene and provided prompt attention to that individual, however this was not the case in this instance. The officer had nothing further to add and was excused from the stand.

The Tribunal accepts the evidence of Officer #1. The Tribunal found the evidence presented by the Applicant was disjointed with respect to her previous medical history and alleged treatment, which were not substantiated by the medical documentation submitted for review. The Tribunal finds that the Applicant's testimony lacks credibility.

APPLICATION OF THE LAW TO FACTS:

In an appeal of this kind, the onus is upon the Applicant to substantiate her position. The documents submitted by the Applicant do not substantiate her claim that she had a medical condition at the time the demand for breath was made which precluded her from providing a breath sample.

The report from Physician #1, the Applicant's medical practitioner, fails to meet the specific requirements of section 15(1) of Regulation 574 of the *Highway Traffic Act* in the following respects.

Physician #1 does not provide any history with regards to the Applicant suffering from a chronic throat involvement. In fact, he states that the Applicant on the 11th of February complained of sore throat for two days and had a husky voice. Physician #1 further states that on examination the Applicant had enlarged red tonsils and swollen glands in her neck. She was treated with antibiotics. Physician #1 states that "this is a painful condition and could certainly diminish her ability to blow hard in a tube." This is a statement only of a possibility, and at no time was there a question as to the force of the blow being provided by the Applicant but only that her attempts were not of a long enough duration to provide an adequate sample. Physician #1 has not provided any history of this "condition" as described by the Applicant that her "condition" is chronic in nature and that she has had numerous courses of antibiotics as indicated by the Applicant. Physician #1 has not indicated that he has referred her to a specialist for further testing nor has he indicated how her condition, other than to state that it could be painful, would have precluded her from providing a sample of breath when requested by the police officer.

The report has failed to meet the requirements of Section 15(1), and the Tribunal after careful review attaches no weight to this report.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated February 9, 2002 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Jeffrey Lee, D.C.,
Presiding Member

RELEASED: April 5, 2002

1040 - ADLS - ASTHMA

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: PATRICK MOORE,
Counsel for the Registrar of Motor Vehicles

Applicant
Counsel for the Applicant

DATE OF HEARING: March 27, 2002
Hamilton

DECISION

A hearing was held on March 27, 2002, at Hamilton, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.
Presiding Member

RELEASED: March 28, 2002

1040 - ADLS - ASTHMA

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: PATRICK MOORE
Counsel for the Registrar of Motor Vehicles
Applicant
Counsel for Applicant

DATE OF
HEARING: March 27, 2002

DECISION
RELEASED: March 28, 2002

Hamilton

REASONS FOR DECISION

A hearing was held on March 27, 2002, at Hamilton, Ontario, to consider appeal of the Applicant pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on March 28, 2002, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was undated, and was received by the Tribunal on March 11, 2002, together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason.

Preliminary Matters

There were no preliminary matters in dispute between the parties and the hearing proceeded.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice to Registrar dated February 17, 2002
- b) Exhibit # 2 Notice Of Appeal Form – 9 pages – received March 11, 2002

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath because he was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

- 50.1(1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
- (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
- (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

- 15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
- (a) the name, telephone number and address, with the postal code, of the medical practitioner;
- (b) the name, date of birth and address of the person who is the subject of the report;
- (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
- (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
- (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
- (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

The Applicant's Notice of Appeal states that the Applicant's driver's licence was suspended "Feb 17/02". (Exhibit # 2)

Applicant's Evidence

Page two of the Applicant's Notice of Appeal is blank.

The Applicant introduced two letters from his family physician of eight months, Physician #1 of the Aboriginal Health Centre.

The first letter, dated February 27th, 2002 states that the "...patient was seen on Wednesday, February 27th, 2002". Under the heading "Additional Notes", Physician #1 explains that the Applicant: "...has been and is being treated for reactive airway disease ...prescribed inhalers ...recently ...exacerbation of ...symptoms...".

A second letter dated March 6th, 2002 repeats the comments in the previous note, expanding that Physician #1 has known the Applicant "...for 8 months..."

At the hearing, the Applicant was represented by Counsel.

In examination-in-chief, under questioning from his counsel, the Applicant testified that his father had "...*died of a heart attack February 15th ...*". Prior to his father's death the Applicant lived with his parents. He has continued to reside with his mother. She is having a hard time coping with the death of her husband, and is not able to get around on her own because she is legally blind.

In his testimony about the events that led up to the demand for the breath sample, the Applicant told the Tribunal that on the day in question, February 17th, he picked up his sister, whom he "...*had not seen in eighteen years...*", at the train station. The Applicant continued, testifying as follows: "...*it wasn't exactly the reunion ...wanted ...arrived at ...house, ...mother broke, severely ...sister was very upset, the two of them being upset, I got very upset ...left to get cigarettes at the gas station...*". Being asked, by his counsel, how the emotion was demonstrated, the Applicant replied: "*Yeah, we were all crying...*"

The Applicant affirmed that during the day and up to the time he went to the gas station to buy cigarettes he had nothing of an alcoholic nature to drink. In the words of his counsel: "...no

wine, beer or hard liquor, like whiskey...".

When he came out of the gas station, the Applicant was approached by two police cruisers and subsequently demanded to provide a breath sample.

In five attempts, the Applicant was unable to blow hard enough for the machine to register. The Applicant believes that he was unable to blow adequately into the machine due to "...*asthma...*". The officers asked and were informed that the Applicant was asthmatic.

The Applicant was agreeable to being taken to the police station, but the suggestion was not followed up. No request for a blood sample was made after the Applicant told the officers that he had an asthmatic condition.

The Applicant confirmed that he requires medication for the condition and has been on "Flavolent" for about five years.

In cross-examination, by the Respondent's Counsel, the Applicant reiterated his previous testimony and emphasized that he had not been concerned about what would happen if he were to provide a proper sample.

Attempting to answer the Respondent's Counsel's question of how "reactive airway disease" was connected to his asthma, the Applicant explained that "...*every once in a while ...trouble breathing ...lungs get very tight...*". The Applicant added that he must take his medication on a regular basis, two or three times daily.

The Applicant denied uttering the words "*I'm screwed either way*", as suggested by the Respondent's counsel.

Other than the two letters submitted from Physician #1, the Applicant has no other medical reports.

The Applicant did not request medical attention at the site of the breathalyzer session, nor did he seek medical attention until "...*a few days later...*".

Prior to closing remarks, the Tribunal asked the Applicant's solicitor if he was aware of the reason the Applicant's physician had not completed page 2 of the Notice of Appeal. Applicant's Counsel replied that not having spoken to the physician, himself, he only could assume that the medical report provided in Physician #1's letters was "...*in lieu of...*" page 2. Applicant's Counsel elucidated that Physician #1 was "...*asked ...for a second letter to comply with the requirements of the section as to how long ...had been a patient.*" of Physician #1.

Respondent's Evidence

The Respondent provided no written submissions for the hearing.

The Respondent's Counsel, called Officer #1, Badge number _____, of the Brantford Police Services as a witness at the hearing.

The Applicant's solicitor objected to Officer #1 using his notes to refresh his memory, on the grounds that the notes were not available to him, as part of the disclosure mandated by the Tribunal's procedure. Given the fact that the Constable's notes served to contradict the Applicant's recollection of events, Applicant's Counsel contended that he would have liked the opportunity to review the notes prior to the hearing and *"...make independent investigations..."*.

Mr. Moore, the Respondent's Counsel, quoted Section 6.3 of the Rules of Practice of the Tribunal and commented that their interpretation and application within the confines of the Tribunal is less stringent than in a court of law. The Tribunal has traditionally required only the disclosure of documents entered into evidence. In this case, the notes are only a means to refresh Officer #1's memory. The Registrar had no intention to enter Officer #1's notes as an exhibit.

The Tribunal noted that it is the procedure of this Tribunal to allow reference to the notes, and since the notes were not being entered as an exhibit, they would be allowed. The Tribunal asked Applicant's Counsel if he would like to take a half hour recess to review the notes. As, in fact, Officer #1's notes had been given to Applicant's Counsel, prior to the hearing, Applicant's Counsel, having made his objection noted, was agreeable to proceeding.

Referring to his notes to refresh his memory Officer #1 attested to the events that led to the demand for the breath sample and to the suspension.

While on patrol, Officer #1 received a call that the Applicant had been reported impaired, by the gas station attendant.

After the routine requirements were completed, the formal request was read, and the Applicant was given instructions on how to use the roadside-screening device to provide a breath sample.

The Applicant was given five opportunities to provide an adequate breath sample. In his first attempt, the Applicant *"...was providing a sufficient air stream to sound the device the air stopped at some point for whatever reason ...approximately one second..."*

Officer #1 confirmed, *"...each blow was exactly the same..."*. As to whether the Applicant offered any reason for not being able to provide a breath sample, Officer #1 noted that the Applicant stated: "asthma".

Officer #1 did not proffer his own opinion, as to possible reasons for the Applicant's failure to provide a breath sample as, not being a qualified breath technician, it was deemed that he is not an expert on breath samples.

Regarding the Applicant's well being, Officer #1 noted: "...he became ...agitated and slightly uncooperative but in regards to his asthma ...nothing I can indicate..."

At one point during the breath sample test session, Officer #1 recorded that during a brief interchange between himself and the Applicant, the Applicant stated: "I'm screwed either way".

The Applicant's counsel challenged the relevancy of asking Officer #1 to offer his understanding of the Applicant's comment. The Respondent's counsel responded that the relevance was in establishing "...whether or not there was actually a genuine attempt to provide a breath sample, and if not, that would detract from the idea that there was a medical problem...". After clarifying his rationale, Mr. Moore conceded that the "...words speak for themselves...". Rather than objecting, Mr. Moore left the issue to the Tribunal to assess the weight that would be given to the statement.

Officer #1 testified that the Applicant never overtly refused to provide a breath sample, but did ask to be taken to the station. Officer #1 verified with his Superior and ascertained that there was no necessity to comply with the Applicant's request.

The Applicant's counsel cross-examined Officer #1 on his use of the word "fumbled", and the fact that Officer #1 testified that he told the Applicant "...to keep going, keep going, keep going...". The Applicant's counsel pointed out that neither comment is mentioned in Officer #1's notes. Officer #1 replied that he was testifying from recollection.

Officer #1 was asked about the procedure of taking someone back to the station and of obtaining a blood sample from an individual. Officer #1 declared only individuals who failed the roadside test were taken back to the station for a second test. Regarding the blood samples, Officer #1 admitted to having no such experience.

Officer #1 asserted that he did not notice any difference in the Applicant's appearance occurring throughout the breath sample testing session.

The Applicant's counsel questioned Officer #1's testimony regarding the smell of alcohol. The Applicant's counsel inferred the possibility that smell of alcohol could have been emanating from the other officer in the vehicle. Officer #1 retorted that he was in close enough proximity to the Applicant to be able to state categorically "...the alcohol odour was coming from The Applicant..."

In answer to the specific question as to why Officer #1 did not transport the Applicant to the station for another sample, Officer #1 replied that he "...did not have the authority as it is not

procedure...".

As asked, by the Applicant's counsel Officer #1 provided the name of his supervisor and other officer in the vehicle, and agreed that they both made notes at the time, which will be used at the trial "...if the Crown so desires...".

In re-direct, the Respondent's counsel asked Officer #1 to differentiate between the type of results obtainable from a road side screening device and those of a breathalyzer device. Officer #1 explained that the reading available from a roadside-screening device is "Fail, Warning, or Pass", where as a breathalyzer device provides an accurate reading of the level of alcohol in the blood.

Officer #1 emphasized his previous testimony that he was not aware of any procedure requiring an individual to be taken for a breathalyzer test in the event of failure to provide a sample at the roadside.

Counsels' Closing Remarks

In closing, the Applicant's counsel noted that it was clearly demonstrated to the Tribunal that the Applicant did not wilfully refuse to provide a sample.

The Applicant tried to establish in good faith that he has a medical condition that prevented him from providing "...*not the sample itself, he was able to provide a sample, but a long enough sample to register in the machine...*"

The Applicant has brought forth two letters from his physician to confirm his testimony that he has a diagnosed asthma condition and that he requires the use of an inhaler.

Applicant's Counsel also alluded to the Applicant's motivation and stressed it was genuine. The Applicant wants to be able to help his blind mother. At the road side, the Applicant had unsuccessfully tried five times to provide a breath sample, which is consistent with his medical condition, yet he still offered to go back to the station and try again.

The Applicant's counsel reminded the Tribunal of the facts at the time of the incident. The Applicant was upset over his father's death, he had been crying and was very distraught.

As to Officer #1's evidence, Applicant's Counsel, indicated that it was surprising that a trained officer has not detected the odour of alcohol at first contact.

The Applicant's counsel concluded by asking the Tribunal to re-instate the Applicant's driver's licence as on a balance of probabilities the Applicant had satisfied his position.

In his closing remarks, the Respondent's counsel, quoted the pertinent sections of the Act and Regulations regarding the grounds for appeal.

In order to succeed in an appeal, the Applicant has to establish that he has a medical condition that prevented him from providing an adequate breath sample. The Respondent's counsel maintained that the letters provided by the Applicant's physician do not comply with the requirements of Section 15 of Regulation 574, which is specific as to the information required in a medical report.

There is no evidence of how "reactive airway disease" relates to the Applicant's inability to blow into the device. Further, neither letter contains details of the present condition nor the history of the condition, including tests performed on the Applicant to assess his breathing.

Mr. Moore stressed a few of the matters, which are not relevant to the Tribunal's determination. For instance, the Tribunal cannot infer that the Applicant's pursuit of this matter is an indication of bona fides as Applicant's Counsel's insinuates. Nor should the Applicant's offer to go to the police station and provide a breath sample, be considered as an indication of a bona fide attempt to provide a sample. However if one "...is to look at the bona fides of what was occurring..." the relevancy of the Applicant's statement "*I'm screwed either way*" is more demonstrative "*...of the good faith in which The Applicant was participating in this attempt...*"

The Respondent's counsel also asked the Tribunal not to relate the death of the Applicant's father to his inability to provide a breath sample.

Mr. Moore closed by remarking that in his opinion the Applicant has not put forth substantial evidence to prove that he was unable to provide a breath sample for medical reasons.

As a rebuttal to the Respondent's counsel's closing remarks regarding Section 15, Applicant's Counsel argued that the fact the physician's letter is addressed "*To Whom it May Concern ...indicates that the report can go to anyone ...and it was done after he received the information of the Tribunal on the appeal...*"

As to the Applicant's medical condition, Applicant's Counsel indicated that the need for the use of an inhaler, in itself, demonstrates the fact that the individual has difficulty breathing.

Applicant's Counsel further pointed out, that "*...had the policeman disclosed the notes where we know that it was the length of the time and the duration of the blow that was the problem that they could not get the reading because he was not going for the full five or six seconds, we might have taken that to the physician and said this is the problem, medically is that caused by his condition. We did not have that opportunity...*"

APPLICATION OF THE LAW TO FACTS:

Applicant's Counsel argued that the Applicant was denied his right to a proper defence, as a

result of the non-disclosure of Officer #1's notes. The Tribunal disagrees with that argument but it is not necessary to comment further respecting that argument because the Applicant's appeal fails without any reference to Officer #1's testimony.

An appeal was brought by the Applicant under Section 50.1(2)(b) of the *Highway Traffic Act*, which prescribes:

"...person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason..."

Thus, the issue is, does the Applicant have a medical condition that could cause the Applicant to fail or not comply with the breath demand.

The Applicant opted to submit two letters from his physician Physician #1 of the Aboriginal Health Centre *"...in lieu of..."* having page 2 of the Notice of Appeal completed by his physician.

The Respondent's counsel challenged the admissibility of these letters as a medical report. Mr. Moore contended that the information contained in these letters, does not meet the criteria set out in Section 15 of Regulation 574, more particularly Section 15(1)(c)(d) and 15(2). The Tribunal will address each section individually.

Section 15(1)(c), (d) and 15(2) of Regulation 574 prescribes as follows:

15(1) A report of a legally qualified medical practitioner that is submitted in evidence shall clearly state:

.....

(c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the Tribunal from the suspension of a driver's license under section 50.1 of the Act.

Applicant's Counsel dismisses the suggestion of the Respondent's counsel that the Applicant's physician was unaware of the purpose of his report by arguing that *"To Whom it May Concern ...indicates that the report can go to anyone..."*. Although that is correct, nonetheless because Physician #1's report is not addressed to anyone in particular, there is no indication Physician #1 was aware of its intended purpose. Further, the fact that the report *"...was done after he received the information of the Tribunal on the appeal..."* does not substantiate Applicant's Counsel's premise either. The Tribunal finds that Physician #1's letters fall short of the meeting the criteria set out in Section 15(1)(c) of Regulation 574.

Section 15(1)(d) of Regulation 574 states:

15(1)(d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination

of the person that supports the findings set out in the report;

The second report from Physician #1, dated “March 6, 2002”, partially complies with Section 15 (1)(d) of Regulation 574. Physician #1’s letter of “March 6, 2002”, speaks to the length of time the Applicant has been his patient “...8 months...”. However, the “...frequency...” of the visits is not specified. Thus, Section 15 (1)(d) of Regulation 574 is not met.

Section 15(2) of Regulation 574 is, perhaps, the most relevant. Section 15(2) of Regulation 574 states:

15(2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath sample including the results of any related tests.

The essence of this clause requires that the physician establish a link between the patient’s condition and the inability to provide a breath sample. This clause relates specifically to the detailed information required on page 2 of the Notice of Appeal, which serves as a valuable guideline to the Tribunal as it is designed to provide pertinent details of the Applicant’s condition, such as:

- Details and diagnosis of the patient’s present condition;
- History of condition;
- Type of Measurements or recent test taken with (date indicated): (Reference to any pathology test (e.g.: PTF represent important corroboration of your medication opinion);
- Relevant details of last visit and when ...patient was last seen

The Applicant’s counsel told the Tribunal that upon recognizing the shortcomings of the Applicant’s physician original report an effort was made to request and obtain “...a *second letter to comply with the requirements...*”. The Tribunal is left unsure as to why Physician #1 was not asked to complete page 2 of the Notice of Appeal. In any event, Physician #1 does not offer any rationalization of how the Applicant’s diagnosis of a “reactive airway disease” affects the Applicant’s breathing pattern. Nor does Physician #1 provide any justification as to how this problem could have affected the Applicant’s ability to provide a breath sample. It is evident that Section 15 (2) of Regulation 574 is not met.

Having established the weight according to the written submissions provided for the hearing, the Tribunal will now proceed to review and consider the viva voce evidence.

The Applicant testified that he suffers from “...asthma...” and uses an inhaler on a daily basis. The Applicant further elucidated that “...every once in a while ...trouble breathing ...lungs get very tight...”. Applicant’s Counsel stresses, that an individual who has been prescribed an inhaler obviously suffers from a respiratory deficiency.

The Respondent's counsel maintains that neither letter from Physician #1 contains any details of the Applicant's present condition nor the history of the condition, including tests performed on the Applicant to assess his breathing.

The Tribunal does not disagree that the Applicant is asthmatic, nor dispute Applicant's Counsel's assertion that the use of an inhaler confirms the presence of a respiratory ailment. The question remains, what is the severity of the deficiency and how did this condition preclude the Applicant from providing an adequate breath sample.

The Tribunal concurs with the Respondent's counsel that no evidence was provided as to the results of any pulmonary function tests that may have been taken by the Applicant. There is no evidence that the Applicant has ever been referred to a respiratologist. The Tribunal is thus, impaired by lack of evidence to determine the degree of severity of the Applicant's respiratory condition.

Accessing the occurrence on the night of the roadside breath test, the Tribunal is told by both the Applicant and his solicitor that he was distraught at the time of breath test session due to his father's recent death. The Tribunal commiserates with the Applicant and accepts that his condition could have been exacerbated by his highly charged emotional state. Nonetheless, no evidence was introduced that at the time the Applicant was exhibiting any of the signs commonly associated with respiratory distress, such as wheezing, shortness of breath or choking. Further, the Applicant's condition was not severe enough to warrant requesting or seeking medical assistance during or immediately after the incident. This statement is corroborated by the Applicant's own admission that he did not request medical attention from the officers, and that he sought medical attention "...a few days later..."

Applicant's Counsel suggests the possibility of a blood sample being obtained. Subsection 48.3 (3) 1 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H-8 as amended is clear in its provision, the concentration of alcohol in the blood may be obtained "...by an analysis of the person's breath sample or blood taken..." However, the decision to request a blood sample is at the discretion of the officers, according to established policy. As the Applicant showed no visible signs of respiratory impairment, at the time, the issue of a blood sample was not pursued.

The onus being on the Applicant to establish the merit of the appeal, the Tribunal finds that the Applicant has failed to do so, and the Applicant has not meet the criteria of Section 50.1 (2) (b), in that he was not able to demonstrate that he suffers from a medical condition, which would prevent him from providing a breath sample.

DECISION:

Upon the application by to appeal the suspension order of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: April 5, 2002

da CAMARA

MARCELINO da CAMARA

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: JOE HEWITT, Presiding member

APPEARANCES: DAVID MILNER, Counsel for the Registrar of Motor Vehicles
TIAGO da CAMARA, Representative for the Applicant

DATE OF HEARING: April 2, 2002

DECISION RELEASED: April 8, 2002 *By teleconference*

REASONS FOR DECISION

A hearing was held on April 2, 2002, at Toronto, Ontario, to consider the Applicant’s appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Marcelino da Camara (the “Applicant”)
Motor Vehicle: 1988 Chevrolet Celebrity, plate no. ALW 108 (the “vehicle”)
Date of Appeal: March 12, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence (i.e. all reasonable efforts) to determine that the driver's licence was not suspended and the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(c) and (d) of the Act.

This matter came before this Tribunal on April 2, 2002 and proceeded as a teleconference hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There being no preliminary matters and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

The owner of the vehicle, Mr. M. da Camara exercised reasonable effort to determine if Mr. T. da Camara had a legal licence to drive a motor vehicle. He was reassured repeatedly that all licensing was in order on several occasions. This turned out to be untrue and Mr. M. da Camara had no knowledge of this fact.

It is also noted that Mr. Marcelino da Camara is 80 years old and needs transportation for daily groceries, medical needs and religious meetings. As Mr. da Camara is a pensioner on a fixed income, the impoundment order will also cause him extreme financial difficulty.

Mr. Marcelino da Camara also feels that he is being personally punished for losing his vehicle as a result of the illegal actions of a suspended driver.

Mr. da Camara is asking for an electronic hearing because of his age and health.

Mr. da Camara's phone number is 1-519-681-3677 and can be contacted at anytime.

The Representative shall be Mr. Tiago da Camara, phone #1-519-686-0300.

We would prefer the hearing to be held at Marcelino da Camara's home number at 12 Haymarket Place, London Ont N6C – 4Y2

Mr. Tiago da Camara, agent and son of the owner, reiterated the points stated in the notice of Appeal and emphasized the inconvenience caused by the loss of the motor vehicle. He stated that Marcelino da Camara was 80 years old and needed the vehicle for groceries, medical appointments and church meetings. Marcelino is retired, on a fixed income and the impoundment will cause him financial hardship. He stated further that Marcelino should not have to suffer because of something that was the fault of Tiago da Camara who Tiago misled his father by showing him a licence and repeatedly telling him it was valid. Also, he stated that the loss of the vehicle has brought much pain and suffering to Marcelino and his wife because of the social and psychological pressure of this incident.

Tiago da Camara testified that his parents live in a residential area of older London, Ontario and that there is bus service within the City. They can't afford taxi service and rely on church friends for help with transportation. There are no major medical problems with his mother or father.

Mr. Marcelino da Camara also testified that he was told that Tiago's driver's licence was valid. He uses his car for church meetings and day-to-day shopping. He stated that he was in good health.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Tiago da Camara;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of driving with more than 80 mgs alcohol in blood under the Criminal Code of Canada pursuant to which the driver's licence of the driver was then under suspension until October 4, 2002.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(c) and (d).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. Law. The attention and care due from a person in a

given situation....

Also, “due diligence” in Black’s Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.

- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

Due Diligence

To succeed in the appeal, the Applicant must establish that he exercised due diligence to determine that Tiago da Camara's driver's licence was not under suspension at the time of impoundment.

Section 50.2(3)(c) of the Act required that the owner, Marcelino da Camara, exercise due diligence in attempting to determine that Tiago da Camara's driver's licence was not suspended at the time of the impoundment of the owner's motor vehicle.

The evidence establishes that the Applicant made no significant inquiries with respect to the status of Tiago da Camara's driver's licence. The Applicant may have made a verbal inquiry as to the status of Tiago's driver's licence and Tiago may have produced a licence that had expired. Tiago da Damara testified that he had a valid licence since 1992 or 1993.

Meeting the requirements of subsection 50.2(3)(c) is the basis of the Applicant's appeal before the Tribunal. The Tribunal finds the Applicant, having made no substantial inquiries as to the status of Mr. Tiago da Camara's driver's licence, and therefore has failed to establish that the owner of the vehicle exercised due diligence as required by subsection 50.2(3)(c) of the Act.

Exceptional Hardship

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The Applicant has appealed on the grounds of exceptional hardship, in accordance with the section 50.2(3) of the Act. Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the specific criteria the Applicant must meet to determine if exceptional hardship under the Act will result from the impoundment.

The Tribunal is precluded from considering other factors not arising from or directly related to the impoundment itself. The unfortunate fact is that the impoundment of the Applicant's vehicle makes it more difficult for the Applicant to get to appointments and shopping; however, this inconvenience does not amount to exceptional hardship.

There is no evidence to establish a threat to health or safety under section 22(2)(b) or (c) of Regulation 632/98. To succeed under section 22(3) of Regulation 632/98 the Applicant must demonstrate that all of section 22(3) has been met. Furthermore, section 22(4) of the regulation provides that the Applicant demonstrate that every reasonable option has been considered for an alternative to the vehicle. The Applicant's agent under cross-examination has testified that alternatives to the impounded motor vehicle are available including taxicab, bus, and friends cars.

Though inconvenienced, the Applicant has not suffered any loss of employment as a result of the impoundment. The Applicant has not presented any evidence that would indicate that the loss of the vehicle would be immediate significant and lasting as required by section 22(3)(b) of Regulation 574 as amended by O. Reg. 632/98.

On the evidence, the Tribunal finds that the Applicant has failed to meet the onus required by the Act to establish exceptional hardship under section 50.2(3)(d) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Joe Hewitt, Presiding Member

RELEASED: April 8, 2002

1054 - MED - PREHRG

PREHEARING

APPLICANT

APPEAL UNDER SECTION 50(1) OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, CHAP. H.8 AS AMENDED, FROM A DECISION OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 47(1) OF THAT ACT

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

Counsel representing the Applicant
PATRICK MOORE, Counsel, representing the Registrar of Motor Vehicles

DATE OF

PREHEARING: April 5, 2002

By teleconference

ORDER

FOLLOWING attendances on April 5, 2002 at a teleconference pre-hearing before this Tribunal of Counsel appearing on behalf of the Applicant, and Patrick Moore, Counsel on behalf of the Registrar of Motor Vehicles (the "Registrar");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Friday, May 3, 2002 at Kitchener, Ontario;

1. The Parties to the hearing are the Applicant and the Registrar.

2. Both parties to the hearing shall fully comply with the requirements of disclosure of documents or things as set forth in Rule 6.5 of the Rules of Practice of the Tribunal.
3. There was no settlement of any of the issues dealt with in the Registrar's Decision to suspend the Applicant's driver's licence and those issues remain to be decided at the hearing.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: April 8, 2002

BACK

EVAN BACK

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
MOTOR VEHICLE DEALERS ACT

TO REFUSE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

EVAN BACK, Applicant, was not represented and was not present at the hearing

AVIVA HARARI, Counsel, representing the Registrar under the *Motor Vehicle Dealers Act*

DATE OF
HEARING:

April 4, 2002

TORONTO

DECISION AND ORDER

BACKGROUND:

Evan Back (the "Applicant") appeals the Proposal to refuse his registration as a motor vehicle salesperson brought by the Registrar of the *Motor Vehicle Dealers Act* (the "Registrar" and "Act" respectively). The Registrar contends that the Applicant's registration should be refused as the Applicant's past conduct affords the Registrar with reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty and that the Applicant cannot be expected to be financially responsible in the conduct of business.

The particulars given by the Registrar in his Proposal dated November 6, 2000, state as follows:

1. The Applicant, who was previously registered under the *Motor Vehicle Dealers Act*, failed to transfer his registration from his previous employer to Sorenson Page Chrysler in the time stipulated under the *Motor Vehicle Dealers Act* and was therefore required to submit a new application.

2. The Applicant applied for registration on or about August 24, 2000. The Applicant proposes to work for Sorenson Page Chrysler.
3. Question 9 of the application for registration asks "Have you ever been found guilty or convicted of an offence under any law or any charges pending". The Applicant answered "yes" and provided summaries of the charges against him which are 4 charges of Fraud which occurred from December 24, 1999 until June 2000.
4. The police summary indicates that the charges relate to instances of conduct where there at least thirty victims. The Applicant defrauded members of the public by approaching individuals in their place of businesses and lied about "emergencies" he was experiencing. These emergencies were similar each time and in the nature of a broken car, the Applicant would ask to borrow money and in exchange or as collateral, the Applicant would give a cheque from a defunct company known as the Tint King. Mr. Back knew the cheques would be returned Not Sufficient Funds.
5. Mr. Back previously operated a registered dealership known as Back-On Bay Fine Cars Inc. This Dealership licence was revoked on March 15, 1994. The dealership went bankrupt on or about 1993. As a result of the bankruptcy, claims totalling \$2,319.00 were paid by the fund.
6. On December 7, 1996, the Applicant agreed to pay back 25% of the debt owing to the Motor Vehicle Dealers Compensation Fund without interest at a minimum of \$25.00 per month. On May 2, 1997 after paying \$100.00 to the Compensation Fund, the Applicant defaulted on his repayment arrangement. On or about May 21, 1998, the Applicant paid the balance owing to the Compensation Fund.
7. Mr. Back made an assignment into bankruptcy on April 22, 1999.

(Exhibit 1 Tab 1)

The Registrar amplified the above particulars by furnishing the following further particulars dated March 8, 2002:

1. On November 21, 2000, the Applicant was convicted of Fraud Under \$5000 and ordered to pay restitution within 30 days.
2. The Applicant's restitution order is in default.
3. The Applicant's driver's licence is currently suspended for unpaid fines.
4. The Applicant has numerous *Highway Traffic Act* (HTA) convictions.

(Exhibit 1 Tab 2)

At the commencement of the hearing, Ms. Heather McArthur, an associate of Mr. John Rosen, Counsel retained by the Applicant in this matter, advised the Tribunal that Mr. Rosen would not be representing the Applicant at the hearing, as he had not been successful in his attempts to arrange to meet with the Applicant and to obtain instructions. Ms. McArthur further advised the Tribunal, that the Applicant had not returned Mr. Rosen's several telephone calls and when Mr. Rosen finally did speak with the Applicant and arranged several appointments to meet with the Applicant, the latter had failed to attend.

Mr. Rosen did however speak with the Applicant on March 31, 2002, at which time he was advised by the Applicant that he was being admitted to hospital on April 1, 2002. No details were provided by the Applicant to Mr. Rosen, but the Applicant did indicate that he would provide a letter from the attending physician to both the Tribunal and the Counsel for the Registrar.

Counsel for the Registrar informed the Tribunal that she had received no letter from the Applicant nor any physician. No communication has been received by the Tribunal from the Applicant or his physician.

Ms. McArthur requested that Mr. Rosen be removed as Counsel of record for the Applicant and her request was granted by the Tribunal.

The hearing of the matter then stood down for thirty minutes. At the end of that time, as there was no appearance by the Applicant, the matter proceeded in his absence.

THE EVIDENCE:

The evidence of the Registrar consisted of the oral testimony of Ms. Laura Gordon ("Ms. Gordon").

Ms. Gordon stated that she is the Director of Compliance with the Ontario Motor Vehicle Industry Council ("OMVIC"), a non profit organization created in 1977 with the necessary authority to enforce the terms of the Act and regulations. She also stated that the Act is a public protection statute which deals with the criteria to be considered regarding the registration of motor vehicle salespersons and dealers.

Ms. Gordon reviewed for the Tribunal the Applicant's application for registration as a motor vehicle salesperson dated August 24, 2002.

(Exhibit 1 Tab 4)

She confirmed that the Applicant disclosed in that application that he had previously been registered as a motor vehicle salesperson, that he had previously been involved in personal bankruptcy proceedings, as well as the bankruptcy of a corporation in which he had held office, and that there were unpaid judgements against him albeit, that there were no judgements against him since his bankruptcy in April 1999. The Applicant also disclosed, by reference to Mr. Rosen's letter of August 18, 2000 which had been addressed to OMVIC, that he was facing two counts of fraud under \$5000.00, contrary to section 380(1) of the *Criminal Code of Canada*.

(Exhibit 1 Tab 5)

Mr. Rosen's letter enclosed a summary of alleged facts prepared by the Peel Regional Police in respect of the two counts of fraud above referred to. One of the counts referred to a loan of

\$53.00 made to the Applicant which loan the Applicant secured by a cheque for \$143.45. That cheque was dishonoured when presented for payment at the bank. The other count involved the purchase by the Applicant of merchandise which the Applicant paid for by a cheque for \$126.95 and which cheque was returned N.S.F. The letter indicates that the Applicant was "in the process of reimbursing the complainants".

Ms. Gordon testified further that Mr. Rosen's letter of August 18, 2000 also referred to one count of fraud under \$5,000.00 contrary to section 380(1) of the *Criminal Code of Canada*, that had been preferred against the Applicant by Halton Regional Police on June 8, 2000. Mr. Rosen enclosed a summary of alleged facts prepared by the Halton Regional Police, from which the allegations it appears more complainants were involved and the nature of the allegations involved "a course of conduct similar (to) that alleged in respect of the Peel Region charges". Mr. Rosen stated that most complainants were repaid before charges were laid, and that the Applicant was in the process of repaying the remainder of the complainants. The summary prepared by the Halton Regional Police stated that at least thirty victims were identified in Oakville and Burlington and the complaints received of Applicant's activities were identical. The Applicant was alleged to have approached individuals on the street or at their businesses and "lied about an emergency he was experiencing". He persuaded persons to loan him small amounts of money ranging from \$40.00 to \$600.00.

(Exhibit 1 Tab 5)

The Applicant, in order to secure some of the loans, gave cheques to the persons who made the loans which cheques were drawn by "Tint King". When those persons tried to cash the cheques they were unsuccessful and the cheques were returned marked "account closed". "Tint King", according to the police allegations, was a business operated by the Applicant in Markham from 1987 to 1991 and during that time the Applicant opened a banking account with and obtained cheques in the name of "Tint King" from the Bank of Montreal. This banking account was closed in 1991 but the Applicant retained the cheques forms. The Applicant, between March 1999 and May 2000 drew cheques on "Tint King's" account and gave these cheques as collateral to persons who gave him loans.

Ms. Gordon continued to testify that on November 21, 2000 the Applicant appeared in court in Oakville on a charge of fraud of a sum of money not exceeding \$5,000.00, contrary to section 380(1)(b) of the *Criminal Code of Canada*. To this charge the Applicant plead guilty and was found guilty. He was ordered to make restitution of \$1,150.00 but defaulted under the restitution order.

Continuing her testimony, Ms. Gordon stated the Applicant has, according to the Ministry of Transportation's records, on seven separate occasions had his driver's licence suspended for failure to pay fines and that since March 2001 his driver's licence remains suspended.

Ms. Gordon also testified that the Applicant operated a motor vehicle dealership known as Back-On Bay Fine Cars Inc. On March 15, 1994 that dealership's registration was revoked and it "went bankrupt" in about 1993. Pursuant to the bankruptcy the Motor Vehicle Dealers

Compensation Fund paid claims of \$2,319.00 made against the dealership. In 1996 the Applicant agreed to pay the Fund 25% of the monies paid by it at a minimum of \$25.00 per month but, after paying \$100.00 to the Fund, the Applicant defaulted. The Applicant only paid the balance owing in May 1998.

In conclusion, Ms. Gordon stated that the Applicant filed an assignment in personal bankruptcy on April 22, 1999.

FACTS FOUND PROVEN:

The following are the facts that were found proven in this matter.

1. On July 26, 2000, the Applicant completed and signed an application for registration as a motor vehicle salesperson under the Act.
2. The aforesaid application was received by OMVIC on August 24, 2000.
3. In the aforesaid application, the Applicant disclosed:
 - (a) the Peel Regional Police charged the Applicant, on May 17, 2000, with two counts of fraud under \$5000.00 contrary to section 380(1) of the *Criminal Code of Canada*.
 - (b) the Halton Regional Police charged the Applicant on June 8, 2000 with one count of fraud under \$5000.00 contrary to section 380(1) of the *Criminal Code of Canada*.
4. The two counts of fraud referred to in paragraph 3(a) above were withdrawn by the Crown and no convictions were recorded in regard thereto.
5. The one count of fraud referred to in paragraph 3(b) above,
 - (a) came before court in Oakville, Ontario on November 21, 2000 at which time the Applicant pled guilty to the charge and was found guilty in respect of that charge, and
 - (b) the court ordered the Applicant to make restitution of \$1,150.00, which order was not complied with the Applicant being in default under that order.
6. During the period 1987 to 1991 the Applicant operated a business in Markham known as "Tint King" which business was discontinued in 1991. Prior to 1991, the business of "Tint King" operated by the Applicant in Markham, conducted its banking at the Bank of Montreal. The Bank of Montreal had issued cheque forms to the Applicant, operating as "Tint King".

7. During the period March 1999 to May 2000, the Applicant obtained various loans from various persons. As collateral for such loans, the Applicant gave the various persons cheques issued by "Tint King" Markham.
8. The bank account operated by the Applicant under the name of "Tint King" in Markham was closed in 1991 when "Tint King" Markham ceased operations.
9. The Applicant, in issuing cheques to various persons in 1999 and 2000 drawn on "Tint King's" bank account with the Bank of Montreal, acted well knowing the cheques would not be honoured when deposited for collection.
10. The cheques issued to the various persons above were dishonoured by the bank and were not paid to the various persons.
11. The Applicant filed a personal assignment in bankruptcy on April 22, 1999.
12. The Applicant was registered as a motor vehicle dealer, and operated as such, under the name Back-On Bay Fine Cars Inc. until 1993 when that firm went into bankruptcy and its registration was revoked in March 1994.
13. On December 7, 1996, the Applicant undertook to reimburse the Motor Vehicle Dealers Compensation Fund with 25% of \$2,319.00 which that Fund had paid to various persons pursuant to the bankruptcy of Back-On Bay Fine Cars Inc. The Applicant defaulted in his undertaking after paying the Fund \$100.00. The Applicant paid the balance of the amount to the Fund on or about May 21, 1998.
14. The Applicant's driver's licence has been suspended on seven occasions by reason of the fact that the Applicant has failed to pay traffic fines. The last suspension of the Applicant's driver's licence was on March 19, 2001, since which date the Applicant's driver's licence has been in suspension.

THE LAW:

Section 7.(1) and 7.(2) of the Act states:

7.(1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the Registrar shall serve notice of the proposal, together with written reasons therefor, on the applicant or registrant.

(2) A notice under subsection (1) shall state that the applicant or registrant is entitled to a hearing by the Tribunal if the applicant or registrant mails or delivers, within fifteen days after service of the notice under subsection (1), notice in writing requiring a hearing to the Registrar and the Tribunal, and the applicant or registrant may so require a hearing.

Section 5.(1) of the Act states:

5. (1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

- (a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
- (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or
- (d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

Section 6.(1) of the Act states:

6. (1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section

DECISION AND REASONS:

The onus of proof rests upon the Registrar to prove the past conduct of the Applicant affords him reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.

The grounds upon which the Registrar relies are:

- (a) The two counts of Fraud under \$5,000.00 brought against the Applicant by the Peel Regional Police under section 380(1) of the *Criminal Code of Canada*.
- (b) The one fraud conviction against the Applicant pursuant to charges being laid against him by the Halton Regional Police under section 380(1) of the *Criminal Code of Canada*.
- (c) The personal bankruptcy of the Applicant on or about April 1999 and the bankruptcy of the Applicant's previous motor vehicle dealership on or about 1993.
- (d) The failure of the Applicant to abide by his undertaking to reimburse in a timely manner the Motor Vehicle Dealers Compensation Fund to compensate that Fund for its payment to creditors of the Applicant's previous motor vehicle dealership.
- (e) The failure of the Applicant to comply with the court's restitution order imposed upon him when the Applicant was convicted of Fraud under \$5000.00 in terms of section 380(1) of the *Criminal Code of Canada*.

- (f) The failure of the Applicant to pay various speeding and traffic fines imposed upon him under the *Highway Traffic Act* and the suspension on seven occasions of the Applicant's driver's licence.

In *Brenner v. Ontario (Registrar of Motor Vehicle Dealers and Salesman)* [1983] O.J. No.1017, April 7, 1983, it was clearly stated that the Tribunal should only refuse to direct the Registrar to carry out his proposal if it thinks the Registrar was in error in concluding that the past conduct of the Applicant affords reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty. To overrule the decision of the Registrar, the Tribunal must conclude that he was wrong in his decision and that the conduct of the Applicant does not afford reasonable grounds for belief that the Applicant will in the future carry on activities in contravention of the Act and its Regulations.

The Tribunal's conclusions and the reasons for its conclusions, based upon the evidence, follow.

FRAUD CHARGES UNDER SECTION 380(1) OF THE *CRIMINAL CODE* (PEEL REGIONAL POLICE)

The fraud charges that emanated from the Peel Regional Police were allegations and did not result in a conviction. In fact, the charges were withdrawn against the Applicant.

The Tribunal believes the Registrar was in error in concluding that charges laid against the Applicant and subsequently withdrawn affords reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.

FRAUD CHARGES UNDER SECTION 380(1) OF THE *CRIMINAL CODE* (HALTON REGIONAL POLICE)

In this instance the Applicant on November 2, 2000, pled guilty to one count of Fraud under \$5,000.00 and was found guilty on that one count. The allegations that gave rise to this plea of guilty and the courts finding of guilt have been referred to in this decision in an overview of the evidence. Various parties became victims of the Applicant's fraudulent actions and the court recognized the plight of the victims when ordering restitution. The evidence at the hearing indicates that restitution has not been made by the Applicant.

The fact that the Applicant pled guilty to fraud, was found guilty pursuant to his plea and has not made restitution as ordered, leads the Tribunal to conclude that, despite the Applicant's acknowledgement of his fraudulent conduct and guilt, he has ignored the restitution order. All this is supportive of the Registrar's conclusion that reasonable grounds exist for his belief that the Applicant will not carry on business in accordance with law with integrity and honesty. The

actions of the Applicant that lead to his guilty plea and conviction are indicative of deceit on the part of the Applicant.

The Applicant's actions, which he acknowledged when he plead guilty, indicate the Applicant's lack of honesty and integrity.

The Tribunal finds that the Registrar is not in error in his belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.

BANKRUPTCY OF APPLICANT AND OF HIS PREVIOUS DEALERSHIP

In April 1999, the Applicant was placed in bankruptcy, and from the Applicant's Statement of Affairs filed with his Trustee in bankruptcy it is evident that he had large liabilities. The Applicant's previous dealership was previously placed in bankruptcy. Both bankruptcies are indicative of an inability of the Applicant to conduct his financial affairs responsibly. The dealership became bankrupt in 1993 and some six years later the Applicant personally became bankrupt. The Applicant, in both his business and personal financial affairs exhibited an inability to be financially responsible.

The Applicant's conduct, in the opinion of the Tribunal, indicates an ongoing course of financial instability on the part of the Applicant that supports the Registrar's belief that the Applicant cannot be expected to be financially responsible in the conduct of business in the future.

APPLICANT'S FAILURE IN A TIMELY MANNER (a) TO REIMBURSE THE COMPENSATION FUND AND (b) TO ABIDE BY THE COURT'S RESTITUTION ORDER

The Applicant met his undertaking to repay 25% of his indebtedness of \$2,319.00 to the Motor Vehicle Dealer's Compensation Fund. However, he defaulted in the agreed scheme of repayment and fell into arrears.

The failure of the Applicant in meeting his undertaking on a timely and agreed basis, once again reflects the Applicant's inability to conduct business in a financially responsible manner.

This conduct indicates an ongoing course of financial irresponsibility on the part of the Applicant. Such conduct supports the Registrar's belief that the Applicant cannot be financially responsible in the conduct of business.

Of greater concern to the Tribunal is the Applicant's failure to comply with the Court's restitution order. Not only does this fact indicate financial irresponsibility by the Applicant in the conduct of his affairs which is likely to pervade his conduct in business, but it reflects a disregard for an Order of Court. No effort has been made to repay the amount of restitution ordered. No explanation has been offered by the Applicant for this failure. Such conduct reflects an attitude of being unable or unwilling to abide by the rules of an ordered society. The Applicant's conduct supports the Registrar's opinion that the Applicant will not in the future

carry on business in accordance with law and with integrity and honesty.

THE APPLICANT'S CONVICTIONS UNDER THE *HIGHWAY TRAFFIC ACT* AND HIS FAILURE TO PAY CONSEQUENT FINES

The Applicant's driver's licence has been suspended under the *Highway Traffic Act* on seven occasions between October 1997 and March 2001. The suspensions arose out of the Applicant's non payment of court ordered traffic fines following his convictions for speeding, improper driving, failure to use a seat belt, having no validation tag on his vehicle's licence plate and driving while his driver's licence was under suspension.

Each of the convictions, while not criminal in nature, do indicate acts and omissions of a person who has not complied with the law. The many and various convictions, in and of themselves, reflect the Applicant's disregard for the law. His repeated failure to pay the court ordered fines, imposed pursuant to his convictions, reflect the Applicant's disregard for the court's orders.

Such past conduct of the Applicant gives the Tribunal no confidence that the Applicant's future conduct, whether in business or in his personal affairs, will be in accordance with law and with integrity and honesty.

Taking into account the cumulative acts and omissions of the Applicant over many years, the Tribunal does not believe the Registrar was in error in concluding that the Applicant will in the future not carry on business in accordance with law and with integrity and honesty.

DECISION:

Pursuant to the authority vested in it by section 7(4) of the *Motor Vehicle Dealers Act*, the Tribunal directs the Registrar to carry out his Proposal dated November 6, 2000 to refuse the registration of the Applicant as a motor vehicle salesperson under the *Motor Vehicle Dealers Act*.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: April 12, 2002

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

MEL HALL TRANSPORT LIMITED

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding member

APPEARANCES: JOHN PETROSONIAK,
Counsel for the Registrar of Motor Vehicles

MARVIN HIGGS, Agent for the Applicant

DATE OF HEARING: April 10, 2002

DECISION RELEASED: April 16, 2002 **LONDON**

REASONS FOR DECISION

A hearing was held on April 10, 2002, at London, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Mel Hall Transport Limited (the "Applicant")
Motor Vehicle:	1997 VOLV, Wag, plate # PR2441 (the "vehicle")
Date of Appeal:	March 26, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence to determine that the driver's licence was not suspended as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on April 10, 2002 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

To whom it may concern:

This letter is in relevance to an Order to Impound that was imposed on us February 5, 2002. The driver on that day was found to have a suspended license. The officer that came up with that information said he had the right and did, have our vehicle towed and impounded for 45 days. He was talking to me and allowed me to know that this was happening but I could appeal it, if desired. I expressed to him my lack of experience in this area since we have never been in this position. He responded by telling me that there was a booklet pertaining to this and he would send a copy of it with our driver.

Upon receiving the documentation, I noticed that the "order to impound" said to see reverse for appeal information. Since the copy was blank on the reverse and a book came with the documents, I proceeded to read the book. The book is called 'Appealing your Commercial/Vehicle Trailer Impoundment and Suspension Order'. According to this book we have the duration of the impoundment to put together and file an appeal. That would seem to be 45 days.

Taking most of the time to get all of our facts together, we were set to file an appeal at approximately the 40 day mark. When we inquired as to where to take or send the information, we were then told we were to late, as we only had 15 days to file an appeal. Apparently the book pertains to a different section of the Highway Traffic Act then we were charged with.

In hindsight this would have been good information to know up front. I hope there is some way of still doing this appeal since it has always been our position and the position of the driver that none of us could have been aware of his suspension. While it was the officer initially just doing his job, I also relied on his expertise to get through the appeal process, without question.

Safety and Compliance Manager
Marvin Higgs
March 20, 2002

At the hearing, the Applicant, Mel Hall Transport Limited, was represented by Mr. Marvin Higgs, the Safety and Compliance Manager for the company.

Mr. Higgs began by explaining the drivers' and the company's predicament to the Tribunal. According to Mr. Higgs, the driver, himself, was not aware that his licence was under suspension. He had been charged in March of 2001 with the offenses of which he was convicted in November 2001. At the time, he was ordered to pay a fine and was given time to

pay.

Mel Transports hires its drivers through Fifth Wheel, an agency that does all the background checking of its drivers. It does a check on a yearly basis.

Mr. Crawford began driving for Mel Transport in October 2001. At that time Mr. Crawford showed the company his driver's licence. Mel Transport also relied on Fifth Wheel's information package containing the background information on Mr. Crawford. The package contained a driver's licence abstract which indicated that the enquiry was done in May 2001.

The Applicant subsequently had Mr. Crawford's driver's licence renewed in July, 2001. Mr. Crawford's driver's licence was subsequently suspended in November, 2001 for one year.

The Applicant's agent, Mr. Higgs, informed the Tribunal that Mr. Crawford is fighting the suspension registered against him.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Errol Roy Crawford;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of dangerous driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until November 19, 2002.

The Registrar's Counsel, Mr. John Petrosoniak noted that there are only four situations in which the Tribunal has jurisdiction to look into these matters.

Mr. Petrosoniak quoted Section 50.(2) (c) and emphasized that the onus is on the Applicant to prove due diligence.

Mr. Crawford was convicted in November of 2001 and whether he was aware or not, his driver's licence was automatically suspended. Thus, at the time of his arrest, Mr. Crawford's driver's licence was under suspension.

The Registrar's counsel submitted that the Applicant should have been more diligent in reviewing the driver's abstract. Although a check of Mr. Crawford's licence with the Ministry in October or early November would have still shown a clean abstract, such an inquiry was not made. Had such an inquiry been made, the Applicant might have been able to argue due diligence. However, the driver's licence abstract is dated May, 2001.

Further, Mr. Petrosoniak contended that the questions asked in the Driver's Reference Check are too narrow in scope, as they are restricted to enquiring as to any driving impairment charges. It would be more diligent to consider other charges that carry mandatory licence suspensions.

The Registrar's Counsel was not able to provide the Tribunal with proof of notification of suspension served upon the driver, Mr. Errol Crawford.

It appears that Mr. Crawford's driver's licence has since been re-instated.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(c).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3.

Careful attention, heedfulness, caution. 4. *Law*. The attention and care due from a person in a given situation....

Also, “due diligence” in Black’s Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

APPLICATION OF LAW TO FACTS:

Much was said as to the validity of the suspension, whether or not the Applicant was aware of the suspension, and whether the licence has been re-instated. The Tribunal has no mandate to deal with these issues, and it will not address these issues.

The Tribunal has jurisdiction only on the four grounds of appeal set out in section 50.2(3) of the *Highway Traffic Act*. The due diligence ground of appeal set out in subsection 50.2(3)(c) is limited to due diligence with respect to the status of the driver of the motor vehicle at the time of the impoundment.

The Registrar’s Counsel is correct in arguing that the onus is on the Applicant to establish due diligence according to 50.2(3)(c), which provides:

“that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver’s license of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension.”

The above ground of appeal is the only ground on which the Tribunal may set aside the order to impound on the basis of the owner’s due diligence. In this case, the driver of the motor vehicle at the time in respect of which the order was made was Mr. Errol Crawford. To succeed in this hearing on the basis of due diligence, therefore, the Applicant must establish that due diligence was exercised in attempting to determine that Mr. Errol Crawford driver’s licence was not under suspension.

The 6th edition of Black’s Law Dictionary defines “due diligence” as:

“...such a measure of prudence, activity, assiduity as is properly to be expected from and ordinarily exercised by a reasonable and prudent man under the circumstances, not measured by any absolute standard but depending on the relative facts of the case.”

At issue is whether the Applicant was “reasonable and prudent” in his efforts to ensure the driver Mr. Errol Crawford had a valid driver’s licence.

Incontrovertible evidence demonstrates that the Applicant procured and obtained the necessary information prior to hiring Mr. Joseph Anthony Jarrell. Copies of Mr. Errol Crawford's driver's licence and abstract were filed with the Tribunal by the Applicant. This information was obtained from the Applicant's agent upon hiring Mr. Errol Crawford.

The Respondent's Counsel contends that accepting the information provided at face value is not sufficient. The Applicant could have different types of questions and checked the driver's abstract more often.

The Tribunal realizes that the onus is on the drivers to inform the employers as to any offences or restrictions on their driver's licence. Further, the Tribunal applauds the fact that recognizing the consequences of Mr. Crawford not paying his fines, the Applicant's agent was planning to carry out an earlier licence check. Nonetheless, the fact remains that the period of one year between checks is unreasonably lengthy, preceded the Applicant's hiring of the driver by a number of months, and in the Tribunal's opinion such conduct does not constitute "reasonable and prudent" measures.

Further, section 50.2 of the Act is specific in its requirement "...that the owner of the motor vehicle..." exercise due diligence. The Applicant relied on a third party for its background check and accepted the information provided without further questioning. If the Applicant relies on third party, the Applicant must exercise careful supervision over the third party's efforts.

The Tribunal finds that the Applicant's endeavour was in fact not "reasonable" and sufficient to be due diligent.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal **confirms** the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: April 16, 2002

BAHRAMI

SHAHRAM BAHRAMI

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: NIVES MONTANO, Presiding member

APPEARANCES: JOHN PETROSONIAK,
Representative for the Registrar of Motor Vehicles

SHAHRAM BAHRAMI, Applicant
unrepresented

DATE OF HEARING: April 11, 2002

DECISION RELEASED: April 16, 2002 TORONTO

REASONS FOR DECISION

A hearing was held on April 11, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Shahram Bahrami (the "Applicant")
Motor Vehicle: 1991 Lincoln SIG, plate AKPH 055 (the "vehicle")
Date of Appeal: March 25, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on April 11, 2002 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

I have been dealing with depretion and other problems since 1997 after seperation with my ex-wife and financial problems are among those. After my Driver's L. was suspended I was not

able to work even P.T. Also I have disability in my left hand so finding a job is almost impossible. I hardly afford the money that I have to pay for Medication and Food. On the other hand I have to deal with the charges and Tickets that I received recently which I don't have the money for a lawyer or Agent and/or the Tickets. Above all of this I have to pay \$5000 to the person who gave me the money to buy this car and work with it (As a Limo Driver). By the time that I can get this car I have to pay them \$800 which I don't have it plus as I mentioned before I have to pay to a lawyer or agent to deal with my charge and after all I have to pay the Fines. At this moment I'm on social Assistance and I have no extra money or savings. During month of March I haven't been able to pay for my medication (4 different kinds) even proper food. I really don't know how I can pay this money (\$800) to the Touring company or hire a lawyer or agent plus the \$5000 that I owe for the car. Basically my situation is not getting better and really need your help. I'm going to attach some document but if there is anything else that you need please let me know and I will provide them up on hiring. Thank you very much.

The following is a summary of the Applicant's affirmed testimony.

The Applicant came to Canada with his wife from Iran seeking political asylum in 1995. He became a landed immigrant in 1997, as well as becoming separated from his wife that same year. He and his wife had no children and the Applicant has no family in Canada. He is currently on social assistance.

Before his suspension in June of 2001 for dangerous driving, he was employed as a limousine driver. Since then, he has applied for various other jobs but has been unsuccessful. As the Applicant allegedly has a disability in his left hand, this also hinders his chances for employment.

In his testimony, the Applicant indicated he is currently prescribed four types of medication. One of the medications is an anti-depressant. He was unable to tell the Tribunal what the other three medications were for. He is also currently under the counselling of a psychiatrist.

At his place of residence on Elwood Boulevard, the landlord had a small driveway and garage which the Applicant was not permitted to use since they had a vehicle as well. The Applicant testified he tried to obtain a municipal permit through the City of Toronto, but they were no longer being issued. He also tried to sell the vehicle, but he only received one offer in the amount of \$500, which he declined.

With respect to the circumstances surrounding the impoundment, the Applicant testified that he had parked his vehicle on Avenue Road for the day. It was after 5 p.m. when the Applicant went to move his vehicle. Vehicles are not permitted to be parked on a main road after 4 p.m. The Applicant advised that the reason for his tardiness was due to his medications. When the Applicant was in his car warming it up, he noticed a police officer in his vehicle in his rear-view mirror. The Applicant then proceeded out of his parking spot and made a right turn onto Elwood Boulevard (approximately 2-4 metres away), wherein he was pulled over by the police officer. When the police officer asked for his driver's licence, the Applicant surrendered it to him.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows (Exhibit 3):

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Shahram Bahrami;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of dangerous driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until June 22, 2002.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously

been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension

- (ii) resulted in the order to impound the motor vehicle, and will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant has requested an appeal on the grounds of “exceptional hardship” under section 50.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the criteria the Applicant must meet to determine if “exceptional hardship” will result from the impoundment. The Applicant in this case has argued that the impoundment will result in hardship as described by section 22(2). In order for his claim to be considered under section 22(2), the Applicant must have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered for an alternative to the impounded vehicle.

The Tribunal may consider the criteria set out in clause (2) (b), (c) and (d) if the owner demonstrates that,

- (a) no alternative to the impounded motor vehicle is available;
- (b) the loss will be immediate, significant and lasting;
- (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
- (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).

These criteria are cumulative. That is, all of these criteria must be met before the Tribunal may consider the ground of "exceptional hardship" under section 50.2(3)(d). On the evidence, only some of the above-mentioned criteria have been met. The Tribunal finds there may be the possibility of the loss being immediate, significant and lasting based on the current financial and emotional hardship the Applicant is facing.

- (a) “**no alternative to the impounded motor vehicle is available**”

The Applicant lives within the City of Toronto, which is also 911 accessible. There are many modes of transportation available, i.e., public transit, taxi cabs. Alternatives are available.

(b) **"the loss will be immediate, significant and lasting"**

The Applicant testified that he is currently on social assistance. He does not have the money for his medications as well as for food. To date, he has borrowed monies for the purchase of his vehicle (\$5,000) as well as for moving expenses and legal advice (\$1,200), which he feels he cannot repay. When his case comes before the court later this month, he will possibly be incarcerated due to his inability to pay the fines. It will cost approximately \$800 to release the vehicle from impound, which money he does not have. The likelihood of job losses are a possibility, though they are not realistic.

(c) **"the impact of the loss will be upon a person ordinarily transported by the motor vehicle"**

(d) **"...other than the person...under suspension..."**

In his testimony, the Applicant testified he was aware that he was not to have care and control of a vehicle. The Applicant's licence was under suspension. The Applicant was the driver of the motor vehicle.

After considering the above requirement, the Tribunal, although sympathetic towards the Applicant's circumstances, finds that the Applicant has not established exceptional hardship as set out in section 50.2(3)(d) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Nives Montano, Presiding Member

RELEASED: April 16, 2002

KIM

STEVE KIM

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
MOTOR VEHICLE DEALERS ACT

TO REFUSE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

STEVE KIM, Applicant, neither present nor represented
A. MICHAEL ROTHE, Counsel, representing the Registrar under the
Motor Vehicle Dealers Act

DATE OF
HEARING: April 17, 2002

TORONTO

DECISION AND ORDER

BACKGROUND:

Steve Kim (the "Applicant") appeals the Proposal of the Registrar of the *Motor Vehicle Dealers Act* (the "Registrar" and "Act" respectively) to refuse the Applicant's registration as a salesperson of motor vehicles. The Proposal was issued on December 4, 2001 in terms of section 7.(1) of the Act and the Registrar bases his Proposal on section 5.(1) (a) and (b) of the Act.

The Registrar's position is that the Applicant should be refused registration as his past conduct affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty; further, that the Applicant cannot be reasonably expected to be financially responsible in the conduct of business.

The reasons given by the Registrar in his Proposal to Refuse registration of the Applicant are as follows:

The intention and objective of the Act is to protect the public interest. The requirements of the Act include that Registrants be financially responsible in the conduct of business and the Registrants carry on business in accordance with the law and with integrity and honesty. The Applicant's past conduct is inconsistent with the intention and objective of the Act, and therefore warrants disentitlement to registration under the Act. Therefore, the Registrar is unwilling to register Steve Kim under the *Motor Vehicle Dealers Act*.

(Exhibit 1, tab 1)

The Registrar's Proposal gives the following particulars regarding the reasons for his Proposal:

1. The Applicant applied for registration as a motor vehicle salesperson on or about November 1, 2001. He proposes to work for World Fine Cars Ltd.
2. On the application to become a registered salesperson question 9 asks:
"Have you ever been found guilty or convicted of an offence under any law or are any charges pending? (This includes those instances where a conditional or absolute discharge has been ordered)."

The Applicant answered, "Yes", indicating:

"In 1995 I had sold a vehicle for a customer without telling my employer. I had the profit from sale for a year without giving it to the customer. There was a conditional discharge from the court."
3. A criminal record search found that the Applicant has the following convictions:

October 26, 2000: Fraud Over \$5000 (x3)
4. On the application to become a registered salesperson question 6 asks:
"Are you engaged now or have you been involved in personal bankruptcy proceedings? If yes, attach a copy of the Assignment in Bankruptcy or proof of discharge."

The Applicant answered "No."
5. The Applicant has been an undischarged bankrupt since March 15, 1999.
6. The Applicant failed to make full disclosure on his application for registration submitted to the Registrar.
7. The Applicant has failed to comply with the *Motor Vehicle Dealers Act* and in particular with section 5.

(Exhibit 1 Tab 1)

The Registrar amplified his proposal by providing Further and Other Particulars dated March 8, 2002 which states as follows:

1. That Steve Kim (the "Applicant") is in arrears with the Ministry of Community and Social Service's Family Responsibility Office for approximately \$7,000.00.
2. The Applicant's driver's licence was suspended on or about February 20, 2002.

(Exhibit 1 Tab 2)

The Applicant was not present or represented when this matter was called at 9:30 a.m. and accordingly the matter stood down for thirty minutes. When the matter was called after thirty

minutes the Applicant was not present nor was he represented. The matter proceeded in the Applicant's absence.

THE EVIDENCE:

The evidence of the Registrar consisted of Ms. Stacy Murphy's evidence and Ms. Mary Jane South's evidence.

Stacy Murphy

Ms. Murphy testified that she is the hearing's coordinator at the Tribunal and that she caused the Notice of Hearing, dated January 22, 2002 to be sent to the Applicant.

She testified that the Notice of Hearing stated that the hearing would commence at 9:30 a.m. on April 17, 2002 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto. This Notice of Hearing was sent by courier to the Applicant at the address given by the Applicant in his Notice of Appeal. The courier had confirmed to Ms. Murphy that on February 1, 2002 the notice was delivered and that one S Kim had signed having received the document.

Ms. Murphy further stated on April 17, 2002 when this matter stood down for thirty minutes, she attempted to communicate with the Applicant at the two telephone numbers given by the Applicant to the Tribunal in his Notice of Appeal. Ms. Murphy stated she was not successful in speaking with the Applicant, as he was no longer at either of the two telephone numbers.

Mary Jane South

Ms. South testified that she is the Deputy Registrar employed by the Ontario Motor Vehicle Industry Council ("OMVIC") and that her duties include overseeing the registration of motor vehicle salespersons and dealers.

Ms. South stated that OMVIC was created in 1997 and is charged with enforcing compliance with the Act and its regulations. She reviewed the criteria for registration of salespersons under section 5 of the Act and also reviewed the Notice of Proposal to Refuse the Applicant's registration dated December 4, 2001 and the Registrar's Notice of Further Particulars dated March 8, 2002

(Exhibit 1 Tabs 1 and 2)

She testified that she had concerns with the Applicant being granted registration and listed her concerns as follows:

- (i) The Applicant in his written application for registration as a salesperson had failed to disclose three convictions for Fraud over \$5,000.00. These convictions were registered on October 26, 2000 arising out of three separate incidents. The first took place in February 1997 while the remaining two incidents took place during the period May to July 1998. The Applicant was ordered to make restitution of \$32,800.00

(Exhibit 1, Tabs 6 and 7)

- (ii) The Applicant had disclosed in his written application for registration of November 1, 2001 that in 1995 he had sold a customer's motor vehicle without disclosing this transaction to his then employer and had failed, for a period of one year, to account to his customer for monies due to his customer. The Applicant was apparently criminally charged although he did not disclose the charge nor does the charge and the conviction appear on the C.P.I.C. report obtained from the Police by OMVIC.

(Exhibit 1 Tab 6)

- (iii) The Applicant had answered "No" on his November 1, 2001 application for registration to the question whether he then or had previously been involved in personal bankruptcy proceedings.

This answer, according to Ms. South, was false as the Applicant was placed in bankruptcy on March 15, 1993 with total liabilities of \$99,600.00 and with assets of \$200.00.

(Exhibit 1, Tab 9)

- (iv) The Applicant's three recent criminal convictions for Fraud over \$5,000.00 raise serious concerns as far as the Registrar is concerned, as such convictions relate to the Applicant's ability to carry on business in accordance with law and with honesty and integrity. These convictions are recent in time.
- (v) The non-disclosure of the three fraud convictions, as well as the non-disclosure of his bankruptcy, causes concern to the Registrar. The questions posed to the Applicant, and to which he falsely responded, were material. The Registrar relies on a full and honest disclosure when applicants answer questions in their applications. A lack of full and honest disclosure by an applicant, such as in this instance, leads the Registrar to question the veracity of such applicant and his ability or willingness to operate within the law and with honesty and integrity.
- (vi) The Applicant has incurred a debt of \$5,000.00 to Casino Rama which debt remains unpaid. Additionally, the Applicant has an unpaid liability of \$7,000.00 for family support and also owes Enbridge Consumer Gas the sum of \$417.00. These unpaid liabilities indicate to the Registrar that the Applicant's financial position is precarious and that he cannot reasonably be expected to be financially responsible

in the conduct of business.

(Exhibit 1, Tab 8)

FACTS FOUND PROVEN:

The following are the facts that were found to have been proven.

1. On October 26, 2000, the Applicant was found guilty in three counts of Fraud over \$5,000.00 and was ordered to make restitution of \$32,800.00.
2. The fraud that led to the first charge took place on February 25, 1997 and the fraud that led to the remaining two charges occurred during the period May 1998 and July 1998.
3. On or about November 1, 2001 the Applicant completed and signed a written application for registration as a motor vehicle salesperson which application was submitted to and was received by OMVIC on November 1, 2001.
4. In the aforesaid written application of November 1, 2001 the Applicant failed to disclose that he had been declared bankrupt on March 15, 1999, with declared liabilities of \$99,600.00 and declared assets of \$200.00.
5. In the aforesaid written application for registration as a motor vehicle salesperson dated November 1, 2001 the Applicant failed to disclose the three Fraud over \$5,000.00 convictions referred to in paragraph 1 above.
6. The Applicant has three recorded unpaid debts incurred by him. These three debts relate to monies due and owing by the Applicant
 - (a) to Casino Rama in an amount of \$5,000.00
 - (b) for unpaid family support payments of \$7,000.00
 - (c) to Enbridge Consumers Gas in an amount of \$417.00.

THE LAW:

Section 7.(1) and 7.(2) of the Act states:

7.(1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the Registrar shall serve notice of the proposal, together with written reasons therefor, on the applicant or registrant.

(2) A notice under subsection (1) shall state that the applicant or registrant is entitled to a hearing by the Tribunal if the applicant or registrant mails or delivers, within fifteen days after

service of the notice under subsection (1), notice in writing requiring a hearing to the Registrar and the Tribunal, and the applicant or registrant may so require a hearing.

Section 5.(1) of the Act states:

5. (1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

(b) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or

Section 6.(1) of the Act states:

6. (1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section

DECISION AND REASONS:

The onus of proof rests upon the Registrar to prove that the past conduct of the Applicant affords reasonable grounds for the belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.

The test to be applied in a matter of this nature has been set out in *re Brenner*, 19 C.R.A.T. 58 in which Southey J. stated:

"The effect of section 7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself."

The Applicant did not appear at the hearing and therefore did not contest the Registrar's allegations and the testimony of the Registrar's two witnesses. The Tribunal accepts the testimony of the Registrar's two witnesses and finds that the Registrar has discharged the onus of proof that rested upon him.

The Tribunal's reasons for its decision follow.

Non-Disclosure

The Applicant failed to disclose his bankruptcy and the three Fraud over \$5,000.00 convictions registered against him. These criminal convictions reflect deceit on the Applicant's part and are by no means minor offences.

The non-disclosure by the Applicant is material. The Registrar has neither the resources nor time to check all answers and relies on Applicants to be honest and forthright when answering questions in the written application for registration. The Applicant's failure to disclose his convictions and bankruptcy reflect adversely on his honesty and integrity and affords the Registrar reasonable grounds for belief that the Applicant will not in the future carry on business in accordance with integrity and honesty.

Fraud Convictions

The Applicant's three criminal convictions for Fraud over \$5,000.00, in and of themselves, indicate a course of recent misconduct and criminal activity. This misconduct justifiably gives the Registrar cause for concern when considering whether to register the Applicant. The Registrar has a duty and obligation to attempt to ensure that all persons whom he registers as a motor vehicles salesperson will conduct themselves with honesty and integrity and will act within the law and will not place the public in jeopardy in their dealings with dealers or salespersons. Having regard to the Applicant's recent serious criminal convictions, the Registrar is, in the opinion of the Tribunal, correct in refusing to register the Applicant. The Fraud convictions, by their very nature, evidence deception on the part of the Applicant. Compounding this deceit, is the Applicant's non-disclosure of material facts in his application.

Expectation of Financial Responsibility

The Applicant's conduct of his financial affairs reflects irresponsibility. His bankruptcy in 1999 with declared debts of \$99,600.00 and declared assets of \$200.00 coupled with his outstanding family support obligations of some \$7,000.00 are reflective of either an inability to control his financial affairs in an orderly manner or are reflective of a person who lives well beyond his financial means. This conduct is inconsistent with the actions of a financially responsible person. This financial irresponsibility in the Applicant's personal affairs may well, in the future, translate into financial irresponsibility in his conduct of business should the Registrar allow the Applicant's registration. The Tribunal, when viewing the Applicant's past conduct in regard to his financial affairs, believes the Registrar is correct that the Applicant cannot reasonably be expected to be financially responsible in the conduct of business.

On the basis of the cumulative effect of the Applicant's past conduct of non-disclosure, criminal convictions, bankruptcy and financial irresponsibility, the Tribunal finds that the Registrar is not

in error in concluding that the past conduct of the Applicant affords reasonable grounds for belief that the Applicant should not be granted his registration.

DECISION:

Pursuant to the authority vested in it by section 7(4) of the *Motor Vehicle Dealers Act*, the Tribunal directs the Registrar to carry out his Proposal dated December 4, 2001 to refuse the registration of the Applicant as a motor vehicle salesperson under the *Motor Vehicle Dealers Act*.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: April 22, 2002

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

DRIZEN

KEVIN AND JOANNA DRIZEN

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: BRIAN K. MAROTTA, Vice-Chair, presiding

APPEARANCES:

KEVIN AND JOANNA DRIZEN, appearing on their own behalf
MARCUS KNAPP, Counsel, representing the Ontario New Warranty
Program
Peter Zions Construction Ltd, Added Party

DATE OF

HEARING: April 11, 2002

Toronto

REASONS FOR DECISION AND ORDER

Kevin and Joanna Drizen (the "Applicants") appeal to the Licence Appeal Tribunal (the "Tribunal") from a decision of the Ontario New Home Warranty Program (the "Program") contained in its decision letter dated December 21, 2001 as amended on January 2, 2002, wherein the Program denied the claim made by the Applicant under section 14(2) of the *Ontario New Home Warranties Plan Act* (the "Act"). The decision of the Program was made under section 16 of the Act.

FACTS FOUND PROVEN:

The Applicants were owners of a building lot on which they intended to construct a residence.

The Applicants had heard of the added party, Peter Zions Construction Ltd. ("Zions"), which was highly recommended to them by several people.

The Applicants made inquiries regarding Peter Zions Construction Ltd. and decided that it was the company that they wanted to construct their dwelling. In addition to making inquiries, the Applicants searched the web site of the Ontario New Home Warranty Program and saw that there were no chargeable offences against Zions and that its after service was rated as excellent.

On September 6, 2001, the Applicants met with Peter Zions, a principal of the company, to discuss his company building their residence. The Applicants had several concepts of their own which they wanted incorporated into their house.

Mr. Zions advised the Applicants that he required \$5,000.00 to get things started. It was agreed with the Applicants that concept drawings had to be completed before the final pricing could be made on the proposed home.

The Applicants were given an invoice from Peter Zions Constructions Ltd. on which Peter Zions had written "Deposit for concept drawings on Lot 4 Beechbrooke. Deposit to be used for total package. A refund of \$1,000.00 to be given if a contract to build is not finalized. Paid by cheque 10/01".

Peter Zions' evidence was that the \$5,000.00 would have been credited towards the cost of building the house if a contract were finalized for his company to build the house. If his company did not enter into a contract and build a house for the Applicants, he would return \$1,000.00 to the Applicants and the balance of \$4,000.00 would be retained as a fee for the concept drawings and the time spent with the Applicants.

Mr. Zions' evidence was that it was impossible to enter into a contract with the Applicants at that time as they required a custom built house and the concept drawings had to be completed first.

The Applicants were anxious to have their house started and applied for a mortgage and advised the bank that they intended to use Peter Zions Constructions Ltd.

The Applicants had meetings with Peter Zions and his draftsman, Trevor Thompson, to discuss various concepts for the home. George Wallis, the Project Estimator for Peter Zions Construction Ltd. provided the Applicants with a three-page list of Upgrades to Standard Pricing, which gave various estimates of costs and choices for the Applicants. It was also noted that a house of that planned size may require two heating systems. The list stated "Please remember that at this time I am using educated guesses for this budget pricing. I will be happy to finalize these options along with any other items that you wish to investigate once the design and the drawings have been completed".

Before the concept designs were completed, Peter Zions Constructions Ltd. made an assignment in bankruptcy.

The Applicants then privately retained the services of Trevor Thompson to complete the design concept drawings which he had been working on as an employee of Peter Zions Construction Ltd.

Mr. Thompson gave evidence that he had spent approximately twenty-five hours on the time sheets of the company before it declared bankruptcy. The charges for concept drawings varies according to the project. According to his evidence and a letter which was written by him at the request of Mr. Drizen, the final concept floor plans and elevations were not completed and more revisions and drawings were needed. He was retained privately by Mr. Drizen to complete the work which included the conversion of the concept drawings into working drawings suitable for submission for a building permit.

At the point that concept drawings were at when Peter Zions Construction Ltd. made an assignment in bankruptcy, it was not possible to have a finished contract as the plans were not completed and the pricing was not done. Even when there was completion of concept drawings that did not always result in a construction contract.

The Applicants demanded that Peter Zions return their full \$5,000.00 and indicated that concept plans were virtually useless. When the \$5,000.00 was not returned, the Applicants applied to the Ontario New Home Warranty Program for full compensation under Section 14 (2) of the Act relating to a claim for failure to substantially perform a construction contract.

In support of his application, Mr. Drizen had his Solicitor write to the Program advising the Program that Mr. Drizen had entered into an oral contract with Peter Zions Construction Ltd. and requested processing of the payment from the guarantee fund as quickly as possible. The letter further stated:

"The parties contemplated that a written building contract would be entered into after the design details and final pricing had been determined.

Peter Zions Construction Ltd. undertook to prepare concept drawings for the new home. These drawings were required to determine the contract price. These drawings were to be appended to the written building contract that the parties intended to enter into."

On December 21, 2001, the Program issued a decision letter denying the Applicants' claim. On January 2, 2002, the Program issued a revised decision letter because of a mistake in the heading of the letter, however, the substance and body of the revised decision letter were the same as the initial letter.

The Applicants appealed the Program's decision to the Licence Appeal Tribunal.

ISSUE:

Did the Applicants enter into an oral contract with Peter Zions Construction Ltd. for the construction of a home and on that basis are the Applicants entitled to succeed in their claim against the Program under the *Ontario New Home Warranties Plan Act*?

THE LAW:

Section 14 (2) of the *Ontario New Home Warranties Plan Act* states:

14 (2) Subject to the regulations, an owner of land who has entered into a contract with a builder for the construction of a home on the land and who has a cause of action against the builder for damages resulting from the builder's failure to substantially perform the contract, is entitled to receive payment out of the guarantee fund of the amount by which the amount paid by the owner to the builder under the contract exceeds the value of the work and materials supplied to the owner under the contract.

If an Applicant is successful in a claim against the guarantee fund, the Act provides the following in Section 14 (6):

14 (6) In assessing the amount for which a person is entitled to receive payment out of the guarantee fund under this section, the Corporation shall take into consideration any benefit, compensation, indemnity payable, or the value of work and materials furnished to the person from any source.

Under Regulation 892, the definition of construction contract is as follows:

"construction contract" means an agreement between a builder and an owner of land which provides for the construction of a home on the land.

APPLICATION OF LAW TO FACTS:

There is no question whatsoever that the Applicants did not have a written building contract. They had an oral agreement with Peter Zions that he would prepare concept drawings in return for a \$5,000.00 deposit. If the parties thereafter agreed to enter into a building contract, the deposit would be applied towards the total package. If they were not able to come to any agreement and did not enter into a building contract, then Mr. Zions would retain \$4,000.00 for his efforts in the concept drawings and a refund of \$1,000.00 would be given to the Applicants. What the parties had was an agreement to prepare concept drawings and to enter into negotiations respecting the building of a home. There was no oral contract to which the Applicants could hold Mr. Zions legally liable to proceed in the construction of their home. The basic ingredients needed for an enforceable contract including the price, the start date, the finish date and what was to be included in the

construction were all undecided at that point. After the concept designs were finished and the project had been priced, the Applicants were free to refuse to enter into a contract with Mr. Zions for the construction of their house if they did not care for the design or for the pricing on the construction. It was also available to Mr. Zions to walk away from the contract if the Applicants did not agree with his terms. There was no enforceable contract with the builder for the construction of a home.

As is stated in G.H.L. Friedman, the Law of Contract (4th Ed.), (Toronto: Carswell, 1999) at page 21:

“Uncertainty about some specific obligation may suffice to make impossible the conclusion that there is a contract in effect between the parties. The test would seem to be whether the term or terms in question relate to essential aspects of the alleged contract. Examples of this are the failure of parties to settle the purchase price for goods, the lack of agreement as to the date of commencement and term of a lease, or the amount of interest to be paid.”

The author continues to state on page 23:

“For the most part, where terms are missing or have not been finalized or there is some ambiguity about the precise meaning of what the parties appear to have agreed to, the general tenor of the decisions is against any possibility of completing the parties' work for them and creating a valid contract out of the vague contractual intent that may be evidenced by their language or conduct.

In other situations the parties may have only agreed to agree. This will be the case where they had left important aspects of the intended contract to be determined by the parties at a later date. Hence it is impossible to conclude that they have arrived at a final, definite contractual relationship. There can not be a contract to enter into a contract. Nor can there be a contract to negotiate, i.e. an agreement to agree. The underlying principal is that all of the terms of the agreement between the parties must be settled. There must be nothing left for negotiation.”

On Goldsmith on Canadian Building Contract (4th Ed.), (Toronto: Carswell 1988, it is stated at page 1-17:

“An agreement to agree in the future is not a contract, since there is no consensus at the time of the original agreement. Furthermore, if some of the terms of the contract are left to future negotiations, the so-called agreement lacks the necessary certainty to make it an enforceable contract.... the court will not make an agreement for the parties, and unless the terms of the contract are certain, or ascertainable without the necessity of further agreement by the parties, it is not enforceable.”

In *re Carvalho*, (September 11, 1992) (Ont. C.R.A.T.), the Applicant had provided the builder with a \$6,000.00 reservation fee for the anticipated purchase of a condominium. The Applicant thought that he was signing a purchasing agreement with the right to obtain return of his monies if it did not proceed and he was convinced that the builders would proceed to build the project. Mr. Carvalho later requested a refund and when the builder declined Mr. Carvalho applied to the Plan for restitution. His request was denied, and he appealed the Program's decision to the Commercial

Registration Appeal Tribunal. The Tribunal held that the transaction between Mr. Carvalho and the builder constituted a contract for the provision of a home and fell within the Act. The Tribunal ordered the Ontario New Home Warranties Plan Act to reimburse Mr. Carvalho for the sum of his deposit. The Plan appealed to the Ontario Divisional Court. In overruling the Tribunal, the Divisional Court stated in part, in the endorsement:

"The Tribunal erred in thinking that it was sufficient that there merely be some kind of transaction for the provision of a home. The statute requires a very particular type of transaction; a contract to provide or agree to sell; not simply a reservation agreement or some other form of contingent option or other transaction. If protection is to be extended to a class of transaction not specified in the legislation that is a matter for the Legislative Assembly, not the court."

In the similar case of *re Bell*, (October 20, 1995) CRAT, the Applicant had entered into a written reservation agreement to purchase a condominium at an agreed upon price. She paid a \$5,000.00 deposit in consideration for which the vendor was to hold the suite for fifteen days to allow the Applicant to examine and sign the Agreement of Purchase and Sale. When the builder declared bankruptcy and the Receiver refused to return the deposit, the Applicant appealed to the Commercial Registration Appeal Tribunal. The Tribunal considered itself bound by the decision of the Divisional Court in *Carvalho* as the parties had no legally enforceable contract for the provision of a home.

In the present case before the Tribunal, the Applicants assert that they have an oral contract with Peter Zions for the construction of their home. They are not entitled to relief from the guarantee fund unless they can satisfy the Tribunal that they fall within the terms of Section 14 (2). The Tribunal is of the opinion that they have failed to do so. They have not "entered into a contract with a builder for the construction of a home...". They have entered into an oral agreement for the provision of concept drawings and if the drawings were suitable and if the price was right and all matters were agreed upon, then the parties would enter into a building contract. The deposit for the concept drawings in no way obligates Zions to build a home for the Applicants and does not bind the Applicants to have Zions build a home for them. Both parties are completely at liberty not to proceed with a building contract. There is no promise to either party, except that if the contract is entered into and Peter Zions Construction Ltd. does build a home for the Applicants then the \$5,000.00 deposit will be applied toward the total package. Indeed, the parties even contemplated that they may not proceed with the building contract as the receipt from Zions sets out that the sum of \$1,000.00 would be returned if the parties did not proceed. The \$5,000.00 deposit merely contemplates the possibility of a future building contract should everything else work out between the parties. The Applicants do not fall within the requirements of section 14 (2) of the Act and accordingly, there is no jurisdiction in this Tribunal to order any payment out of the guarantee fund.

ORDER:

Accordingly, by virtue of the authority vested in it under section 16 of the *Ontario New Home Warranties Plan Act*, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim of the Applicants.

LICENCE APPEAL TRIBUNAL

Brian Marotta, Vice-Chair

Released: April 17, 2002

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

BRESSI

PREHEARING

JOSEPH BRESSI

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
REAL ESTATE AND BUSINESS BROKERS ACT

TO REFUSE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair, Presiding
MICHAEL TURK, Vice-Chair

APPEARANCES: JOSEPH BRESSI, appearing on his own behalf
GEORGE P. DRAMETU, Counsel, representing the Registrar, *Real Estate and Business Brokers Act*

DATE OF
PREHEARING: April 17, 2002 Toronto

ORDER

FOLLOWING attendances on April 17, 2002 at a pre-hearing before this Tribunal of Joseph Bressi, (the "Applicant") appearing on his own behalf and George P. Drametu, Counsel on behalf of the Registrar, *Real Estate and Business Brokers Act* (the "Registrar");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Monday, May 17, 2002 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario;

1. The Parties to the hearing are the Applicant and the Registrar.
2. The Parties to the pre-hearing recorded the following in regard to the allegations contained in paragraph one (1) through thirty-four (34) of the Registrar's Notice of Proposal to Refuse to Grant Registration to the Applicant dated January 10, 2002.

- a) The allegations contained in the following paragraphs of the Proposal are agreed to by the Applicant as being factually correct.

PARAGRAPH

number 1
number 2
number 3
number 4
number 5
number 7
number 9
number 10
number 11
number 12
number 13
number 14
number 16
number 17
number 18
number 19
number 20
number 21
number 23
number 24
number 25
number 26
number 27 (c)
number 28

- b) The allegations contained in the following paragraphs of the Proposal are not agreed to by the Applicant as being factually correct.

PARAGRAPH

number 30
number 31
number 32
number 33
number 34
number 27 (b)

- c) The allegations contained in the following paragraphs of the Proposal are agreed to by the Applicant as being factually correct, save as to the following words in each paragraph set out hereunder.

PARAGRAPHS

Number 6	("when his employment with Homelife was terminated")
Number 8	("when his employment with Homelife was terminated")
Number 15	("was terminated effective July 31, 2000")
Number 22	("Following receipt of the May 23, 2001 application, the office of the Registrar caused an execution search to be conducted against the name of the Applicant.")
Number 27(a)	("The Applicant acquired properties through Garwood Financial")
Number 29	("In late August or early September, 2001, the Office of the Registrar became aware of a court decision in the matter of <i>Cybernetics Exchange Inc. v. J.C.N Equities Ltd.</i> 54 O.R (3d) 80 (the "Cybernetics Decision")")

3. The Applicant advised the Tribunal that he has retained Thomas W. Ziebel as Counsel to represent him at the hearing of this matter on May 17, 2002 and that Thomas W. Ziebel has advised the Applicant that he will be available to represent the Applicant before the Tribunal on that date.
4. All parties to the hearing shall fully comply with the requirements of disclosure of documents or things as set forth in Rule 6 of the Rules of Practice of the Tribunal, particularly Rule 6.3.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair,
Presiding

Michael Turk, Vice-Chair

RELEASED: April 23, 2002

ANDREWS

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
BRYAN E. ANDREWS

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: February 7, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

BRYAN E. ANDREWS

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Bryan E. Andrews, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: April 24, 2002

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
789 Don Mills Road, Suite 800
Toronto, Ontario M3C 1T5

AND TO: Licence Appeal Tribunal
1 St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Bryan Andrews
394 Kerman Avenue
Grimsby, ON L3M 3W8

Pursuant to subsection 5(2) of the *Motor Vehicle Dealers Act* Bryan Edward Andrews (hereinafter referred to as "the Applicant") and the Registrar, *Motor Vehicle Dealers Act*, (hereinafter referred to as "the Registrar"), in accordance with section 4.1 of the *Statutory Powers Procedure Act*, do hereby waive the requirements of a hearing and consent to an Order of the Licence Appeal Tribunal based upon the following Terms and Conditions:

1. The Applicant agrees, if he is charged in the future, to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.
2. The Applicant agrees if he is convicted under any law of an industry specific offence or if he is convicted under the Criminal Code, the Registrar is directed to and shall carry out the proposal.
3. The Applicant agrees not to transfer his registration as a salesperson under the *Motor Vehicle Dealers Act* to another dealer without the prior written consent of the Registrar.
4. The Applicant agrees to provide full disclosure on all future applications and/or discussions with the Registrar, regardless of whether or not disclosure has been made in the past.
5. The Applicant agrees not to be involved in the process of buying, selling or leasing motor vehicles without the benefit of registration.
6. The Applicant shall not be an officer, director, owner or partner in a dealership.
7. The Applicant confirms that the circumstances surrounding his convictions are substantially as disclosed to the Registrar.
8. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.
9. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.
10. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.

- Signed in the City of _____ this _____ day of _____ 2002.

Carl Compton
Registrar
Motor Vehicle Dealers Act

DEVLIN

PATRICK AND DEBRA DEVLIN

APPEAL FROM A DECISION OF THE CORPORATION DESIGNATED
FOR THE PURPOSES OF THE *ONTARIO NEW HOME
WARRANTIES PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL: JOHN ORT, Member

APPEARANCES:

PATRICK AND DEBRA DEVLIN, Applicants, representing themselves,
ANDREW LEWIS, Counsel, representing the Ontario New Home
Warranty Program,
JEFFREY W. KRAMER, Counsel, representing the Added Party,
Kansun Homes Ltd.

DATES OF

HEARING:

March 25, 26, and 27, 2002

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") by Patrick and Debra Devlin (the "Applicants") under section 14(1)(b) of the *Ontario New Home Warranties Plan Act* (the "Act") respecting a decision by the Ontario New Home Warranty Program (the "Respondent" and the "Program") dated April 30, 2001, (the "Decision") denying the Applicants' claim for compensation.

The Decision described the Applicants' complaint as: "Water penetration 2 nd. Bedroom outside wall. Builder reports he fixed leak but 'massive' amounts of rain enter with each rain/shower." The Applicants complain about the presence of mould. The reason given by the Decision for denying the Applicants' claim is: "This complaint does not represent a defect in either materials or workmanship nor is it a violation of the Ontario Building Code and does not affect the structure. Complaint received February 8, 2000 at ONHWP. Pursuant to Section 13(4) of the Act, complaints must be received by ONHWP in writing within the first year after the Owner takes possession. As such, this complaint was received too late to be considered for warranty coverage."

ISSUE:

Should the Tribunal set aside, confirm, or modify the decision of the Program to disallow the Applicants' claim for compensation under section 14(1)(b) of the *Ontario New Home Warranties Plan Act*?

FACTS:

The evidence presented by the Applicants consisted of the testimony of Patrick Devlin, Debra Devlin, and Arthur W. Robinson as well as documentary evidence introduced through them.

TESTIMONY OF PATRICK DEVLIN:

Mr. Devlin testified that the Applicants moved into their new house on the closing date of December 18, 1997.

Mr. Devlin stated that in the spring of 1998 the Applicants discovered a water stain in the second upstairs bedroom. He said that Todd Lewis, an employee of the Added Party, Kansun Homes Ltd. ("Kansun" and the "Builder"), later told him that he fixed the roof leak and will replace the stained portion of the drywall in the bedroom. Mr. Devlin testified that problems with that water leak persisted. He stated that on September 6, 1999, he sent a letter to the Program (exhibit 5, tab 3, pages 3 and 4) with an attachment previously sent to Kansun about outstanding work including the following complaint: "Damage done to drywall in bedroom from leak in roof during winter of 1998". Mr. Devlin said that the Applicants sent to the Program a Conciliation Request Form dated October 6, 1999, (exhibit 7) that states a complaint as: "water penetration in the second bedroom" and specifies the dispute with the Builder as: "Builder reports he fixed leak but 'massive' amounts of rain enter with each rain shower."

Mr. Devlin stated that during continued investigation of the water leak in the autumn of 1999, Kansun's representative cut out a piece of the drywall in the second upstairs bedroom. Mr. Devlin testified that the wall cavity was wet and mould was present on the inside surface of the exterior wall, on the Aspenite sheeting. Mr. Devlin said that after several attempts, the roof leak was satisfactorily repaired in November 1999.

Mr. Devlin testified that the Applicants hired Pillar to Post Professional Home Inspection to examine the exposed exterior wall and the house, and he referred to their report (exhibit 5, tab 9, pages 3 and 4). That report states in part: "Stains typical of water stains and an advanced growth typical of mould/mildew was observed on wall sheathing covering approx. 90% of exposed wall sheathing." The report adds: "Advise consultation with or inspection of moulds/mildews by an Environmental Testing Technician to determine health hazard and treatment of same..."

Dr. Devlin said that Pinchin Environmental Ltd. next inspected the house. He referred to their

report (exhibit 5, tab 10, pages 2 to 4), which states: "Patchy mould growth is present on the Aspenite sheeting with the wall cavity of the children's bedroom and adjacent washroom." The report identifies the mould as *Penicillium implicatum* and *Penicillium roquefortii* and further states: "The moulds identified are not toxic or mycotoxin producing species and are present as a result of water infiltration and or condensation."

Mr. Devlin further testified that Pinchin Environmental Ltd. made a second inspection of the house on May 23, 2000. He stated that mould was found on the whole second floor of the house. Mr. Devlin referred to his letter to Kansun dated June 28, 2000, (exhibit 5, tab 11, pages 2 to 4). That letter states: "A second set of samples were taken from the south and east walls of the house. Mold was visible to the naked eye in these walls at the time. Mr. Siedlecki did not take mold from the west wall (even though a hole was cut in this wall) stating that the mold in the west wall was probably all the same type and a sample was not necessary." Mr. Devlin stated that the Builder refused to release to the Applicants the report prepared by Pinchin Environmental Ltd. following their second inspection.

Mr. Devlin said that the Applicants asked Sick Building Solutions Corporation to investigate. Their report dated September 8, 2000, (exhibit 5, tab 12, pages 5 to 12) states in part: "...no growth was apparent either from visual examination nor from microscopic mycelium examination...Microscopic examination of the mould suggested moulds of the *Penicillium* genus and that there had been no new growth (no apparent recent mycelium growth) on the samples taken...The mould growth appeared to extend behind the studding and continue along the sheathing, with no apparent growth on the studding or sill...It is my opinion that the sheathing was wet either upon application or severely soaked shortly after, with the wall then being sealed by the insulation, vapour barrier and bricks being put in place before the wall had adequate time to dry.-Or-The sheathing was already supporting mould growth at the time of installation." The report also states that *Penicillium implicatum* and *Penicillium roquefortii* are not toxigenic moulds. Among the recommendations of the report is that any water-damaged materials be replaced.

Mr. Devlin said that the second report of Pinchin Environmental Ltd., dated July 20, 2000, (exhibit 5, tab 12, pages 13 to 16) was given to the Applicants by the Program on September 19, 2000.

That report states: "No AIHA [American Industrial Hygiene Association] recognized moulds (Toxic) of concern were identified in air sample collected. The report concludes: "...the mould is more extensive than previously believed and is not a healthy environment for occupants." It recommends: "Remove Aspenite board supporting mould growth and investigate for sources of moisture or high humidity."

Mr. Devlin testified that the Applicants were concerned that removing the Aspenite sheeting from inside might compromise the structural integrity of the house and would leave pieces of Aspenite covered by mould behind the studding. Mr. Devlin stated that the Applicants therefore obtained estimates on removing the mouldy Aspenite from the outside. Mr. Devlin referred to the estimate of Tri-Sant Contracting Ltd. for work for the approximate sum of

\$84,000.00 plus taxes (exhibit 5, tab 19) and to the estimate of Under Construction for \$76,400.00 plus taxes (exhibit 5, tab 20).

Upon cross-examination by Mr. Kramer, Counsel for the Added Party, Mr. Devlin admitted that to his knowledge his family suffered no health problems from the mould.

Mr. Kramer referred Mr. Devlin to a letter dated September 24, 1999, (exhibit 3, tab 7), which states in part: "Enclosed, at your request, is a Request for Conciliation Form, for your completion." Mr. Kramer next showed to Mr. Devlin letter dated November 15, 1999, from the Program to the Applicants (exhibit tab 6, page 2), which states: "In our review of your file, we have noted that you must provide ... Completed request for Conciliation Form..." Mr. Devlin admitted that as of November 15, 1999, the Program had not received the Request for Conciliation Form. Mr. Kramer next showed to Mr. Devlin exhibit 7, the Request Conciliation Form. Mr. Devlin acknowledged that the stamp on the form states: "Received Jan 04 2000 West Central R/O".

TESTIMONY OF DEBRA DEVLIN:

Mrs. Devlin testified mainly about exhibit 4, the Hurley Engineering Inc. Report. Page 3 of the report considers possible causes for the mould on the inner face of the Aspenite. It states: "One, the aspenite may have been stacked on site, without protection from the elements...As the ground floor aspenite appears unaffected by mould, the above premise - lack of protection on site - would suggest that the second floor was sheathed with damp-affected aspenite and the ground floor was not. This seems an unlikely proposition.

"Two, the possibility of moist air entering the second floor at roof level is very real...There appears to be unhindered access by cold moist air immediately adjoining the second floor wall framing. This could lead to condensation, mould formation and water in the wall system. The report concludes: "In undersigned's opinion, the only solution to the problem of the mould-affected aspenite is to remove the material from outside the house. This process would permit repairs to the vapour retarder, review of the state of the batt insulation, etc. It would also confirm whether the base plate ... is in sound condition."

TESTIMONY OF ARTHUR W. ROBINSON:

Mr. Robinson stated that he has an Environmental Science Specialist certification from the University of Toronto. He started his company, Sick Building Solutions Corporation, in 1995. The Tribunal accepted Mr. Robinson as an expert.

Mr. Robinson testified that in his opinion it is not very probable that the mould would grow from the inside surface of the Aspenite to the outside surface. He stated that he found no new growth of the mould, and that the mould is dormant. Mr. Robinson also explained that, in ninety-nine per cent of cases, moisture is the limiting factor in mould growth.

Mr. Robinson also testified that the species of mould identified as present in the house in the second letter of Pinchin Environmental Ltd., dated July 20, 2000, (exhibit 5, tab 12) are not toxic.

Upon cross-examination by Mr. Kramer, counsel for the Added Party, Mr. Robinson stated that application of sodium hypochlorite, bleach, in a concentration of fifteen to twenty per cent is one of the standard ways of treating mould-infested surfaces. He said that one application would kill about half of the mould.

When cross-examined by Mrs. Devlin, Mr. Robinson said that the recommendation of Pinchin Environmental Ltd. set out in their letter of July 20, 2000, (exhibit 5, tab 12) that the Aspenite board be removed is a reasonable recommendation.

In response to a question by the Tribunal, Mr. Robinson said that treatment with a fungicide is another standard, reasonable method of dealing with mould. He also testified that selection among the reasonable, standard methods should be based on cost-effectiveness and simplicity. Mr. Robinson stated that the Applicants should stay away from the house for less than a week, a couple of days, when the mouldy Aspenite is treated.

The evidence presented by the Added Party, Kansun, consisted of the testimony of Alex Talwood and Morris Kansun as well as documentary evidence introduced through them.

TESTIMONY OF ALEX TALWOOD:

Mr. Talwood stated that he obtained a Masters degree in Architecture in 1984 from the University of Michigan. He was accepted as an expert by the Tribunal.

Mr. Talwood testified that he examined hundreds of homes, but that he has never seen mould to this extent in any other residence.

Mr. Talwood said that he disagrees with the second possible cause of dampness set out on page 3 of the Hurley Engineering Inc. report (exhibit 4) as: "...the possibility of moist air entering the second floor at roof level is very real. The roof soffit over the front door does not meet the stonework tightly ..." He said that the joint need not be caulked, because the area is completely protected from rain by the roof overhand.

Mr. Talwood testified that the industry tends to rely on government agencies in similar situations and stated that the mould should be treated with bleach solution, as recommended in a Canada Mortgage and Housing Corporation publication entitled "Clean-Up Procedures for Mold in Houses" following his report (exhibit 6, tab 1).

TESTIMONY OF MORRIS KANSUN:

Mr. Kansun said that he is the president of Kansun Homes Ltd. and that he has been in the

business since 1985.

Mr. Kansun testified that the Applicants wanted the Aspenite removed from the outside, while he was willing to remove it from the inside. He stated that Kansun removed mouldy Aspenite sheeting along about fourteen feet of the second floor of the house. He estimated the cost of treating the mould with bleach solution from the inside as \$7,5000.00, and he estimated the cost of removing mouldy Aspenite from the inside as \$15,000.00.

The evidence presented by the Program consisted of the testimony of Roger Hicks as well as documentary evidence introduced through him.

TESTIMONY OF ROGER HICKS:

Mr. Hicks stated that he has been a warranty representative with the Program for three years. He testified that he is the author of the Desk Assessment Report (exhibit 5, tab 15) and the Decision Letter (exhibit 5, tab 16).

Mr. Lewis, counsel for the Program, showed the stamp stating "Received Jan 04 2000 West Central R/O" on page 2 of the Conciliation Request Form (exhibit 7) to Mr. Hicks and asked him what it means. Mr. Hicks said that January 4, 2000, is the date that the document was received in the Program office. He said that correspondence received by the office is first date-stamped.

Mr. Hicks stated that the letter from the Program to the Applicants dated November 15, 1999, (exhibit 5, tab 6) stating: "you must provide one or more of the following (as indicated below)...Completed Request for Conciliation Form" would suggest that the Program did not have it.

Concerning the letter from the Program to the Applicants dated January 11, 2000, (exhibit 5, tab 8) stating in part: "We received your Request for Conciliation Form." Mr. Hicks said that such is the practice of the Program to acknowledge receipt and is part of the procedure in the office.

Mr. Hicks stated that he does not see a relationship between the roof leak and the mould. He said that he has nothing from experts telling him that it is related.

LAW:

Section 14(1) of the *Ontario New Home Warranties Plan Act (the "Act")* stated in part:

"Where...(b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty;...the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations."

Section 13(1) of the Act adds:

"Every vendor of a home warrants to the owner,

"(a) that the home,

"(i) is constructed in a workmanlike manner and is free from defects in material,

"(ii) is fit for habitation, and

"(iii) is constructed in accordance with the Ontario Building Code;

"(b) that the home is free of major structural defects as defined by the regulations; and

"(c) such other warranties as are prescribed by the regulations."

Section 13(4) states in part:

"A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect ..."

Section 15 of Regulation 892 under the Act states in part:

"(2) Every vendor of a new home warrants to the owner,

"(a) that the home is constructed in a workmanlike manner and is free from defects in materials including windows, doors and caulking such that the building envelope of the home prevents water penetration;"

"(3) The warranties described in subsection (2) apply only in respect of claims made within two years after the home was completed for possession..."

Section 15(1) of Regulation 892 under the Act defines "building envelope" as:

"the wall and roof assemblies that contain the building space, and includes all those elements of the assembly that contribute to the separation of the outdoor and indoor environments so that the indoor environment can be controlled within acceptable limits."

Section 1 of Regulation 892 under the Act defines "major structural defect" for the purposes of clause 13(1)(b) of the Act as:

"any defect in work or materials,

(a) that results in failure of the load-bearing portion of any building or materially and adversely affects its load-bearing function, or

(b) that materially and adversely affects the use of such building for the purpose for which it was intended, including significant damage due to soil movements, major

cracks in basement walls, collapse or serious distortion of joints or roof structure and chemical failure of materials, but excluding floor damage, dampness not arising from failure of a load-bearing portion of the building, damage to drains or services, damage to finishes and damage arising from acts of God, acts of the owners and their tenants, licensees and invitees, acts of civil and military authorities, acts of war, riot, insurrection or civil commotion and malicious damage;".

APPLICATION OF LAW TO FACTS:

The Tribunal finds that the Applicants' complaint about mould and their associated claim for compensation for water penetration was not made within two years after the home was completed for possession. Therefore, section 15(3) of Regulation 892 under the Act is not satisfied. The Applicants' letter to the Program of September 6, 1999, (exhibit 5, tab 3) refers to damage done to the drywall in a bedroom from a leak in the roof during the winter of 1998. That is not sufficient notice of the mould problem. The letter dated November 15, 1999, from the Program to the Applicants (exhibit 5, tab 6) indicates that they must yet provide a completed Request for Conciliation Form. The Request for Conciliation Form may provide sufficient notice of the Applicants' claim, but it was received by the Program on January 4, 2000, as indicated by the date stamp on page 2. Thus, the Applicants' claim for compensation for water penetration under section 15 of Regulation 892 fails.

In the event that the Tribunal is mistaken and timely notice of water penetration was received by the Program, the Tribunal notes that the burden was on the Applicants to prove that the building envelope of the home did not prevent water penetration and that the mould resulted from such water penetration. The Tribunal finds that the Applicants failed to do so and their claim fails. Mr. Robinson testified that the mould is dormant and that moisture is generally the limiting factor in mould growth. There is now no water penetration sufficient to support mould growth. Based on the testimony presented, the Tribunal finds that water penetration from the roof leak was not sufficient to explain mould growth on the entire second floor of the house. Of the theories presented to explain the presence of mould in the house, the Tribunal found most persuasive speculation based on the opinion of Mr. Robinson that the Aspenite sheeting was already supporting mould growth at the time of installation or was wet upon application. Therefore, the Tribunal finds that the home either is not constructed in a workmanlike manner or is not free from defects in material. However, such claim was not made pursuant to section 13(4) of the Act within one year after the warranty takes effect and any such claim fails.

Although, there is a defect in work or materials, the Tribunal finds no major structural defect. No evidence was presented that such defect results in failure of the load-bearing portion the house or materially and adversely affects its load-bearing function. Further, the defect does not materially and adversely affect the use of such building for the purposes for which it was intended. The evidence is that the mould is dormant and non-toxic. Mr. Devlin testified that to his knowledge his family suffered no health problems from the mould. The Applicants continued to use the second floor of their house. Therefore, a claim for compensation under section 13(1)(b) of the Act on the basis of a major structural defect fails.

DECISION:

Accordingly, by virtue of the authority vested in it under section 16(3) of the *Ontario New Home Warranties Plan Act*, the Tribunal directs the Ontario New Home Warranty Program to disallow the Applicants' claim.

LICENCE APPEAL TRIBUNAL

John Ort, Member

Released: April 25, 2002

FILENAME: 0596.nhw.Devlin

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

SOURIAL

ADEL SOURIAL

APPEAL FROM A DECISION OF THE BOARD OF TRUSTEES OF
THE ONTARIO MOTOR VEHICLE DEALERS COMPENSATION
FUND

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

THOMAS W. ZWIEBEL, Counsel, representing the Applicant, Adel
Sourial

LARRY BANACK, Counsel, representing the Ontario Motor Vehicle
Dealers Compensation Fund

DATE OF
HEARING:

April 19, 2002

TORONTO

DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") from a decision of the Ontario Motor Vehicle Dealers Compensation Fund (the "Fund") dated June 6, 2001 wherein Adel Sourial's (the "Applicant") claim for compensation was disallowed.

The Fund's refusal to allow the Applicant's claim was set out briefly in the Fund's letter of June 6, 2001 which reads as follows:

It was the Board's decision to deny your claim for several reasons; firstly, there is no bill of sale, secondly, it was a cash transaction for which you cannot provide sufficient evidence as to where the money was obtained or how much was actually paid for the vehicle, thirdly, you have indicated that you have sold the vehicle, yet it is still registered in your name.

(Exhibit 1)

The Applicant brings his appeal to the Tribunal pursuant to section 12 of Regulation 801 to the *Motor Vehicle Dealers Act* (the “Act”). The Applicant’s claim to compensation from the Fund is based upon the Fund’s refusal to pay compensation to the Applicant.

Salvatore Sam Muia (“Muia”) was a registered motor vehicle dealer under the Act and a participant in the Motor Vehicle Dealers Compensation Fund. The Applicant and Muia had entered into an agreement in terms of which the Applicant claimed he bought a motor vehicle from Muia and that Muia had breached the terms of that agreement. The Applicant sued Muia in the Superior Court of Justice and recovered, by way of a default judgment, the sum of \$25,552.33.

(Exhibit 3, Tab 3, page 21)

The above-noted judgement has not been paid by Muia.

THE EVIDENCE:

Testimony of the Applicant

The Applicant gave oral testimony at the hearing.

The Applicant stated in his testimony that he is 58 years of age, is a Canadian citizen and has resided in Canada for the past 35 years. He established a corporation that invests in the Middle East. Included in the corporation’s interests is a brick making plant operating in Egypt.

During the past thirty five years, the Applicant has bought many motor cars in Canada. In March 1999 he was looking to buy a motor car and read an advertisement in the “European Auto Trader” in which a 180 Mercedes Benz (the “180”) was advertised for sale. He called the telephone number of the advertiser and spoke to Muia and arranged to view the 180 at an address given to him by Muia. He went to Muia’s address with his wife where they met Muia and viewed the 180 which was parked in the driveway. Muia told him that he was leaving Canada and was returning to Italy and for this reason he was selling the 180.

He test drove the 180 and came to an arrangement with Muia to purchase the 180.

Upon returning home, but before concluding the purchase of the 180, he and his wife decided that the 180 did not really meet their requirements.

The Applicant had seen a Mercedes Benz 420 SEL motor car which had also been parked at Muia’s residence when he had seen the 180. The Mercedes Benz 420 SEL (the “420”) was according to the Applicant in “beautiful” condition and he and his wife decided to purchase the 420 rather than the 180. Accordingly, the Applicant telephoned Muia and told

him that he wished to buy the 420 and not the 180. Muia told him he wanted \$10,000.00 for the 420. The Applicant agreed to pay \$10,000.00 plus G.S.T. and P.S.T.

The following evening, by arrangement with the Applicant, Muia came to the Applicant's residence together with the 420. The 420 was driven by another gentleman while Muia drove himself in another vehicle. The Applicant instructed Muia to have the 420 parked in the basement garage of the building in which the Applicant resided.

After parking the 420, Muia and the person who drove the vehicle as well as the Applicant, proceeded upstairs to the Applicant's apartment. In the Applicant's apartment, the Applicant gave Muia a cheque for \$5,000.00 as well as \$1,500.00 in cash. The Applicant told Muia to "hold" the cheque until the registration papers for the 420 were delivered to the Applicant. When the papers were delivered, the \$5,000.00 cheque would be returned by Muia to the Applicant and the Applicant would replace that cheque with \$5,000.00 in cash.

The Applicant was told by Muia that the latter's sister worked at the motor vehicle licensing department and she "would do a quick transfer".

The following day Muia arrived with the registration papers for the 420 and handed them to the Applicant. Muia returned the \$5,000.00 cheque to the Applicant. The Applicant then gave Muia \$4,500.00 in cash plus a cheque for \$500.00 drawn on the Applicant's wife's bank account. After giving this cheque of \$500.00 to Muia, the Applicant altered the amount of the cheque to \$200.00 and gave Muia \$300.00 in cash.

The next day, according to the Applicant's testimony, "a lot of smoke came from the car's muffler" when he started the car. The Applicant attempted to telephone Muia over the next week to complain about the smoke coming from the muffler. After a week he succeeded in speaking with Muia and he told Muia that "the engine was shot" and that he no longer wanted the car. An argument erupted and the conversation ended.

The Applicant continued that "three to four days later", the 420's transmission "was shot" and he decided to sell the vehicle. The Applicant spoke with his brother-in-law, as he is a motor vehicle dealer operating as Marvena Auto Sales, and he agreed to sell the vehicle for the Applicant. The Applicant subsequently sold the 420 for \$1,100 to a private buyer.

The Applicant contacted the Ontario Motor Vehicle Industry Council ("OMVIC") to complain about the car and its condition. He also complained to the Ministry of Transport regarding the condition of the 420 and the Ministry inspected the vehicle and issued a "Field Inspection Report".

(Exhibit 3, Tab 3, pages 16 and 17)

In regard to the monies used by him in the transaction, the Applicant testified that on February 25, 1994 he withdrew the sum of \$2,000.00 from his banking account (Exhibit 3, Tab 3, page 13) in order to purchase a motor vehicle but he decided against such vehicle

and retained the cash he had withdrawn. He confirmed that on March 17, 1999 he withdrew the sum of \$580.00 from his banking account (Exhibit 3, Tab 3, page 13) and on March 15, 1999 he withdrew a further \$1,000.00 in cash from his wife's banking account (Exhibit 3, Tab 3, page 12).

Under cross-examination the Applicant stated that every two to three months he returns to Canada from Egypt and on all such occasions he brings back with him \$10,000.00 to \$12,000.00 in cash. He either banks these amounts or keeps the cash at his home. He has no office in Canada.

When he went to view the 180, he and his wife travelled to Muia's residential address in the Applicant's Mercedes Benz 300 motor vehicle, which had been involved in a collision and had sustained rear end damage. Pursuant to this collision, he had arrived at a settlement with the vehicle's insurer. The insurer agreed to pay the Applicant \$3,500.00 and to take the vehicle in return for the payment of \$3,500.00.

The Applicant stated that he did not test drive the 420 before purchasing it from Muia. He has no receipt to show for any monies paid to Muia nor has he any documentation regarding the transaction of purchase and sale of the 420.

He conceded that he, his son and his wife drove the 420 for some two months after purchasing the car from Muia. He conceded that at the time of its purchase the vehicle's odometer reading was 154,000 kilometres (Exhibit 3, Tab 3, second last page) whereas at the date of the vehicle's field inspection on May 25, 1999 (Exhibit 3, Tab 3) the vehicle's odometer reading recorded 160,224 kilometres.

The Applicant also stated that he paid \$1,900.00 storage charges for the 420 from April 1, 1999 until November 2000 (Exhibit 3, Tab 3) and that the vehicle's motor gave problems from the day after he purchased it. He further stated that "the transmission failed later". The Applicant also stated he had the 420 comprehensively insured with All State Insurance Company of Canada until November 2000 at a cost to him of \$735.54.

Testimony of Muia

Muia testified that he did advertise both the 180 and the 420 for sale in an auto traders publication and that the Applicant had telephoned him in March 1999 following the advertisements.

Muia stated in his testimony that the 180 was advertised for sale at \$3,500.00 or best offer. When the Applicant initially communicated with him, the Applicant expressed interest in the 180 and after giving the Applicant his residential address, Muia received a visit from the Applicant and his wife. The Applicant took the vehicle for a test drive. He left his 1982/83 Mercedes Benz 300 at Muia's residence while test-driving the 180. He noticed that the Applicant's Mercedes Benz 300 "was smashed at the back". On returning with the 180, the

Applicant was told by Muia that he could not afford to pay more than \$3,000 for the 180 as that was all the insurer of his damaged car was prepared to pay him. The Applicant called Muia the following day and told him he wanted to buy the 420.

The Applicant then asked Muia what deal he would make for the 420. The Applicant stated that he had recently returned from Egypt with little money but he could borrow \$3,000 from someone and was to get \$3,000 from his insurance company for his damaged car. Muia stated that he concluded a deal with the Applicant to sell him the 420 for something "less than \$6,500.00". The condition of the 420 was not discussed although the Applicant wanted it "safetied". Muia did not drive the 420 to test it nor did he enquire as to its condition.

Muia obtained a safety certificate and delivered the 420 to the Applicant's residence. Muia was accompanied by a friend, Eric Walker, when the 420 was delivered into the basement garage of the apartment building where the Applicant resided. Muia and Walker were met by the Applicant and his son and they all then went to the Applicant's apartment in the building. Once in the Applicant's apartment, the Applicant advised that he only had \$4,000.00 in cash with him and would pay the balance of the purchase price the next day. He then gave Muia \$4,000 in cash who accepted same.

Muia retained the ownership papers, as well as the keys to the 420, and left the vehicle parked in the apartment's underground garage.

At the time of the Applicant handing the \$4,000.00 to Muia, the Applicant requested a receipt for this payment. Eric Walker wrote out a receipt, and the Applicant and Muia signed same.

The next morning Muia went to the Applicant's apartment with the 420's registration papers. Muia was then asked by the Applicant to drive him to a bank so he could withdraw the balance of the monies owing to Muia. Muia and the Applicant drove to three separate banks. The Applicant gave Muia \$1,500 in cash which he had withdrawn from his visits to the three banks and gave Muia a cheque for \$500.00 (Exhibit 7). This cheque was given to Muia after the Applicant had visited the second of the three banks. After visiting the third and last bank, the Applicant appeared with \$300.00 in cash which he gave to Muia. Muia then altered the amount of the cheque he had already given to Muia from \$500.00 to \$200.00.

Muia drove the Applicant back to his apartment at which time Muia had received \$1,500 in cash from the Applicant plus the \$300.00 in cash after the Applicant's visit to the second bank plus the cheque for \$200.00, a total of \$2,000.00. Previously the Applicant had paid Muia \$4,000.00 in cash for a total amount of \$6,000.00. At the apartment Muia gave the Applicant the vehicle ownership papers. At this time the Applicant had still not driven the 420.

The Applicant's cheque for \$200.00, after being deposited by Muia, was returned by the bank marked N.S.F.

Muia further testified that, after he had purchased the 420 at an auction sale, he noticed the odometer was not working and the dashboard cluster including the odometer was thereupon removed by a mechanic on Muia's instructions, and the odometer was replaced. Muia further stated that he was subsequently charged for tampering with the vehicle's odometer to which charge he plead guilty, was found guilty and paid a fine of \$1,000.00.

He also stated that he met with the Applicant at the offices of OMVIC in an attempt to settle the matter. He offered to pay the Applicant \$4,000.00 against which payment the Applicant was to return the vehicle to him. This offer was made on the basis that the Applicant had used the vehicle for about a year after purchasing it. The offer was refused by the Applicant.

Under cross-examination, Muia conceded that he could have been charged with three criminal charges. One of the charges related to odometer tampering. Muia stated the Crown withdrew two of the three charges.

Muia also testified under cross-examination that when he purchased the 420, he paid about \$6,100.00.

Testimony of Eric Charles Walker

Eric Walker testified that he assisted Muia to deliver the 420 to the Applicant. He stated that he is a friend of Muia and has been for five or six years.

After he and Muia delivered the 420 to the Applicant's apartment building, they met with the Applicant in the Applicant's apartment and sat around a table. Present at that meeting were the Applicant, the Applicant's son, Muia and himself. The purchase price of the 420 was discussed, and \$6,000.00 was agreed on. The Applicant gave Muia \$4,000.00 in cash, and \$2,000.00 was to be paid the next day.

Mr. Walker was asked by the Applicant to write a receipt on a piece of paper. He wrote that \$4,000.00 was received by Muia in cash and the balance of \$2,000.00 was to be paid the following day. The receipt was dated, signed and given to the Applicant.

Mr. Walker testified further that he attended at OMVIC's offices when Muia met with the Applicant. He recollects that the Applicant expressed dissatisfaction with the 420 and wanted his money refunded by Muia. He also remembers that the Applicant became upset at that meeting and left.

Mr. Walker testified further that when the Applicant and Muia met in the Applicant's apartment, the latter gave Muia \$4,000.00 and not \$5,000.00

FACTS FOUND PROVEN:

The following are the facts to have been proven.

1. In or about March 1999 Muia advertised two vehicles for sale in an auto publication known as the European Auto Trader.
2. The advertisements related to a 180 Mercedes Benz and a 1987 Mercedes Benz 420 SEL (the "420").
3. On or about March 16, 1999 the 420 was sold by Muia to the Applicant.
4. At the time of the sale to the Applicant, the 420's odometer had a reading of 154,000 kilometres.
5. On May 25, 1999 at the time of the Ministry of Transport's Field Inspection regarding the 420, the odometer reading of that vehicle was noted as 160,229 kilometres.
6. The 420 was registered into the name of the Applicant on March 17, 1999 and remained so registered until May 23, 2001.
7. The Applicant paid Allstate Insurance Company of Canada to insure the 420 commencing from April 11, 1999. From July 13, 1999 to November 14, 2000 the 420 was comprehensively insured by Allstate Insurance Company of Canada and the cost of insurance coverage for the 420 was paid by the Applicant.
8. The Applicant paid indoor rental accommodation for the 420 for the period April 1, 1999 to November 30, 2000 in an amount of \$1,900.00.
9. The Applicant withdrew the sum of \$2,000.00 from his banking account on February 25, 1999 as well as the sum of \$580.00 on March 17, 1999. The sum of \$1,000.00 was withdrawn from the banking account of the Applicant's wife, Mervat Sourial, on March 15, 1999.

THE LAW:

Section 12. (3) of Regulation 801 to the *Motor Vehicle Dealers Act* states:

12. (3) A customer may make a claim against the Fund where the customer gives written notice of the claim to the Registrar within two years of the participant's refusal or failure to pay, even if the motor vehicle dealer with respect to whom the claim is being made ceased to

be a participant after the refusal or failure to pay, and where the claim meets one of the following requirements:

1. The customer has recovered in any court in Ontario a judgment in respect of the claim and the judgment has become final by reason of the expiration of the time for appeal or of having been confirmed by the highest court to which an appeal may be taken and the customer makes an application, supported by the judgment and statement of claim, for payment of the unsatisfied portion of the judgment and costs as assessed.

Section 12(10)(a) of the aforesaid regulation states:

12. (10) Despite subsections (1), (2), (3) and (6) and subsection 15 (3) of this Schedule, there shall not be paid out of the Fund,

- (a) more than \$15,000, exclusive of costs, to each claimant in respect of each transaction, in respect of a claim or claims against any one participant;

Section 15. (1) of the aforesaid regulation states:

15. (1) Where the Board determines that a claim or any part of it made under section 12 of this Schedule is not a proper claim, it shall serve notice of its decision, together with written reasons, on the claimant and the notice shall inform the claimant that the claimant is entitled to a hearing by the Tribunal if the claimant mails or delivers to the Registrar and the Tribunal, within fifteen days after the notice is served on the claimant, notice in writing requiring a hearing.

Section 15. (3) of the aforesaid regulation states:

15. (3) Where a claimant requires a hearing before the Tribunal under subsection (1), the Tribunal shall appoint a time for and hold the hearing and, after affording the claimant an opportunity to be heard, may confirm the determination of the Board or may set aside the determination of the Board with respect to all or any part of a claim and direct the Trustee to pay the amount determined by the Tribunal.

DECISION AND REASONS:

The onus of proof rests upon the Applicant in this matter.

The Applicant is required to prove that there was a contract of purchase and sale between himself and Muia. The Applicant is also required to prove the terms of the contract, that Muia breached the contract, and that pursuant to the breach the Applicant suffered damages which are recoverable under Regulation 801.

After considering the oral testimony and the documentation submitted, the Tribunal finds the Applicant has not discharged the onus and for the reasons stated hereunder confirms the Board's determination to disallow the Applicant's claim.

The Applicant and Muia's evidence are diametrically opposed on all major issues that were canvassed at the hearing. They only agreed that there was an agreement arrived

at between them for the sale of the 1987 Mercedes Benz 420 SEL, but no agreement as to the purchase price or whether the contract was breached.

In view of the major differences between the testimonies of the Applicant and Muia, the Tribunal carefully weighed the evidence to determine whether the Applicant has discharged the onus that rests upon him.

An essential element that required proof by the Applicant was the purchase price. The Applicant contended that the agreed price was \$10,000.00 plus G.S.T. and P.S.T. for a total of \$11,500.00 excluding the \$80.00 that was to be paid for the safety certificate. Muia testified that the agreed price was over \$6,000.00 but less than \$6,500.00.

The Applicant testified that he was a businessman with many years of business experience in Egypt. He runs an apparently successful venture in Egypt. He brings \$10,000.00 to \$12,000.00 cash every few months to Canada. Nonetheless, he did not deem it necessary to have or retain a bill of sale or any receipt for the monies he paid to Muia who was a total stranger to him. The Applicant's testimony lacks any supporting documentation. Also, the evidence indicates that although the Applicant felt the vehicle was quite unsatisfactory immediately after buying it from Muia, he nonetheless kept the car for more than two years, when he sold it to third party. The evidence also shows that approximately 6,000 kilometers were put on the vehicle in the Applicant's first seven to eight weeks of ownership which is not consistent with the Applicant's statement that when he received the vehicle, its motor and transmission were "shot". Further, as to the price of the car, the testimony of Muia is more consistent with the little documentation shown to this Tribunal than is the testimony of the Applicant, and the testimony of Muia is corroborated to a large extent by the witness, Mr. Walker.

The Tribunal also notes that the testimony of the Applicant was aggressive and argumentative and did not leave a favourable impression on the Tribunal. Compounding this unfavourable impression was the fact that the Applicant did not produce any documents to substantiate his version of events. There was no bill of sale produced and no receipts whatsoever for the cash that passed between the parties.

DECISION:

Pursuant to the authority vested in it by the Motor Vehicle Dealers Act, in particular section 15(3) of the Schedule in Regulation 801, the Tribunal directs the Board of Trustees of the Motor Vehicle Dealers Compensation Fund to disallow the claim of the Applicant.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: April 29, 2002

LONGO

PREHEARING

ANTHONY LONGO AND SYLVIE LONGO

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE *ONTARIO NEW
HOME WARRANTIES PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, Vice-Chair, Presiding
MICHAEL TURK, Vice-Chair

APPEARANCES:

BRIAN CAMPBELL, Counsel, representing Anthony and Sylvie Longo
FIL CECE, Agent, representing the Ontario New Home Warranty
Program
JOE DILECCE, Agent, representing the Added Party, Ivy Green Homes
Inc.

DATE OF

PREHEARING: April 23, 2002

Toronto

ORDER

FOLLOWING attendances on April 23, 2002 at a pre-hearing before this Tribunal of Brian Campbell, Counsel on behalf of Anthony Longo and Sylvie Longo (the "Applicants") and Fil Cece, Agent on behalf of the Ontario New Home Warranty Program (the "Program") and Joe Dilecce, Agent on behalf of Ivy Green Homes Inc. (the "Added Party");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Monday, July 29, 2002 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario and to continue if necessary, on July 30, 31 and August 1 and 2, 2002 at 9:30 a.m. at the Tribunal's above chambers;

1. The Parties to the hearing are the Applicants, the Program and the Added Party.
2. No facts or evidence were agreed upon by the Parties.
3. There was no settlement of any issues.
4. The Applicants' Counsel advised the Tribunal that the Applicants intend to call Tim Maxson to testify at the hearing as an expert in masonry issues.

The Applicants shall comply with Rule 6.4 (1) (a), (b), (c) and (d) of the Tribunal's Rules of Practice in regard to the testimony of Tim Maxson and shall, by no later than Friday, June 14, 2002, send to the other parties by courier all information required in terms of the above stated Rule including a copy of the written report of Tim Maxson.

5. The Agent for the Program advised the Tribunal that the Program may call an expert to testify in regard to the masonry issue at the hearing.

Should the Program decide to call an expert to testify at the hearing, it shall comply with Rule 6.4 (1) (a), (b), (c) and (d) of the Tribunal's Rules of Practice and shall by no later than July 9, 2002 send to the other parties by either prepaid registered mail or by courier all information required in terms of the above stated Rule including a copy of the written report of its expert.

6. The Agent for the Added Party advised the Tribunal that the Added Party intends to call an expert in masonry to testify at the hearing.

The Added Party shall comply with Rule 6.4 (1) (a), (b), (c) and (d) of the Tribunal's Rules of Practice in regard to the testimony of its expert and shall, by no later than July 9, 2002 send to the other parties by either prepaid registered mail or by courier, all information required in terms of the above stated Rule including a copy of the written report of its expert.

7. Nothing in the foregoing shall relieve any party from complying with the Rules of Disclosure referred to in Rule 6.3 of the Rule of Practice of the Tribunal.

8. The Applicants will provide the Program and the Added Party together with their expert witnesses reasonable access to the Applicants' home for the purpose of inspection. The Program and the Added Party shall give the Applicants written notice prior to the inspection of the date and time of such inspection. The inspection shall not be scheduled to take place earlier than seven (7) days after the mailing of the notice which shall be sent by prepaid registered mail addressed to the Applicants at the home.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair,
Presiding

Michael Turk, Vice-Chair

RELEASED: April 29, 2002

EDMONDS, KENNETH o/a SHELBY MOTOR CAR COMPANY

KENNETH EDMONDS o/a SHELBY MOTOR CAR COMPANY

MOTION TO CONSIDER AN APPLICATION
FOR EXTENSION OF TIME

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: KENNETH EDMONDS, appeared on his own behalf
AVIVA HARARI, Counsel, representing the
Registrar, *Motor Vehicle Dealers Act*

DATE OF
HEARING: April 26, 2002 *Via Teleconference*

REASONS FOR RULING AND ORDER

BACKGROUND:

Kenneth Edmonds (the "Applicant") brings a motion before the Tribunal for an Order extending the time for filing an appeal to the Notice of Proposal to refuse registration to the Applicant, dated December 21, 2001. The Notice of Proposal (the "Proposal") was brought by the Registrar, *Motor Vehicle Dealers Act* (the "Act" and "Registrar" respectively.)

The Applicant filed a Notice of Appeal dated March 19, 2002 to the Registrar's Proposal. This Notice of Appeal was received by the Tribunal on March 20, 2002. The Registrar's position is that the Applicant failed to file his Notice of Appeal within the prescribed time. The Applicant has brought this motion for an extension of time pursuant to Section 7 of the *Licence Appeal Tribunal Act*.

THE EVIDENCE:

The Applicant gave testimony by telephone. He stated that he always intended to appeal the Proposal as is evidenced by his letter to the Registrar of November 30, 2001. He expected an answer to his letter but did not receive an answer.

(Exhibit 1, Tab C)

The Applicant also stated it was an oversight on his part in not filing an appeal to the Proposal. He acknowledged having been served with the Proposal towards the end of December 2001 and stated that he read portions only of the Proposal. He did acknowledge that together with the Proposal that was served on him, there was a booklet of the Tribunal on how to proceed with an appeal of a Proposal.

The Registrar did not introduce oral evidence but relied upon the various documents in the Motion Record filed by him.

(Exhibit 1)

The Registrar's Motion Record consisted of an affidavit of Yovanka McBean which stated that she is employed by the Ontario Motor Vehicle Industry Council ("OMVIC") as a legal assistant and has knowledge of the facts attested to by her in her affidavit.

Ms. McBean stated that the Applicant was originally registered as a motor vehicle salesperson in 1983 but his registration lapsed on September 29, 2001 due to his failure to renew that registration. On October 1, 2001 the Registrar received a renewal application from the Applicant and provisionally registered the Applicant. During the period of the Applicant's provisional registration the Registrar ascertained information regarding the Applicant that caused the Registrar to cancel the provisional registration pursuant to Regulation 801 Section 13(3). The Applicant was advised by the Registrar in a letter dated November 28, 2001 that his registration was cancelled. On November 30, 2001 the Applicant wrote to the Registrar. This letter attempts to explain the alleged actions of the Applicant.

(Exhibit 1, Tab C)

The Registrar, after receipt of the Applicant's letter of November 30, 2001 issued his Notice of Proposal to refuse the Applicant's registration. This Proposal was dated December 21, 2001 and was received by the Applicant on December 28, 2001. The Applicant personally signed receipt for delivery of this Proposal. Together with the Proposal was a "Proposal/Order Booklet" published by the Tribunal which sets out the procedure an Applicant or registrant may follow in order to appeal a Proposal.

Prior to the Proposal being issued on December 21, 2001, the Deputy Registrar, Mary Jane South, spoke by telephone with the Applicant. In that conversation Ms. South advised the Applicant of the Proposal that was being prepared for service on him and that if the Applicant disagreed with the allegations in the Proposal "he had the right to appeal and that he would have to file the appeal within 15 days of service of the Proposal." The Proposal was then served on the Applicant on December 28, 2001. The Applicant personally signed for receipt of the Proposal.

The Applicant did not file an appeal to the Proposal within 15 days of service and on January 15, 2002 the Registrar sent a "final notice" by "Xpresspost" to the Applicant.

By letter dated February 18, 2002 the Applicant wrote to the Registrar requesting the granting

of an extension of time within which to file an appeal to the Proposal of December 21, 2001. In his letter of February 18, 2002 the Applicant stated "I provided a response on December 4, 2001" and "thought that was all that was necessary to make an appeal."

On March 5, 2002 the Registrar advised the Applicant that he would not consent to an extension of time for the filing of an appeal by the Applicant.

The Applicant by Notice of Application dated March 21, 2002, notified the Registrar of this motion.

FACTS FOUND PROVEN:

1. The Registrar's Notice of Proposal to refuse the Applicant's registration dated December 21, 2001 was served personally upon the Applicant on December 28, 2001.
2. Together with the delivery on December 28, 2001 to the Applicant of the Notice of Proposal to refuse the Applicant's registration was delivery of an information booklet from the Tribunal on the procedure to be followed in order to appeal a Notice of Proposal.
3. The Deputy Registrar, Mary Jane South, spoke with and explained to the Applicant prior to the service of the Proposal that the Applicant may appeal the Proposal and to do so the Applicant would have to appeal within 15 days of service of the Proposal.
4. The Registrar's "Final Notice" dated January 15, 2002 was sent to the Applicant.
5. On February 18, 2002 the Applicant requested an extension of time to commence an appeal to the Registrar's Proposal.

THE LAW:

Section 20 of the *Motor Vehicle Dealers Act*, R.S.O. 1990, states:

"(1) Any notice or order required to be given or secured under this Act or the regulations is sufficiently given or served if delivered personally or sent by registered mail addressed to the person to whom delivery or service is required to be made at the latest address for service appearing on the records of the Ministry of Consumer and Commercial Relations...."

Section 7 of the *Motor Vehicle Dealers Act*, R.S.O. 1990, states:

"(1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the Registrar shall serve notice of the proposal, together with

written reasons therefor, on the applicant or registrant.

"(2) A notice under subsection (1) shall state that the applicant or registrant is entitled to a hearing by the Tribunal if the applicant or registrant mails or delivers, within fifteen days after service of the notice under subsection (1), notice in writing requiring a hearing to the Registrar and the Tribunal, and the applicant or registrant may so require a hearing.

"(3) Where an applicant or registrant does not require a hearing by the Tribunal in accordance with subsection (2), the Registrar may carry out the proposal stated in the notice under subsection (1)..."

Section 7 of the *Licence Appeal Tribunal Act*, 1999 states:

"Despite any limitation of time fixed by or under any Act for the giving of any notice requiring a hearing by the Tribunal or an appeal from a decision or order of the Tribunal under section 11 or any other Act, if the Tribunal is satisfied that there are reasonable grounds for applying for the extension and for granting relief, it may,

"(a) extend the time for giving the notice either before or after the expiration of the limitation of time so limited; and

"(b) give the directions that it considers proper as a result of extending the time."

REASONS FOR DECISION:

In the matter of *Frey v. MacDonald* (1989) O.J. No. 236 heard on January 27, 1989 before the Ontario Court of Appeal, Blair J.A. stated:

"...Usually, time for an appeal or taking any steps within an appeal is not extended unless the appellant has maintained a firm intention from the beginning to appeal and the failure to observe the time limits is reasonably explained. This, however, is subject to a broader rule that extensions should be granted if the "justice of the case" requires: see *Miller Manufacturing and Development Co. v. Robert J. Alden et al.* (1979), 13 C.P.C. 63 where authorities are collected."

In this matter before the Tribunal the Applicant conceded he had received both the Notice of Proposal and the Tribunal's booklet regarding the procedures to be followed on appealing a Proposal. The evidence indicates that the Proposal was served personally on the Applicant on December 28, 2001. The Applicant did not take steps to appeal that proposal within 15 days after service of the Proposal and only took steps on March 21, 2002 to apply for an extension of time within which to appeal.

The Applicant contended at the hearing that he intended to appeal the Registrar's Proposal and as evidence of his intention to appeal he referred the Tribunal to his letter of November 30, 2001 addressed to the Registrar. However, the Tribunal finds that this letter in no way indicated an intention to appeal the Proposal for it was written some time prior to the issue and service of that Proposal. Furthermore, the letter only attempts to offer information as to the

allegations made by the Registrar. Beyond the letter of November 30, 2001 the Applicant advanced no explanation or reasons for his not filing an appeal within the required time.

The inaction of the Applicant from the time he received the Proposal until March 21, 2002 are indicative of disinterest and neglect on his part and are by no means supportive of his maintaining "a firm intention from the beginning" to appeal the Proposal.

The Tribunal finds that no appeal was filed by the Applicant to the Registrar within the time prescribed by the Act and that no grounds exist for the granting of an order for extending the time for the filing of a Notice of Appeal.

ORDER:

For the reasons set out above the Tribunal refuses the granting of an Order extending the time for the filing of a Notice of Appeal to the Registrar's Notice of Proposal to Refuse Registration of the Applicant dated December 21, 2001.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: April 29, 2002

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

LIPTON

STEPHEN AND VALERIE LIPTON

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE ONTARIO NEW
HOME WARRANTY PROGRAM

TO DISALLOW A CLAIM

TRIBUNAL: WILLIAM McINTOSH, VICE CHAIR

APPEARANCES:

STEPHEN AND VALERIE LIPTON, Applicants
ANDREW LEWIS, Counsel, for the Ontario New Home Warranty
Program
JOSEPH HOFFMAN, Principal of and appearing for the Added Party,
Polaris Restorations Inc.

DATES OF

HEARING: August 27, 28, 29, 30, 31, November 28 and 29, 2001 Toronto

REASONS AND DECISION

BACKGROUND:

This matter comes before the Licence Appeal Tribunal (the "Tribunal") by way of a Notice of Appeal filed by Stephen and Valerie Lipton (the "Applicants") pursuant to the Applicants' right of Appeal under Section 16(2) of the Ontario New Home Warranties Plan Act R.S.O.1990, Chapter O. 31(the "Act"). The Appeal is from a decision of the Respondent, the Ontario New Home Warranty Program ("the Program") contained in a Decision Letter issued by the Program on April 24, 2001.

The subject property is a single-family dwelling. The Applicants entered into an Agreement of Purchase and Sale ("APS") on May 9, 1999 with the Vendor, Polaris Restorations Inc., the Added Party ("Polaris"), with a closing date of August 30, 1999. Polaris retained JAM Construction ("JAM") to build the residence. There was a deposit paid of \$50,000.

The purchase did not close on May 9, 1999 due to difficulties in completing the work but did occur on November 5, 1999. The Applicants took possession on November 8, 1999.

Before closing and after considerable negotiation, the Applicants and Polaris entered into an Amendment to the APS (the "Amendment"), and it was on this basis that the transaction closed. Under the Amendment, in satisfaction of certain claims by the Applicants, the Applicants and the Vendor agreed that the Vendor would construct a deck and gazebo for which the Vendor's obligated for lumber was limited to \$1,000. The parties closed the sale on the basis of this Amendment, and the sale price was abated by \$1,000 to cover the Vendor's lumber obligation. After closing, the Applicants proceeded to claim against the Program for items, which included items the Applicants had agreed to forego under the Amendment.

The Program argued that the Applicants under the Amendment took their compensation for the items listed in the Amendment in satisfaction of their claims against the Vendor and cannot now assert a claim against the Program for those same items. If the Applicants had wanted to claim for deficiencies in construction, they should have closed pursuant to the APS and claimed against the Program as the Act permits them to do.

The Applicants argued that the Amendment was signed under duress in that the alternative was not to close with the Vendor and give up this home and find another home in a rising market. The Applicants were living in a motel and incurring monthly costs. Also, they had paid a \$50,000 deposit when the Act only allows for recovery of \$20,000.00 for return of a deposit, and they risked not recovering the \$30,000 difference. They also stated that any upgrades put into the home would be at risk should they not have agreed to close pursuant to the Amendment. As well, the Applicants argued that the Amendment was rendered of no effect because the Vendor did not fulfill the Vendor's obligations under the Amendment within the required time. On any of these grounds, but particularly on the basis that the Amendment was signed by them under duress, the Applicants argued that they should be free to ignore the Amendment, keep the \$1,000 abatement in the purchase price and seek compensation for their claims from the Program.

The Applicants made a claim for delayed closing. The Program took no issue with the amount of the Applicants' claim for late closing, which was the \$5,000.00 maximum amount recoverable for such a claim under the Act, but disputed the liability to pay the claim.

The Applicants obtained legal advice at all times in their disputes with the Vendor.

ISSUES:

In considering the Applicants' claims, this Tribunal must consider the following issues:

- 1) Are any of those claims not recoverable under the Act due to the Amendment?
- 2) Are the Applicants' claims warranted under the Act?
- 3) Is the Amendment of no effect because the Applicants entered into it under duress?

EVIDENCE:

There were many disputes between the Applicants and the Vendor during the construction of the home. The Applicants were often in contact with the Program, giving the Program descriptions of what they considered to be the defaults by the Vendor.

The Tribunal was presented with a large volume of letters and other pieces of documentary evidence. It is clear that from mid-summer of 1999 onwards, there was virtually no trust between the parties. The Vendor believed he was being held up for too great an abatement in the purchase price. The contractor did not believe he was going to be paid and felt Mrs. Lipton was closely watching him. The Applicants were suspicious of Mr. Hoffman, principal of the Vendor. By the November 5, 1999 closing date, it appears there were four sets of counsel involved in the negotiations, along with the Applicants' real estate agent, Ms. Han, and the Vendor's agent, Mr. D'Aquino.

It was recognized early that the original August 30, 1999 closing date would not be met. The Applicant's solicitors received a facsimile from the Vendor's solicitors late afternoon on the original date of closing, August 30, postponing the closing to September 30. Shortly before the new closing date, the builder, JAM Construction, placed a construction lien on the property.

Prior to the new September 30 closing date, the Applicants' solicitors wrote the Vendor's solicitors indicating that as the September 30 date would not be met, the Applicants were requesting a new date without prejudice:

"to close the transaction with an abatement in the purchase price failing which they will seek specific performance with an abatement in the purchase price."

The end result of all the correspondence and negotiations was the Amendment to the APS, and it was under the terms of this Amendment that the transaction closed.

The events leading up to the subject Amendment to the APS and the idea of a deck and gazebo as compensation for outstanding claims began with a meeting between a Mr. D'Aquino for Polaris and the Applicants on October 7, 1999. A deck and gazebo was first mentioned as a solution to the outstanding items between the parties. Mr. Hoffman, representing Polaris, testified that he became aware of the proposal around October 15 and became concerned about the size of the deck being sought as compensation. The Applicants wanted either abatement in the purchase price or other suitable compensation for the late closing and construction deficiencies. The Vendor wanted a way to resolve the outstanding issues without resort to the Program. Both sides were extremely suspicious of one another and were trying to extract the most favourable terms. Solicitors for both sides were in constant communication. The signing of the Amendment proceeded as follows.

The Applicants signed and delivered to the Vendor a document entitled "Amendment to

Agreements” which stated, in part:

The Amendment states:

“It is understood and agreed between the undersigned parties hereto that the following changes shall be made to the above mentioned Agreement, and except for such changes noted below all other terms and conditions in the Agreement shall remain in full force and effect.”

Under the title “Insert” on the Amendment to Agreement the following words appear:

“Vendor agrees that a deck and gazebo shall be constructed on the subject property by May 1st. 2000, as per renderings provided to James M Gilmore.

Purchasers agree that the above mentioned deck and gazebo shall comprise adequate compensation for all outstanding issues and expense as per letter from James M Novak to James M Gilmore dated October 14, 1999.”

Mr. Hoffman for the Vendor signed back the document, with the following addition:

“vendor limits his cost of one thousand dollars for lumber to construct deck and gazebo in the form of a voucher from Fairbanks Lumber. Construction of Gazebo and Deck to be done by Jeff Marshall J.A.M. Construction no later than May 31, 2000.”

The signed back document was dated October 31, 1999.

The relevant portions of the letter referred to in the Amendment as the “letter from James M. Novak to James M. Gilmore dated October 14, 1999” (“the October 14 letter”) states:

“...my clients request the following:

1. As a result of the reduction in the constructed basement ceiling height to 7’7” instead of 8’, compensation should be paid at 5%=\$18,212.50, as an abatement to the purchase price.
2. The house has been constructed without a cold cellar and compensation should be paid at \$3,000 as an abatement to the purchase price.
3. The area labeled as “Kitchen” in both the Cantor and Cedar Hollow diagrams should have been the only area to be fitted with tile. The entire area variously labeled as Breakfast/Nook, Family Room/Hearth was tiled, in spite of extensive discussions and instructions to limit the tiled area to serve the working area of the kitchen and maintain hardwood flooring in the adjacent areas...To remove the tile in the adjacent areas would cause great inconvenience...The cost of and loss of enjoyment of the kitchen area during this amount of time this requires is compensable. Compensation should be paid at \$3,000 as an abatement to the purchase price.
4. Incorrect Sono tube supports were utilized at the front porch. The purchaser instructs that this is to be corrected prior to closing.
5. The purchaser must now continuously be on site to provide correct instructions or else face

further deficiencies. The purchasers' time is compensable since Valerie Lipton must devote all her time to direct the subcontractors, help builder avoid mistakes and provide whatever assistance will assist in completing the job as soon as possible. Project management - Compensation of \$1,500 as an abatement to the purchase price.

6. In addition, prior to closing my client insists on the following conditions:

a) All work on the house must be completed. The fireplace in perfect working order, the rock washed and the mortar joined. The hardwood flooring to be in place. The cabinets to be adjusted. The trim and walls to be repaired and painted. All electrical and plumbing work to be completed...The furnace, heat exchanger, hot water tank, etc., tested and in good working order..phone panel...all working systems in excellent working order...cleaned...the mica rock face on the front of the house completely built and the outdoor lights installed.

b) The decks built. The grading completed. The driveway graveled. The area completely sodded remaining area to be cleared of debris...garage area cleaned...electric garage door openers installed and tested. All outside doors painted according to the Schedules and the purchasers' instructions to the Builder.

c) For the pre-closing inspection, which is to be conducted during a 7 day period prior to closing, the purchasers reserve the right to contract an independent...inspector...This condition should be acknowledged by the Vendor.

7. In the event that the foregoing is not completed with the purchase price abated, the purchasers would seek the following:

Return of Deposit of \$50,000 plus interest

Reimbursement for 8,5000 in upgrades

Reimbursement for 3,000 for lighting

Reimbursement for 350 for tiling

Reimbursement for 1,400 paid for oak staircase

Reimbursement for 310 paid for cutting of stone for fireplace mantle and hearth

Reimbursement for 9,250 paid for delay compensation, storage, shelter, food

And the Agreement of Purchase and Sale terminated and at an end

On October 21, 1999, the Applicants and the Vendor's representative signed the Certificate of Completion and Possession, required under the Act, with the space for the date of possession entered as October 22, 1999. Beside the signatures of the purchasers, is the following pre-printed block of text:

"Purchaser Certificate: The undersigned Purchaser(s) hereby certify to the New Home Warranty Program that the Purchaser(s) have inspected the home described above and such home is substantially completed and is ready for possession by the Purchaser(s) on the date of possession indicated above notwithstanding completion by the Vendor Builder of surface defects in work and materials and unfinished work as particularly described above. (It is acceptable to sign this form prior to the resolution of the items listed above.) THIS IN NO WAY PRECLUDES THE DISCOVERY AND REPORTING OF FURTHER COMPLAINTS AND OR DEFECTS WITHIN THE SPECIFIED WARRANTY PERIODS."

A list, initialed by the Applicants and the builder's representative, is attached to the Certificate

of Completion and Possession form. On that list, under the heading "Surface defects not accepted by owners" are the following items:

- Keystone above middle garage doors chipped (in dispute)**
- Concrete at left garage door bottom right side damaged (in dispute)**
- Cracked tile in garage dog shower (may be OK if not leaking)
- Laundry room sink drain too close to cabinet floor/to be checked
- Kitchen cabinets to be adjusted by Raywall, hole in door #4 bottom row left of sink
- Master bath shower spout area tiled over
- 2nd bedroom right closet door not aligned at bottom
- Basement window in front of stairs to left inside frame broken
- Basement ceiling height not in accordance with developer's schedule

The Applicants' claim against the Program that the Vendor failed to build a cold cellar is not on this list.

The listed item involving the basement ceiling height is mentioned in both the above Certificate and letter of October 14 from the Applicants' solicitors.

The Vendor's solicitors replied by letter of October 26 to the Applicant's solicitors October 14 letter as follows:

"My client advises me that as a result of meetings between our respective clients that all outstanding issues as between them have been resolved. The basis of the resolution is a deck and gazebo to be constructed no later than May 31 2000. The gazebo and deck are provided as compensation for the issues complained of by your client as referenced in your letter of October 14, 1999 and also as compensation for expenses which they have incurred as a result of delayed closing.

In conversation with you yesterday you indicated that your clients were not prepared to accept the resolution in satisfaction of all their claims including compensation for delayed closing. I confirmed with my clients their understanding that this was part of the negotiation. We subsequently spoke and you indicated that your clients are not prepared to close on the basis that this resolution that was negotiated is a complete resolution including compensation for delayed closing.

As a result it appears as though there has not been a meeting of minds of our clients and unless your client is prepared to complete the transaction on this basis the transaction will be at an end."

The Applicants' solicitors replied immediately by letter of October 26:

"Further to your letter of October 26,1999 please be advised that it was never my client's understanding that the acceptance of a deck and gazebo would waive any of their conciliation rights and recovery under the Ontario New Home Warranty Program for costs and expenses incurred as a result of delayed and improper extensions of closing. This suggestion of a deck and gazebo was to be compensation for lack of the proper basement height."

This letter further indicates that the Applicants would be amenable to compromise had a proper deck and gazebo been proffered, but by that date none had been, and the Applicants' position:

"My letter of October 14 1999 clearly set out the position of my client as to what they were seeking and even to this date there has been no written proposal by your client as to the specifics of a suggested deck and gazebo."

The letter asks what the Vendor was prepared to offer as compensation for the Applicant's claim for damages:

"by setting out specifics and particulars of the deck and gazebo which would then become part of the agreement and included in the purchase price by amendment to the agreement rather than a free extra."

By return post, the Vendor's solicitors sent a rendering of the deck, with the rendering of the gazebo to follow.

By facsimile of October 29, the Vendor's solicitors confirmed that they were receiving the sketch of the gazebo and requested that the Applicants draft their version of an Amendment. The Vendor's solicitors asked for confirmation from the Applicant's solicitors that the deck and gazebo be in exchange for all claims including compensation for delayed closing, and stated that "This is essential before we can move forward"

By return correspondence, the Applicant's solicitors referred to this October 29 facsimile and go on to state:

"... the purchasers have been ready willing and able to close pending the vendor providing in writing specifically what will be constructed by way of a deck and gazebo. The purchasers insist that the vendor provide a specific closing date and fail to understand why the vendor cannot move expeditiously to set out this proposal in writing. At this point my clients are requesting the agent to attend to the preparation and execution of an amendment to the agreement."

On October 30, 1999, Ms Han, the Applicants' real estate agent, sent the following fax to the Applicant, Mr. Lipton. It reads in part:

" I would like you to be aware of a message on my voice mail from Dante D'Aquino/Polaris Construction Inc. sent at 4:40pm when I had already left home to meet him, wherein he stated:

"I've just had a meeting with Mr. Hoffman and he tells me the \$1,000 decreases \$100 a day and he's also thinking that if it doesn't close on Monday of imposing a \$1,000 aggravation tax on the house. He's pretty serious about this, he's going to talk to his lawyers".

On October 31, 1999, Ms Han, wrote to regarding the Amendment, stating:

"I would like to run this by you as you may wish to ask your lawyer whether this reasoning is sound.

The vendor agreed that the deck and gazebo would be constructed and the Purchaser agreed that this deck and gazebo compromise adequate compensation.....

Therefore if there is no deck and gazebo on May 31, 2000 for whatever reason compensation will not have occurred bringing all the issues and expenses to the table under the warranty program or other means of recovery.

The first sentence does not specify who is to consume or pay for the deck, but Mr. Hoffman's insert clarifies who does what (Jeff Marshall still being under contract to the vendor at the time of the amendment). Mr. Hoffman's price limit does not prevent the construction of the deck. He could find other means of providing lumber, for example by negotiation with Jeff Marshall."

On November 2, 1999, Mr. Lipton wrote to his solicitor indicating his desire to close the transaction on the property as soon as possible, stating:

"I believe that we are ready pending finalizing the amendment. On this matter Angela Han is preparing a document which she will review with the builder."

On the subject of the contents of the Amendment, the letter states:

"Yesterday she [Ms. Han] discussed the change to the amendment issued by Polaris Restorations with Joseph Hoffman who feels that the amount of \$1,000 for materials is sufficient and will purchase a significant amount of lumber since the builder can purchase it wholesale. Angela [Ms. Han] feels he will not budge from this position because he feels he can sell this property to someone else at a higher price so there is no pressure for him to change."

"Jeffery Long [the Applicants litigation lawyer] is planning to contact Mr. Drudi [Vendor's litigation lawyer] to discuss the issue. Since Hoffman has dug in his heels I do not feel the proposal will improve in our favour. I do feel however that we could lose this property if Hoffman is able to complete a sale to another party while we are trying to maneuver into a more favourable position."

Mr. Lipton testified that his litigation lawyer's advice was to "close or litigate". It appears that after considering this advice, the Applicants decided to close pursuant to the terms of the Amendment.

On November 3, 1999, the Applicants' solicitors wrote the Vendor's solicitors informing them that the Applicants accepted the terms of the Amendment, stating:

"In any event be advised our clients accept the above noted offer, namely a \$1,000 abatement of the purchase price on closing. In that regard enclosed please find a copy of the Amendment to Agreement as initialed by our clients."

The sale was closed and title transferred to the Applicants on November 5, 1999.

The Amended Statement of Adjustments for the sale of the home shows the agreed abatement as a "Credit to Purchaser" of \$1,000. There is no evidence before the Tribunal of a refusal to accept this abatement in the purchase price on closing. Acceptance of the abatement is evidence of the acceptance of the terms of the Amendment.

On November 18, 1999, the Applicants wrote the Program:

"We wish to bring to your attention some deficiencies which we have identified in our home since finally being able to move in on 08 November."

On November 19, 1999 the Applicants wrote the Program:

"I have mentioned to you during previous discussions that I would like to consider the option of pursuing the Vendor concerning 1) incomplete/deficient items covered under warranty and 2) delayed closing dates."

On January 17, 2000 the Applicants filed a "Delayed Closing Information For Freehold Homes" with the Program. In the following weeks the Applicants made further claims against the Program for compensation for items covered in the Amendment including the cold cellar and the basement ceiling height.

From his testimony, the Applicant Mr. Lipton was aware that the claims being made after closing included items that were covered by the Amendment. He felt he had grounds for not abiding by the terms of the Amendment as he insisted it was signed under duress. He also indicated that would have been content with the \$5,000.00 compensation for the delay in closing and then to abandon the deck and gazebo.

Mrs. Lipton testified that she was in contact with the Program many times and that her post-closing correspondence with the Program allowed her to believe that despite the Amendment, the Applicants could make claims against the Program for items covered by the Amendment.

The Program's warranty representative, Sherri Lumley, carried out an inspection on May 19, 2000 in preparation for the issuance of a conciliation report, which was issued October 10, 2000.

Also on May 19, 2000, the parties attended a conciliation arranged by the Program. Continuation of the conciliation was deferred to June 12 to allow Polaris to make a proposal. On June 8, 2000 counsel for Polaris wrote to the Applicants renewing its offer to build the deck and gazebo to the agreed specifications and give a \$1,000 abatement in the price. As well, there was an offer either to pay \$1,000 towards the cost of sodding or to do the work itself. Further, Polaris offered to give up its claim for legal costs in pursuing its rights under the Amendment. In return, the Applicants would be obliged to withdraw their claims covered by the Amendment while being free too proceed within the warranty period with any claims not set out in the Amendment. On receipt of this offer, the Applicants wrote to the Program exhorting it to

find against the Vendor and to conciliate the disputes in their favour. A further meeting was arranged for June 15. Matters were not fully resolved.

The Program issued its Decision Letter on April 24 2001 denying the Applicants' claims, which are the subject of this hearing.

Both the Applicants' solicitors and the Applicants' real estate agent, Ms. Han, wrote a letter to the Applicants to document their thoughts on the matters raised in the Program's Decision Letter. To the Program's position that the Applicants had the option of not signing the Amendment, closing without an abatement and making a claim against the Program, Ms. Han's letter, written in August of 2001, states her position that there was no such option as the Amendment was a condition of closing, and the Vendor would not have closed without the Amendment. As for not signing the Amendment, not closing and suing the Vendor, Ms. Han's recollection was that given the Applicant's circumstances of not having a home, this was simply too unpleasant to be an alternative.

Mr. Hoffman testified that if the Applicants had not signed the Amendment, he would have closed but without providing the deck and gazebo. He also stated that as there was no closing date stipulated, there was still room to negotiate.

THE LAW:

Section 1 of the Act defines "warranty" as a warranty set out in section 13 of the Act.

Section 1 of the Act defines "home". Under section 1,

"home" means,

(a) a self-contained one-family dwelling, detached or attached to one or more others by common wall,
...

and includes any structure or appurtenance used in conjunction therewith, but does not include a dwelling built and sold for occupancy for temporary periods or for seasonal purposes;

Section 13 of the Act states:

13.(1) Every vendor of a home warrants to the owner,

(a) that the home,

(i) is constructed in a workmanlike manner and is free from defects in material,

(ii) is fit for habitation, and

(iii) is constructed in accordance with the Ontario Building Code

13.(2) A warranty under subsection (1) does not apply in respect of,

(a) defects in materials, design and work supplied by the owner.

13.(3) The Vendor of a home shall deliver to the owner a certificate specifying the date upon which the home is completed for the owner's possession and the warranties take effect from the date specified in the certificate.

13(6) The warranties set out in (1) apply despite any agreement or waiver to the contrary and are in addition to any other rights the owner may have and to any other warranty agreed upon.

Section 14 of the Act states:

14(1) Where,

...

(b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty,

the person or owner is entitled to be paid out of the guarantee fund the amount of such damages subject to such limits as are fixed by the Regulations.

14(2) In assessing damages, the Corporation shall take into consideration any benefit, compensation or indemnity payable to the person or owner from any source.

APPLICATION OF LAW TO FACTS:

Are the Applicants' claims recoverable under the Act?

For the Applicants to establish a claim under the Act, the Applicants must prove a breach of warranty provided under the Act for which they have suffered damages.

Amendment of Agreement of Purchase and Sale

The Program argued that the Applicants cannot recover in this matter because they contracted out of any recovery by signing the Amendment.

The Amendment incorporated items 1 through 6 in the October 14 letter. In return for accepting those items as listed, the Applicants were to receive from the Vendor's a gazebo and deck, with a maximum \$1,000 contribution by the Vendor toward the required lumber.

Items 1 through 6 in the October 14 letter listed matters that were different than provided for in the Agreement of Purchase and Sale. For example, instead of a basement 8 foot ceiling, the ceiling height was 7'7". The Amendment provides that the gazebo and deck "shall comprise adequate compensation for all outstanding issues and expenses" set out in the October 14 letter.

The Vendor paid its \$1,000 obligation to the Applicants through a \$1,000 abatement on the house price, which the Applicants accepted. The Applicants' acceptance of the \$1,000 abatement on closing can only be taken as acceptance by the Applicants of the Amendment. The sale closed on that basis.

The Tribunal therefore finds that the agreement between the Applicants and Vendor is the Agreement of Purchase and Sale as amended by the Amendment, which incorporated items 1 through 6 in the October 14 letter. The Tribunal, therefore, must consider the Applicants' warranty claims in the context of that amended agreement, unless part or all of the Amendment is invalid by operation of law.

Duress

The Applicants argued that the Amendment is invalid because it was signed under duress.

Agreements can be voided if they were completed under circumstances of duress. The Tribunal was referred to *Stott v Merit Investments* (1988), 63 O.R. (2d), 545 a matter where the plaintiff sought relief from a contract he alleged was entered into under circumstances which constituted intimidation. Finlayson J.A. after stating that if the factual basis behind the "intimidation" rose to the level of "economic duress" then relief may be available. He then went on to offer evidentiary parameters within which the relief may be sought:

"The term 'economic duress' as used in recent cases, particularly in England, is no more than a recognition that in our modern life the individual is subject to societal pressures which can be every bit as effective, if improperly used, as flowing from threats of physical abuse. It is an expansion in kind but not class of practices that the law already recognizes as unacceptable such as those resulting from undue influence or persons in authority. But not all pressure, economic or otherwise, is recognized as constituting duress. It must be a pressure which the law does not regard as legitimate and it must be applied to such a degree as to amount to 'a coercion of the will', to use the expression found in English authorities, or it must place the party to whom the pressure is directed in a position where he has no 'realistic alternative' but to submit to it, to adopt the suggestion of Professor Waddams (S. M. Waddams, *The Law of Contract*, 2nd ed. (1984) at p. 376 *et seq.*). Duress has the effect of vitiating consent and an agreement obtained through duress is voidable at the instance of the party subjected to the duress unless by other agreement or through conduct, either express or implied, he affirms the impugned contract at a time when he is no longer the victim of the duress."

Further in his decision his Lordship quotes from *Pao On v. Lau Yiu*, [1979] 3 All E.R. at p. 79 (P.C.), which states in part:

"American law (Williston on Contracts) now recognizes that a contract may be avoided on the ground (sic) of economic duress. The commercial pressure, however, must be such that the victim must have entered the contract against his will, must have had no alternative course open to him, and must have been confronted with coercive acts by the party exerting the pressure: see Williston on Contracts."

In the same paragraph the state of English jurisprudence on the subject was summarized:

"In their Lordships view, there is nothing contrary to principle in recognizing economic duress as a factor which may render a contract voidable, provided always that the basis of such recognition is that it must amount to a coercion of the will, which vitiates consent. It must be shown that the payment made or the contract entered into was not a voluntary act."

In the Stott case the plaintiff was a securities salesman who sold on margin gold futures to a customer who failed to maintain his margin requirements in a falling market forcing a sale by the plaintiff, as was his right, of a portion of those futures contracts to bring into accord the stipulated margin requirements and the market price of the commodity. This action angered the customer, and he confronted the plaintiff with a cheque to cover the deficiency. Upon noting that the cheque was post-dated, the plaintiff informed the customer that he had no authority to accept such payment and brought the matter to his compliance officer for resolution. The compliance officer not only authorized the cheque but also ordered the repurchase of two of the contracts sold to maintain the customer's margin requirement. The cheque when presented to the customer's bank was refused certification. The customer was informed that were funds not available by the Monday, his accounts would be sold out. No monies were forthcoming and the account was sold resulting in indebtedness to the plaintiff's firm of \$66,434. Had the cheque been rejected and the account sold out on that date, the firm would have been owed nothing and the customer would have been in funds to the amount of \$55,000. The following day the customer attended a meeting with the plaintiff and plaintiff's superior. At that meeting, the customer acknowledged his debt and promised to pay it off within the year. All persons were aware that the salesman in accordance with industry practice would be liable for the debt should the customer default. On the day after this meeting, the plaintiff was directed into his superior's office and presented with a document for his signature which made the plaintiff responsible for the debt and that it would be immediately due and payable should he leave the firm. Also during that meeting, it was accepted by the Trial judge that the plaintiff's superior told him that if he did not sign, his time at the firm would not be pleasant and that he would not be easily employed in the field elsewhere. There were also assurances that the customer would pay anyway and that if he did sign, his esteem in the firm's eyes would increase. To quote His Lordship:

"It is idle to argue whether what Kasman (the employer) said amounted, in the circumstances to economic duress; it, is in my view, certainly(sic) amounted to intimidation and I cannot put it more succinctly than Lord Denning did in the case of *D. & C. Builders Ltd, Rees*, {1965} *All E.R.* 837 at p. 841....'No person can insist on a settlement procured by intimidation'

On appeal it was affirmed that as a matter of fact the standard to be imposed was the "know your client" rule and that ordinarily the plaintiff as the salesman was to be held liable for the debts of his customers. It became a matter therefore to examine the effect in law of the intervention of the plaintiff's superior in accepting the post-dated cheque in satisfaction for the slippage in the customer's margin requirements; for clearly the losses all around would have been less had the cheque been refused and the accounts sold on that day instead of the following Monday after a fall in the price of the subject of the futures contract. The Trial judge had found that there was no consideration for the obligation of the plaintiff to make the firm whole, as there was no obligation upon him at first instance. In the absence of the primary

obligation, there could not be a new one created out of contractual conjecture. The appeal court stated that on this reasoning the discussion of a contract being entered under duress was moot as of course there could not be a contract concluded. To the contrary, the appeal court found that the evidence indicated that the plaintiff was aware of his liability for the debt of the customer and entered into an arrangement with the firm whereby a hold back from his commissions would be established in return for the firm's forbearance from suing him for the amount owing. The acknowledgement by the plaintiff that he was responsible for the outstanding debt and the agreement by the firm to forebear collecting on the debt immediately was, in the opinion of the appeal court a contract. And while there may have been a pall of intimidation over the negotiations between the plaintiff and his employer, as outlined, the situation did not rise to the level of economic duress. It did not do so for the reason that the plaintiff had options available and in any event his actions subsequent to the agreement resulted, in the opinion of the court, to an approbation and approval of the arrangement. The court held that the plaintiff's choices were to quit or be fired. He could have refused the offer, taken time to seek legal advice and repudiated the contract. If sued for such a large amount upon the repudiation, more than his gross annual pay, he would have his hearing and if found liable had been no worse off than to have entered into the arrangement to pay off the obligation over time. His options may have been unpleasant but they were available. In any event, the application of duress only renders a contract voidable, subsequent actions of approbation render it enforceable.

In the present case, the Applicants after considering their legal advice and the practical difficulties of their options, decided to accept the Amendment as the best alternative and to close the transaction on the basis of the Amendment. Although the Applicants were in stressful negotiations with the Vendor, both parties were aware of their rights and remedies. The evidence is not consistent with that required to amount to unconscionable coercion. The Tribunal does not find that the Amendment was signed under duress. The Applicants by agreeing to the terms of the Amendment entered into a new APS. The Amendment stands as part of the contractual basis under which the transaction closed.

Applicants' Claims

Accordingly, the Tribunal will consider the Applicants' claims for warranty coverage on the basis that the Vendor was to deliver a home that met the terms of the Agreement of Purchase and Sale as amended by the Amendment.

The items as numbered in the Program's Decision letter of April 24, 2001 are used in the Applicants' Notice of Appeal and in the analysis below.

1. Delayed Closing

The Applicants claimed compensation under the Act for delayed closing.

The Program took the position that the amounts claimed under this heading were dealt with in the Amendment, which incorporated the terms of the October 14 letter and that the delayed closing claim was thereby satisfied.

In support of this position, the Program also argued that by closing pursuant to the terms of the Amendment and accepting the consideration of the \$1,000 abatement in the purchase price, the Applicants accepted those terms. In addition, the Program argued that it was the Applicants who first threatened to terminate the APS, that the Applicants were the first party to threaten litigation, that they had legal advice throughout, that there is no evidence of coercion, that there was no communication between counsel that the sale was being closed under protest, that there were negotiations over two weeks between both sides, and finally that there was no immediate rescission but rather an acceptance of the offered abatement. The Program further argued that there were options open to the Applicant, such as closing in accordance with the original APS and claiming under the Act for deficiencies. There was a signed Certificate of Completion indicating to the Program that the home was acceptable for occupancy.

In response, the Applicants argued that as with other items covered by the Amendment, the fact that the deck and gazebo were not built by the date required by the Amendment rendered the Amendment of no force or effect, thus allowing them to claim for compensation under the Act. In the alternative, the Applicants argued that the Amendment is of no force and effect as it was entered into under duress. As indicated above, the Tribunal rejects the duress argument.

The evidence shows that the original closing date agreed to by the parties was not met, and the Vendor did not extend that closing date in the manner provided in the Act and Regulation 892 under the Act.

It was open to the parties prior to closing to amend the date of closing set out in the Agreement of Purchase and Sale to a specific new closing date, but this was not done in the Amendment or the October 14 letter.

As to any claim for delay, the October 14 letter makes its most particular reference to delay in item 7 in that letter:

7. In the event that the foregoing is not completed with the purchase price abated, the purchasers would seek the following:

...

Reimbursement for 9,250.00 for delay compensation, storage, shelter, food

and the agreement of purchase and sale terminated and at an end.

Item 7 was the alternative to the Vendor not accepting responsibility to do items 1 through 6, in which case item 7 would apply. However, the transaction did close, items 1 through 6 were

incorporated by reference into the Amendment, and item 7 was not incorporated by reference and is not part of the Amendment. Accordingly, item 7 does not foreclose the Applicants making a delayed closing claim. Even if the parties had tried to waive a delayed closing claim by specific agreement prior to closing, the Tribunal would have to consider that such an attempt would offend section 13(6) of the Act which states:

13(6) The warranties set out in (1) apply despite any agreement or waiver to the contrary and are in addition to any other rights the owner may have and to any other warranty agreed upon.

However, the Amendment did not incorporate item 7 of the October 14 letter, and there is no agreement to waive a delayed closing claim.

The claim for delayed closing not being incorporated into the Amendment, the Applicants may make that claim under the Act. There is no dispute that there was considerable delay past the closing date set out in the Agreement of Purchase and Sale. The Program did not contest that if a delayed closing claim were successful, the amount of that claim would be the maximum allowed under the Act of \$5,000, which the Tribunal finds is the quantum for delayed closing to which the Applicants are entitled under the Act.

2. Sod

The Applicants contended that more of the area around the house should have been sodded and not merely seeded.

The APS states in schedule E under the title “1. Land Treatment”,

...
Front sides and rear seeded where disturbed by construction. Remaining area to remain natural. Septic tank area will be sodded.
...

Over the word “seeded” is handwritten the word “sodded”. The schedule indicates that the septic tank was to be sodded, and the Tribunal finds the handwritten “sodded” was to apply to the areas disturbed by construction. The evidence is that only a 12-foot strip around the house and over the septic tank was sodded, not all areas disturbed by grading.

The Program argued that a breach of the APS is not equivalent to a breach of a warranty under the Act. Also, the Program’s warranty representative, Ms. Lumley, stated in her testimony that the definition of “home” in the Act does not include lawn. The Applicants may be able to sue the Vendor under the APS for this shortcoming, but they could not look to the Program for redress.

The Applicants argued that a “home” under the Act should be considered that which is bargained for in an agreement of purchase and sale. As consumer protection legislation, the

Act should be viewed as protection for purchasers of new “homes” against the defaults of Vendors, and warranty protection against those defaults should extend to those things which an ordinary purchaser would view as included in his bargain for a “home”. This protection should apply not only to the bricks and mortar but also to the landscaping. In response to the Applicants’ reference to the cases of *Thomas James Williams* [1998] C.R.A.T. and *Julie Kent* [1998] C.R.A.T. to support of the Applicants’ position that sod is a item covered by warranty, the Program argued that these cases do not stand for this proposition because the definition of home was not in the analysis. Section 1 of the Act defines “home” as:

“home” means,

(b) a self-contained one-family dwelling, detached or attached to one or more others by common wall,
...

and includes any structure or appurtenance used in conjunction therewith, but does not include a dwelling built and sold for occupancy for temporary periods or for seasonal purposes;

The Tribunal does not agree that sod is necessarily excluded from the definition of a home where the particular facts of a matter support the finding that sod is an appurtenance used in connection with the home. However, it is not necessary to decide this point in this case because the status of the sod was covered by the Amendment.

The October 14 letter includes a relief from this obligation by the Vendor as the letter states in item 6 b), “The area completely sodded”. This item being covered by the October 14 letter, the parties amended their Purchase and Sale Agreement to provide that the condition of the sodding, although inadequate in the Applicants’ view, was the condition that the Vendor was to deliver to the Applicants on closing. That being done, there is no breach of warranty and the Applicants’ claim in this respect is dismissed.

3. Porch

The Applicants claim respecting the porch consists of not only the porch itself but also the pillars on the porch.

The Program’s position with both aspects of this claim was that the claim is not warranted. The evidence is that the cement porch called for in the APS would cost \$600.00 and that prior to closing Mr. Marshall gave the Applicants \$600.00 in lieu of that obligation so that the Applicants could make their own arrangements with respect to the porch. The Applicants cashed Marshall’s cheque.

The Tribunal did not have sufficient evidence before it to conclude that there was a breach of warranty with respect to the porch, and the Applicants’ claim with respect to the porch is therefore dismissed.

As to the two pillars, the Applicants' claim is that the two pillars do not match in size, and that the difference in size is significant.

The Program argued that the work on the pillars was done by the contractor, JAM, as the Applicants' contractor, not the Vendor's, and that such work was therefore not warranted under section 13(2)(a) of the Act. Mr. Marshall, of JAM, testified that his company did not do this work but that two masons hired by Mr. Hoffman did this work. The Tribunal finds that persons working for the Vendor did this work and the exception under section 13(2)(a) does not apply.

The diagram of the home set out in Schedule "G" to the APS indicates two pillars of similar size. The Program's warranty representative was of the opinion that as this stone was a "natural" product, there were going to be variations. The Program's warranty representative felt that while one pillar was built slightly smaller than the other, this variation was unavoidable and therefore, not warrantable.

The Tribunal did not hear expert evidence with respect to the workmanship of the pillars. However, a difference in dimensions is not denied, and the difference is apparent from the photographs accepted as evidence and that difference in size is not insignificant. The Tribunal is not prepared to conclude that the use of "natural" products with unavoidable variations inevitably forecloses a breach of warranty claim respecting the apparent differences in the size of the pillars. To proceed in a workmanlike manner, a person should have balanced the irregularities found in such pillars to select those with symmetry. With regard to the front pillars, the Tribunal finds that these are unacceptably asymmetrical and must be brought into balance in terms of their overall dimensions. Accordingly, the Tribunal finds that there has been a breach of the warranty under subsection 13(a)(i) requiring that the home be constructed in a workmanlike manner, and the porch pillars should be replaced with pillars of the same size.

4. Tree Cutting

The Applicants complained of trees being felled and taken away for rendering into firewood without compensation. Also, they complained that a large tree was damaged and as a result of the damage now represents a threat of falling on the house. Also, the Applicants stated that there are dead trees that require cutting. The Program argued that these are not warranted claims, as trees do not fall within the scope of "home" under section 1 of the Act.

The Tribunal heard no expert opinion to confirm a threat to the home from root damage to the tree referred to by the Applicants or to identify which trees were those identified in Schedule "H" to the APS as "Tall (unhealthy, rotten) trees to be cut and rendered into chord wood." Further, the Tribunal cannot conclude on the facts that this aspect of the agreement between the parties is within the definition of a "home" under the Act. Accordingly, this aspect of the Applicant's claim under the Act is dismissed.

5. Construction Debris

The Applicants complained of trees that were felled and not cleared away. The Program took the position that this was an item covered by the Amendment since the October 14 letter referred to "The remaining area to be cleared of debris and rendered presentable."

The Tribunal finds that such trees, which were to be cleared away, would be debris and is covered under the October 14 letter. Accordingly, the Tribunal dismisses this aspect of the Applicants' claim.

6. Walstone at 2nd Bedroom Window

The Applicants' Notice of Appeal indicates that this matter is not appealed and is not before this Tribunal.

7. Exterior Paint

The October 14 letter in item 6 b) refers to, "All outside doors painted according to the Schedules and the purchasers' instructions to the Builder." This being an item incorporated into the Amendment, the Applicants' claim respecting this matter is dismissed.

8. Interior Paint

The October 14 letter in item 6 a) refers to "The trim and walls to be repaired and painted." This being an item incorporated into the Amendment, the Applicants' claim in this matter is dismissed.

9. Fireplace

The Applicants' Notice of Appeal indicates that this matter is not appealed, and is not before this Tribunal.

10. Bathroom Shower Faucet

The Applicants' Notice of Appeal indicates that this matter is not appealed, and is not before this Tribunal.

11. Ceiling Height of Basement

The evidence is that the height of the basement is not 8 feet but 7 feet 7 inches. The height of the basement ceiling is item 1 in the October 14 letter.

1. As a result of the reduction in the constructed basement ceiling height to 7'7" instead of 8' compensation should be paid at 5%=\$18,212.50, as an abatement to the purchase price.

This being an item incorporated into the Amendment, the Applicants' claim respecting this matter is dismissed.

12. Cold Cellar

"Cold cellar in basement as shown on Plan" is listed in Schedule E under "Interior Appointments".

A cold cellar was built by enclosing the north side indentation of the basement wall during the month of October. The Applicants said that cold cellar should have been built under the front porch but was not. There is no evidence that there were defects in work or material respecting this cold cellar.

The cold cellar is item 2 in the October 14 letter. This being an item incorporated into the Amendment, the Applicants' claim respecting this matter is dismissed.

13. Master Bedroom Windows

The Applicants claim the loss of operable windows for the Master Bedroom.

The Vendor admits substituting a larger or Garden double door and no windows on the outside wall of the master bedroom for a single door with the two adjacent windows specified in the plans.

This is not one of the items listed in the October 14 letter from the Applicant's solicitors to the Vendor as requiring correction prior to closing and is, therefore, not covered by the Amendment.

The Program argued that there was not improper substitution under sections 18 or 19 of Regulation 892. The Program also argued that the compensation received by the installation of the door and sidelights is more than adequate compensation. The Vendor's evidence was that the price of the actual installation is higher than the one contracted for, indicating prices of \$400 for single door windows with 30% more for operable windows and \$1,200 for a Garden door. The Program also argued that there is not defect in work or materials or violation of the Ontario Building Code.

The Tribunal agrees with the Applicants' argument that they bargained for windows capable of being opened at night, that this function was valuable to the Applicants and that this was lost by the Vendor's substitution. In the circumstances, the Tribunal finds that the substitution was not of equal or better quality. The Applicants received a door, which ordinarily would be taken into account as an offset, however its installation does not fully compensate for the fact that the windows cannot be opened at night. The operable window function was not equaled by the substitution. The best evidence before the Tribunal of the differential in price between

operable and non-operable windows in the Master bedroom is \$400.00 in total, which the Tribunal directs the Program to pay to the Applicants in satisfaction of this aspect of their claims.

14. Brickwork

The Program's Decision letter of April 24, 2001 also stated that brickwork was "Warranted in part". The Applicants required different remedial work than that proposed by the Program.

The Program agreed that this was a warranted item due to poor workmanship under 13(1)(a), stating:

"the brickwork on the west wall of the house is wavy. This represents poor workmanship and is therefore a breach of section 13(1)(a) of the Act."

The Applicants complained that the bricked wall had a wavy appearance. It also was unattractive due to different colours of mortar being used, which showed up as a patchwork of uneven lines. The May 19 conciliation inspection carried out by the warranty representative, Ms. Lumley, on May 19, 2000 indicated the following with regard to this item:

"The complaint relates to the brickwork on the west side of the house and on the south wall between the front entrance and the garage.....on the south wall, the mortar joints were about 1 inch wide around the windows and about ¾ inch elsewhere. There were minor colour variations in the mortar, which were only visible close up, there was a section of brickwork, which was wavy and had mortar colour variations noticeable from a moderate distance. The section is located halfway up the south west corner and is about 5 feet by 3 feet."

In her testimony, Ms Lumley stated that it was the intention of the Program to have the depth of the mortar changed to eliminate the wavy look to the wall. She stated that after consultation with a bricklayer, the Program decided that "repointing" of the mortar was the best solution. She went on to say that any such repairs would be reinspected to ensure that a proper fix had been accomplished.

Mr. Montemurro testified for the Program with regard to the quality of the brickwork. He himself was not a mason but ran a large masonry-contracting firm. He in essence found the job to be up to industry standards. There could be variations in mortar due to differences in the sand or moisture content; as well, the stone used on the house was "stone brick", a tumbled product that had deliberately non-uniform dimensions. This design was employed to give a "natural" look to the wall on which it was applied. These variations were up to 1/8 to ¼ inch and could give the illusion of curves in the wall. He was not questioned on how actual differences could give an "illusion".

The Tribunal finds that the brickwork is defective in that approximately 15 square feet of the wall does not appear to be flat. It was not established, however, that the bricks themselves were not laid in the appropriate straight lines. The Tribunal did not hear expert evidence to

establish the most appropriate means of remedying this defect. On the evidence available, The Tribunal orders that the Program have repointed the 15 square fee of the brick wall that is in issue.

15. Decks and Gazebo

Under the amended agreement, the Applicants were to get a deck and gazebo from the Vendor although the Vendor's liability for lumber was not to exceed \$1,000. The Vendor made its \$1,000 payment by a \$1,000 abatement in the purchase price. The Vendor has not provided the deck and gazebo. The Vendor indicated that this was not done because the Applicants made a claim under the Act, which was contrary to the Amendment. Accordingly, there is no dispute that the deck and gazebo were not done as set out in the Amendment.

The Tribunal therefore orders the Program to have the agreed deck and gazebo constructed pursuant to the agreed renderings, provided however that the Applicants must pay the cost of the lumber required in that construction.

DECISION:

Pursuant to the authority vested in it under section 16(3) of the Ontario New Homes Warranty Plan Act, the Tribunal makes the following order:

1. The following claims of the Applicants are allowed on the terms set out below:
 - (a) The Program shall pay to the Applicants \$5,000.00 for delayed closing;
 - (b) The Program shall arrange for the installation of two porch pillars of the same size and in the style provided in the agreement of purchase and sale between the Vendor and the Applicants;
 - (c) The Program shall pay to the Applicants \$400.00 for substitution of non-operable windows for operable windows in the Master Bedroom;
 - (d) The Program shall arrange for repointing of the mortar in the 15 square feet of the brick wall on the west wall of the Applicants' home that is the subject of their claim;
 - (e) The Program shall arrange to have the agreed deck and gazebo constructed pursuant to the agreed renderings, provided however that the Applicants must pay the cost of the lumber required in the construction.
2. Work that is to be attended to by the Program shall be completed within nine months of the date of the release of this order and the payment of money shall be made within 60 days of the date of the release of this order.

3. The balance of the Applicants claims herein are dismissed.

LICENCE APPEAL TRIBUNAL

William McIntosh, Vice-Chair

Released: April 30, 2002

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

FAWZI

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
FIRYAL FAWZI

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

FIRYAL FAWZI

Applicant

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

BALLANTRY HOMES (RICHMOND HILL) INC.

Added Party

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter on May 1 and 2, 2002;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicant* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Monday, August 26, 2002 and to continue August 27, 2002, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: April 29, 2002

CANEX CANADA INC. o/a CANADIAN TRAVEL SERVICE

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
CANEX CANADA INC. o/a CANADIAN TRAVEL SERVICE
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: April 1, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

CANEX CANADA INC. o/a CANADIAN TRAVEL SERVICE

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by Canex Canada Inc. o/a Canadian Travel Service, the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: April 30, 2002

ERLAND

MICHAEL ERLAND

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE ONTARIO NEW
HOME WARRANTY PROGRAM

TRIBUNAL: WILLIAM MCINTOSH, Vice Chair

APPEARANCES:

JOHN NAPIORKOWSKI, Agent representing the Applicant, Michael Erland

SARA KARGES, Counsel representing the Respondent, Ontario New Home Warranty Program

JAMES IAN RIGGS, Agent representing the Added Party, Brookfield Homes Ltd.

DATES OF

HEARING: October 22 - 26, 2001, February 5, 2002

OTTAWA

REASONS AND DECISION

BACKGROUND:

This matter comes before the Tribunal by way of a Notice of Appeal of Michael Erland (the "Applicant") filed pursuant to the right of Appeal granted to the Applicant by section 16(2) of the *Ontario New Home Warranties Act* R.S.O. 1990 chapter 31 (the "Act"). The appeal is from a decision of the Respondent, the Ontario New Home Warranty Program ("the Program") contained in a Decision Letter issued by the Program and dated December 21, 2000.

The new home in question was bought pursuant to an Agreement of Purchase and Sale ("APS") dated August 30, 1999 with a closing date of March 31, 2000.

After difficulties surrounding the signing of the Certificate of Completion and Inspection, possession was taken on April 3, 2000. On that date, the Applicant sought activation of the New Home Warranty protection for a list of items. The Program in the usual course passed these complaints on to the Vendor for action. After correspondence about the outstanding items, the owner requested conciliation. The conciliation form submitted listed a total of 65 items for which the owner wanted review. That document was duly passed on to the builder. The builder met with the representative of the owner, Mr. Napiorkowski, as the owner was out of town. Their attempts at reconciliation were only partially successful and an inspection by the Program took place on September 27,

2000 leading to the issuance of a Conciliation Inspection Report dated September 29. The homeowner was present at the time of the inspection.

The builder responded to the conciliation report but there were continuing complaints, and the owner was not satisfied with the classification of some of the complained of items being non warrantable under the Act. By October 2000, the owner was contemplating an appeal. By the end of November, it had become obvious that the owner was not satisfied with the responses from the Program and the builder. By facsimile of December 3, 2000, the Applicant asked the Program for a decision letter with regard to the outstanding items against which he wished to launch an appeal. The Program issued its Decision letter of December 21, 2000 and a Supplementary Decision Letter dated January 10, 2001.

During the hearing, several items were agreed to and settled.

The hearing took place with all parties represented save for the final day. The Applicant's representative chose not to appear for the final day of hearing despite having received proper notice.

ISSUES:

The sole issue in this adjudication is whether the items complained of fall within the warranty provisions of the Act.

EVIDENCE:

The numbering of the items below follows the numbering in the Program's decision letter and supplementary decision letter.

The Applicant did not attend at the hearing. Mr. Napiorkowski gave evidence on behalf of the Applicant. Although from his testimony it was obvious that he had some familiarity with the construction of homes, Mr. Napiorkowski offered no other evidence as to his credentials.

#3 "Cannot connect dryer vent to wall vent":

It would appear from the evidence that the Applicant had a European appliance installed which had, due to its larger dimensions the need for a larger pan to be placed underneath it. Because of the installation of a pan which accommodated smaller North American appliances, the fitting were affected. The Agreement of Purchase and Sale does not stipulate oversized appliances and the Program's view is that a North American builder would logically build openings to accommodate the smaller North American dimensions unless advised otherwise. The builder offered to build a bigger

pan but the offer was refused. A fix, according to the builder would be in the range of \$50.00.

The Program argues that the item was not warranted. The Program submitted that the vent was connected and the complaint does not represent a defect in materials or workmanship or a violation of the Ontario Building Code.

An inspection was carried out on behalf of the builder by a Mr. Chiarelli, who is a professional engineer. He has a degree in engineering, from 1962 and 36 years of consulting work. On this basis, the Tribunal found him qualified to give expert testimony. His inspection was carried out on April 24, 2001. He testified that the dryer connection was operational and that there was no reason the washing machine could not operate normally. His conclusions were based upon his observation rather than testing.

The Program argued that a modification to the APS would have been accommodated had the builder been informed of the non-standard appliance size. In any event, the builder offered to fix the problem with a modified pan, and the Applicant refused.

#4: Inadequate space for washing machine hose cannot be installed:

The Program informed the Applicant that in fact the hose was connected. Also, because the underpan was too small, the connection could not be perfectly completed or the machine properly leveled. The Program's position is that these concerns are matters of design and are not covered by warranty. It was argued by the Program that all these complaints come about or are traceable to the undersized pan and that is an issue beyond the scope of the warranty protection offered by the Act.

The builder's inspector Mr. Chiarelli concluded from his inspection that the taps were working. The top of the of the drain pipe is held in position with wood blocking and is not hindering the flow of water.

#6 Squash Blocks not installed under load bearing walls:

The Applicant stated that this deficiency represented a breach of the Ontario Building Code (the "OBC"). The Program stated that there was the requisite blocking installed and therefore the complaint has been resolved.

Mr. Chiarelli agreed with the Program's position. There was perhaps confusion about when the blocks were installed. It appears they were installed between the time of the observations of the Applicant's representative and when Mr. Chiarelli became involved on April 24. Mr. Chiarelli examined the drawings for the substructure and concluded that the blocking was installed as required.

#7 I-Beam end support is not adequate:

In the Notice of Appeal, the Applicant's representative asserted that the supporting structure to the beams did not conform to the OBC. On cross-examination he stated he agreed with the findings of Mr. Chiarelli that:

"...the support of the main I-Beam at the east end is a built up wood column of 3-2x6 members nailed together with two of the members bearing on the concrete slab directly over the footing location and one bearing directly on the wall. The support at the west end is a built up wood column of 3-2x6 bearing on the concrete slab directly over the footing location. The supports are adequate and no remedial action is necessary."

The Program argued that there was nothing left to rule upon regarding this item.

#8 Load bearing wall compressing floor downward. Floor is not level. Inadequate I-Beam support, floor compressing downward:

The finding of the Program, concurred in by Mr. Chiarelli, was that solid blocking had been installed under the load bearing wall down to the I-Beam which is supported at each end by wooden columns. The deflection in the floor was found to be 7mm over four feet or within industry and the Program's standards.

Mr. Chiarelli testified that the deflection was so minor it could not be noticed. The conclusion was that there being no defect in workmanship, the item was not warrantable under the Act

#9 Several floor joists are not straight:

On the first inspection by the Program there were several floor joists that were not straight. Repairs were completed to correct these misalignments by the addition of blocking or additional joists. These repairs were inspected by Mr. Chiarelli and found to be satisfactory. The Program concurred.

It was not clear to the Tribunal that the Applicant's representative had seen the repairs which were done after his initial visit.

#36 Water leaking behind brick stop over back door:

The Applicant stated that water was entering the house around the brickwork of the back door. The Program's representative inspected the area and found no evidence of water damage. The only explanation that there may have been leakage was the entry into the house of a television cable which may have allowed water to run down its length and enter the house. As there was no evidence of damage or defect in workmanship on the part of the builder, the Program denied the claim. The lack of evidence of water penetration was concurred in by Mr. Chiarelli.

#38 Crack in concrete basement floor:

The issue regarding this item is whether the crack was the result of normal shrinkage or represents a defect in workmanship. Normal shrinkage does not give rise to warrantable claims as it is specifically excluded by section 13(2) of the Act.

Mr. Chiarelli testified that this shrinkage showed no vertical displacement on opposite sides of the crack. This was evidence to him that the crack was the result of shrinkage. He went on to say that cracks exceeding 5 mm are excessive. His measurement of the present crack was 2 to 4 mms. Concrete basement slabs do not constitute an element of structural integrity and imperfections in them do not lead to structural weakness. The Program argued that the size of this crack falls under the exclusions in the Act. The crack was repaired and photographs were provided.

The Applicant's representative felt repairs were inadequate.

#40 Gas furnace air intake is without a screen.

Photographs were provided showing a screen over the intake on top of the furnace. The Program's representative explained that the furnace would shut off if the intake somehow became blocked. There was some confusion as to whether the original complaint was with regard to the outside intake and not the intake on top of the furnace. In such case there would be a complaint without a decision.

#41 Rear balcony not secured directly to wall structure:

The Applicant's representative objected to connecting bolts going through the vinyl siding as there would be the possibility of moisture penetration. There was no evidence given of any lack of integrity to the connection. The Program's witness testified that the connection was with ½ inch lag bolts 16 inches on center, that there was no evidence of moisture penetration or of Ontario Building Code violations or of defects in workmanship or materials. The Program argued that there was no allowable warranty claim. Photographs were provided showing the bolted attachment.

Mr. Chiarelli conducted an inspection and could find no remedial action as being necessary.

#42 Vertical posts and handrail not secured properly:

This claim was previously covered under warranty at the time of conciliation. An engineering firm was consulted and an attachment installed in accordance with the Ontario Building Code was drawn up. The Applicant's representative at the time of his inspection found the attachment not in accordance with the repair suggested.

Mr. Chiarelli suggested that the attachments be tightened, and the evidence is that they were so tightened.

#47 Upper kitchen cupboards not lined up with lower cupboards.

The Applicant's representative stated that he could see a difference in the alignment across the top of the kitchen cabinets.

The Program's witness stated that the upper cabinets in question had the same dimension from the top of the counter to the underside of the uppers. Any misalignment was the result in a slight deflection on the ceiling towards the left end of the upper cabinets and was not the result of installation workmanship. Photographs were produced. The difference according to the Program was not noticeable and there was no structural implication in the difference. As the difference was considered minimal, the Program did not consider the difference poor workmanship and did not consider the claim warrantable.

#48 Incoming water line and waste lines are located 5 feet from foundation. Prime development space destroyed:

The Program refused warranty coverage on this item as there was no defect in workmanship or materials and no breach of the Ontario Building Code. The basement is an unfinished area in the Agreement of Purchase and Sale. The area in question was measured by Mr. Chiarelli and found to be 1200 mm. A photograph showed a tape measure beside the pipe at 44 inches. It was the position of the Program that this siting of pipes cannot be ascertained accurately prior to construction in that there may be reasons that pipes are located due to by-law restrictions and the Ontario Building Code. There was nothing specified in the APS that the pipes were to be a certain distance in from the wall. The Program therefore argued that there was no improper workmanship and no claim in warranty.

#49 Ceramic floor uneven with a gap at molding:

The Program's position, concurred in by Mr. Chiarelli, was that the "unevenness" amounted to $\frac{1}{4}$ inch in 48 and that the tiny gap between the molding and the tile was probably due to either shrinking of the molding or unavoidable variations in the surface of the tiles and did not amount to a defect in workmanship. A photograph of the area was supplied. The Program denied warranty coverage as the gap was within its standards and due to normal shrinkage.

#50 Molding trim at base of stairs done poorly:

The Program examined the complaint and found a slight difference in color between the shoe molding at floor level and the staircase riser. The Program found this slight colour difference acceptable and thereby could find no breach of workmanship upon which to base a warranty claim. A photograph was produced.

The Tribunal, while recognizing the difficulty in showing such a difference in a picture, could see no appreciable colour variation. It is clear that the builder tried to match the colour of the boards but on different boards there is going to be some difference when staining wood due to pieces of wood, even from the same tree, having individual characteristics such as absorption rates and grain patterns.

#58 The floor at the right hand side of the fireplace drops in excess of 1 inch to the corner. Squash blocks not used under bearing wall:

The Applicant's representative felt the deflection in the floor was noticeable.

The Program measured the deflection in the floor to be 1/8 to 3/16 inches over 48 inches and therefore within standards and not ordinarily noticeable. Squash blocking was installed under the area in question.

Mr. Chiarelli concurred in the Program's findings and felt no further remedial action was required.

#60 The steel columns in the basement are bent under compression. Some are not set level, one is set at 12 foot beam spans and all others are set at 15 and 16 foot spans.. Footing sizes may be inadequate:

The Applicant's position was that an engineer should review the installation and certify any remedial action. An inspection by both the Program's representative and Mr. Chiarelli found that there were no bent columns. Two of the columns were slightly off-vertical. There were no problems found with the footings. With regard to the space between the columns, the builder installed additional columns in the affected areas.

In view of Mr. Chiarelli's expertise, where there is a conflict between that of Mr. Chiarelli and that of the Applicant's witnesses, the Tribunal prefers the evidence of Mr. Chiarelli.

THE LAW:

The *Ontario New Home Warranties Plan Act* provides as follows:

13(1) Every vendor of a home warrants to the owner,
(a) that the home

(i) is constructed in a workmanlike manner and is free from defects in material,

(ii) is fit for habitation, and

(iii) is constructed in accordance with the Ontario Building Code,

(b) that the home is free of major structural defects as defined by the regulations; and

(c) such other warranties as are prescribed by the regulations

13(2) A warranty under subsection 1 does not apply in respect of,

(d) Normal shrinkage of materials caused by drying after construction

14(1) Where

....

(b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty,

.....

The person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

APPLICATION OF LAW TO FACTS:

The onus is upon the Applicants to prove the existence of a breach of warranty under the Act.

In the present case, the Tribunal has examined the available evidence and with regard to all of the listed items and finds the submissions on behalf of the Program more compelling than those of the Applicant. In the instances where there were grounds for complaint, the evidence is to the effect that remedial work was satisfactorily carried out.

The Tribunal in hearing the evidence took into account the argument by the Program that perfection is not the standard by which warranty claims must be assessed. The term “workmanlike” as used in the legislation can only, in the opinion of the Tribunal, be usefully employed as a criterion if applied against either recognized standards or in their absence common sense.

Counsel for the Program referred the Tribunal to the case of *Breen* [1999] O.C.R.A.T.D. No 86 for guidance on the issue of perfection as a standard to be applied. The Tribunal in that case referred to an earlier decision of the Tribunal, *Mark Teitelman* (1987) 16 CRAT 178 which contained the following finding:

“The Teitelmans were not the authors of the defects and the Tribunal understands that they are a constant source of irritation to them. However, they must accept the fact that no house new or old is perfect or is warranted to be perfect. Floors and stairs will squeak, wood will shrink and warp, cracks will appear and paint will peel. All that can be expected is to

keep these imperfections at reasonable acceptable levels. The limited warranty provided by the Ontario New Home Warranties Act recognized these facts, and this Tribunal is obligated to make findings in accordance with the statutory provisions and not otherwise.”

In the *Teitelman* case, the Tribunal also held that the builder had gone to some considerable lengths to correct deficiencies. In the present case the evidence is to the effect that the builder attempted to satisfy the purchaser but was unable to.

Obviously one person’s observation about perfection will differ from that of another. Any attempt to refine the difference between perfection and workmanlike would necessarily drift into the realm of the subjective and be unhelpful as a grounds for mediation.

Once it has been established that an item has passed the test of “workmanlike” in terms of its suitability as part of a completed home, it falls outside of the warranty provisions of the Act.

DECISION AND ORDER:

The Tribunal having heard the evidence and reviewed the law and authorities agrees with the submission of the Program that the listed items have either been completed in a workmanlike manner or have been otherwise satisfactorily dealt with by the Program. Accordingly, there remain no grounds upon which a claim in warranty under the Act can be sustained.

Pursuant to the authority vested in it under section 16(3) of the *Ontario New Home Warranties Plan Act*, the Tribunal directs the Ontario New Home Warranty Program to disallow the claims presented on this appeal.

LICENCE APPEAL TRIBUNAL

William McIntosh, Vice-Chair

Released: May 1, 2002

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

919810 ONTARIO INC. O/A ALL SERVICE AUTO CENTRE AND ZOLTAN HEGEDUS

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: RICHARD C. DELANEY, Member

APPEARANCES:

LEONARD HOCHBERG, Counsel for the Applicants, 919810
Ontario Ltd. o/a All Service Auto Centre and Zoltan Hegedus
A. MICHAEL ROTHE, Counsel representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: January 14, 2002 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is a hearing before the Licence Appeal Tribunal (the "Tribunal") arising out of a Notice of Proposal issued by the Registrar under the *Motor Vehicle Dealers Act* (the "Registrar", and the "Act" respectively). The Notice of Proposal dated August 21, 2001 proposed to revoke the registration of Zoltan Hegedus ("Hegedus"), as a motor vehicle salesperson under the provisions of the Act. The Notice of Proposal dated August 21, 2001 also proposes to revoke the registration of 919810 Ontario Ltd. o/a All Service Auto Centre ("All Service"), as a motor vehicle dealer under the provisions of the Act. Hegedus and All Service (the "Applicants") appealed the proposal to revoke the registrations to the Licence Appeal Tribunal by Notice of Appeal dated August 30, 2001.

ISSUE:

The Registrar's Notice of Proposal to revoke registration of the Applicants stated that the Applicant's past conduct was inconsistent with the intention and objective of the Act, and therefore warranted revocation of registration under the Act. The requirements of the Act include that registrants be financially responsible in the conduct of their business

and that they carry on business in accordance with the law and with integrity and honesty.

The Registrar's Notice of Proposal includes the following allegations:

- 1) On or about June 11, 1999 a representative of the Registrar, Motor Vehicle Dealers (the "Registrar") attended at the Dealer's registered premises at 17380 Highway 27, Schomberg, Ontario and found that the Dealer was not present, did not have an office and had not erected a sign identifying the dealership contrary with the Motor Vehicle Dealers Act (the "Act");
- 2) On or about March 12, 2001 a representative of the Registrar attended at the Dealer's premises at 14692 Highway 48, Stouffville, Ontario and found that the Dealer was not present, did not have an office and had not erected a sign identifying the dealership contrary with the Act;
- 3) On or about March 23, 2001 a representative of the Registrar attended at the Dealer's registered premises at 220 Molock Dr. Unit 201, New Market, Ontario and found that the Dealer was not present, did not have an office and had not erected a sign identifying the dealership contrary with Act;
- 4) On or about June 26, 2001 a representative of the Registrar attended the dealer's registered premises, for the purposes of conducting an inspection under the Act. During the course of the inspection the dealer provided documents to be inspected which had been altered;
- 5) On or about December 12, 2000 the Dealer purchased a 1993 Audi Quattro VIN WAUEJ54A8PNOO0258. The odometer reading on the vehicle at the time of purchase was 182,931 "true KM unknown". On or about January 12, 2001 the Dealer sold the vehicle to Attila Farago with the distance traveled disclosed as 183,228 without further disclosing that the true kilometers were unknown thereby misrepresenting to the purchaser the true distance traveled;
- 6) On or about January 9, 2001 the Dealer purchased a 1988 Audi Quattro VIN WAUUC0896JA158316. At the time of purchase, the vehicle was branded as salvage and the odometer reading on the vehicle was 359,134 kilometers. On or about February 14, 2001 the Dealer sold the vehicle to Amrose Raftis with the distance traveled disclosed as 159,354 kilometers thereby misrepresenting to the

purchaser the true distance traveled. The Dealer also failed to disclose on the bill of sale that the vehicle was branded as salvage;

- 7) On or about February 6, 2001 the Dealer purchased a 1986 Audi 5000s VIN WAUUD0445GN096271. At the time of purchase the vehicle was branded as salvage and the odometer reading on the vehicle was 284,533 kilometers. On or about March 16, 2001 the Dealer sold the vehicle to Maria Elizabeth Story with the distance traveled disclosed as 184,575 kilometers thereby misrepresenting to the purchaser the true distance traveled. The Dealer also failed to disclose on the bill of sale that the vehicle was branded as salvage;
- 8) On or about February 8, 2001 the Dealer purchased a 1993 Audi Quattro VIN WAUCJ04A9PNOO0134. At the time of purchase the odometer reading on the vehicle was 238,000 kilometers. On or about February 23, 2001 the Dealer sold the vehicle to Helena Lis with the distance traveled disclosed as 139,945 kilometers thereby misrepresenting to the purchaser the true distance traveled;
- 9) The Dealer and Hegedus have failed to comply with the Act and in particular with section 5.

The issue in this proceeding is whether the Registrar had sufficient grounds to support the belief that the Applicant would not carry on business in accordance with the law and with integrity and honesty.

THE LAW:

5. (1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

(a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty;

6. (2) Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5 if the registrant were an applicant

or where the registrant is in breach of a term or condition of the registration.

EVIDENCE:

The Registrar presented three consumer witnesses, Laura Gordon, the Director of Compliance at the Ontario Motor Vehicle Industry Council ("OMVIC") and Louise Gingras, an OMVIC inspector.

Maria Story

The first consumer witness was Virginia Maria Elizabeth Story (hereinafter "Story"). She is a self-employed professional engineer and runs an environmental consulting business.

In March of 2001, Story purchased a 1986 5000 Audi Turbo from the Applicant, Hegedus. At the time of the purchase she dealt directly with the Applicant and his older son.

Story was referred to Exhibit 3, Tab 9, page 7. She was present when the entire Bill of Sale was completed. It was completed while sitting in the Applicant's house. Story had observed that the Applicant's house was a residence with a vehicle shop in the rear. There was a small table at the entrance of the residence that was apparently maintained for the purpose of transacting business deals.

Story had heard about the Applicant from a friend of the family. The friend's recommendation was that the Applicant had great vehicles.

She attended upon the Applicant's place of business and became interested in a 1986 5000 Audi Turbo (the "5000 Turbo"). Story would not normally buy an older car but the 5000 Turbo appeared good in the shop. She did observe some minor damage to the hood and front grille. Story was sufficiently impressed that she provided a \$2,000.00 deposit despite not being able to test drive the vehicle because repairs were needed.

When she returned with her husband to pick up the vehicle, they observed that the grille had been painted or replaced. Story's husband drove the vehicle home and observed that there was no heat in the 5000 Turbo. They called the Applicant and were advised that the heat could be fixed. Story and her husband took some comfort that the Applicant offered his assurances that he would fix anything with the 5000 Turbo if they had any problems.

Story was directed to the Registration forms of the 5000 Turbo, which indicate that the vehicle had been branded as "rebuilt." She recalled some mention of the rebuilt status of the vehicle with the Applicant. However, she characterized it as having been raised in a "very inconsequential way". She did not know what rebuilt meant.

Story observed that the mileage revealed on her Bill of Sale was 184,754 kilometers. This was quite low and was a selling feature of the car.

Since the date the vehicle was obtained, it has presented a series of problems including fuel leaks and hard start difficulties.

The witness was referred to a consumer questionnaire that she had been sent and confirmed that it included an accurate representation of the story of the vehicle (Exhibit 3, Tab 9, pages 5-6).

Story testified that she had received a call from Ralph Bayley at OMVIC asking whether she was aware of the true kilometers on the 5000 Turbo. Bayley advised her that they were well in excess of 280,000 kilometers. Moreover, the vehicle had ten (10) previous owners and the mileage had been nearly 300,000 kilometers prior to the accident that wrote it off.

After the conversation with Bayley, Story and her husband went back to the Applicant's place of business and confronted him about the odometer issue. The Applicant, when asked how he could do or allow such a thing, allegedly responded "what do you want me to do?" Story interpreted this response as an admission by the Applicant that the odometer had been altered.

Story added that an unknown person called from the Applicant's business and offered the Story's \$2,500.00 to get out of the matter. At that point, she was not prepared to accept \$2,500.00 as she had invested nearly \$4,000.00 into the vehicle by way of repairs.

Ms. Story did not feel that she was treated fairly by the Applicant. No further repairs or money was received from the Applicant with respect to the subject vehicle except for the provision of some spare parts and a more useful radio for the subject vehicle.

Ms. Story compared the Bill of Sale at Exhibit 3, Tab 9, page 7 with the Bill of Sale at Exhibit 3, Tab 9 Page 2. The latter was provided by the Applicant to OMVIC and the former is the Bill of Sale given to Story by the Applicant at the time the vehicle was purchased from the Applicant. Story confirmed that it appeared there had been an attempt to change the first digit of the odometer reading from a 1 to a 2.

On cross-examination, Story indicated that she had been to the Applicant's place of business on several occasions prior to placing the \$2,000.00 deposit. That particular visit was probably the second or third visit to the Applicant's place of business. She met with the Applicant's wife on the first visit and had no specific recollection of a second visit.

Ms. Story was not aware whether or not the Applicant had a business practice of not allowing a test drive. She re-confirmed that she was only told about the damage to the

hood and grille. She also had the impression that there had been only one previous driver, a female.

She recalled being advised that the vehicle was in a “minor” accident. She was a trusting person and did not ask about the extent of the “minor” damage. She did no further investigation on the vehicle.

Story stated that she would never buy another 15-year-old car again. Had she been aware that the true mileage was nearly 300,000 kilometers, she would not have purchased the 5000 Turbo. Story believed that a fifteen-year-old car with mileage as low as 180,000 kilometers should have presented few mechanical problems.

She stated that she was not able to look at a car and determine if it was in good shape or not. When asked if her expectations about the transaction were “naïve”, she stated they were better characterized as “trusting”. She had been referred to the Applicant by people she trusted and to that point had no real reason to question the Applicant’s assertions and representations.

Story confirmed that when the Applicant offered to make repairs, they were completed a short time thereafter.

She confirmed that the Applicant did not ever personally admit that the mileage was incorrect. However, she did get such an admission on the telephone from the unknown representative from the Applicant’s business.

When asked about the thoroughness and accuracy of the questionnaire she completed, Story indicated that there was not a lot of room on the form for detail. Also, she completed it at work and was busy and in a hurry. This accounted for her failing to mention that she had been made aware of the “minor” accident.

Helena Lis

The next consumer witness was Helena Lis (“Lis”). Ms. Lis is retired. She has been married 46 years and has two sons and three grandchildren.

She was familiar with the Applicant and his business All Service Auto Centre.

Lis and her husband first met the Applicant while traveling to Haliburton from Toronto. Their vehicle broke down, and Mr. Hegedus stopped to offer roadside assistance. He gave them his card and they decided at a later date to make a purchase from All Service Auto Centre.

Lis was referred to her Bill of Sale at Exhibit 3, Tab 10, page 5. Lis had sent this Bill of Sale to OMVIC. She identified her signature in the left centre region of the Bill of Sale. She also confirmed the signature of the Applicant in the bottom right corner. She was present when the Applicant completed and signed the form.

Lis and her husband had observed the Haliburton winters to be severe. They decided to buy a second "winter" car. They went to the Applicant's garage because it was convenient to where they lived. At all times, they dealt exclusively with the Applicant.

When questioned about what the Applicant had indicated to her with respect to the 1993 Audi Quattro she purchased, the witness indicated she was advised that the tires were not great but that it was a good car.

The odometer reading on Lis' copy of the Bill of Sale indicates 139,995 kilometers. She confirmed that her initials were beside the mileage.

Lis was referred to the consumer questionnaire she completed for OMVIC. Her husband had completed the form for her using the Bill of Sale, and his signature appeared at the bottom of the received questionnaire.

She stated that she had been told nothing else by the Applicant with respect to the odometer and its reading.

She was referred to page 2 of Exhibit 3, Tab 10, which is the Bill of Sale provided to OMVIC by the Applicant. Lis confirmed that the first digit on her copy of the Bill of Sale indicated a "1" and the copy sent to OMVIC by the Applicant appeared to indicate a "2".

Lis stated that, other than the mileage, there had been other difficulties with the car. There had been some price negotiation prior to agreeing to purchase the vehicle but the mileage was never really on her mind. The true mileage, if known to Lis, would have affected the price she was prepared to pay. She had no recollection whether the Applicant indicated the vehicle had been in accident.

Attila Farago

Attila Farago ("Farago") is 46 years old and is a driving instructor. He has known of the All Service Auto for approximately 11.5 years.

Farago was referred to Exhibit 3, Tab 7, Page 2, which is a Bill of Sale for a 1993 Audi 100 he purchased from the Applicant. He confirmed his signature in the various locations on the Bill of Sale. He was present when the Bill of Sale was completed was completed by the Applicant.

At the time of the purchase, Farago had a Pontiac Grand Am that was getting on in age. He needed a vehicle that would pass the annual tests required for cars used in driving instruction schools.

The Applicant told him that the car had 180,000 kilometers. He may have been told more but could not recall. The Applicant told Farago that the vehicle was in good condition and that some of the molding had been changed to improve the appearance.

He did not notice any other damage to the vehicle nor was he advised that there was any further damage to the vehicle. He was not advised about previous owners or that the odometer had been altered.

Farago recalled taking the vehicle for a test drive and observing that it drove straight in the lanes.

On cross-examination, Farago stated that he still had the car. At the time he made the purchase, the mileage seemed acceptable given the age of the vehicle. He clarified that the Applicant told him the mileage was "183,000 kilometers, maybe more, we do not know".

Louise Gingras

Ms. Gingras has been an inspector at OMVIC for the last four years. Prior to her employment with OMVIC, Ms. Gingras was employed as a private investigator and as an investigator for the Government of Canada. Her duties at OMVIC include ensuring compliance with the various requirements of the *Motor Vehicle Dealers Act* and other related legislation.

In the course of her work with OMVIC, Ms. Gingras inspected All Service Auto Centre in June 2001.

Ms. Gingras referred to her notes of the inspection. These are at Exhibit 3, Tab 5. The notes of a follow up inspection are at Tab 6. The witness confirmed that these notes were made at the time of the inspection and had not been altered.

The first inspection was on June 21, 2001, and Ms. Gingras attended at 17380 Highway 27 in Schomberg, Ontario. There was a problem with the premises and it had become known to Ms. Gingras that the Applicant was operating out of a van. She observed the van at the back of a large fenced area at the subject address. She was able to enter the premises and observed that no one was present. Two vehicles were parked beside the van. Ms. Gingras noted two numbers for the business on the side of the van. When she called the second number a young boy answered the phone. She asked for All Service Auto Centre and the Applicant and was given a residence address on the Caledon-King Line.

Upon attending at the address provided by the young boy, she was met by the Applicant's spouse and two children. They told her that the Applicant had returned to the van.

Ms. Gingras returned to the van and met the Applicant. She asked for various Bills of Sale and was provided with purchase bills of sale but not sale bills of sale. She set up a re-attendance date for June 26, 2001.

On June 26, 2001, Ms. Gingras returned to the van. She was given the purchase and sale bills of sale she had requested. A few issues arose as Ms. Gingras reviewed the documents. For example, a document was missing, a sale bill of sale appeared to be altered, there was a 1993 Audi purchase bill of sale that indicated a mileage uncertainty, and at least one vehicle was not registered to his dealership although he had purchased the vehicle.

Ms. Gingras was advised that the Applicant used some vehicles for spare parts only.

She observed that the garage register was up to date and that there were a total of 10 purchase and sale sets of bills of sale.

Ms. Gingras testified that Impact Auto Auctions is an operation located in Stouffville, Ontario that sells insurance write-off vehicles by way of auction. She was shown Exhibit 3, Tab 7, which she identified as a purchase Bill of Sale for a 1993 Audi bearing VINWAUEJ54A8PN000258. The document was prepared by Toronto Auto Auctions at the time the vehicle was sold to All Service. In the section entitled "Announcements", the following is stated: "ODO CHND at 56,000, TRUE KM UNKNOWN". At the bottom of the document, the odometer disclosure is indicated as 182,931. Ms. Gingras obtained the document from the Applicants during her inspection on June 26, 2001.

The next page of the same Exhibit is a copy of the All Service bill of sale for the same vehicle to Attila Farago. The odometer reading on the vehicle on that bill of sale indicated the distance traveled as 183,228 km. It did not reveal that the true distance traveled was unknown. Ms. Gingras obtained the document from the Applicants during her inspection on June 26, 2001.

Ms. Gingras stated that the purchase bill of sale disclosure was not on the sale bill of sale and, as a result, there was insufficient disclosure on the bill of sale to Mr. Farago and was not in compliance with OMVIC's standards of practice.

Ms. Gingras then reviewed the documents at Exhibit 3, Tab 8 pertaining to the vehicle purchased by Ambrose Raftis.

The Raftis vehicle is a 1988 Audi Quattro. The odometer on the purchase bill of sale from Impact Auto Auctions Ltd. to All Service Auto Centre revealed 359,134 km. Ms. Gingras obtained the document from the Applicants during her inspection on June 26, 2001. The purchase bill of sale clearly indicates that the vehicle ownership is branded as salvage.

The sale bill of sale at page 2 of the same exhibit indicates the distance traveled as 359,354 km. However, it appeared to Ms. Gingras, and to the Tribunal, that the "3" at the start of the odometer reading had been changed either from or to a "1" at some point in time. Ms. Gingras obtained the document from the Applicants during her inspection on June 26, 2001.

During the same inspection, Ms. Gingras obtained a copy of the Structural Inspection Certificate for the subject vehicle from the Applicants' files. This type of Certificate is required for all vehicles that are branded as salvage in order for them to be plated. Once plated, the brand changes from salvage to re-built. The odometer reading at the time of the Inspection on February 7, 2001 was 159,317 km.

"Branding" is a voluntary procedure carried out by some insurance companies. It follows the vehicle on the ownership history. There are four brands – salvage, rebuilt, stolen and irreparable. The latter brand reveals a vehicle that cannot be plated. A stolen brand indicates the vehicle has not been recovered after a reported theft. This brand is reported by the police. A vehicle may pass from a salvage vehicle to rebuilt upon successfully obtaining a Structural Inspection Certificate.

Ms. Gingras testified that the status of the vehicle as "salvage" or "rebuilt" is relevant and should be disclosed to the consumer.

Ms. Gingras then reviewed the documents at Exhibit 3, Tab 9 pertaining to the vehicle purchased by Maria Story.

The Story vehicle is a 1986 Audi 5000s. The odometer on the purchase bill of sale from Impact Auto Auctions Ltd. to All Service Auto Centre revealed 284,533. Ms. Gingras obtained the document from the Applicants during her inspection on June 26, 2001. The purchase bill of sale clearly indicates that the vehicle ownership is branded as salvage.

The sale bill of sale at page 2 of the same exhibit indicates the distance traveled as 284,754 km. However, it appeared to Ms. Gingras, and to the Tribunal, that the "2" at the start of the odometer reading had been changed either from or to a "1" at some point in time. There was no further disclosure on the sale bill of sale to indicate the brand of the vehicle or the uncertainty with respect to the odometer reading. Ms. Gingras obtained the document from the Applicants during her inspection on June 26, 2001.

During the same inspection, Ms. Gingras obtained a copy of the Structural Inspection Certificate for the subject vehicle from the Applicants files. The odometer reading at the time of the Inspection on March 15, 2001 was 184,575 km.

The Rebuilt Vehicle Parts Audit prepared on March 15, 2001 also reveals a distance traveled as 184,575. Ms. Gingras obtained the document from the Applicants during her inspection on June 26, 2001.

The vehicle identification number history for the vehicle indicates the status of the subject vehicle was changed from salvage to rebuilt on March 16, 2001. None of this is revealed on the sale bill of sale prepared for the purchaser, Maria Story.

Ms. Gingras then reviewed the documents at Exhibit 3, Tab 10 pertaining to the vehicle purchased by Helena Lis.

The Lis vehicle is a 1993 Audi Quattro. The odometer on the purchase bill of sale from Toronto Auto Auctions to All Service Auto Centre revealed 238,000 km. Ms. Gingras obtained the document from the Applicants during her inspection on June 26, 2001.

The sale bill of sale at page 2 of the same exhibit indicates the distance traveled as 239,995 km. However, it appeared to Ms. Gingras, and to the Tribunal, that the “2” at the start of the odometer reading had been changed either from or to a “1” at some point in time. Ms. Gingras obtained the document from the Applicants during her inspection on June 26, 2001.

Page 5 of that Exhibit is a copy of the sale bill of sale in the possession of Mrs. Lis. It very clearly indicates distance traveled as 139,995 km.

As a result of these inspections, Ms. Gingras referred the matter to a committee. That committee decided to follow up the inspection findings by contacting the relevant consumers and asking them about the odometer readings and the extent of the disclosure they received when they purchased their vehicles.

On cross-examination, Ms. Gingras stated that she had been directed to attend at the Applicant’s place of business because there were concerns about the registrant’s business location. She was simply attending to confirm the address. The inspection was not triggered as a result of a complaint. As a result of her concerns about the location, the inspection was broadened to include a review of the bills of sale and other documents on the premises. Apparently, there had been two previous attempts to inspect that were unsuccessful.

Ms. Gingras observed that the Applicant’s business was being conducted out of a cube van. The van had a table and two chairs. At the time she was present, she did not see any customers. Ms. Gingras observed that there was no evidence of heat or hydro at the cube van.

Ms. Gingras confirmed that she has been duly designated to conduct inspections pursuant to Section 10 of the *Motor Vehicle Dealers Act*. Her designation was issued in May 1999 and has no expiration date.

Laura Gordon

Laura Gordon is the Director of Compliance with OMVIC. OMVIC is a non-profit agency established to administer the *Motor Vehicle Dealers Act* (the “MVDA”). The MVDA is a consumer protection legislation.

Ms. Gordon was familiar with the Applicants’ case through her preparation for this hearing.

The dealership was registered under the MVDA on February 18, 1997. Mr. Hegedus was registered as a salesperson on March 21, 1997. Ms. Gordon confirmed that as of December 20, 2001, both Applicants were registrants under the Act.

The witness stated that the reasons for the proposed revocation were as follows:

- 1) There were concerns about the dealer operating from non-approved locations;
- 2) There was a concern that false documents had been provided to Ms. Gingras during the course of her inspection;
- 3) There were concerns about full disclosure of vehicle histories to consumers.

The requirements of OMVIC are that a dealer's premises have a lot, office and sign. The Act also requires dealers to advise OMVIC should they change their premises within five days of the change. Registrants are required not to deal with customers anywhere except the registered premises.

Ms. Gordon stated that since inspectors are only allowed access at the registrants registered business locations, it is critical that these locations be kept current. She also indicated that the business practice standards essentially form a code of ethics for OMVIC and its membership.

Ms. Gordon testified that the OMVIC Registrar has zero tolerance for non-disclosure and altering odometer readings. The accuracy of this type of information is essential for consumers to assess accurately the anticipated future repair and maintenance costs of a vehicle they intend to purchase. It also helps to establish the fair market price for the used vehicle. She further testified that the onus is on the dealer to act with honesty, integrity and in accordance with the law. The standards of business practice for registrants require full disclosure. Moreover, it is an offence under the Act to knowingly provide false information or altered documents to the Registrar.

Applicant's Evidence

The Applicant did not testify or provide additional evidence.

FACTS FOUND PROVEN:

Based upon the oral and documentary evidence presented at the hearing, the following are the facts found by the Tribunal to have been proven:

1. The Applicant, Hegedus, was registered as a motor vehicle salesperson on or about March 21, 1997.

2. The Applicant, 919810 Ontario Inc. o/a All Service Auto Centre, was registered as a motor vehicle dealer on or about February 18, 1997.
3. Although no Articles of Incorporation were presented as evidence, the Bills of sale of every relevant transaction were signed by Mr. Hegedus as an official of the vendor corporation with authority to bind the corporation. As such, the Tribunal finds that Mr. Hegedus is an officer of the corporation.
4. The Applicant issued a Bill of Sale to Attila Farago that did not reflect the full information in the possession of the Applicant respecting the distance traveled by the vehicle at the time of the sale. The Applicant was aware that the true mileage was unknown on the subject vehicle.
5. All Service Auto Centre acquired the Lis vehicle from Toronto Auto Auctions on February 8, 2001 with a revealed odometer disclosure of 238,000 km. On February 23, 2001 the same vehicle was sold to Helena Lis. The Bill of Sale provided by the Applicants to the purchaser Lis indicated a distance traveled of 139, 995 kilometers. During her June 26, 2001 inspection of All Service Auto Centre, Ms. Gingras was provided with a Bill of Sale for the Lis vehicle that indicated 239,995 as the distance traveled. The information provided to the consumer was inaccurate. The information provided to Ms. Gingras appeared to have been altered and was an inaccurate representation of the Lis transaction.
6. All Service Auto Centre acquired the Story vehicle from Impact Auto Auctions Ltd. on February 6, 2001 with a revealed odometer disclosure of 284,533 km. The Bill of Sale from Impact Auto Auctions also clearly indicated the vehicle had been branded as salvage. On or about March 16, 2001 the same vehicle was sold to Maria Story. The Bill of Sale provided by the Applicants to the purchaser Story indicated a distance traveled of 184, 754 kilometers. During her June 26, 2001 inspection of All Service Auto Centre, Ms. Gingras was provided with a Bill of Sale for the Story vehicle that indicated 284,754 km. as the distance traveled. The information provided to the consumer was inaccurate. The information provided to Ms. Gingras appeared to have been altered and was an inaccurate representation of the Story transaction. Furthermore, the Bill of Sale provided to Ms. Story by the Applicants failed to reveal the vehicle was branded as salvage and had been rebuilt.

DECISION AND REASONS:

The onus of proof rests upon the Registrar to satisfy the Tribunal that he has reasonable grounds to believe that based upon their activities of the Applicants' registration ought to be revoked under Section 6(2) of the Act in that their past conduct afforded reasonable grounds for belief that the Applicants would not carry on business in compliance with Section 5 of the Act.

The leading authority, which has been followed in numerous cases, is the Divisional Court decision of *Brenner*, reported in 19 CRAT 58. This decision held that the

Tribunal should only refuse to direct the Registrar to carry out his proposal if it is of the opinion that the Registrar was in error in concluding that the past conduct of an Applicant afforded reasonable grounds for the Registrar's belief that such Applicant would not carry on business in accordance with law and with integrity and honesty. The authority of the Tribunal under Section 7(4) of the *Motor Vehicle Dealers Act* respecting the proposal of the Registrar was reviewed by Southey J. where he stated at page 60:

The effect of Section 7 (4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the Applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself.

This Decision was confirmed by the Divisional Court in *Albert Fascenda* (1994) 26 CRAT Part II 1050, where it stated at page 1051:

. . . that the Tribunal should have refused to direct the Registrar to carry out his proposal only if it thought the Registrar was in error in his belief.

As a result of the above and a line of cases following that reasoning, to overrule the decision of the Registrar, the Tribunal must conclude that the Registrar was wrong in his decision. It must find that the conduct of the Applicant does not afford reasonable grounds for the Registrar's belief that the Applicant will carry on activities in contravention of the Act and its regulations. The Tribunal must not concern itself with its own opinion of whether or not the Applicant has reformed. It must look at the past conduct of the Applicant and at the decision of the Registrar to come to a conclusion as to whether or not the past conduct of the Applicant would afford reasonable grounds for the Registrar's belief that such Applicant would not carry on business in accordance with law and with integrity and honesty in the future.

The Tribunal finds that this case essentially revolves around two basic allegations:

- 1) The Applicants provided false documentation to the Registrar during an inspection; and,
- 2) The Applicants failed to make disclosure of material facts to purchasers.

The first allegation concerns the Applicants and their relationship with OMVIC. The second relates to the business practices of applicants with consumers.

With the respect to the first allegation, the Registrar is entitled to carry out routine inspections of registrants pursuant to Section 10 of the *Motor Vehicle Dealers Act* (the “Act”). That section stands alone from section 9 inspections, which are triggered by complaints received by the Registrar. Ms. Gingras stated that no complaints were received with respect to the Applicants. The inspection was carried out to ensure compliance with the Act and its regulations relating to registration. During the course of that inspection, the Applicants provided Ms. Gingras with two documents – the Applicant’s copies of the Story Bill of Sale and the Lis Bill of Sale – which were altered from the original Bills of Sale provided to the consumers.

Section 11 of the Act provides, in part, that upon an inspection under section 10, “...no person shall obstruct the person inspecting or withhold or destroy, conceal or refuse to furnish any information or thing required by the person inspecting for the purposes of the inspection.” Furnishing altered and inaccurate documentation on such an inspection is a clear breach of the requirements of this section. Moreover, it is an indication that the Applicants do not act with honesty or in accordance with the law.

The second allegation concerns the business practices of the Applicants with respect to the public. Laura Gordon, OMVIC’s Director of Compliance, testified that the Registrar has a zero-tolerance level for non-disclosure or altering of odometer readings. Disclosure of material facts revealing the true distance a vehicle has traveled is clearly important to the consumer’s purchase decision. As Ms. Gordon indicated, accurate information allows the consumer to assess the future maintenance and repair costs to be expected for the vehicle and the present market value of the vehicle.

According to Ms. Gordon, The *Business Practices Act* and OMVIC’s standards of conduct require full disclosure and not misrepresent all material facts.

Mr. Farago testified that he was told by Mr. Hegedus at the time of the purchase that the vehicle had “...180,000 km., maybe more, he did not know.” He indicated that he was never advised the odometer was changed. Mr. Farago still has the vehicle and, on cross-examination, indicated that the mileage seemed “okay” to him given the age of the car. The latter comment is important as the consumer obviously assessed the price and condition of the car based on age and mileage information supplied by the Applicants. In fact, the Applicant knew that the mileage had been changed at 56,000 kilometers and the true mileage was unknown. It is the Tribunal’s view that there is a significant difference between the information the Applicants possessed and the information the consumer was actually given.

The Lis and Story transactions include even more troubling examples of non-disclosure.

Helena Lis understood from the Bill of Sale she was provided that the distance traveled on her car was 139,995 kilometers. She testified that, although mileage was not really on her mind at the time of the purchase, the mileage would have affected the price she

was prepared to pay for the vehicle. The Applicants acquired the vehicle from Toronto Auto Auctions with a revealed distance traveled of 238,000 kilometers.

The failure to reveal 100,000 kilometers in vehicle travel history from a consumer is the failure to disclose a material fact to the consumer. It really is of no consequence that the purchaser is still happy with the transaction. For the purpose of the issues now before this Tribunal, it is relevant that at the time of the transaction a very significant fact was withheld from the consumer. Ms. Story testified on cross-examination that had she known the true mileage, possibly in excess of 300,000 kilometers, she would not have purchased the vehicle. The Tribunal finds misrepresenting by 100,000 kilometers the vehicle's travel history is a failure to disclose a material fact to the purchaser.

The transaction involving Maria Story is also troubling. The Applicants acquired the vehicle on February 6, 2001 from Impact Auto Auctions Ltd. The Bill of Sale to the Applicants indicates the vehicle is branded as "salvage" and that the true distance traveled is unknown and may be in excess of what is recorded to date. The consumer was told the vehicle was rebuilt but did not understand what "rebuilt" meant in the parlance of the industry. She testified that Mr. Hegedus mentioned it to her in a very inconsequential manner. The Tribunal finds this to be further evidence of the Applicant's misleading of the purchaser.

On the evidence presented, the Tribunal concludes that the past conduct of the Applicant afforded the Registrar reasonable grounds for his belief that the Applicant would not carry on business in accordance with the law and with integrity and honesty.

Having carefully considered all of the evidence presented, this Tribunal finds no ground to interfere with the Registrar's proposal.

ORDER:

Pursuant to the authority vested in it by Section 7(4) of the *Motor Vehicle Dealers Act*, the Tribunal directs the Registrar to carry out his proposal dated August 21, 2001 to revoke the registration of Zoltan Hegedus as a motor vehicle salesperson under the Act and to revoke the registration of 919810 Ontario Inc. o/a All Service Auto Centre as motor vehicle dealer under the Act.

LICENCE APPEAL TRIBUNAL

Richard C. Delaney, Member

Released: May 1, 2002

SAMUEL

BRIAN M. SAMUEL

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE *ONTARIO NEW
HOME WARRANTY PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL: DOUGLAS MACKINTOSH, Vice Chair, presiding
MICHAEL TURK, Vice-Chair

APPEARANCES:
BRIAN SAMUEL, Applicant, representing himself
KAREN JONES, Counsel, representing the Ontario New Home
Warranty Program
MICHAEL TITLE, Agent, representing the Added Party, Redpath
Residences Corporation

DATE OF
HEARING: April 11, 2002 Toronto

REASONS FOR DECISION AND ORDER

The Applicant, Brian Samuel, appeals to the Licence Appeal Tribunal from a decision of the Ontario New Home Warranty Program (the "Program") set out in a letter dated November 23, 2001. The decision letter denied seven warranty claims made by the Applicant. There was an eighth claim which was warranted, but the Applicant turned down the offer to settle.

BACKGROUND:

In August 1998, the Applicant entered into an agreement of purchase and sale to buy unit 709 at 188 Redpath Avenue in Toronto. This was his first home. The price was \$208,990 and he took possession in July of 2000.

The Applicant is well educated and represented himself. He has a BA in political science from University of Western Ontario and has worked for ten years as sales manager for a multi-national office products company.

During the purchase procedure, two pre-delivery inspections were carried out with the Applicant by Leslie Yager, the representative from the Vendor, Redpath Residences Corporation. On the second inspection, Ms. Yager made out a list of deficiencies and the Applicant signed it.

Other problems surfaced, and the Applicant became dissatisfied with the way the builder was responding. The Applicant contacted the Program. In due course, this led to conciliation after which, in June of 2001, the Program issued a conciliation report. In their report, two of the items complained of were found to be warranted and eleven, including the hardwood floor, were not.

This situation was complicated by a burst pipe in the unit above the Applicant's which flooded the Applicant's home in August of 2001. He was compelled to evacuate his home. Some of the water damage done was to the hardwood floor. Although the insurance company replaced the whole hardwood floor, the Applicant maintained his claim for the flooring against the Program.

THE FACTS:

The Applicant relied on his own evidence. Each of the other parties called two witnesses.

The Program's two witnesses were Al Stevenson, a widely experienced warranty representative, and Vincent Mascone, the owner of a tile company.

The Vendor also called two witnesses, Leslie Yager, the representative from Redpath Residences Corporation, and Pamela Brophy, the insurance claims adjuster.

As indicated there are eight claims.

1) The Refrigerator

The Applicant's contract stated he was to get a 19 cubic foot refrigerator with a choice of white or black. He chose black. But it turned out that the 19 cu. ft. black model had been removed from the production line and the supplier, Whirlpool Home Appliances, only had 18 cu. ft. or a 22 cu. ft. models in black. The Program says that the 19 cu. ft. unit is a warranted choice.

The Applicant is not content with the 18 cu. ft. model which the vendor had installed. He wants the 22 cu. ft. model and the contention arose as to whether or not it would fit into his home.

The Applicant testified that he measured both the entrance to his home and the alcove and concluded that the larger unit would fit. He stated that Whirlpool at first agreed to

the substitution but then changed its mind. The Vendor takes the position that several others in the building accepted compensation and signed releases.

On the basis that the actual difference in capacity between the 18 and 19 cu. ft. models is only .6 cu. ft. or 3%, the vendor offered \$40 recompense to the Applicant. (That calculation is based on the 18 cu. ft. model containing 18.2 cu. ft. and the 19 model containing 18.8 cubic feet)

2) The absence of a light above the powder room shower

The Applicant claims there should be a light above the shower because the other units in the building have one although he admitted he believed the contract of sale was ambiguous.

Al Stevenson, the Program's representative, took the position that the absence of a light in the shower is not warranted as is it not set out in the agreement of purchase and sale.

The agreement of purchase reads as follows in schedule B:

3. Vendors finishing comprise the following:

.... shower stall with shower light and glass shower door ..

Redpath Residences Corporation made a gratuitous offer of \$400 to settle, but this was not accepted by the Applicant. His position was he should be entitled to \$1,000 which he believed to be the real cost of installation from advice he had received from a contractor, the father of a friend.

3) The Towel Bar

One item on the Pre-Disposition Report is a notation, "clean towel bars in both bathrooms of paint". The Applicant testified that the bar was scratched when the paint was cleaned off it, and he now wants it replaced. He did not produce any photographs or the bar itself.

However, the warranty representative, Al Stevenson, who has a wide experience in the industry, testified that he inspected the towel bar and saw no scratches. His evidence was supported by Leslie Yager, the assistant to the president of Redpath Residences Corporation. She inspected the towel bar in February and also saw no damage. She noted the complaint was made by the Applicant at the time of the Conciliation inspection and there were no scratches then.

4) Problems with the toilet

The layout plan of the home shows the toilet in the ensuite bathroom centred in an alcove. But the Applicant says it is not. This is a particular problem because Mr. Samuel is well over an average size.

The Applicant testified that the toilet is so close to one wall in the alcove that when on it, he has to lean over with the tissue roll sticking into his side. He estimates the toilet is only 1" from the wall. As a result, he has had to resort to using the toilet in his other bathroom.

The Program's warranty representative testified that although the toilet is off centre, it is not abnormally close to the wall. He disagreed that the toilet was 1" from the wall.

The Builder's representative, Leslie Yager, testified that the toilet looks and works fine.

The Applicant takes issue with another problem with the toilet. He says the supply pipe going from a riser to the toilet is covered with foil and is a conspicuous eye sore which decreases the value of his home. The Applicant contends this is a defect in workmanship but mainly a design flaw.

The warranty representative said there was nothing unusual in the supply pipe for the toilet coming from the riser (it boxes in pipes going to the units above) although, implying that it could be made less visible, a supply pipe could come up from the floor or out from the wall.

5) Shut-off valves for the washer

The Applicant, having experienced a deluge of water from the unit above, is sensitive to the dangers from water and wants more readily available shut-off valves for the washer/dryer stack.

The washer has two sets of valves. The main shut-off valves are behind the washer/dryer stack and are not visible. The other set is in behind a panel on the stack and the panel has to be opened with a screwdriver before these valves can be reached.

The Applicant says he cannot reach the main valves behind the stack because there is only an inch or two between the stack and the wall. The gap is in fact so small that he cannot retrieve anything such as a sock that has fallen in between the stack and the wall.

He wants \$900 or \$1,000 to install readily available valves. He stated, "My concern is safety as priority number one and issue number two is liability".

The Program's representative stated that it is not uncommon to access the valves through a panel in high rise homes and suggested that since it is the owner's responsibility to look after his home, he should have the necessary screw driver available.

The Vendor says the use of space has to be efficient and has no problem with the set up.

6) The Carpet

The Applicant complains that the carpet has come untacked from the edge where it meets the hardwood floor between the master bedroom and the hall. He claims the carpet was simply cut too short at the transition.

Some confusion arose from the word "tucked", which carpet layers use to indicate stretching a carpet into position with a knee kicker. The Applicant seems to have wrongly concluded that "tucked" meant the carpet should be folded under itself.

The warranty representative noted the carpet had come loose from the spiked tack board which holds the carpet in place, but he said this was not unusual and is a matter for the homeowner's maintenance.

7) The Hardwood floor

The home has hardwood flooring except in the two bedrooms and two bathrooms. The Applicant claims this flooring was damaged by a cleaning woman sent in by the builder at the time he took possession. He claims that she used an abrasive mop which scraped the wood. In addition, there was an extra washer/dryer in his home when he came in and its removal may also have been responsible for some of this damage and for dents in the wooden flooring.

In addition, some time later, a board in the floor popped up but the Vendor fixed it. The situation changed when the home was flooded, and the whole hardwood flooring was replaced by the Applicant's insurance company.

The Applicant indicated that he wants \$3,000 for the damage done to the floor prior to the flood and that he has in mind a global figure for all his claims of \$15,000.

8) The tiles in the ensuite bathroom

On the selection chart in the agreement of purchase, the Applicant chose vechia grey for the floor tile and for the vertical tub surround in the ensuite bathroom.

This choice was qualified in the list he signed in the Pre Disposition report which reads:

"Purchaser would prefer that the floor tile extend to top of the tub but ONLY if tile + grout can be a perfect match to floor tile. If not then remove floor tile from tub + replace with wall tile to match installed wall tiles. Purchaser has spent considerable time in dealing w/ Moscone Tile to sort out issues regarding the installation in the ensuite. As compensation for this, once ensuite installation is completed satisfactorily Purchaser wants tile backsplash installed in the kitchen as originally offered by Moscone, with tiles as selected by purchaser"

The backsplash in the kitchen was installed by Mascone Tile Company. The company also replaced all the tiles on the tub surround three times.

Vincent Mascone testified that his company has 50 employees and his experience in the tile business runs over five decades. He personally had the tub surround tiles replaced when the Applicant correctly noted the tub surround tiles did not match the floor tiles.

The Applicant was not satisfied claiming that the tiles still do not match. But Mr. Mascone testified that he had found tiles from exactly the same dye lot and testified this was impossible and that any perceived mismatch was from the light reflecting differently on the horizontal floor tiles and the vertical tiles on the tub surround.

Nonetheless, Mr. Mascone replaced the tiles again. He tried to make the Applicant happy and it finished up that there were two replacements of the tiles, one before closing and one after. Each time required \$10 to \$15 of material and \$100 of labour.

The Program's warranty representative testified that the Applicant got what he had asked for, the tub surround tiles were finally the same as the wall tile. He found no defect in materials or workmanship and no conflict with the Ontario Building Code ("OBC").

ISSUES:

There are two issues.

The first is whether the larger refrigerator unit could fit into the home and if not, whether the offer of settlement is reasonable.

The second, issue is whether the other items are warranted under the Act.

THE LAW:

The relevant sections of the Act are as follows:

13. (1) Every vendor of a home warrants to the owner,:

(a) that the home,

(i) is constructed in a workmanlike manner and is free from defects in material

(ii) is fit for habitation, and

(iii) is constructed in accordance with the Ontario Building Code

(c) such other warranties as are prescribed by the regulations.

(2) A warranty under subsection (1) does not apply in respect of;

(c) normal wear and tear;

(f) damage caused by improper maintenance;

14 (1) Where

(b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty....

the person is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulation.

(3) The Corporation may perform or arrange for the performance of any work in lieu of or in mitigation of damages claimed under subsection (1).

Regulation 892

18. (1) Every vendor of a new home warrants to the owner that the vendor shall make no substitutions in those items of construction or finishing for which the purchaser is entitled to make selection pursuant to the purchase agreement without the written consent of the purchaser.

(3) Every vendor of a new home warrants to the purchaser that where the purchaser fails to make a selection under clause (2)(a) or (b) that the vendor will make a selection on the purchaser's behalf that is of equal or better quality than the original selection as set out in the purchase agreement.

THE APPLICATION OF THE LAW TO THE FACTS:

With respect to the eight items reviewed above, the following applies:

(1) The refrigerator,

It is true that the Applicant selected a 19 cu. ft. black refrigerator, but it is not available. There has been a substitution because the Applicant has a smaller unit. Regulations 18 and 19 stipulate that the Applicant is entitled to his selection but a substitution has to be of equal or better quality.

Certainly the larger 22 cu. ft. model is of equal or better quality. But the question of whether it would fit into the home is not resolved. The onus is on the Applicant to prove his case, but he has not provided detailed measurements, and the Tribunal has not been persuaded that the larger model would fit into the home. The question therefore is: what is a fair amount of compensation.

Redpath Residences Corporation offered \$40, probably correlated to the 3% reduction in the size of the 18 cu. ft. refrigerator which the Applicant received. However, the Tribunal finds that a more appropriate figure is \$150.

(2) The light over the shower

The Tribunal has concluded that a light above the shower is called for. The key words in the contract are "shower stall with light". The difficulty is that the Tribunal is not in a good position to determine what the cost of installing such a light would be. The onus is on the Applicant to establish this. But there is no indication of what type of light is required, how it can be secured and what materials are required to come through the shower ceiling.

Given the background it is preferable to avoid ordering the work to be done. The only acceptable guide for a proper amount to be awarded is contained in the Vendor's offer \$400 which seems a little low. Accordingly, the Applicant should have \$500.

(3) The Towel Bar

The Applicant says the bar is scratched. He has to persuade the Tribunal that this is so on the balance of probabilities, and he has not done so. He could have produced the bar itself or a photograph, but did neither. Accordingly, the Applicant's claim respecting the towel bar is dismissed.

(4) Problems with the Toilet

The Applicant has testified that the amount by which the toilet is off centre is critical to the Applicant, especially as he is considerably more than average size. However, there are no measurements of the size of the alcove in which the toilet is placed. There is disagreement between the Applicant and the warranty representative about the distance from the toilet to the wall. The onus on the Applicant has therefore not been discharged.

With respect to the supply pipe for the toilet which the Applicant says is an eye sore. the Tribunal has no photograph or other way to determine if the Applicant is correct in this dispute with the Vendor and the warranty representative.. Accordingly, the Applicant's claims with respect to the toilet and supply pipe are dismissed.

(5) Shut-off valve for the Washer

The complaint by the Applicant that there are no accessible shut-off valves for the washer is a matter of a design favouring cosmetics. As Al Stevenson, the warranty representative, stated, "You have to know how to access the valves". There is no evidence of a defect in workmanship or materials. The Tribunal dismisses the Applicant's claim with respect to the shut-off valve for the washer.

(6) Loose carpet

The Applicant's complaint that the carpet keeps coming untacked because it was cut too short to tuck back does not stand analysis. The warranty representative stated that this is not unusual and is part of house maintenance for the owner. The Tribunal accepts that explanation and the Applicant's claim respecting the loose carpet is dismissed.

(7) The Hardwood floor

The Tribunal is not inclined to consider the Applicant's claim for damage done to the floor before the flood because he has a totally new floor installed by his insurance company.

Moreover even if his claim was not undone by the replacement of the floor by the insurer, he has not produced the evidence needed to support his contention. Accordingly, the Applicant's claim with respect to the hardwood floor is dismissed.

(8) The Tiles in the ensuite bathroom

The Tribunal finds that Mr. Mascone took great trouble to make the Applicant content, but without success. The tub-surround tiles were replaced three times and the Applicant got what he bargained for. There is no merit in this claim and it is dismissed.

DECISION:

Therefore, by virtue of the authority vested in it by section 16(3) of the *Ontario New Home Warranty Plan Act*, the Tribunal orders,

- (1) that the Program pay the Applicant by way of recompense \$500 for the absence of a light in the shower stall and \$150 for the undersized refrigerator. Such payments shall be made to the Applicant within 60 days of the release of this decision.
- (2) that all other claims herein are dismissed.

LICENCE APPEAL TRIBUNAL

Douglas Mackintosh, Vice-Chair,
Presiding

Michael Turk, Vice-Chair

RELEASED: April 30, 2002

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

KHAN, AMZAD A. d/b/a KHAN AUTO REPAIRS AND AMZAD KHAN

BY TELECONFERENCE

AMZAD A. KHAN d/b/a KHAN AUTO REPAIRS AND AMZAD KHAN

MOTION TO CONSIDER AN ADJOURNMENT OF THE DATE OF
HEARING OF A PROPOSAL

IN THE MATTER OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990,
CHAPTER H.8 AS AMENDED,

AND IN THE MATTER OF MOTOR VEHICLE INSPECTION
STATION LICENCE NUMBER 22-40772 ISSUED TO AMZAD A.
KHAN d/b/a KHAN AUTO REPAIRS,

AND IN THE MATTER OF MOTOR VEHICLE INSPECTION
MECHANIC, AMZAD A. KHAN HOLDING TRADE CERTIFICATE
NUMBER 310S-078453 AND 310T-078453.

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

TERRY SINGH, Agent appeared on behalf of Amzad A. Khan d/b/a
Khan Auto Repairs and Amzad A. Khan
PATRICK MOORE, Counsel, representing the Director, Vehicle
Inspection Standards

DATE OF
MOTION:

May 2, 2002

By Teleconference

ORDER

WHEREAS the Director of Vehicle Inspection Standards (the "Director") issued a Proposal dated November 24, 2001 to revoke the Motor Vehicle Inspection Station Licence Number 22-40772 issued to Amzad A. Khan d/b/a Khan Auto Repairs and to revoke the registration of Motor Vehicle Inspection Mechanic, Amzad A. Khan holding Trade Certificate Number 310S-078453 and 310T-078453 (the "Applicants");

AND WHEREAS the hearing of the Proposal of the Director is set down for hearing before the Tribunal at 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario at 9:30 a.m. on Monday, May 6, 2002 and to continue if necessary on May 7, 8, 9 and 10, 2002.

AND WHEREAS Counsel for the Director, has brought an Application by way of motion for an Order adjourning the hearing of this matter on the basis that five of the Director's

witnesses are members of the Ontario Public Service Employees Union ("OPSEU") which has been on strike since March 13, 2002;

AND WHEREAS the OPSEU strike may not be settled before the scheduled date or dates for the hearing of this matter;

AND WHEREAS the Parties have jointly consented to the withdrawal of the Director's motion for adjournment and have consented to the hearing commencing and proceeding on May 6, 2002 at 9:30 a.m.;

NOW THEREFORE this Tribunal Orders that:

1. The Director's motion for adjournment is hereby withdrawn,
2. The hearing of the Director's Proposal shall commence and shall proceed at 9:30 a.m. on May 6, 2002 at the Tribunal's Chambers, at 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.
3. Should the OPSEU members, who the Director proposes to call as witnesses at the hearing, not be available on May 6, 2002 or subsequent days scheduled for the continuation of the hearing in May 2002 due to the continuation of the strike, then the Director may proceed to call a witness who is not a member of OPSEU. At the conclusion of such witness' testimony, if the strike is then continuing, the matter will be adjourned to a date or dates to be fixed by the Tribunal.
4. Notwithstanding the foregoing, the Applicants shall at the commencement of the hearing on May 6, 2002 be entitled to raise preliminary matters of law and to have such matters heard and adjudicated upon before any evidence is adduced by the Director.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: May 2, 2002

VELTMAN

GALINA VELTMAN

APPEAL FROM A DECISION OF THE BOARD OF
DIRECTORS OF THE ONTARIO TRAVEL
INDUSTRY COMPENSATION FUND CORPORATION
UNDER THE *TRAVEL INDUSTRY ACT*

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD C. DELANEY, Member

APPEARANCES:
GALINA VELTMAN, appearing on her own behalf
TREVOR BRANION, Counsel representing the Travel Industry
Council of Ontario

DATE OF
HEARING: February 20, 2002 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal by Galina Veltman (the "Applicant") to the Licence Appeal Tribunal from a written decision dated December 21, 2001 of the Board of Directors of the Ontario Travel Industry Compensation Fund Corporation (the "Fund") to deny the Applicant's claim for compensation in the amount of \$2,031.35.

The Applicant bases her claim on Section 50(1) of Regulation 806/93 (the "Regulation") made under the *Travel Industry Act* (the "Act").

THE EVIDENCE:

The evidence was both oral and documentary. Oral testimony was given by the Applicant and Lori Furlan on behalf of the Fund.

Evidence of the Applicant:

The Applicant, Galina Veltman, testified that in December 2000 she booked a trip with Sun Holidays. It was to be a four-day trip with Marine Expeditions. The excursion was to be a four-day cruise of Greenland in June of 2001. There were three adult bookings made by the Applicant.

The trip was booked through a Dianne Baldacchin, a travel consultant with Sun Holidays.

Regrettably, on or about June 16, 2001, just five days before the cruise was set to begin, the cruise line Marine Expeditions went out of business and the booked trip did not take place. The Applicant was advised of this situation by her travel consultant. She was advised to contact the Travel Industry Council of Ontario (TICO).

On July 24, 2001, TICO sent the Applicant a blank Customer Claim Form. The Applicant completed her claim and submitted the same on or about August 24, 2001.

The Applicant paid for the trip by authorizing the charges to be placed on her CIBC VISA card. On December 18, 2000, a charge in favour of Marine Expeditions NV was made on the Applicant's VISA card in the sum of CDN \$1406.11. This charge was the required deposit to secure the trip booking. On April 25, 2001, the sum of CDN \$4442.25 was placed on the Applicant's VISA card. This was the balance of the trip expense. The Applicant confirmed on cross-examination that she had not made any so-called "charge-back" claims against VISA with respect to the bookings.

TICO allowed some of the Applicant's claim. However, she claims in this hearing for the unpaid balance of \$2,031.35.

Evidence of the Respondent:

Ms. Lori Furlan is the claims co-ordinator for TICO. She receives, administers and processes claims received by TICO for the compensation fund.

Ms. Furlan processed all aspects of the Veltman claim.

Ms. Furlan testified that in February 2001, a business known as Canadian Venture Travel Ltd. was formed. Canadian Venture Travel was registered under the *Travel Industry Act* on or about February 20, 2001.

The witness was referred to Exhibit "A" of Tab B, Exhibit 3, which was the sworn claim form of the Applicant. The taxes referred to in the Sun Holiday summary are post or departure taxes. The witness advised that taxes are not eligible for reimbursement from the compensation fund pursuant to section 50(3)(7). Section 50(3)(8) also excludes insurance premiums from reimbursement.

Ms. Furlan confirmed that the final payment made by the applicant to Marine Expeditions was made to a TICO registrant.

On October 16, 2001, Ms. Furlan sent a letter to the Applicant requesting that she furnish any information regarding reimbursement she may have received from her credit card company. Further, the Applicant was asked, in accordance with the regulations, to have VISA provide TICO with a letter stating that the Applicant had not received a credit on her account with respect to the aborted travel plans. This form of letter was sent to all of the Marine Expedition claimants.

As regards the Applicant's claim, Ms. Furlan indicated that it was a difficult case. However, the Applicant's initial deposit payment was made to a non-registered cruise line. It was for this reason that that portion of the Applicant's claim was disallowed.

She confirmed that Sun Holidays is a registrant.

FACTS FOUND PROVEN:

The following are the facts to have been proven.

1. At the relevant time, Marine Expeditions was not registered with the Fund as either travel agent or travel wholesaler.
2. In or about December 2000, the Applicant booked a cruise through Sun Holidays, a registrant, for a Marine Expeditions cruise which was to depart in June of 2001.
3. The Applicant paid Marine Expeditions by way of providing her VISA number to Sun Holidays. Sun Holidays passed the VISA number on the Marine Expeditions to be processed.
4. Marine Expeditions Travel ceased to operate as a travel agent on or about June 16, 2001 and the June 2001 cruise was cancelled prior to its departure. The Applicant has not received reimbursement of any amounts paid by her to Marine Expeditions by means of her credit card.

THE ISSUE:

Does the Applicant's claim fall within the terms of Regulation 806/93 to the Act?

THE LAW:

The relevant portions of Regulation 806/93 to the Act that are applicable to these proceedings are:

50.(1) A customer is entitled to be reimbursed for travel services paid for but not provided if,

- (a) the customer made payment for the travel services directly to or through a registered travel agent;
- (b) the customer had made a demand for payment from the registered travel agent or the appropriate registered wholesaler; and
- (c) the customer has not been reimbursed by,
 - (i) the registrant because the registrant is unable to pay by reason of bankruptcy or insolvency,
 - (ii) any other person who has received the customer's money, or
 - (iii) any other person who may be legally obliged to reimburse or compensate the customer, including a person obliged under a contract for insurance.

Section 50 (2) , which reads as follows:

- (2) A reimbursement under subsection (1) is limited to the amount paid by the customer to the travel agent for those travel services that were not provided.

Section 50(3), which reads as follows:

(3) A customer is not entitled to be reimbursed for the following or in the following circumstances:

1. For a claim arising out of the failure of an end supplier to provide the travel services.
2. For losses or damages incurred by a customer as a result of a failure of an end supplier to provide the travel services.
-

Section 59.(1), which reads as follows:

59.(1) A customer or registrant is not entitled to be reimbursed if the failure to provide travel services is due to the failure of an end supplier and not to the bankruptcy or insolvency of a registrant.

Section 62.(1), (2) and (6) which respectively read as follows:

62.(1) If the board of directors of the Council determines that a claim, or any part thereof made under section 50, 51 or 52 is not eligible for reimbursement, the Council shall immediately serve notice of the decision on the claimant.

(2) A person who receives notice under subsection (1) is entitled to a hearing before the Tribunal if, within 15 days after notice is served, the person mails or delivers a written request for a hearing to the Registrar, the Council and the Tribunal.

.....

62.(6) The Tribunal may,

- (a) allow the claim, in whole or in part, and direct the Council to pay the amount allowed out of the Compensation Fund; or
- (b) refuse to allow the claim in whole or in part.

APPLICATION OF LAW TO FACTS:

The Applicant in her written claim directed to the Travel Industry Council of Ontario claimed reimbursement from the Fund in respect of the June 2001 cruise which was cancelled.

The Applicant made payment of the disputed amounts through her travel agent, Sun Holidays. The Registrar conceded that Sun Holidays was a registrant. Therefore, in that respect, the Applicant falls initially within the ambit of Section 50(1)(a) of the Regulation 806/93. Moreover, the Applicant contacted Sun Holidays to seek reimbursement and was advised by her travel agent to contact TICO. I would accept this as fulfilling the obligations of Section 50(1)(b). Finally, the relevant portion of Section 50(1)(c) essentially requires that the customer has not been reimbursed by the registrant because of the registrant's bankruptcy or by any other person who has received the money or that may be legally obligated to reimburse the Applicant. This requirement would also appear to be fulfilled.

The Applicant's dilemma is that she made payment indirectly through Sun Holidays. The evidence established that the VISA charges were processed by Marine Expeditions NV, and not Sun Holidays. Section 50(2) limits recovery under Section 50(1) to the "...amount paid by the customer to the travel agent for those travel services that were not provided." In that regard, there is no evidence that the Applicant ever paid the disputed amounts directly to Sun Holidays and that the said amounts were ever received by Sun Holidays. The payments appear to have been made to Marine Expeditions NV.

The portion of the claim that is related to taxes and insurance premiums is precluded from recovery by the Applicant by virtue of Sections 50(3)(7) and 50(3)(8).

The evidence was not clear whether the failure to provide the services was due to the failure of the end supplier or the bankruptcy or other failure of the registrant, Canadian Venture Travel Ltd. o/a Marine Expeditions Travel.

DECISION:

Accordingly, pursuant to the authority vested in it by the Travel Industry Act and Regulations thereunder, the Tribunal upholds the decision of the Board of Trustees of the Travel Industry Council of Ontario to refuse the Applicant's claim.

LICENCE APPEAL TRIBUNAL

Richard C. Delaney, Member

RELEASED: May 8, 2002

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

1402446 ONTARIO LTD. O/A OCEAN ACCESS TRAVEL CONNECTION

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *TRAVEL INDUSTRY ACT*

TO REVOKE REGISTRATION

TRIBUNAL: RICHARD C. DELANEY, Member

APPEARANCES:

THAN SHANTHAKUMAR, Representing the Applicant
TREVOR BRANION, Counsel representing the Registrar,
Travel Industry Act

DATE OF
HEARING:

February 20, 2002

Toronto

REASONS FOR DECISION AND ORDER

This is a hearing before the Licence Appeal Tribunal (the "Tribunal") arising out of a Notice of Proposal issued by the Registrar under the *Travel Industry Act* (the "Registrar", and the "Act" respectively). The Notice of Proposal dated December 13, 2001 proposed to revoke the registration of 1402446 Ontario Ltd. o/a Ocean Access Travel Connection ("Ocean Access") under the Act.

BACKGROUND:

The Registrar under the Act proposed to revoke the registration of Ocean Access. The statutory grounds relied upon by the Registrar for the Proposal are set out below:

1. Section 24(1) of Ontario Regulation 806/93, as amended, made under the Act (the "Regulation"), states that every Registrant shall file with the Registrar financial statements for each fiscal year.
2. Section 24(2) of the Regulation states that if the registrant had sales of less than \$10 million during the previous fiscal year, the registrant shall file, within three months of the end of the fiscal year:
 - (a) annual financial state ments with a review engagement report by a accountant licensed under the *Public Accountancy Act*; or
 - (b) annual financial statements with an audit opinion from a public accountant if the registrant is required to obtain annual financial statements audit opinion under the *Business Corporations Act*.

3. Section 24(3) of the Regulation states that if the registrant had sales of \$10 million or more but less than \$20 million during the previous fiscal year the registrant shall file,
 - (a) annual financial statements with an audit opinion from a licensed accountant within three months of the end of the fiscal year; and
 - (b) semi-annual financial statements within forty-five days of the end of a half year during the fiscal year.
4. Section 24(4) of the Regulation states that if the registrant had sales of \$20 million or more during the previous fiscal year, the registrant shall file,
 - (a) annual financial statements with an audit opinion from a licensed public accountant within three months of the fiscal year, and
 - (b) quarterly financial statements within forty-five days of the end of each quarter year during the fiscal year.
5. Section 24(5) of the Regulation states that the financial statements shall include a statement of sales made during the period, a balance sheet, an income statement and a reconciliation of customer funds and customer obligations.

WORKING CAPITAL

1. Section 25(1) of the Regulation states that a registrant shall maintain a minimum working capital of \$5,000 if the registrant had sales in Ontario of less than \$1.5 million during the previous fiscal year.
2. Section 25(2) of the Regulation states that a registrant who had sales in Ontario of \$1.5 million or more but less than \$10 million during the previous fiscal year shall maintain a minimum working capital of \$25,000.
3. Section 25(3) of the Regulation states that a registrant who had sales in Ontario of \$10 million or more but less than \$20 million during the previous fiscal year shall maintain a minimum working capital of \$50,000.
4. Section 25(4) of the Regulation states that a registrant who had sales in Ontario of \$20 million or more during the previous year shall maintain a minimum working capital of \$100,000.
5. Section 25 (5) of the Regulation states that the working capital of a registrant shall be calculated in accordance with generally accepted accounting principles and shall not include the value of any security provided under subsection 26(1) or the account of any person with whom the registrant has a non-arm's length relationship.

TRUST ACCOUNTING

Subsection 36 (1) of Ontario Regulation 806/93, as amended, made under the Act (the "Regulation") states that a registrant shall maintain a trust account to protect customer funds if the registrant is required to maintain a trust account under the terms and conditions specified in the registrant's registration.

Subsection 36(3) of the Regulation states that a registrant required to maintain trust accounting under subsection (1) shall hold all customer funds in trust and shall deposit all customer funds received into the trust account within two banking days after receiving them.

Subsection 36(6) states that no registrant shall disburse or withdraw any money held in a trust account under subsection (1) until payment is made to the supplier of the travel services for which the money was received.

SPECIFIC ALLEGATIONS:

The specific allegations against Ocean Access are as follows:

1. The Registrant is registered as a travel agent (Registration No.50007711).
2. On March 9, 2000, the Registrant signed Terms and Conditions of registration which included the implementation and maintenance of a Travel Industry Act Trust Account.
3. By letter dated March 8, 2000, Scotiabank, 1880 Eglinton Ave E., Unit 21, Scarborough Ontario M1 L 2L9, provided TICO with the banking information for the Registrant, which included Travel Industry Act Trust Account. account # 9132200367-14, and general business account# 9132200366-17.
4. On April 18, 2001, the Registrant was visited by one of TICO's Inspectors, to ensure that the company was operating in accordance with the Regulation. The visit revealed that trust accounting was not being properly maintained. Customer monies were not deposited within two business banking days, cash payments were not being used to purchase travel services, business expenses were paid through the trust account, and the employees were using their personal credit cards to purchase travel services. The Registrant was advised that the use of personal credit cards must cease immediately as only a shareholder or corporate credit card can be used for this purpose. The Registrant acknowledged the Inspector's findings.
5. On July 25, 2001 the Registrant was again visited to ensure that the compliance issues noted during the April 18, 2001 visit had been corrected. The visit

revealed that cash payments were not identified on deposit slips, therefore making it impossible to determine if all customer monies are deposited intact. The Registrant was asked to identify all customer deposits, for both cash and cheques, for the months of June and July 2001, as required by the Regulation, for the Inspector's return visit. The Registrant acknowledged the Inspectors findings.

6. On November 22, 2001, the Registrant was visited by TICO's Inspector to ensure that the compliance issues noted in the April and July 2001 inspection visits were corrected. The visit revealed that the Registrant had issued cheques that had been returned NSF (non-sufficient funds) by the bank for the trust account, for September 2001. The Registrant was asked to provide TICO with its Travel Industry Act Trust Account bank statement for the month of October 2001. The Registrant was also asked to provide trust account reconciliations for the months of September and October 2001, with details of the NSF cheques written on the trust account in September 2001. This Information was due by November 30, 2001. The Registrant acknowledged the required documentation during the visit.
7. To date the Registrant has failed to provide TICO with the required information.
8. It is therefore the opinion of the Registrar that the Registrant's registration should be revoked.

THE LAW:

Section 3 of the *Travel Industry Act* (the "Act"), states as follows,

(1) No person shall act or hold himself, herself or itself out as being available to act as a travel agent unless the person is registered as a travel agent by the Registrar.

(2) No person shall act or hold himself, herself or itself out as being available to act as a travel wholesaler unless the person is registered as a travel wholesaler by the Registrar.

Section 4 of the *Travel Industry Act* (the "Act"), states as follows;

4(1) An applicant is entitled to registration or renewal of registration as a travel agent or travel wholesaler by the Registrar except where,

(a) having regard to his, her or its financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of his, her or its business; or

(b) the past conduct of the applicant affords reasonable grounds for belief that he, she or it will not carry on business in accordance with law and with integrity and honesty; or

(c) the applicant is a corporation and,

(i) is incorporated without share capital, or

- (ii) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, or
- (iii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or

(d) the applicant is carrying on activities that are or will be, if the applicant is registered, in contravention of this Act or the regulations.

.....

Section 5 of the Act states as follows;

(1) Subject to section 6, the Registrar may refuse to register an applicant where in the Registrar's opinion, the applicant is disentitled to registration under section 4.

(2) Subject to section 6, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 4 if he, she or it were an applicant, or where the registrant is in breach of a term or condition of the registration.

Section 6 of the Act states as follows;

.....

(4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing, and on the application of the Registrar at the hearing, may by order direct the Registrar to carry out his or her proposal or refrain from carrying out his or her proposal and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

(5) the Tribunal may attach such terms and conditions to its order or to the registration as it considers proper to give effect to the purposes of this Act.

With respect to the ambit of review for this hearing, the leading authority, which has been followed in numerous cases, is the Divisional Court decision of *Brenner*, reported in 19 CRAT 58. This decision, within the context of the *Motor Vehicle Dealers Act*, held that the Tribunal should only refuse to direct the Registrar to carry out his proposal if it is of the opinion that the Registrar was in error in concluding that the past conduct of an Applicant afforded reasonable grounds for the Registrar's belief that such Applicant would not carry on business in accordance with law and with integrity and honesty. The authority of the Tribunal under Section 7(4) of the *Motor Vehicle Dealers Act* respecting the proposal of the Registrar was reviewed by Southey J. where he stated at page 60:

The effect of Section 7 (4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the Applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did

not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself.

This Decision was confirmed by the Divisional Court in *Albert Fascenda* (1994) 26 CRAT Part II 1050, where it stated at page 1051:

. . . that the Tribunal should have refused to direct the Registrar to carry out his proposal only if it thought the Registrar was in error in his belief.

As a result of the above and a line of cases following that reasoning, to overrule the decision of the Registrar, the Tribunal must conclude that the Registrar was wrong in his decision. It must find that the conduct of the Applicant does not afford reasonable grounds for the Registrar's belief that the Applicant will carry on activities in contravention of the Act and its regulations. The Tribunal must not concern itself with its own opinion of whether or not the Applicant has reformed.

In this case, the Tribunal must examine the past conduct of the Applicant and the decision of the Registrar to come to a conclusion as to whether or not the past conduct of the Applicant would afford reasonable grounds for the Registrar's belief that the Applicant, having regard to its financial position, cannot reasonably be expected to be financially responsible in the conduct of their business and would not carry on business in accordance with law and with integrity and honesty in the future.

ISSUES:

The legal issue in this case is whether the Registrar had sufficient grounds for revoking the registration of the Registrant on the basis that the Registrant's past conduct constituted failure to comply with the requirements of the Act and the regulations respecting the filing of financial statements, operation of the Trust Account and maintaining working capital requirements.

EVIDENCE:

Registrar's Evidence:

The evidence of the respondent was given by Mr. Jack Foster. Mr. Foster is a Certified Management Accountant and has been an inspector for the Registrar since May 1993.

As an inspector, Mr. Foster's duties include:

- Analyzing financial statements;
- Conducting on-site inspections;
- Attends to trust fund closures;

He estimated that he had reviewed approximately ten-thousand-five-hundred financial statements in his career. He has conducted over five-hundred inspections for the Registrar.

On April 18, 2001, Mr. Foster inspected the Books and Records of Ocean Access. As a designate of the Registrar, he is entitled to attend upon the premises of a registrant to make an inspection to ensure compliance with the *Travel Industry Act* (the “Act”) and the associated Regulations (the “Regulations”). This inspection power is provided in Section 16 of the Act. Section 37 of the Regulations to the Act sets out the record keeping requirements of registrants.

The Act sets out the Trust Account requirements of registrants. Mr. Foster testified that all customer funds received must be deposited into a trust account within two banking days. The Regulations require that the trust account, of which there may only be one without the consent of the Registrar, be designated as the *Travel Industry Act* trust account. Funds are to remain in the trust account until the travel services are to be paid or a refund is to be given to the customer. Expense items related to the operation of the agency are not to be dispersed from the trust account.

The working capital requirements of a registrant are found in Section 25 of the Regulations. When Mr. Foster conducts a working capital analysis it is done by subtracting current liabilities from current assets.

During the April 18, 2001 inspection, Mr. Foster observed the Applicant’s trust account to be overdrawn or in a negative cash position. He stated that if the trust accounts are maintained properly and in accordance with the Regulations, this situation should not occur. He also observed that there appeared to be insufficient cash in the general account to meet the working capital requirements of the Regulations.

His inspection also revealed that cash receipts were not being immediately deposited into the trust account. They were being used to pay for travel services. As a result, there was no “audit trail”. As a result of this inspection, a number of concerns and infractions were noted including:

- Failure to promptly deposit funds received into bank accounts;
- Failure to have purchaser names and addresses on all invoices;
- Failure to put business name and TICO number as registered on all invoices;
- Failure to maintain working capital;
- Failure to deposit funds within two banking days;
- Payments from trust account for non-trust related items;
- Unclear banking records.

Mr. Foster also noted that employees appeared to be using their personal credit cards to secure bookings for clients.

At the conclusion on the inspection, Mr. Foster reviewed the requirements with Mr. Kumar Shanthakumar, the manager. Mr. Shanthakumar acknowledged these findings and he signed the Inspection Findings report on behalf of the Applicant. In that report, it indicates that Mr. Foster will return in three months to follow-up on the compliance issues.

On July 25, 2001, Mr. Foster returned to the Applicant business to review the books and records. He observed that the banking records remained incomplete and the working capital requirements were still not being met.

Mr. Foster returned again to the Applicant business on November 22, 2001. As a result of his observations from that inspection, he wrote an Inspection Report dated November 27, 2001 (Exhibit 3, Tab 17). His findings were as follows:

- The General account and Trust account had a combined balance of \$27.14. Mr. Foster concluded from this state of affairs that the working capital requirements of the Regulations were not being maintained.
- NSF cheques were returned on Travel Industry Act trust account on September 17, 2001 for \$3,588.00 (cheque 211) and on September 19, 2001 for \$3,588.00 (cheque 212). The amount was cleared by cheque 213 on September 25, 2001. All three cheques were to Air Link Travel.
- ABM withdrawals without supporting documentation were made on two occasions during October 2001 (October 24, 2001 - \$1,000.00 and October 26, 2001 - \$780.00)
- Customer deposit position reports were not available during the inspection
- Customer addresses were not shown on all invoices.

The NSF cheques were of some particular concern. Mr. Foster noted that several deposits were made between September 12, 2001 and September 21, 2001 to boost the trust account balance to permit the cheque to Air Link to clear.

This inspection generated an Inspection Findings report (Exhibit 3, Tab 16). Mr. Foster required the Applicant to fulfill the following reporting requirements no later than November 30, 2001:

1. On receipt October 31 Travel Industry Trust Account Statement, it is to be faxed to TICO;
2. Customer Deposit Position Reports for September & October to be faxed to TICO with (1);
3. Deposit details for Trust on September 12, September 14 and September 21 are to be sent to TICO/also deposit details on General;
4. Details of NSF cheques (Trust) #211 & #212 to be sent to TICO;
5. Details of ABM withdrawals (General) for October 24 /01 - \$1,000.00 and October 26 - \$780 are to be sent to TICO.

As of the date of this hearing, none of those items had been sent as required to TICO.

During the inspection, Mr. Foster asked what was available as accounts receivable and was advised that there were essentially none. He concluded that the business had insufficient working capital as required by the Regulations and that the Applicant posed a threat to the Compensation Fund.

Applicant's Evidence

Mr. Tham Shanthakumar gave evidence on behalf of the Applicant. Mr. Shanthakumar is the Manager of the Applicant, Ocean Access Travel Connection.

Mr. Shanthakumar reviewed the Inspection Findings report of the April 18, 2001 inspection prepared by Mr. Foster. He stated that some of the Applicant's customers do not like to give their names and addresses. They maintained phone numbers as records of customers. He suggested that indicating customer names on invoices would result in lost business.

With respect to the practice of employees booking trips with their cards, he indicated that the Applicant business did not have a corporate credit card. They did this because many charter companies would not accept cheques to book trips. This practice was eventually stopped by Ocean Access.

Mr. Shanthakumar provided a February 15, 2002 invoice from the Applicant (Exhibit 4). This document reveals how an invoice looks where a credit card payment is made. When a credit card is used, the total amount due indicates \$0.00. This was compared to a cash deal such as is indicated at Exhibit 3, Tab 11. A cash transaction on the Internet-based Sabrenet generates a total amount due number. When these were paid in cash, the customer's copy would be marked as paid in full.

Mr. Shanthakumar explained that the Air Link cheques that were returned NSF from the trust account was the result of the Air Link owner being away on holidays at the relevant time. Apparently, a practice had evolved where Air Link would hold cheques from the Applicant for 5-7 days upon receipt before cashing them at the bank. However, in this case, the owner of Air Link was away and the employees cashed the cheques issued by the Applicant without any waiting period.

As regards the Inspection Report located at Exhibit 3, Tab 17, Mr. Shanthakumar stated that they now retain all deposit records made at ABMs and attach them to deposit slips. Mr. Shanthakumar explained the two ABM transactions that were referred to in that report as follows:

- The \$780.00 was his pay which he withdrew in cash;
- The \$1,000.00 was deposited into the trust account the same day by ABM.

Mr. Shanthakumar confirmed that the Applicant had not fulfilled the requirements of Mr. Foster's November 22, 2001 inspection. He stated that he left the country on November 26, 2001 and did not return until January 18, 2002.

The witness stated that the events of September 11, 2001 had depressed sales in September and October 2001.

The Applicant now has a new bookkeeper.

On cross-examination, Mr. Shanthakumar indicated that a Ragabavan Logosundranam was acting as manager at the Applicant's place of business. The Applicant, as required by the Regulations at Section 16, did not advise TICO of this change.

FACTS FOUND PROVEN:

The facts found by the Tribunal are as follows:

- 1) On April 18, 2001, July 25, 2001 and November 22, 2001, inspections were carried out at Ocean Access.
- 2) The first inspection revealed incomplete banking records, delays in depositing customer funds beyond two days, improper invoicing and improper use of the trust account to pay operational expenses.
- 3) The second visit revealed that cash payments received from customers were not being adequately recorded, June and July 2001 deposits to the Trust account were not adequately recorded and majority of invoices were still missing.
- 4) The final inspection revealed inadequate records regarding customer deposit positions, incomplete records with respect to trust and general account deposits and several NSF cheques on the trust account in September 2001. Ocean Access was required to provide details by no later than November 30, 2001 on the shortcomings revealed in that inspection. Those details have not been provided to date.
- 5) The final inspection indicated that, at least of September 2001, the Applicant did not have sufficient working capital as required by the Regulations.
- 6) Cheques were issued from the Trust Account in September 2001 for which funds were not then available in the trust account.

APPLICATION OF LAW TO FACTS:

Under section 5 of the Act, the Registrar may revoke registration for any reason that would disentitle an Applicant to registration under section 4, and section 4, among other things, requires a reasonable expectation of financial responsibility in the conduct of business and that business be conducted in accordance with the law.

The Tribunal is mindful that the tragic events of September 11, 2001 had an undoubted effect on the whole of the travel industry. However, in this case, the breaches of the Regulations were first observed in April 2001. Some were corrected by the follow-up inspection in July 2001. However, problems continued to persist and, in fact, were much worse and more serious by the final November inspection. Most troubling is the occasional negative balances and NSF cheques with respect to the Trust Account. A properly maintained trust account should not have negative balances or NSF cheques. This is of concern to the Tribunal because, despite three inspections, the issues remained and became worse over time. Rather than observing a gradual improvement in compliance, there was a rather precipitous decline.

The legal test to be used by the Tribunal is whether the Registrar was in error in deciding that the past conduct of the Applicant provided reasonable grounds to believe that the Applicant would not be financially responsible in the conduct of the business or would not carry on business with integrity, honesty, and in accordance with the law. The persistent inadequacies of the Applicant's record-keeping, together with the inappropriate maintenance and usage of the trust account afforded the Registrar sufficient evidence to conclude that the Applicant would not carry on business with integrity, honesty and in accordance with the law. The very low working capital levels afforded the Registrar with sufficient evidence to conclude that the Applicant could not reasonably be expected to be financially responsible. The failure to observe the imposed and accepted time limits for the furnishing of documentation and the failure to keep TICO advised of managerial changes reflect a cavalier attitude to the regulatory duties carried out by TICO.

On the facts as found, and the application of the law to those facts, the Tribunal finds that the decision by the Registrar was not in error.

DECISION:

Therefore, by virtue of the authority vested in it under section 6(4) of the *Travel Industry Act*, the Tribunal directs the Registrar to carry out his proposal to revoke the registration of the Applicant.

LICENCE APPEAL TRIBUNAL

Richard C. Delaney,
Member, Presiding

Released: May 10, 2002

1306609 ONTARIO INC. AND BRADIN WAYNE EASTERBROOK

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

BRADIN WAYNE EASTERBROOK, appearing on his own behalf
and as Agent for 1306609 Ontario Inc.

MICHAEL ROTHE, Counsel, representing the Registrar under the
Motor Vehicle Dealers Act

DATE OF
HEARING:

April 24, 2002

TORONTO

DECISION AND ORDER

BACKGROUND:

1306609 Ontario Inc. and Bradin Wayne Easterbrook (the "Applicants") appeal the Proposal of the Registrar of the *Motor Vehicle Dealers Act* (the "Registrar" and "Act") to revoke the Applicants' registration as dealer and as salesperson of motor vehicles, respectively. The Proposal was issued on August 3, 2001 in terms of section 7.(1) of the Act and the Registrar bases his Proposal on section 5 (1) (b) (c) (ii) and (d) of the Act.

The Registrar takes the position that the Applicants' registrations should be revoked as the Applicants' past conduct affords reasonable grounds for belief that they will not carry on business in accordance with law and with integrity and honesty; further the Applicants are carrying on activities that are, or will be, if the Applicants are registered, in contravention of the Act and regulations.

The reasons given by the Registrar in his Proposal to Revoke the registrations of both Applicants are as follows:

The intention and objective of the Act is to protect the public interest. The requirements of the Act include that Registrants be financially responsible in the conduct of business and that Registrants carry on business in accordance with the law and with integrity and honesty. The Registrant's past conduct is inconsistent with the intention and objective of the Act, and therefore warrants disentanglement to registration under the Act. Therefore,

the Registrar is unwilling to continue to register 1306609 Ontario Inc. o/a Auto Wholesale and Bradin Wayne Easterbrook under the *Motor Vehicle Dealers Act*.

[Exhibit 3, Tab 1, page 1]

The Registrar's Proposal to Revoke gives the following particulars regarding the reasons for the Proposal:

1. On or about September 24, 1998, Bradin Wayne Easterbrook ("Easterbrook") was registered as a motor vehicle salesperson.
2. On or about September 24, 1998, 1306609 Ontario Inc. o/a Auto Wholesale (the "Dealer") was registered as a motor vehicle dealer. At all material times Easterbrook was the controlling mind of the Dealer. Easterbrook on behalf of the Dealer executed a Wholesale Affidavit, which included the following clauses:
 - A) That the declarant Motor Vehicle Dealer shall conduct business operations from commercial premises which are not in contravention of any municipal by-laws or provincial statutes and for which a letter of business from the municipality is included with this application for registration.
 - B) That all books and records required to be kept by the Motor Vehicle Dealer Act or other records relating to the business operation of the dealership be maintained and stored at the commercial business premises. At no time will the books and records of the business nor the motor vehicles owned by the business be stored and maintained or offered for sale from residential property.
 - C) ... and further that a violation of the terms and conditions of this declaration shall be sufficient grounds for revocation of the dealer's registration in accordance with the Motor Vehicle Dealers Act (by the Registrar).
3. On or about June 2, 2000 a representative of the Registrar, *Motor Vehicle Dealers Act* (the "Registrar") attended at the Dealer's registered premises and found that the Dealer was not present and did not have an office and had not erected a sign identifying the dealership contrary with the *Motor Vehicle Dealers Act* (the "Act").
4. On or about September 24, 2000 pursuant to section 13(1) of Regulation 801 of the *Act*, the Dealer's registration lapsed. The Dealer's Registration was subsequently renewed on or about October 17, 2000.
5. On or about November 7, 2000 a representative of the Registrar attended at the Dealer's registered premises and found that the Dealer was not present and did not have an office and had not erected a sign identifying the dealership contrary to the *Act*. Pursuant to section 13(3) of Regulation 801 of the *Act*, the Dealer's conditional registration was cancelled.
6. On or about December 7, 2000 a representative of the Registrar met with Easterbrook at the Dealer's registered premises and found that in contravention of the *Act*, the Dealer did not have complete books and records, an office or a sign identifying the dealership. At that time Easterbrook was provided with Inspection Findings, which stated that the *Act* required him to maintain an office, a clearly visible sign and all books and records at his registered premises.
7. On or about December 14, 2000 a representative of the Registrar attended at the Dealer's registered premises and found that the Dealer was not present, did not have

an office and had not erected a sign identifying the dealership contrary to the *Act*.

8. On or about December 20, 2000 the Dealer re-applied for registration attaching signed terms and conditions, which included the following clause:
 - A) The Dealer agrees to operate exclusively from the location approved by the Registrar. The Dealer agrees to apply for the Registrar's approval, by way of prior written notice, of any changes in employment location in the form required by the Registrar. The Dealer further agrees to store all books and records at the registered premises and to display a sign that is visible to the public, stating the dealership name.
9. On or about March 14, 2001 a representative of the Registrar attended at the Dealer's registered premises and found that the Dealer was not present, did not have an office and had not erected a sign, which was clearly visible to the public identifying the dealership contrary to the *Act*.
10. By letter dated May 28, 2001 a representative of the Registrar requested that the Dealer attend at the Registrar's offices on June 25, 2001 for the purpose of conducting an inspection of the Dealer's books and records. All three letters sent via registered mail to the Dealer's registered address and the registered addresses of Easterbrook were returned unopened. To date, the Dealer has not provided the Registrar with complete access to his books and records.
11. The Dealer has failed to operate from his registered premises contrary to the *Act*.
12. The Dealer and Easterbrook have failed to comply with the *Act* and its Regulations.

THE EVIDENCE:

The evidence of the Registrar consisted of documents as well as the testimony of Louise Gingras and Amanda Leedempsey. The evidence of the Applicants consisted of the testimony of Bradin Wayne Easterbrook.

Testimony of Louise Gingras

Ms. Gingras testified that she is an inspector with the Ontario Motor Vehicle Industry Council ("OMVIC"). Her duties include making inspections of Registrants and their premises to ensure compliance with the *Act* and regulations. She was entrusted with OMVIC's file relating to the Applicants and is familiar with that file.

She testified that both Applicants were presently registered under the *Act*, Bradin Wayne Easterbrook ("Easterbrook") as a salesperson of motor vehicles and 1306609 Ontario Inc. (the "Corporation") as a motor vehicle dealer. On August 12, 1998, Easterbrook, in his capacity as director of the Corporation, signed an affidavit in which the Corporation undertook that it would conduct business from commercial premises not in contravention of any municipal by laws or provincial statutes; do keep all books and records required under the *Act* to be maintained and stored at the Corporation's commercial business premises and not on residential property and if these terms were

violated, such violation would be sufficient grounds for the Corporation's registration being revoked by the Registrar.

Gingras further testified that on June 2, 2000 she attended at the Corporation's registered premises at 715 Speedvale Road West, Guelph and found that the dealer was not occupying such premises and was using that address only as a mail drop. Furthermore, Easterbrook was not to be found nor was there a sign identifying the Corporation.

A "trade freeze" was placed upon the Corporation but this was lifted by the Registrar and the Corporation was permitted to trade.

On November 7, 2000 Gingras again attended at 715 Speedvale Road West, Guelph and found there was no sign on the premises identifying the Corporation, that the premises were being occupied by a firm called Hydra Air and that within the latter's firm's offices on the premises there was a desk for the use of the Corporation. Easterbrook was not present. Gingras was informed by a person on the premises that Easterbrook uses someone to pick up mail for Easterbrook or the Corporation.

On December 7, 2000 Gingras again visited 715 Speedvale Road West, Guelph and noted on entry that there was no sign on the premises identifying the Corporation. Gingras however met Easterbrook inside the building and he produced from his jacket pocket a plastic sign with the Corporation's name on it.

Easterbrook told Gingras he could not use the offices, which were occupied by Hydra Air, as it was having a meeting. Gingras and Easterbrook proceeded to a donut shop for Gingras to inspect the books and records of the Corporation. Easterbrook had advised Gingras that he had all the books and records with him. When they arrived at the donut shop Easterbrook did not have any current records with him and the financial records were either missing or incomplete. An arrangement was made that Gingras and Easterbrook meet again so as to enable Gingras to inspect all books and records. The written inspection findings of Gingras were left with Easterbrook who sign a receipt for same. The inspection findings reiterated the requirement to maintain an office on the registered premises, to have a sign clearly visible on the premises and to have all books and records on the premises.

At that time the registered premises of the Corporation were moved from 715 Speedvale Road West, Guelph to 94 Gordon Street, Guelph. When on December 14, 2000 Gingras visited the premises at 94 Gordon Street, Guelph she was unable to find the Corporation at that address and there was no sign at the premises identifying the Corporation. Easterbrook could not be found at or about the address.

Gingras managed to speak with Easterbrook who told her he was not able to provide her with the Corporation's books and records and on December 20, 2000 Easterbrook signed certain written "terms and conditions". Two of such terms and conditions read:

- c) The Dealer agrees to maintain a garage register in accordance with the Highway Traffic Act and will maintain all books and records as required. The Dealer further agrees to store his books and records at the location approved by the Registrar.
- f) The Dealer agrees to operate exclusively from the location approved by the Registrar. The Dealer agrees to apply for the Registrar's approval, by way of prior written notice, of any change in employment location in the form required by the Registrar. The Dealer further agrees to store all books and records at the registered premises and to display a sign that is visible to the public, stating the dealership name.

On March 14, 2001 Gingras attended at a residential apartment building at 108 Surrey Street East, Guelph to attempt to speak with Easterbrook. She could not find Easterbrook but Gingras did go "downstairs" in the building where she found washers and dryers and two hot water tanks. There were no books and records seen by Gingras nor were there desks or filing cabinets seen as well as there being no sign. On March 15, 2001, Easterbrook called Gingras to offer an excuse for not meeting her on March 14, 2001 and advised Gingras that he would be away for next two weeks but would contact her on his return.

Easterbrook did not contact Gingras as promised and on May 28, 2001 a letter was sent by registered mail to Easterbrook requesting him to attend at OMVIC's offices on June 25, 2001 at 1:00 p.m. Easterbrook did not attend at OMVIC's offices and has not provided OMVIC with the books and records of the Corporation to date.

Testimony of Amanda Leedempsey

Ms. Leedempsey testified that she is the Manager of Inspections at OMVIC and that she reviews problem files.

She stated that OMVIC was created in 1997 as a non profit corporation with authority and delegated responsibility of administering the Act and its regulations. She also explained that the Act is a consumer protection statute.

Ms. Leedempsey explained the reasons for the Registrar's proposal to revoke the registrations of both the Corporation and Easterbrook. She also stated that an Applicant when submitting an application for registration gives an address from which the Applicant undertakes to trade once registered and that registration is specific to that address. A registrant has five days after changing the registered address within which to advise OMVIC in writing of such change. The original address of the Corporation was 715 Speedvale Road West, Guelph which address was changed on December 12, 2000 to 94 Gordon Road, Guelph.

Ms. Leedempsey confirmed that the original application of the Corporation for registration as a dealer was accompanied by an undertaking by Easterbrook dated August 12, 1998.

In December 2000 the Corporation agreed to enter into “terms and conditions” with the Registrar and signed same. The Corporation and Easterbrook had failed to abide by certain items of the terms and conditions namely to maintain a garage register and books and records as well as to store such books and records at the premises at which the Corporation was registered.

Testimony of Bradin Wayne Easterbrook

In his testimony Easterbrook stated that he is the sole shareholder and director of the Corporation.

In his further testimony Easterbrook did not take issue with the evidence of either Gingras or of Leedempsey.

FACTS FOUND PROVEN:

The following are the facts that were found proven in this matter.

1. On September 24, 1998 Bradin Wayne Easterbrook and the Corporation were registered as a motor vehicle salesperson and a motor vehicle dealer respectively.
2. Easterbrook was at all material times the sole shareholder, Director and controlling mind of the Corporation.
3. The Applicants failed to maintain books and records relating to the Corporation, nor were any books and records of the Corporation stored at the registered premises of the Corporation, as required by the Act.
4. The Corporation, contrary to the Act, failed to erect and maintain at its registered premises, a sign whether clearly visible to the public or at all, that identified the Corporation’s registered name as a motor vehicle dealer.
5. The Corporation failed to operate the business of a motor vehicle dealership from premises approved by the Registrar, as required by the Act.

THE LAW:

Section 7.(1) and 7.(2) of the Act states:

7.(1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the Registrar shall serve notice of the proposal, together with written reasons therefor, on the applicant or registrant.

(2) A notice under subsection (1) shall state that the applicant or registrant is entitled to a

hearing by the Tribunal if the applicant or registrant mails or delivers, within fifteen days after service of the notice under subsection (1), notice in writing requiring a hearing to the Registrar and the Tribunal, and the applicant or registrant may so require a hearing.

Section 5.(1) of the Act states:

- 5.(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,
- (a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
 - (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or
 - (d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

Section 6.(1) of the Act states:

6. (1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section

Section 13.(4) of Regulation 801 of the Act states:

- 13.(4) It is a condition of registration as a motor vehicle dealer that the motor vehicle dealer,
- (a) operates from premises located in Ontario that are approved by the Registrar;
 - (b) has an office for the conduct of business at each premises where the motor vehicle dealer operates; and
 - (c) has erected at each premises where the motor vehicle dealer operates, a sign that is clearly visible to the public that identifies the motor vehicle dealer's registered name.

Section 15 of Regulation 801 of the Act states:

15. Every motor vehicle dealer shall, with respect to the purchase or sale of a motor vehicle, maintain for a period of two years from the date of expiry of any warranty or service plan covering the vehicle all purchase orders, sales orders and written records of all transactions resulting in the purchase or sale of the motor vehicle and in the case of a used motor vehicle,

.....

APPLICATION OF LAW TO FACTS:

The onus of proof rests upon the Registrar to prove that the past conduct of the Applicants affords reasonable grounds for the belief that the Applicants will not carry on business in accordance with law and with integrity and honesty.

In *Brenner v. Ontario (Registrar of Motor Vehicle Dealers and Salesmen)* [1983] O.J. No. 1017, April 7, 1983, it was clearly stated that the Tribunal should only refuse to direct the Registrar to carry out his proposal if it thinks the Registrar was in error in concluding that the past conduct of the Applicant affords reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty. To overrule the decision of the Registrar, the Tribunal must conclude that he was wrong in his decision and that the conduct of the Applicant does not afford reasonable grounds for belief that the Applicant will in the future carry on activities in contravention of the Act and its Regulations.

The Tribunal's conclusions and the reasons for its conclusions, based on the evidence, follow.

The evidence of Louise Gingras, which the Tribunal accepts, was that she, in her capacity as an inspector with OMVIC, visited the Corporation's registered address on five separate occasions between June 2000 and May 2001. The purpose of her visits was to ensure that the Applicants were in compliance with the Act and its regulations. On each and every occasion that Ms. Gingras visited the Applicants' registered premises she was unable to inspect the books and records of the Corporation as they were either incomplete, not available for inspection or not at the registered premises of the Corporation. Further, on her visits to the registered address of the Corporation there was no sign erected and visible that identified the Corporation's name. In addition, the Corporation did not have an office at the registered premises of the Corporation.

In a short period of time after obtaining registration, the Applicants were repeatedly not complying with the Act and its regulations. The investigator, Ms. Gingras, was patient and tireless in her pursuit of obtaining the Applicants' compliance with the Act. After each visit by Ms. Gingras to the Applicants, they made no effort to comply with the requirements of the Act and regulations. Easterbrook, in his evidence, conceded that there was no compliance and offered no excuse for the Applicants' failure. He conceded that he was at all material times the sole Director of the Corporation as well as its controlling mind, and he is responsible for the Corporation's failure to comply with the Act and its regulations. The failure to comply with the Act and its regulations was not an isolated incident but an ongoing course of conduct. This reflects an inability or unwillingness of the Applicants to carry out business in accordance with law. Without the cooperation of the Applicants, the Registrar was severely handicapped in its duty to ensure compliance by the Applicants with the Act and its regulations and thereby protect the consumer from potential harm.

The Tribunal accordingly finds that the Applicants past conduct affords the Registrar reasonable grounds for belief that the Applicants will not carry on business in accordance with law and with integrity and honesty.

DECISION:

Pursuant to the authority vested in it by section 7(4) of the *Motor Vehicle Dealers Act*, the Tribunal directs the Registrar to carry out his Proposal dated August 3, 2001 to revoke the registrations of the Bradin Wayne Easterbrook and 1306609 Ontario Inc. as motor vehicle salesperson and motor vehicle dealer under the *Motor Vehicle Dealers Act*, as amended.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: May 1, 2002

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

TOFAN, CONSTANTIN and DUMITREL

CONSTANTIN TOFAN and DUMITREL TOFAN

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair, Presiding
VICTOR DREVNIG, Vice-Chair

APPEARANCES:

CONSTANTIN TOFAN and DUMITREL TOFAN, Applicants,
appearing on their own behalf
MICHAEL ROTHE, Counsel, representing the Registrar under the
Motor Vehicle Dealers Act

DATE OF
HEARING: April 29 and 30, 2002 TORONTO

DECISION AND ORDER

BACKGROUND:

Constantin Tofan ("Constantin") and Dumitrel Tofan ("Dumitrel") collectively referred to as the Applicants, appeal the Proposal of the Registrar of the *Motor Vehicle Dealers Act* (the "Act") to revoke their registrations as motor vehicle dealer and salesperson respectively, under the Act. The Proposal was issued on December 21, 2001 in terms of section 7.(1) of the Act and the Registrar bases his Proposal on section 5.(1) (a) (b) and (d) of the Act.

The Registrar takes the position that the Applicants' registrations should be revoked as their past conduct affords reasonable grounds for belief that they will not carry on business in accordance with law and with integrity and honesty; further, that the Applicants cannot reasonably be expected to be financially responsible in the conduct of business and that they are carrying on activities that are in contravention of the Act and its regulations.

The reasons given by the Registrar in his Proposal for revocation of the Applicants' registrations, are as follows:

The intention and objective of the Act is to protect the public interest. The requirements of the Act include that Registrants be financially responsible in the conduct of business and that Registrants carry on business in accordance with the law and with integrity and honesty. The Registrant's past conduct is inconsistent with the intention and objective of

the Act, and therefore warrants disentanglement to registration under the Act. Therefore, the Registrar is unwilling to continue to register Constantin Tofan o/a C & D Motors and Dumitrele under the *Motor Vehicle Dealers Act*.

[Exhibit 3, Tab 1, page 1]

The Registrar's Proposal to Revoke gives the following particulars regarding the reasons for his Proposal:

1. Constantin Tofan o/a C & D Motors (the "Dealer") was registered as a motor vehicle dealer on or about February 12, 1996.
2. Dumitrele Tofan (the "salesperson") was registered as a motor vehicle salesperson for the Dealer on or about January 2, 1997.
3. On or about June 28, 2001 the Dealer purchased a 1991 Ford VIN 1FABP36X6MK128706 from Impact Auto Auctions Ltd. The vehicle was branded as salvage and the odometer reading on the vehicle at the time of purchase was 128,280 "TKU". On or about July 25, 2001 the Salesperson sold the vehicle on behalf of the Dealer to Charles Walsh without disclosing that the true kilometres were unknown thereby misrepresenting to the purchaser the true distance travelled. The Dealer also failed to disclose on the bill of sale that the vehicle was branded as salvage.
4. On or about March 20, 2001 the Dealer purchased a 1994 Pontiac VIN 1G2WJ52M6RF232055 from Impact Auto Auctions Ltd. The vehicle was branded as salvage and the odometer reading on the vehicle at the time of purchase was 222,110. On or about August 15, 2001 the Salesperson sold the vehicle on behalf of the Dealer to Brian Krompass with distance travelled indicated as 153,234 kilometers thereby misrepresenting to the purchaser the true distance travelled. The Dealer also failed to disclose on the bill of sale that the vehicle was branded as salvage.
5. On or about July 12, 2001 the Dealer purchased a 1995 Ford VIN 1FALP52U0SG118362 from Impact Auto Auctions Ltd. The vehicle was salvaged and the odometer reading on the vehicle at the time of purchase was 163,594 "The True Distance Travelled is UNKNOWN". On or about August 17, 2001 the Dealer sold the vehicle to Suzanne Hughes without disclosing that the true kilometres were unknown thereby misrepresenting to the purchaser the true distance travelled. The Dealer also failed to disclose on the bill of sale that the vehicle was previously a salvage vehicle.
6. On or about June 28, 2001 the Dealer purchased a 1992 Oldsmobile VIN 1G3AM51NXN6399276 from Impact Auto Auctions Ltd. The vehicle was a theft recovery and the odometer reading on the vehicle

- at the time of purchase was 226,559 "TKU". On or about August 22, 2001 the Salesperson sold the vehicle on behalf of the Dealer to Ehab Elsaadawy without disclosing that the true kilometres were unknown thereby misrepresenting to the purchaser the true distance travelled. The Dealer also failed to disclose on the bill of sale that the vehicle was a theft recovery.
7. On or about September 6, 2001 the Dealer purchased a 1993 Pontiac VIN 1G2JC51HXP7503683. The vehicle had frame damage at the time of purchase. On or about September 13, 2001 the Dealer sold the vehicle to 135331234 Ontario Inc. o/a Sam Auto Sale without disclosing to the purchaser that the vehicle had frame damage.
 8. The Dealer has failed to comply with the requirements of the Retail Sales Tax Act as to the filing of returns, remitting of tax due and paying assessments when due.
 9. As a result of failure to comply with the Retail Sales Tax Act, the Dealer is indebted to the Ministry of Finance in the amount of \$18,180.81.
 10. The Salesperson and the Dealer have failed to comply with the Motor Vehicle Dealers Act, in particular section 5.

THE EVIDENCE:

The evidence of the Registrar consisted of documentation as well as the testimony of Louise Gingras and Mary Jane South. The evidence of the Applicants consisted of their testimony.

Testimony of Louise Gingras

Ms. Gingras testified that she is employed by the Ontario Motor Vehicle Industry Council ("OMVIC") as a field inspector and has been so employed over the past four and one half years. She stated that OMVIC is a non-profit organization which is empowered to administer the Act and its regulations and to ensure compliance with that Act and regulations by motor vehicle dealers and salespersons appointed as such under the Act.

Her duties include the inspection of motor vehicle dealers' books, records and premises to ensure compliance with the Act.

In the course of her employment, Ms. Gingras has become familiar with the Applicants' business. On September 18, 2000 she conducted an inspection at 450 Beach Road, Hamilton, Ontario which is the registered address of the dealership operated by Constantin under the style and name of C & D Motors and where his brother Dumitrel

works as a registered salesperson. During the inspection Ms. Gingras inspected the books and records of the business, as well as certain bills of sale entered into during the previous five months, and the garage register.

Ms. Gingras stated that present at this inspection were both Constantin and Dumitrel. During her inspection she determined that the dealership sells "salvage" vehicles after repairing them in a body shop on premises. She was told that such cars are sold as "accident repairs". Ms. Gingras pointed out to the Applicants that when selling these vehicles, there was to be disclosure by the dealership of material facts regarding the vehicles' condition and that it must be disclosed on the bills of sale if the vehicle was "salvage or insurance write off". She noted that the dealership is not a structural inspection station. Ms. Gingras also noted during the inspection, that many vehicles purchased by the dealership had been purchased at auctions conducted by Impact Auto Auctions ("Impact") and that, as vehicles had been sold as salvage to the dealership, she had concerns whether consumers who purchased such vehicles from the dealership were aware that they were purchasing salvage vehicles.

(Exhibit 3, Tab 6)

Testimony of Jean Cameron

Following the inspection of September 18, 2000 by Ms. Gingras, a further inspection of the dealership was made on August 28, 2001 by Jean Cameron. Ms. Cameron is employed by OMVIC as an inspector.

Ms. Cameron testified that at this inspection she spoke with Constantin and Dumitrel and explained that she wished to inspect the garage register and the bills of sale entered into by the dealership during the last three months. She was shown files containing wholesale bills of sale when motor vehicles were purchased by the dealership at auctions and bills of sale when vehicles were sold by the dealership to the public. The latter bills of sale were referred to as retail bills of sale. Ms. Cameron chose 17 transactions, all but one of which related to "salvage" vehicles. Of the 17 transactions only three retail bills of sale had disclosure on the bills that the vehicles being sold by the dealership were salvage. In answer to Ms. Cameron's query why only three bills of sale contained disclosure, she was told by Dumitrel that customers were told verbally. She was also informed that Dumitrel attended to most of the retail sale transactions, while Constantin "dealt at auction" when the vehicles were purchased. Ms. Cameron stated that some of the wholesale bills of sale were stamped "TKU", but there was no note on the corresponding retail bill of sale that the true distance travelled was unknown. Constantin advised Ms. Cameron that frequently when Impact stamped a wholesale bill of sale "TKU", there was nothing wrong with the vehicle's odometer.

Ms. Cameron further stated that when inspecting the 17 transactions she noticed that one transaction related to a 1994 Pontiac Grand Prix (Exhibit 3, Tab 8). She noted that this vehicle had been purchased by the dealership on March 20, 2001 and the odometer reading of the vehicle on the wholesale bill of sale was 222,110 kilometers. She also

noted that the copy of the retail bill of sale stated, when on August 15, 2001, the dealership sold this vehicle to Brian Krompass, that the "distance travelled" by the vehicle was 153,234 kilometers. She further noted that the wholesale bill of sale stated that the vehicle was branded as "salvage", which fact was not recorded on the retail bill of sale when the vehicle was sold to Brian Krompass.

During the inspection Constantin informed her that the dealership was "behind" in paying retail sales tax and thought "16,000.00 to \$18,000.00" was owing. He stated further that arrangements had been made for "repayment".

Ms. Cameron stated that at the conclusion of the inspection she removed documents relating to the 17 transactions. Of these 17 transactions, there are four that are referred to in the Registrar's Proposal and form part of the allegations made against the Applicants.

Ms. Cameron testified regarding the four transactions, as follows.

The first transaction related to a 1991 Ford Tempo motor vehicle that the dealership purchased at an auction conducted by Impact on June 28, 2001. The wholesale bill of sale of Impact reflects that the vehicle was branded as "salvage" and across the face of the bill of sale there was stamped "TKU". The vehicle was subsequently sold by the dealership to Charles Walsh under a retail bill of sale dated July 25, 2001. The latter bill of sale made no reference to the vehicle being branded "salvage" or to the letters "TKU". The retail bill of sale was signed by Dumitrel on behalf of the dealership.

(Exhibit 3, Tab 7)

The second transaction related to a 1994 Pontiac Grand Prix motor vehicle that the dealership purchased at an auction conducted by Impact on March 20, 2001. The wholesale bill of sale of Impact reflects that the vehicle was branded as "salvage". The vehicle was subsequently sold by the dealership to Brian Krompass under a retail bill of sale dated August 15, 2001. The latter bill of sale made no reference to the vehicle being branded "salvage". The retail bill of sale was signed by Dumitrel on behalf of the dealership.

(Exhibit 3, Tab 8)

The third transaction related to a 1995 Ford Taurus motor vehicle that the dealership purchased at an auction conducted by Impact on July 12, 2001. The wholesale bill of sale of Impact is stamped with the words "The true distance travelled is unknown. It may be in excess of that which is recorded". The odometer reading on the wholesale bill of sale of Impact, reflects 163,594 kilometers. This figure is shown on the dealer's retail bill of sale of August 17, 2001 when the dealer sold the vehicle to Suzanne Hughes. However, the latter bill of sale makes no mention of, nor does it disclose, the contents of the stamped note on Impact's wholesale bill of sale. The retail bill of sale was signed by Constantin on behalf of the dealership.

(Exhibit 3, Tab 9)

The fourth transaction to which Ms. Cameron made reference, related to a 1992 Oldsmobile Cutless Ciera motor vehicle that the dealership purchased at an auction conducted by Impact on June 28, 2001. Impact's wholesale bill of sale reflects that there is a large stamp across the face of the bill of sale containing the letters "TKU". The retail bill of sale was signed by Dumitrel on behalf of the dealership. The odometer reading recorded on the wholesale bill of sale was 226,559 kilometers and this figure was contained in the retail bill of sale under "distance travelled". However, no mention or disclosure of the letters "TKU" was contained in the dealership's retail bill of sale when it sold the vehicle to Ehab Elsaadawy on August 22, 2001.

(Exhibit 3, Tab 10)

Ms. Cameron stated that she was concerned with the lack of proper disclosure by the dealership and pointed to OMVIC's publication titled "Standards of Business Practice" which had been sent to all registered dealers and salespersons. She stated that paragraphs 2.2.3 and 2.2.4 of that publication reads as follows:

2.2.3. Where a Dealer knows, or has reasonable grounds to believe that the distance shown on an odometer is not accurate, the purchaser is notified. Where this is the case, the contract includes one of the following plain language statements on the front of the contract:

- (a) "The true distance traveled is unknown, but is believed to be in excess of {estimate of distance traveled} which was recorded on {date}".
- (b) "The true distance traveled is unknown, but is believed to be substantially higher than that shown on the odometer".

2.2.4 Further to section 2.2.3, Dealers do not use abbreviations when disclosing the fact that an odometer does not accurately reflect the true distance traveled by a motor vehicle. Examples of prohibited abbreviations include: "T.K.U." and "T.M.U."

Testimony of Ralph Bayley

Ralph Bayley testified that he is an inspector with OMVIC and his duties include "following up" on inspections already made by other inspectors.

After receiving files containing 17 transactions from Ms. Cameron, Bayley forwarded questionnaires to the 17 retail purchasers. Only six of the purchasers returned their completed questionnaires to OMVIC. The completed questionnaires were returned by Charles Walsh, Brian Krompass, Suzanne Hughes, and Ehab Elsaadawy.

Bayley stated, in regard to Walsh's completed questionnaire, that Walsh contended that when he purchased from the dealership neither the salesperson nor the dealer indicated anything regarding the odometer reading or mileage of the vehicle; that nothing was told to him regarding the vehicle's structural or mechanical condition; that no information was given to him as to whether the vehicle was branded as salvage, an accident repaired vehicle, an insurance write off or a rebuilt vehicle.

(Exhibit 3, Tab 7, last 2 pages)

Bayley further stated that in regard to Brian Krompass' completed questionnaire, the latter person contended that at the time of sale neither, the dealer nor the salesperson indicated anything to him as to the vehicle's odometer reading or the mileage.

(Exhibit 3, Tab 8, third last page)

Bayley continued that in regard to Suzanne Hughes' completed questionnaire, she stated that at the time of sale neither the dealer nor the salesperson indicated anything to him regarding the vehicle's odometer reading or mileage.

(Exhibit 3, Tab 9, third last page)

Bayley also testified that in regard to Ehab Elsaadawy's completed questionnaire, the latter person stated that at the time of sale neither the dealer nor the salesperson indicated anything to him regarding the vehicle's odometer reading or mileage.

(Exhibit 3, Tab 10, third last page)

Testimony of Mary Jane South

Ms. South testified that she is the Deputy Registrar under the Act and her duties include overseeing the registration of dealers and salespersons as well as the administration of the Act. She also testified that OMVIC is a non-profit organization and is authorized to administer the Act and ensures compliance with the Act.

Ms. South reviewed the Proposal and expressed her concerns regarding the various aspects of non-disclosure by the dealer and salesperson. She was also concerned in regard to the dealer's failure to submit Retail Sales Tax to the Department of Finance.

Regarding the unpaid Retail Sales Tax, Ms. South referred to the letter of July 27, 2001 addressed to OMVIC by the Ministry of Finance, from which letter and attachment she quoted. The Ministry of Finance stated in its communication of July 27, 2001 that the dealer had a poor record of compliance since April 1997; that the Ministry had received several NSF cheques from the dealer; that the dealer's account was referred for collection in April 1997; that the Vendor made certain payments and signed Terms and Conditions, after which NSF cheques had been received; that following garnishment in April, 2000 a small amount was received from the dealer; that the dealer entered into another arrangement which he had broken and that \$18,000.00 remained outstanding. The dealer continued to refuse to remit Retail Sales Tax while he continued to collect tax on the sale of motor vehicles.

(Exhibit 3, Tab 10)

Ms. South stated that the Retail Sales Tax collected by the dealer was collected in trust for the Ministry and the failure to submit these funds is indicative of the dealer's financial instability.

In so far the allegations of non-disclosure are concerned Ms. South stated that the dealer is aware of the disclosure requirements as all dealers were sent OMVIC's

Standard of Business Practice of November 2000, which contained by-laws applicable to all members of OMVIC. Included in these Standards is a section on "Disclosure" which Ms. South reviewed. She specifically referenced section 2.2.3 and section 2.2.4. She stated that the dealer had repeatedly breached these subsections and thereby had failed to make disclosure. She also stated that critical to a decision by the purchaser of a motor vehicle, is full disclosure of the distance travelled by the vehicle or, if this is unknown, a statement to that effect. She concluded her testimony by stating that apart from any statutory obligation of disclosure by a dealer, there is the aspect of fundamental honesty and integrity of a dealer who must make material disclosures to a purchaser which could affect his decision regarding the purchase of a vehicle. Ms. South stated that the wording "Branded" indicated that the vehicle was "salvage" or, not economically repairable, alternatively irreparable or rebuilt by a licensed structural inspection station.

Testimony of DumitreI Tofan

DumitreI stated in his evidence that if a motor vehicle was sold as "branded" it would mean that there would be a "slight difference" in its value when compared to a vehicle that had not been branded. He indicated the difference could be between 10% and 25%.

He stated that he did not disclose to purchasers that a vehicle's true kilometres were unknown. He did not feel it necessary to make this known to a purchaser by writing it on the bill of sale. He conceded that he successfully passed OMVIC's Automotive Certification course conducted by Georgian College. This course covered, amongst other aspects, the *Motor Vehicle Dealers Act*. He was familiar with the Act.

DumitreI confirmed that he sold a 1991 Ford Tempo to Charles Walsh after it was purchased by Constantin at an auto auction. He also conceded that the wholesale bill of sale had the letters "TKU" stamped across its face and that the dealer's retail bill of sale to Walsh did not contain "TKU".

(Exhibit 3, Tab 7)

He confirmed that the wholesale bill of sale of Impact, when the 1994 Pontiac Grand Prix was sold to Constantin by the dealer, stated that the vehicle's odometer read 222,110 kilometers. He also confirmed that when the dealer sold the vehicle to Brian Krompass the bill of sale stated that the distance travelled by the vehicle was 153,234 kilometers.

(Exhibit 3, Tab 8)

He also confirmed that the 1992 Oldsmobile Cutlass that the dealer sold the Ehab Elsaadawy, did not contain the letters "TKU" although the wholesale bill of sale when Impact sold that vehicle to Constantin did contain the letter "TKU".

(Exhibit 3, Tab 10)

Dumitrele conceded that there was about \$18,000.00 owing to the Ministry of Finance in respect of Retail Sales Tax collected by the dealership. He also conceded that arrangements with the Ministry to pay this amount had been broken by the dealer. He stated that in 1997 the dealership's premises were broken into and considerable equipment was stolen. This loss has not been overcome. He also conceded that Retail Sales Tax has been collected on all vehicles sold.

Testimony of Constantin Tofan

Constantin stated in his testimony that he commenced to operate as a motor vehicle dealer under the name C & D Motors in 1996. He had been shown how to complete bills of sale by an OMVIC representative.

As a dealer he mainly sold "write off vehicles" which he bought at auctions. He knew that such vehicles had been written off by insurance companies.

He was advised by an inspector of OMVIC that had to "explain everything to a customer" when a bill of sale was entered into.

In September 2000, he was instructed by an OMVIC inspector that when he sold an "insurance write-off" vehicle he was obliged to write this on the retail bill of sale. He did so for some 10 deals and then discontinued the practice. When purchasing a vehicle at auction he is not concerned with the kilometres that that vehicle had travelled. He only looked at condition of the vehicle.

Under cross-examination, Constantin stated that the break-in at his premises resulted in his falling behind with his payments of Retail Sales Taxes to the Ministry. He did not have insurance to cover the loss he sustained.

FACTS FOUND PROVEN:

The following are the facts that were found proven in this matter.

1. By bill of sale dated June 28, 2001, the dealer purchased at an Impact Auto Auction sale, certain 1991 Ford Tempo motor vehicle. The bill of sale contained the letters "TKU" stamped across its face and the vehicle was branded as salvage.
2. By bill of sale dated July 25, 2001 the aforesaid 1991 Ford Tempo was sold by the dealer to Charles Walsh. The bill of sale between the dealer and Walsh did not contain the words "TKU" nor any reference to the vehicle being branded salvage.

3. By bill of sale dated March 20, 2001, the dealer purchased at an Impact Auto Auction sale, certain 1994 Pontiac Grand Prix motor vehicle. The bill of sale disclosed that the vehicle was branded as salvage.
4. By bill of sale dated August 8, 2001, the aforesaid 1994 Pontiac Grand Prix motor vehicle was sold by the dealer to Brian Krompass. The bill of sale between Krompass and the dealer did not contain any reference to the vehicle being branded salvage.
5. By bill of sale dated July 12, 2001, the dealer purchased at an Impact Auto Auction sale, certain 1995 Ford Taurus motor vehicle. The bill of sale contained words, which were stamped on the face of the bill, that the true distance travelled by the vehicle was unknown and may be in excess of what was recorded on the bill of sale.
6. By bill of sale dated August 17, 2001, the aforesaid 1995 Ford Taurus motor vehicle was sold by the dealer to Suzanne Hughes. The bill of sale between the dealer and Hughes did not contain any reference to the true distance travelled by the vehicle was unknown and may be in excess of that recorded.
7. By bill of sale dated June 28, 2001, the dealer purchased at an Impact Auto Auction sale, certain 1992 Oldsmobile Cutlass motor vehicle. The bill of sale contained the letters "TKU" stamped on its face.
8. By bill of sale dated August 22, 2001, the aforesaid 1992 Oldsmobile Cutlass motor vehicle was sold by the dealer to Ehab Elsaadawy. The bill of sale between the dealer and Elsaadawy did not contain any reference to the words "TKU".
9. The dealer has failed to remit to the Ministry of Finance an amount of approximately \$18,000.00 which the dealer has collected as Retail Sales Tax on the sale by the dealer of various motor vehicles.
10. The dealer failed to abide by arrangements with the Ministry to liquidate the amount of Retail Sales Tax owing. The dealer furnished the Ministry with certain cheques in respect of Retail Sales Tax which were not paid on presentation and have been returned to the Ministry marked N.S.F.

THE LAW:

Section 7.(1) and 7.(2) of the Act states:

7.(1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the Registrar shall serve notice of the proposal, together with written reasons therefor, on the applicant or registrant.

(2) A notice under subsection (1) shall state that the applicant or registrant is entitled to a hearing by the Tribunal if the applicant or registrant mails or delivers, within fifteen days after service of the notice under subsection (1), notice in writing requiring a hearing to the Registrar and the Tribunal, and the applicant or registrant may so require a hearing.

Section 5.(1) of the Act states:

- 5.(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,
- (b) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
 - (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or
 - (d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

Section 19.(1) and (2) of Regulation 801 to the Act states:

19. (1) Except in the case of an exchange or repair of an odometer and subject to subsection (2), no motor vehicle dealer or salesperson shall alter, adjust or permit any alteration or adjustment to the odometer on any motor vehicle in the dealer's or salesperson's possession or control in such a manner that as a result of the alteration or adjustment the total distance indicated on the odometer is other than the total distance travelled by the motor vehicle.
- (2) Where a motor vehicle dealer exchanges an odometer or effects any repairs to the odometer of a motor vehicle in the dealer's possession or control or to any other part of the motor vehicle that is directly related to the odometer, the dealer shall record in the reconditioning record of that motor vehicle the reading in miles or kilometres that was on the odometer prior to the exchange or repair and shall ensure that the identical reading appears on the odometer of the motor vehicle after the exchanges or repairs have been effected.

Section 2. of the *Business Practices Act*, R.S.O. states:

2. For the purposes of this Act, the following shall be deemed to be unfair practices:
1. A false, misleading or deceptive consumer representation including but without limiting the generality of the foregoing,
 -
 - v. a representation that the goods have been used to an extent that is materially different from the fact,
 -
 2. An unconscionable consumer representation made in respect of a particular transaction and in determining whether or not a consumer representation is unconscionable there may be taken into account that the person making the representation or the person's employer or principal knows or ought to know.
 -
 - vii. that he or she is making a misleading statement of opinion on which the consumer is likely to rely to his or her detriment,

.....

APPLICATION OF LAW TO FACTS:

There are two issues to be decided by the Tribunal. Those issues are:

1. Does the past conduct of the Applicants afford the Registrar reasonable grounds for belief the Applicants they will not carry on business in accordance with law and with integrity and honesty, and
2. Having regard to the financial position of the Applicants, can the Applicants reasonably be expected to be financially responsible in the conduct of business.

The onus of proof rests upon the Registrar.

In the leading case of *Brenner 19 CRAT SCO Decisions and Orders (1971 – 1989)* page 95 Southey J. held that a Tribunal should only refuse to direct the Registrar to carry out his proposal if it thinks the Registrar was in error in concluding that the past conduct of an Applicant afforded reasonable grounds for belief that such Applicant would not carry on business in accordance with law and with integrity and honesty.

Brenner 19 CRAT SCO Decisions and Orders (1971-1989), page 59, is a decision issued on April 7, 1983 where the Divisional Court overruled a decision of this Tribunal. Southey J. states that the Registrar proposed to refuse registration because of the existence of the specific circumstances set out in Section 5(1)(b) of the *Motor Vehicle Dealers Act*:

The effect of Section 7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself.

In the *Brenner* case, due to the particular facts in this case Southey J. sent it back for a rehearing, however, he adds in the third last paragraph:

The proper question at the rehearing remains, however, whether the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and

honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal.

To overrule the decision of the Registrar, the Tribunal must conclude that he was wrong in his decision and that the conduct of an Applicant does not afford reasonable grounds for the Registrar's belief that the Applicant will in the future carry on business in contravention of the Act and its Regulations. This was confirmed by Divisional Court in the matter of *Albert Fascenda (1994) 26 CRAT Part II 1050* where that court on appeal quashed the

Tribunal's decision to direct a Registrar not to carry out his proposal and in sending the matter back for re-hearing stated at page 1051.

It follows that the Tribunal should have refused to direct the Registrar to carry out his proposal only if it thought the Registrar was in error in his belief.

The Tribunal's conclusions and the reasons for its conclusions, based on the evidence, follow.

APPLICANTS CANNOT REASONABLY BE EXPECTED TO BE FINANCIALLY RESPONSIBLE IN THE CONDUCT OF BUSINESS

It is not disputed by the Applicants that approximately \$18,000.00 is owing by Constantin to the Ministry of Finance in respect of Retail Sales Tax and that this sum, which includes penalty and interest, commenced to accrue in or about April 1997. It is also not disputed by the Applicants that several cheques received from the dealership have been unpaid and marked N.S.F. Additionally, it is not disputed that arrangements as well as Terms and Conditions were entered into between the Ministry and Constantin and that Constantin has not abided by those arrangements or Terms and Conditions.

The monies collected by Constantin as Retail Sales Tax were collected by him on behalf of the Ministry to whom that tax rightfully belonged. The conduct of Constantin in failing to remit monies that do not lawfully belong to him and in failing to meet his legal obligations flowing from his undertakings and the Terms and Conditions to which he agreed, raises questions as to his honesty and integrity as well as whether he can reasonably be expected to be financially responsible in the conduct of business.

The monies collected by Constantin in respect of retail Sales Tax, are clearly funds held in trust for the Ministry. These monies should not have been used by Constantin for any purpose other than to pay the sales tax due to the Ministry. Had he maintained these monies in trust he would have had the monies to pay the Ministry. His failure to remit the funds is due either to financial irresponsibility or failure to carry on business in accordance with law and with integrity and honesty.

Whether the conduct of Constantin amounts to financial irresponsibility or a lack honesty and integrity, it is conduct that rightfully affords the Registrar reasonable grounds to revoke Constantin's registration. His failure to remit monies to the Ministry does not consist of an isolated incident but is an ongoing course of conduct since 1997. Such conduct, in the opinion of the Tribunal, affords the Registrar reasonable grounds for his belief that Constantin will not carry on business in accordance with law and with honesty and integrity; alternatively, that he cannot reasonably be expected to be financially responsible in the conduct of business.

Accordingly on this issue, the Tribunal finds there to be no error in the Registrar's reasons or conclusion to revoke Constantin's registration.

FAILURE TO DISCLOSE

The Registrar has alleged that the Applicants failed to disclose to purchasers of certain motor vehicles that such vehicles were branded salvage; that the Applicants failed to disclose that the true distance travelled by certain vehicles were unknown, and in one instance a vehicle was sold when the recorded distance travelled by the vehicle upon resale by Constantin was less than the odometer reading at the time of purchase by Constantin. An examination of the four sale transactions that gave rise to the Registrar's Proposal are set out hereunder.

1991 Ford Tempo

There is no dispute that this vehicle was bought by Constantin at an auction conducted by Impact on June 28, 2001. There is also no dispute that the Impact bill of sale indicates the vehicle was branded salvage and that the letters "TKU" were stamped on the face of the bill of sale.

There is also no dispute that Constantin subsequently sold this vehicle to Charles Walsh, which sale was conducted by Dumitrel on July 25, 2001. Nor is it disputed that there was no disclosure on that bill of sale that the true kilometers or distance travelled by the vehicle were unknown nor was there disclosure that the vehicle was branded salvage.

Dumitrel conceded in his evidence that the value of a salvage vehicle is between 10% and 25% less than a non-salvage vehicle. He also conceded that he wrote and passed the Automotive Certification Course conducted by Georgian College and knows the Act and its regulations.

Constantin acknowledged in his testimony that in September 2000 he was told by an OMVIC inspector that "insurance write off" must appear on all bills of sale when selling a vehicle that had been purchased at an auction. He also stated that he was aware that Impact sold "salvage" motor vehicles on behalf of insurance companies and that

“salvage” refers to a vehicle damaged by collision and then sold by the insurer of that vehicle.

He also acknowledged that he abided by the OMVIC inspector’s instructions regarding disclosure of bills of sale of write off vehicles for “about 10 sales”. He then decided not to abide by those instructions and made no disclosure as stipulated by the inspector. Constantin stated in his testimony that he was advised by an inspector that he had “to explain everything to customers”.

1994 Pontiac Grand Prix

There is no dispute that when this vehicle was purchased by Constantin at an Impact auction on August 15, 2001 the bill of sale stated that the odometer reading of the vehicle stated 222,110 kilometers and that the vehicle was branded as salvage.

When Dumitrele, acting as salesperson, sold this vehicle to Brian Krompass on August 15, 2001 there was no reference on that bill of sale to the vehicle being branded salvage. In addition, the “distance travelled” by the vehicle as stated in the bill of sale to Krompass was stated to be “153,234” kilometers.

The Applicants offered no explanation as to the discrepancy in odometer reading.

1995 Ford Taurus

Again, this vehicle was purchased at an auction conducted by Impact on July 12, 2001 and the Impact bill of sale stated “the true distance travelled is unknown and may be in excess of which is recorded”. This is not disputed by the Applicants nor is it disputed that when this vehicle was resold, the retail bill of sale made no mention of the true distance travelled being unknown.

1992 Oldsmobile Cutlass

This vehicle was also purchased at an Impact auction and the wholesale bill of sale was stamped “TKU”. When this vehicle was resold by Constantin, the sale being conducted by Dumitrele, the retail bill of sale did not disclose that the vehicle’s true kilometers were unknown.

In the four sale transactions dealt with above, there are disclosures that should have been made by Constantin as dealer and as well as by Dumitrele as salesperson.

The Standards of Business Practice published by OMVIC, which was sent to all OMVIC members, makes clear that where a dealer has reasonable grounds to believe that the distance shown on a vehicle’s odometer is not accurate the purchaser is to be notified in

the contract of sale. Constantin has clearly failed to abide by this requirement as well as the *Business Practices Act* and Section 19 of Regulation 801 to the Act. The branding of a vehicle as salvage indicates to both a registered dealer and salesperson that the vehicle has sustained damage, sufficient for the insurer of the vehicle to write off that vehicle on the basis of it being uneconomic to repair. In all the instances where Constantin bought vehicles at an Impact auto auction it is clear from the wholesale bills of sale that the seller of such vehicles was an insurance company and that the vehicle was being sold by the insurer as it was damaged beyond economic repair. This is a material fact that Constantin should have brought to the notice of retail buyers of such vehicles. Full knowledge of material facts such as the distance travelled by a vehicle, or that it is a salvage vehicle, are important to a buyer in deciding whether or not to purchase and at what price to deal. Denial to a prospective purchaser of such material information, is in the Tribunal's opinion, a reflection of a lack of integrity and honesty. The Applicants were aware of OMVIC's insistence that full and adequate disclosure be made. In fact they carried out these instructions in some ten transactions whereafter in September 2000 they deliberately decided to ignore OMVIC's instructions and made no written disclosure thereafter.

The fact that Constantin sold vehicles, knowing they were branded salvage and the implications of such branding, and not disclosing this material fact to buyers is in the Tribunal's opinion unethical and dishonest. Buyers should be made aware of the condition of a vehicle when purchasing so as to enable them to make informed decisions whether to purchase and at what price. Similarly, the mileage or distance that a vehicle has travelled is both pertinent and material when considering whether to purchase and at what price. If the true kilometers travelled by the vehicle are unknown to the selling dealer, as is the case in the present matter, this information must be disclosed as it is also material information that can influence a purchaser. Finally, for a dealer to purchase a vehicle and at the time of purchase have the actual distance travelled disclosed and thereafter for that dealer to sell that vehicle and disclose a lesser distance travelled by it, without a plausible explanation, is both dishonest, contrary to section 19(1) and (2) of regulation 801 to the Act and the *Business Practices Act*.

For all the reasons above the Tribunal finds that the past conduct of both Constantin and Dumitrel affords the Registrar reasonable grounds for belief that the Applicants will not carry on business in accordance with law and with integrity and honesty.

DECISION:

Pursuant to the authority vested in it by section 7(4) of the *Motor Vehicle Dealers Act*, the Tribunal directs the Registrar to carry out his Proposal dated December 21, 2001 to revoke the registrations of the Constantin Tofan and Dumitrel Tofan as motor vehicle dealer and motor vehicle salesperson respectively under the *Motor Vehicle Dealers Act*, as amended.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair,
Presiding

Victor L. Drevnig, Vice-Chair

Released: May 6, 2002

11369450 ONTARIO LIMITED o/a ROMANCE HOMES

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE REGISTRATION

TRIBUNAL: DOUGLAS MACKINTOSH, Vice-Chair

APPEARANCES: MAURO MARCHIONI, Counsel, representing the Applicant,
11369450 Ontario Limited o/a Romance Homes
KENNETH T. ROSENBERG, Counsel, representing
the Registrar, *Ontario New Home Warranties Plan Act*

DATE OF
HEARING: May 9, 2002 Toronto

CONSENT ORDER

Upon the application to the Tribunal by 11369450 Ontario Limited o/a Romance Homes, Applicant, and the Registrar under the *Ontario New Home Warranties Plan Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Ontario New Home Warranties Plan Act* as to the disposition of these proceedings which is filed and attached hereto as Schedules "A" and "B";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A" and "B".

LICENCE APPEAL TRIBUNAL

Douglas Mackintosh
Vice-Chair

Released: May 9, 2002

LARIVIERE

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
RHEAL LARIVIERE

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATION
- Proposal dated: December 3, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

RHEAL LARIVIERE

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Rheal Lariviere, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: May 6, 2002

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
789 Don Mills Road, Suite 800
Toronto, ON M3C 1T5

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON, M4V 1K6

FROM: Rheal Lariviere
41 Queen Street
Baden, ON N0B 1G0

In accordance with Section 4.1 of the *Statutory Powers Procedure Act*, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereinafter the "Act") the parties to the proceeding, Rheal Lariviere (hereinafter referred to as the "Applicant"), and the Registrar, *Motor Vehicle Dealers Act* (hereinafter the "Registrar") waive the requirement of a hearing and hereby consent to an Order of the Licence Appeal Tribunal (hereinafter the "Consent Order") based on the following terms and conditions to their registrations as a motor vehicle salesperson:

1. The Applicant agrees that if he is criminally charged or convicted in the future, he will immediately notify his employer in writing of the charges or convictions against him and provide a copy of the notification signed by his employer to the Registrar, giving the particulars of the charges or convictions.
2. The Applicant agrees that if he is convicted under the Criminal Code or convicted of any industry specific offences under any Statute in the future, he will be automatically revoked.
3. The Applicant agrees to provide full and accurate disclosure on any applications, documents, statements or other form of communication/information provided to the Registrar or his authorized representatives regardless of previous disclosure.
4. The Applicant acknowledges that the Registrar is relying upon the accuracy of the disclosure provided by the Applicant in entering into these terms and conditions.
5. The Applicant agrees that his explanation of the circumstances of his criminal record, are substantially as set out in the disclosure provided to the Registrar.
6. The Applicant agrees not to be a partner, shareholder, officer, or director of a dealership.
7. The Applicant agrees not to be the final signatory on any sales contracts on behalf of the dealer.
8. The Applicant agrees not to transfer his registration as a motor vehicle Salesperson to another dealer without having first obtained the prior written consent of the Registrar.
9. The Applicant acknowledges and understands that his registration will not be used to buy or sell motor vehicles where the Applicant knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
10. The Applicant agrees that he is under a positive obligation to disclose all material facts about the vehicles he sells to his customers. Material facts include but are not limited to salvage, previous salvage, frame and unibody damage, rebuilt, accident repair, theft recovery, prior use as a police cruiser, taxicab or daily rental and branded vehicles. The Applicant agrees to make reasonable

efforts to research the history of all vehicles he sells prior to sale to ensure all material facts are disclosed in writing to the purchaser.

11. The Applicant agrees to immediately enrol in the Ontario Motor Vehicle Industry Council Certification Course and to be responsible for all fees in relation to enrolment. The Applicant further acknowledges that enrolment in the course entitles him to a sixty (60) day conditional registration period that allows for his successful completion of the course (including passing the exam).
12. The Applicant agrees that his registration will not prevent the Registrar from taking administrative action, including a proposal to revoke his registration, arising from matters that may have occurred or may occur in the future related to his financial circumstances and honesty and integrity.
13. The Applicant acknowledges that his registration as a motor vehicle Salesperson will not prevent the Registrar from taking legal action, including a Provincial Offences prosecution, arising from matters that may have occurred or that may occur in the future.
14. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
15. The Applicant will provide a copy of this order to his employer forthwith.
16. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
17. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
18. The Applicant acknowledges that he has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____, this _____ day of _____ 2002.

Rheal Lariviere (Signature)

These Terms and Conditions are accepted by the Registrar, *Motor Vehicle Dealers Act*.

Date:

Carl Compton
Registrar
Motor Vehicle Dealers Act

0956 - MED - ALCL

Appeal under Section 50(1) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 47(1) of that Act.

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ROSS BENNETT, M.D., Presiding Member

APPEARANCES:

PATRICK MOORE, Counsel for the Registrar of Motor Vehicles
APPLICANT, unrepresented

DATE OF
HEARING:

April 25, 2002

KITCHENER

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by The Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8 ("HTA").

EXHIBITS:

- (1) Notice of Suspension from the Deputy Registrar of Motor Vehicles dated December 5, 2001.
- (2) Notice of Appeal from the Applicant, received January 21, 2002 at the Tribunal.
- (3) Tabulated file (1-12) compiled by the Ministry
- (4) Canadian Medical Laboratories Report dated October 12, 2001 received from the Applicant

FACTS:

The Applicant is a 37-year-old married man, with two young daughters, who operates a business in Kitchener. The Applicant had his licence suspended on December 5, 2001 for medical reasons on a recommendation from the Medical Advisory Committee (MAC).

The Applicant has a long history of problems with alcohol, resulting in eight convictions of either impaired driving or refusing to provide a breath sample during the period 1981 to 1995. In 1998 his licence was suspended for three years for not providing a Medical Report (Exhibit #3, tab4a), required after receiving a licence suspension and a four month sentence for impaired driving in 1995. During this sentence he was ordered to take a five-week Relapse Prevention Program in the Correctional Facility.

Following the Applicant's release on parole he attended another six week Alcohol Addiction program at the "Homewood Institute" in Guelph and a Programme to Address the Causes of Impaired Driving (P.A.C.I.D.) at the John Howard Society.

In April 1998 the MAC requested up-to-date laboratory testing (MCV, AST & GGT readings and an Alcohol Assessment Form. The Applicant provided the requested information in October 2001 (Ex # 3, tab6 & Ex #4) and all of the blood tests were recorded as normal. The Alcohol Assessment Form appears to be answered truthfully as he admits that he is still drinking and he stated that it is controlled and moderate. In answer to a direct question the Applicant admitted to being impaired on two occasions this year, at New Years and at a stag, but he did not drive.

The Applicant gave evidence that he has done nothing wrong since 1995 and that things have changed. He has two daughters, owns his own business and has matured. He gave evidence that he did not drink for three years, but the only proof is the normal blood tests.

The MAC reviewed the Applicant's case in November 2001 and again recommended suspension for medical reasons. It requested another detailed report with confirmation of abstinence for one year and supportive biochemical markers. The report states that the Applicant has had numerous D+D and collision while impaired, whereas the Applicant gave evidence that he has never had a collision in his life. The MAC Case Study was followed up with the Deputy Registrar's letter of suspension, indicating a year of abstinence was required, before his driver's licence would be reconsidered.

The Applicant was quite upset about this requirement because a year's abstinence has never been mentioned previously. He maintains that he was abstinent for three years and has just provided a Medical Report, Alcohol Assessment Form and the laboratory results in October 2001.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

Section 47(1) unquestionably empowered the Registrar to ".....*suspend or cancel*" a driver's licence for " *any....sufficient reason...*" on December 5, 2001. The Registrar originally suspended the Applicant's driver's licence in 1998 for failing to provide a Medical Report, as requested under Sec. 32 (12) of the *Highway Traffic Act*, following a conviction and suspension in 1995 for impaired driving. The latest suspension was for medical reasons on a recommendation from the MAC.

This suspension required a detailed report from his physician or a specialist in addiction medicine confirming a one year period of abstinence from alcohol and a treatment program, participating in a relapse prevention program with supportive bio-chemical markers, before reconsidering reinstatement of his licence.

The Applicant has already taken courses in Relapse Prevention and Alcohol Abuse and submitted an Alcohol Assessment Form with the bio-chemical markers, which were normal, in October 2001. These facts seem to have been ignored by the Ministry. The Applicant gave evidence that he had been abstinent for three years. He started drinking alcohol again, but moderately and controlled. The Applicant appears to have completed the Alcohol Assessment Form truthfully, but the fact that he is drinking again, seems to be the reason for the continued suspension.

The Applicant stated that he was unaware that a year of abstinence was a requirement and as a result he can not prove he did not drink for three years. The Tribunal was impressed with his explanation of how he has matured, owns a business, is a family man now and understands his problem with alcohol. He feels that he has served his sentence successfully since 1995 without any problems

The Tribunal finds that the evidence presented does not support the Respondent's position to refuse reinstatement of the Applicant's licence, inspite of the Applicant's abysmal driving record from 1981 until 1995. The Tribunal feels the Applicant has matured and is sufficiently aware of his past history to act as a responsible citizen in the future.

DECISION:

Upon the application by the Applicant to appeal the decision dated December 6, 2001 of the Registrar of Motor Vehicles to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar to suspend the Applicant's driver's licence be set aside.

LICENCE APPEAL TRIBUNAL

Ross Bennett, M.D., Presiding Member

RELEASED: May 1, 2002

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

BRESSI

REAL ESTATE AND BUSINESS BROKERS ACT
Revised Statutes of Ontario 1990, Chapter R. 4

IN THE MATTER OF
JOSEPH BRESSI

AND IN THE MATTER of the PROPOSAL by
the Registrar, *REAL ESTATE AND BUSINESS BROKERS ACT*
TO REFUSE REGISTRATION
- Proposal dated: January 10, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

JOSEPH BRESSI

Applicant

- and -

REGISTRAR, *REAL ESTATE AND BUSINESS BROKERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on May 17, 2002;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicant* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Friday, July 19, 2002.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: May 3, 2002

CASINO BUS SERVICE INC.

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
CASINO BUS SERVICE INC.
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: October 30, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

CASINO BUS SERVICE INC.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by Casino Bus Service Inc., the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: May 9, 2002

LICENCE APPEAL TRIBUNAL

BETWEEN:

CASINO BUS SERVICE INC.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

BACKGROUND

1. Casino Bus Service Inc. (hereinafter referred to as "the Registrant") is a company incorporated pursuant to the laws of Ontario and has been registered under the *Travel Industry Act*, R.S.O., c. T-19, as amended (hereinafter referred to as "the Act") as a travel agent (registration number 4638953/R) since October 28, 1998. The Registrant's fiscal year end is May 31st.

FINANCIAL STATEMENTS – GROUNDS FOR THE PROPOSAL

2. Subsection 24(2) of Ontario Regulation 806/93 made under the Act (hereinafter referred to as "the Regulation") states that if a registrant had sales of less than \$10 million during the previous fiscal year, the registrant shall file within three months of the end of the fiscal year annual financial statements with a review engagement report by a public accountant licensed under the *Public Accountancy Act*.
3. By letter dated April 23, 2001, the Registrant was requested by the Travel Industry Council of Ontario ("TICO") to file financial statements for the fiscal year ending May 31, 2001 by August 31, 2001.

4. On September 20, 2001, a second request was sent to the Registrant, providing the Registrant with a deadline to submit the required filing by September 30, 2001.
5. By letter dated October 3, 2001, the Registrar, *Travel Industry Act* issued a final due date of October 11, 2001 for the Registrant's May 31, 2001 financial statements, failing which the Registrant was advised that a proposal to revoke its registration would be issued.
6. By October 30, 2001, the Registrant had failed to provide its financial statements. On that date, the Registrar issued a Proposal to Revoke the Registrant's Registration.
7. To date, the Registrant has not filed its financial statements for its fiscal year ended May 31, 2001 in accordance with subsection 24(2) of the Regulation.
8. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsections 6 (4) and (5) of the *Travel Industry Act* directing that:

1. the Registrar refrain from carrying out the Proposal to Revoke Registration dated October 30, 2001;
2. the Registrant's registration is to be subject to the following terms and conditions:
 - (a) the Registrant shall file complete financial statements as required by section 24 of the Regulation, for its fiscal year ending May 31, 2001, no later than June 15, 2002;
 - (b) If the above-noted financial statements as submitted reveal an insufficient working capital amount or are otherwise deficient, the Registrant will have 30 days from the date of notice of the amount of the deficiency to fully and completely address any deficiency and produce proof of such correction to the Registrar. Thereafter, the Registrant shall maintain the minimum working capital in accordance with section 25 of the Regulation or such subsequent provision as may be in force from time to time. Notice of the deficiency, if any, shall be sent by registered mail to the Registrant;
 - (c) The Registrant shall file complete financial statements as required by section 24 of the Regulation or such subsequent provision as may be in force from

time to time, for its fiscal year ending May 31, 2002, no later than August 31, 2002;

(d) The Registrant shall file complete financial statements as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for its fiscal year ending May 31, 2003, no later than August 31, 2003;

3. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) to (d) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.
4. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by its signature below that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED this ____ day of May, 2002

Mr. Peter Krawec
Casino Bus Service Inc.
I have authority to bind the corporation

Mr. Michael Pepper
Registrar, *Travel Industry Act*

1054-MED-ADJ

IN THE MATTER of the *Highway Traffic Act*,
R.S.O. 1990, Chap. H.8 as amended, section
50(1);

AND IN THE MATTER of a motion by the
Counsel for the Minister of Transportation
seeking an Order adjourning the hearing of this
appeal under section 21 of the *Statutory
Powers and Procedures Act*, R.S.O. 1990;

AND IN THE MATTER of

APPLICANT

APPLICANT
(Respondent on Motion)

-and-

MINISTER OF TRANSPORTATION

RESPONDENT
(Moving Party on Motion)

TRIBUNAL: STUART CORK, Presiding Member

APPEARANCES:

Counsel representing the Applicant
PATRICK MOORE, Counsel, representing the Registrar of
Motor Vehicles

DATE OF
MOTION:

April 26, 2002

By teleconference

ORDER

Pursuant to the provisions of the *Highway Traffic Act*, Section 50(1), the Applicant
appealed the Registrar's decision dated February 15th, 2002, to Suspend the driver's
licence of the Applicant,

AND WHEREAS the appeal was set down for hearing before the Tribunal on May 3,
2002 at the Kitchener City Hall, Conestoga Room, 200 King Street West, Kitchener,
Ontario, and both parties were duly notified;

AND WHEREAS the Respondent filed a motion dated April 15th, 2002 seeking an Order adjourning the hearing of this appeal under section 21 of the *Statutory Powers and Procedures Act*, R.S.O. 1990;

AND WHEREAS at the commencement of the hearing as a preliminary matter Counsel for the Applicant informed the Tribunal that his client was consenting to the motion to adjourn the hearing to a later date, and would confirm this by letter to the Tribunal;

AND WHEREAS both the parties then agreed upon a hearing date of July 8th, 2002, at Kitchener City Hall;

NOW THEREFORE the Tribunal orders that the Appeal of the driver's licence Suspension by the Registrar of the Applicant per section 47(1) of the *Highway Traffic Act* will be heard on July 8th, 2002 at the Kitchener City Hall.

LICENCE APPEAL TRIBUNAL

Stuart Cork
Member

Released: May 9, 2002

DELORME

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
MICHEL DELORME

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: February 11, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

MICHEL DELORME

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Michel Delorme, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: May 7, 2002

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
789 Don Mills Road, Suite 800
Toronto, Ontario M3C 1T5

AND TO: Licence Appeal Tribunal
1 St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Michel Jerry Delorme
15 Glenmanor Crescent
Nepean, ON K2G 3E8

Pursuant to subsection 5(2) of the *Motor Vehicle Dealers Act* Michel Jerry Delorme (hereinafter referred to as "the Applicant") and the Registrar, *Motor Vehicle Dealers Act*, (hereinafter referred to as "the Registrar"), in accordance with section 4.1 of the *Statutory Powers Procedure Act*, do hereby waive the requirements of a hearing and consent to an Order of the Licence Appeal Tribunal based upon the following Terms and Conditions:

1. The Applicant agrees, if he is charged in the future, to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.
2. The Applicant agrees if he is convicted under any law of an industry specific offence or if he is convicted under the Criminal Code, the Registrar is directed to and shall carry out the proposal.
3. The Applicant agrees not to transfer his registration as a salesperson under the *Motor Vehicle Dealers Act* to another dealer without the prior written consent of the Registrar.
4. The Applicant agrees to provide full disclosure on all future applications and/or discussions with the Registrar, regardless of whether or not disclosure has been made in the past.
5. The Applicant agrees not to be involved in the process of buying, selling or leasing motor vehicles without the benefit of registration.
6. The Applicant shall not be an officer, director, owner or partner in a dealership.
7. The Applicant confirms that the circumstances surrounding his convictions are substantially as disclosed to the Registrar.
8. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.
9. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.
10. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
11. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
12. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.

13. The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____ this _____ day of _____ 2002.

Michel Delorme (signature)

These Terms and Conditions are accepted by the Registrar, *Motor Vehicle Dealers Act*

Date:

Carl Compton
Registrar
Motor Vehicle Dealers Act

1079-ADLS-RESP

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: JOHN PETROSONIAK
Counsel for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF HEARING: May 07, 2002 Toronto

DECISION

A hearing was held on May 07, 2002, at Toronto, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.
Presiding Member

RELEASED: May 08, 2002

1079-ADLS-RESP

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: JOHN PETROSONIAK
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF
HEARING: May 7, 2002

DECISION
RELEASED: May 8, 2002 Toronto

REASONS FOR DECISION

A hearing was held on May 7, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on May 8, 2002, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated April 15, 2002, and was received by the Tribunal on April 18, 2002, together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

Prior to the commencement of the evidence gathering commencement of the hearing the Respondent's Counsel informed that the criminal proceedings against the Applicant are still pending. As such, the Respondent's Counsel asked the Tribunal for an Order to ensure that no information from these proceedings be used for purposes other than perjury, more particularly in the up coming criminal trial.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice to Registrar dated January 30, 2002, issued by the Registrar of Motor Vehicles
- b) Exhibit # 2 Notice of Appeal Form - received at the Tribunal April 18, 2002

By the Respondent:

- a) Exhibit # 3 Ministry of Transportation submissions – received May 2, 2002

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is:

Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

- 50.1(1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
 - (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
 - (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

- 15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
 - (a) the name, telephone number and address, with the postal code, of the medical practitioner;
 - (b) the name, date of birth and address of the person who is the subject of the report;
 - (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.

- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

The Applicant's Driver's Licence was suspended "Jan.30.2002" as per Notice of Appeal (Exhibit # 2)

Applicant's Evidence

The Applicant has submitted an incomplete Notice of Appeal, in that page two of the Notice of Appeal has been left blank, rather than filled in by the Applicant's family physician, as required.

Physician #1 confirms in a letter dated April 2002, that he has been the Applicant's physician since 1998. Physician #1, states that the Applicant "...presented February 1, 2002, complaining of cough of several weeks duration ...shortness of breath ...On February 26, 2002 ...followed up ...complaining of shortness of breath ...similar to ...episode in January 2002 ...diagnosed with upper respiratory tract infection ...tests so far normal ...sometimes has difficulty breathing ...this would have aggravated his upper respiratory tract infection he may not have been able to blow..."

A handwritten note at the bottom on the letter notes, "...pulmonary airway tests 5.3.02 show 'small airway obstruction and normal volume diffusion'..."

The Applicant testified that he told the officer he was blowing as hard as he could but did not ask for medical assistance.

The Applicant confirmed that his first visit to his physician, after the incident was February 1st 2002. The Applicant was subsequently referred for Pulmonary Function Tests, but had not been in the past. Further he does not require the use of an inhaler.

The Applicant explained to the Tribunal that he was unaware that page two of the Notice of Appeal required filling in by the physician.

On cross-examination the Applicant established for the Respondent's Counsel that he on occasion gets shortness of breath, the severity of which depends on the circumstances.

The Applicant asserted that he was not influenced by his past record and he had no motive not to provide a breath sample, and would have, had he been able to do.

Respondent's Evidence

The Respondent provided the following Documents:

1. Notice to Registrar numbered 2402201
2. Driving record of the Applicant

The Applicant's driver's record according to the Ministry of Transportation, showing several infractions since "77 03 28". (Exhibit #3)

In a letter dated May 1, 2002, Dr. Roger S. Goldstein, MB,ChB,FRCP(UK)FRCP(C) FCCP, Director of Program in Respiratory Rehabilitation - University of Toronto, states that he is a "...consultant respiratologist in practice since 1979 with particular interest in chronic respiratory conditions such as: asthma, emphysema and chronic bronchitis ...Director of the University of Toronto, Respiratory Divisional Program in Rehabilitation, ...medical advisor to the pulmonary function laboratories for over 16 years ...familiar with the Alcotest and the Intoxilyzer 5000C having evaluated both machines in ...Pulmonary function laboratory ...have tested both the portable and the station monitor among a variety of individuals (men and women) age range 44-77 years, vital capacity range 1.6 to 4.5 litres, FEV1 range 0.4 to 2.9 litres, FEV1/FVC range 20% to 78% ...The vast majority of individuals, even with an FEV1 of 0.7 are able to satisfactorily provide a breath sample notwithstanding their respiratory condition...".

Dr. Goldstein points out that in his "...opinion Physician #1 does not provide sufficient medical information to suggest that the Applicant could not provide a breath sample ...as a result of ...obesity and physical conditioning ...have tested many patients including obese and deconditioned individuals and have yet to encounter one whose lung function was limited to the extent of their not being able to provide the types of volumes or flow rates necessary for a breath alcohol test ...pulmonary function tests were carried out on March 5, 2002 and showed normal lung volumes and diffusion, small airway obstruction. In the presence of normal volumes and diffusion, small airway obstruction is extremely unlikely to be sufficient to prevent satisfactory breath sample..."

The Respondent called Police Officer #1, a Qualified Breathalyzer Technician, as a witness. Police Officer #1 testified that he has been with the Ontario Provincial Police – Aurora Detachment for six months, but has exercised "...general duties..." as a Police Constable for 12 years.

Police Officer #1 described the events that led to the Applicant being stopped and the subsequent demand for a breath sample.

The Applicant was given a total ten opportunities to provide a breath sample, but failed to do so. Each time the Applicant blew into the machine the screen registered and “E0” indicating that some air was going in but the Applicant was neither “...blowing hard enough, not hard enough.”

During his dealings with the Applicant at no time did Police Officer #1 observe the Applicant wheezing, or exhibiting any other symptoms of shortness of breath. No breathing difficulties were mentioned, nor medical assistance asked for, by the Applicant.

In closing the Applicant re-iterated that he wanted his licence back and emphasized he tried hard to provide a breath sample but was unable to do so.

In his closing remarks, the Respondent’s Counsel quoted Section 48.3 of the Act and suggested that according to Police Officer #1 the Applicant failed to provide a breath sample.

The Respondent’s Counsel referred to Physician #1’s letter and reviewed it against the comments of the Respondent’s expert witness, Dr. Roger Goldstein.

In conclusion the Respondent’s Counsel cited that in his opinion the Applicant had specific personal motives not to provide a breath sample.

APPLICATION OF THE LAW TO FACTS:

Prior to setting out the reasons for decision, the Tribunal will address the Respondent’s Counsel’s request regarding the use of the information imparted at this hearing. The Tribunal’s position is that since these proceedings are a matter of public record, and the Respondent’s Counsel did not ask the documents be sealed, the Tribunal has no way of controlling use of the information.

At issue is did the Applicant have a medical condition that could cause the Applicant to fail or not comply with the breath demand.

Section 50.1 (2) (b) of the *Highway Traffic Act* allows for an appeal in circumstances where a

*“...person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood **because he or she was unable to do so for a medical reason...**”*

The Applicant's Notice of Appeal is incomplete, in that page two of the Notice of Appeal has not been filled by the Applicant's family physician. Page 2 of the Notice of Appeal is an important piece of evidence that must form the foundation of any appeal under Section 50.1 (2) (b) of the *Highway Traffic Act*. The Applicant is hindered by the fact that he was not able to offer any viable justification for not requesting his physician to fill in the form. The Applicant simply stated that he was unaware of the requirement. Unfortunately, the Tribunal is left with a lack of knowledge regarding the Applicant's medical history.

As did the Respondent's Counsel, the Tribunal refers to Physician #1's letter as well as Dr. Goldstein's report.

Physician #1 alludes to the Applicant's "...upper respiratory tract infection..." and infers that "...he may not have been able to blow...". Dr. Goldstein is quite clear that he has reviewed the test results of various subjects in similar circumstances, i.e. obese and deconditioned and found that he has "...yet to encounter one whose lung function was limited to the extent of their not being able to provide the types of volumes or flow rates necessary for a breath alcohol test..."

In what appears to be Physician #1's own handwriting, Physician #1 adds that "...pulmonary airway tests 5.3.02 show 'small airway obstruction and normal volume diffusion'...". Dr. Goldstein counters that "...In the presence of normal volumes and diffusion, small airway obstruction is extremely unlikely to be sufficient to prevent satisfactory breath sample..."

With all due respect to Physician #1, he is not a respiratologist. Dr. Roger Goldstein is. The Tribunal must accept the evidence of the Respondent's expert, Dr. Roger Goldstein.

The Applicant has not provided the Tribunal with medical reports from any specialists. In fact, it appears that Physician #1, who has known the Applicant since 1998, did not feel that the Applicant's history was severe enough to warrant sending him to a specialist until March 2002. This premise is corroborated by the Applicant's own testimony that he did not carry an inhaler.

Since neither Physician #1, nor Dr. Goldstein was at the scene of the roadside breathalyser test session, the Tribunal also considered the evidence of Police Officer #1. At no time, was the Applicant observed in an afflicted breathing state, nor did the Applicant request medical assistance.

The Applicant's testimony was credible, but he failed to substantiate the basis for an appeal on medical grounds.

The onus being on the Applicant to establish the merit of the appeal, the Tribunal finds that the Applicant's testimony although credible, failed to substantiate the basis for an

appeal on medical grounds. Thus, the Tribunal finds that the Applicant does not meet the criteria of Section 50.1 (2) (b), in that he was not able to demonstrate that he suffers from a medical condition, which would prevent him from providing a breath sample.

DECISION:

Upon the application by The Applicant to appeal the suspension order dated January 30, 2002 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal **confirms** the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: May 9, 2002

1058-ADLS-NOMC

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: KENNETH W. KOPROWSKI
Presiding Member

APPEARANCES: PATRICK MOORE, Counsel for the Registrar of Motor Vehicles,
Applicant,
by written submissions only

DATE OF
HEARING: May 14, 2002

DECISION
RELEASED: May 15, 2002 Written

REASONS FOR DECISION

A written hearing was held on May 14, 2002, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that her appeal be decided by the Tribunal by way of a written hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated March 21, 2002, and was received by the Tribunal on March 22, 2002, together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

There were no preliminary matters.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice of Appeal, including medical report and photocopied excerpts
- b) Exhibit # 2 Letter of May 2, 2002, from Applicant.

By the Respondent:

- a) Exhibit # 3 Respondent's submissions

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath because she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

- 50.1(1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
 - (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
 - (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

- 15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
 - (a) the name, telephone number and address, with the postal code, of the medical practitioner;
 - (b) the name, date of birth and address of the person who is the subject of the report;
 - (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner.”

Finally, section 13 of Regulation 574 (amended) provides:

“A person appealing a suspension has the onus of establishing the merit of the appeal”.

FACTS:

On February 22, 2002, Police Constable #1 of the Hawkesbury Detachment of the Ontario Provincial Police stopped a vehicle being driven by the Applicant on City Road 17 in the Village of Alfred.

Constable #1, in her affidavit sworn April 24, 2002, states that the reason for stopping the vehicle was that the Applicant had driven her vehicle off the roadway a total of five times.

On approaching the vehicle, Constable #1 detected a strong odour of alcohol coming from the Applicant's breath. The Constable read to the Applicant the roadside screening device breath demand and took her to the police cruiser. The Constable started to explain the procedure for the screening device. At this point, the Applicant stated that she refused to blow into it.

On three further occasions, the Applicant stated that she refused to blow. She also accused the Constable of having tailgated her and of harassing her. There is no evidence before this Tribunal which could verify either of these two accusations.

Constable #1 also explained to the Applicant the consequences of not providing a breath sample and that a charge would result. The Applicant still refused to provide a breath sample.

Police Constable #2 then came upon the scene, at the request of Constable #1. Constable #2 again explained to the Applicant the consequences of refusing to provide a breath sample. Again, the Applicant refused.

Constable #1 then charged the Applicant with failing to provide a sample of her breath. The Constable served the Applicant with the Notice to the Registrar of the suspension of her licence. The Applicant refused to sign it.

The Applicant now appeals the suspension of her licence.

In her Notice of Appeal, Exhibit 1, the Applicant claims that she was unable to provide a breath sample because of a medical reason.

It is significant that, in the evidence before this Tribunal, the Applicant at no time stated to either police officer that there was a medical reason, or some impediment, for refusing to provide a breath sample. She simply stated to them that she refused to blow.

In support of her appeal, the Applicant has filed, as part of Exhibit 1, a medical Information sheet, dated March 21, 2002, and signed by Physician #1. Physician #1 states that the Applicant has been a patient of his for seven years. Physician #1 also states that the Applicant sees a rheumatologist for her fibromyalgia, and occasionally sees Physician #1 .

Physician #1 also states that the Applicant also takes amitriptyline, which, he says, can occasionally cause drowsiness.

Physician #1 had last seen the Applicant on June 6, 2001, slightly more than eight months before the Applicant was charged with refusing to provide a breath sample.

Significantly, there is nothing in the Doctor's report which provides any support for the Applicant's argument that she was unable, for a medical reason, to provide a breath sample on February 22, 2002. Nor, for that matter, does Physician #1 refer to any condition from which the Applicant suffers and which might impede her ability to provide a sample of her breath.

Physician #1 , in his report, also makes the statement: **"This condition, however, does not preclude various testing such as a breath sample."** (emphasis is added).

The Applicant, in Exhibit 2, states that, what the Doctor meant by that statement was that her medical condition "does not require test from his part while taking 'amitriptyline' such as a breath sample" (sic). The Applicant goes on to say, in Exhibit 2, that the medication, combined with alcohol, may produce a greater than expected impairment in psychomotor skills and may intensify this effect. She further states: **"This is the reason why I did not want to take the test."**(emphasis is added).

The Applicant also filed photocopies of excerpts from different publications concerning the drug, "amitriptyline." The Compendium of Pharmaceuticals and Specialties (CPS 2002) is one of them. They are included as part of Exhibit 1. The Applicant did not refer to anything specific in any of the excerpts. Nor does Physician #1 refer to them in his report.

On reading the excerpts, it certainly appears that one of the side effects of amitriptyline is that it may impair mental and/or physical abilities required for performing hazardous tasks such as operating machinery or driving a motor vehicle.

Physician #1 , in his report, suggested only that amitriptyline may cause the Applicant drowsiness, but suggests nothing more.

Nowhere in the materials submitted by the Applicant does it state that the Applicant would be unable to provide a sample of breath into a roadside screening device.

APPLICATION OF THE LAW TO FACTS:

With respect, this Tribunal cannot accept the Applicant's submissions as being evidence to substantiate her inability to provide a breath sample for a medical reason. The evidence of Constable #1, and the Applicant's own letter, Exhibit 2, paint a picture of a person who was "unwilling" to provide a breath sample, not of a person who was "unable" to do so. At no time while the several demands were made to provide a breath sample did the Applicant offer any reason for her inability to provide one.

There is no evidence which would permit this Tribunal to conclude that the Applicant was unable to provide the required breath sample because of a medical reason.

Consequently, the Applicant has not satisfied her onus of establishing the merit of this Appeal.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated February 22, 2002, of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Kenneth Koprowski
Presiding Member

RELEASED: May 15, 2002

1075361 ONTARIO LTD. O/A SOLAREX TRAVEL

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
1075361 ONTARIO LTD. O/A SOLAREX TRAVEL
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: February 11, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

1075361 ONTARIO LTD. O/A SOLAREX TRAVEL

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by 1075361 Ontario Ltd. o/a Solarex Travel, the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

David J. Hunt
Vice-Chair

Released: May 14, 2002

LICENCE APPEAL TRIBUNAL

BETWEEN:

1075361 ONTARIO LTD. O/A SOLAREX TRAVEL

Applicant

- and -

REGISTRAR, TRAVEL INDUSTRY ACT

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

BACKGROUND

1. 1075361 Ontario Ltd. o/a Solarex Travel (hereinafter referred to as "the Registrant") is a company incorporated pursuant to the laws of Ontario and has been registered under the *Travel Industry Act*, R.S.O., c. T-19, as amended (hereinafter referred to as "the Act") as a travel agent (registration number 4398129/R) since October 10, 1995. The Registrant's fiscal year end is July 31st.

FINANCIAL STATEMENTS – GROUNDS FOR THE PROPOSAL

2. Subsection 24(2) of Ontario Regulation 806/93 made under the Act (hereinafter referred to as "the Regulation") states that if a registrant had sales of less than \$10 million during the previous fiscal year, the registrant shall file within three months of the end of the fiscal year annual financial statements with a review engagement report by a public accountant licensed under the *Public Accountancy Act*.
3. By letter dated July 12, 2001, the Registrant was requested by the Travel Industry Council of Ontario ("TICO") to file financial statements for the fiscal year ending July 31, 2001 by October 31, 2001.
4. On November 6, 2001, a second request was sent to the Registrant, providing the Registrant with a deadline to submit the required filing by November 30, 2001.
5. By letter dated December 3, 2001, the Registrar, *Travel Industry Act* issued a final due date of December 11, 2001 for the Registrant's July 31, 2001 financial statements, failing which the Registrant was advised that a proposal to revoke its registration would be issued.
6. On December 14, 2001, TICO received a telephone call from the Registrant advising that everything was with the Accountant and estimating that the financial statements would be submitted by mid January 2002.
7. On February 4, 2002, TICO telephoned the Registrant to advise that financial statements had not been received and was advised that the company had not been getting its mail. TICO advised the Registrant of the December 14, 2001 conversation. The Registrant indicated that it would contact its accountant to see when financial statements would be ready for submission.

8. On February 5, 2002, the Registrant indicated that it did not have the funding to pay the accountant.
9. By February 11, 2002, the Registrant failed to file its financial statements. On that date, the Registrar, *Travel Industry Act* issued a Proposal to Revoke the Registrant's registration.
10. To date, the Registrant has not filed its financial statements for its fiscal year ended July 31, 2001 in accordance with subsection 24(2) of the Regulation.

EVENTS SINCE THE ISSUANCE OF THE PROPOSAL - LATE FORM 1 FILING

11. Section 47 of the Regulation states that within forty-five days after the end of the Registrant's fiscal year and fiscal half-year the Registrant shall make payments to the Ontario Travel Industry Compensation Fund and said payment shall be accompanied by a completed return, in the form ("Form 1") provided by TICO indicating the sales of the Registrant for the reporting period and the amount owing to TICO.
12. To date, the Registrant has not filed its Form 1 with the corresponding payment to TICO, for its fiscal half-year ended January 31, 2002, which was due by March 15, 2002.
13. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsections 6 (4) and (5) of the *Travel Industry Act* directing that:

1. the Registrar refrain from carrying out the Proposal to Revoke Registration dated February 11, 2002;
2. the Registrant's registration is to be subject to the following terms and conditions:
 - (e) the Registrant shall file its Form 1 with the corresponding payment to TICO, for its fiscal half-year ended January 31, 2002, which was due by March 15, 2002, by June 15, 2002;
 - (f) the Registrant shall file complete financial statements as required by section 24 of the Regulation, for its fiscal year ended July 31, 2001, no later than June 15, 2002;
 - (g) If the above-noted financial statements as submitted reveal an insufficient working capital amount or are otherwise deficient, the Registrant will have 30 days from the date of notice of the amount of the deficiency to fully and completely address any deficiency and produce proof of such correction to the Registrar. Thereafter, the Registrant shall maintain the minimum working capital in accordance with section 25 of the Regulation or such subsequent provision as may be in force from time to time. Notice of the deficiency, if any, shall be sent by facsimile, registered mail, or courier to the Registrant;
 - (h) The Registrant shall file complete financial statements as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for its fiscal year ending July 31, 2002, no later than October 31, 2002;
 - (i) The Registrant shall file complete financial statements as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for its fiscal year ending July 31, 2003, no later than October 31, 2003;
 - (j) the Registrant shall file its Form 1 with the corresponding payment to TICO, for its fiscal year ending July 31, 2002 by September 15, 2002 ;

- (k) the Registrant shall file its Form 1 with the corresponding payment to TICO, for its fiscal half-year ending January 31, 2003 by March 15, 2003; and
 - (l) the Registrant shall file its Form 1 with the corresponding payment to TICO, for its fiscal year ending July 31, 2003 by September 15, 2003.
3. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) to (h) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via facsimile transmission, courier or registered mail.
 4. The Registrar shall provide the Registrant with written reminder that its filings identified in paragraphs (2) (d) to (h) inclusive are due at least 30 days in advance of their respective due dates. Such reminder shall be sent via facsimile transmission, courier or registered mail.
 5. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by its signature below that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED this ____ day of May, 2002

Ms Nadia Palos
1075361 Ontario Ltd.
I have authority to bind the corporation

Mr. Michael Pepper
Registrar, *Travel Industry Act*

FIRST CLASS TRAVEL LTD.

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
FIRST CLASS TRAVEL LTD.
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: February 11, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

FIRST CLASS TRAVEL LTD.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by First Class Travel Ltd., the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

David J. Hunt
Vice-Chair

Released: May 14, 2002

LICENCE APPEAL TRIBUNAL

BETWEEN:

FIRST CLASS TRAVEL LTD.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

BACKGROUND

1. First Class Travel Ltd. (hereinafter referred to as "the Registrant") is a company incorporated pursuant to the laws of Ontario and has been registered under the *Travel Industry Act*, R.S.O., c. T-19, as amended (hereinafter referred to as "the Act") as a travel agent (registration number 50007307/R) since January 18, 2000. The Registrant's fiscal year end is August 31st.

FINANCIAL STATEMENTS – GROUNDS FOR THE PROPOSAL

2. In or about March 2201, First Class Travel filed a police report in which it reported that its premises were burgularized and its computer systems containing all of its electronic records were stolen.
3. In or about March 2001 the Registrant filed a claim with its insurer Wawanesa to cover business interruption, among other things.
4. Thus far, Wawanesa has failed or otherwise refused to pay the Registrant's business interruption claim.
5. As a result, the Registrant commenced an action in the Ontario, Superior Court of Justice, which action remains pending.
6. Subsection 24(2) of Ontario Regulation 806/93 made under the Act (hereinafter referred to as "the Regulation") states that if a registrant had sales of less than \$10 million during the previous fiscal year, the registrant shall file within three months of the end of the fiscal year annual financial statements with a review engagement report by a public accountant licensed under the *Public Accountancy Act*.
7. By letter dated July 24, 2001, the Registrant was requested by the Travel Industry Council of Ontario ("TICO") to file financial statements for the fiscal year ending August 31, 2001 by November 30, 2001.

8. As at August 31, 2001, the electronic records had not been reconstructed and financial statements provided to the auditor.
9. On December 18, 2001, a second request was sent to the Registrant, providing the Registrant with a deadline to submit the required filing by December 31, 2001.
10. As at December 31, 2001, the reconstruction and auditing process had not been completed.
11. By letter dated January 11, 2002, the Registrar, *Travel Industry Act* issued a final due date of January 21, 2002 for the Registrant's financial statements, failing which the Registrant was advised that a proposal to revoke its registration would be issued.
12. On February 1, 2002, TICO telephoned the Registrant, who advised that the financial statements would be submitted the following week.
13. By February 11, 2002, the Registrant failed to file its financial statements. On that date, the Registrar, *Travel Industry Act* issued a Proposal to Revoke the Registrant's registration.
14. Financial information relevant to the preparation of the Review Engagement Report was supplied to a Chartered accountant in or about February 2002.
15. On May 12, 2002, the Registrant filed its financial statements for its fiscal year ended August 31, 2001, which were due by November 30, 2001. TICO's review of the financial statements revealed that the Registrant had a working capital shortfall as of August 31, 2001.

EVENTS SINCE THE ISSUANCE OF THE PROPOSAL - LATE FORM 1 FILING

16. Section 47 of the Regulation states that within forty-five days after the end of the Registrant's fiscal year and fiscal half-year the Registrant shall make payments to the Ontario Travel Industry Compensation Fund and said payment shall be accompanied by a completed return, in the form ("Form 1") provided by TICO indicating the sales of the Registrant for the reporting period and the amount owing to TICO.
17. To date, the Registrant has not filed its Form 1 with the corresponding payment to TICO, for its fiscal half-year ended February 28, 2002, which was due by April 15, 2002.

COMPLIANCE HISTORY – LATE FILING

18. The Registrant's financial statements for its fiscal year ended August 31, 2000, which were due by November 30, 2000, were not filed until April 19, 2001
19. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsections 6 (4) and (5) of the *Travel Industry Act* directing that:

1. the Registrar refrain from carrying out the Proposal to Revoke Registration dated February 11, 2002;
2. the Registrant's registration is to be subject to the following terms and conditions:
 - (m) the Registrant will have until July 15, 2002 to provide proof to the satisfaction of the Registrar that it has corrected the working capital deficiency reflected in its August 31, 2001 financial statements;

- (n) If the above-noted financial statements as submitted reveal an insufficient working capital amount or are otherwise deficient, the Registrant will have 30 days from the date of notice of the amount of the deficiency to fully and completely address any deficiency and produce proof of such correction to the Registrar. Thereafter, the Registrant shall maintain the minimum working capital in accordance with section 25 of the Regulation or such subsequent provision as may be in force from time to time. Notice of the deficiency, if any, shall be sent by registered mail to the Registrant;
 - (o) The Registrant shall file complete financial statements as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for its fiscal year ending August 31, 2002, no later than November 30, 2002;
 - (p) The Registrant shall file complete financial statements as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for its fiscal year ending August 31, 2003, no later than November 30, 2003;
 - (q) the Registrant shall file its Form 1 with the corresponding payment to TICO, for its fiscal half-year ended February 28, 2002, which was due by April 15, 2002, by June 15, 2002;
 - (r) the Registrant shall file its Form 1 with the corresponding payment to TICO, for its fiscal year ending August 31, 2002 by October 15, 2002 ;
 - (s) the Registrant shall file its Form 1 with the corresponding payment to TICO, for its fiscal half-year ending February 28, 2003 by April 15, 2003; and
 - (t) the Registrant shall file its Form 1 with the corresponding payment to TICO, for its fiscal year ending August 31, 2003 by October 15, 2003;
 - (u) the Registrant agrees that the Registrar shall hold TICO's \$10,000.00 security until such time as the Registrant has demonstrated to the Registrar that it is meeting the working capital and filing requirements of the Regulation.
3. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) to (h) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.
4. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by its signature below that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED this ____ day of May, 2002

Ms Yvonne Lea
First Class Travel Ltd.
I have authority to bind the corporation

Mr. Michael Pepper
Registrar, *Travel Industry Act*

TIGELAAR CONSTRUCTION LTD.

PREHEARING

TIGELAAR CONSTRUCTION LTD.

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*
TO SUSPEND REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

MARTIN TIGCHELAAR, Agent representing the Applicant
CAROL STREET, Counsel, representing the Ontario New Home
Warranty Program

DATE OF

PREHEARING: May 17, 2002

Toronto

ORDER

FOLLOWING attendances on May 17, 2002 at a prehearing before this Tribunal of Martin Tigchelaar, Agent, appearing on behalf of Tigelaar Construction Ltd. (the "Applicant"), and Carol Street, Counsel on behalf of the Ontario New Home Warranty Program (the "Program");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Thursday, June 13, 2002 at the Tribunal's Chambers, 1 St. Clair, Avenue West, 12th Floor, Toronto, Ontario and to continue if necessary on June 14, 2002 at the Tribunal's above chambers;

1. The Parties to the hearing are the Applicant and the Program.
- 2.a) The Applicant must serve the Program and the Attorney General, and file with the Tribunal, on or before May 28, 2002 the following:

- i) The particular provisions of any legislation, regulations, bylaws, and/or the impugned Vendor and Builders Agreements that the Applicant says infringes the Charter.
 - ii) The sections of the Charter that the Applicant says are infringed, and how they are infringed.
 - iii) The evidence, in affidavit form, that the Applicant relies upon in support of i) and ii);
 - iv) The remedy the Applicant seeks from the Tribunal;
 - v) A statement of issues, fact and law that summarizes the Applicant's Charter challenge.
- 2. b) The Program must serve the Applicant, the Attorneys General of Ontario and of Canada and file with the Tribunal on or before June 4, 2002 the following:
 - i) The evidence, in affidavit form, on which the Program relies in defending the Applicant's Charter challenge;
 - ii) A statement of issues, fact and law that summarizes the Program's response and defence to the Applicant's Charter challenge.
- 2. c) Either party may cross-examine the deponents of the opposing party's affidavits. These cross-examinations must take place on June 10, 2002. Transcripts of the cross-examinations must be provided to opposing counsel and filed with the Tribunal on or before June 12, 2002. No viva voce evidence will be heard by the Tribunal at the hearing with respect to Charter issues unless permitted by the Tribunal.
- 2. d) If either party fails to comply with paragraphs 3(a) through 3(c) above, the Tribunal will not hear submissions from such party regarding the Charter issues.
- 3. All parties to the hearing shall fully comply with the requirements of disclosure of documents or things as set forth in Rule 6.3 of the Rules of Practice of the Tribunal. All parties shall also fully comply with the disclosure requirements set forth in Rule 6.4 of the Rules of Practice of the Tribunal dealing with expert witnesses.

4. There was no settlement of any of the issues dealt with in the Registrar's Notice of Proposal and those issues remain to be decided at the hearing.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: May 17, 2002

1190467 ONTARIO LTD. OPERATING AS A1 CAR SALES, 1296945 ONTARIO INC.
AND ADE TAITLBAUM

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF THE
MOTOR VEHICLE DEALERS ACT

TO REVOKE REGISTRATIONS

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

ADE TAITLBAUM, Agent, representing himself and 1190467
Ontario Ltd. operating as A1 Car Sales and 1296945 Ontario Inc.
A. MICHAEL ROTHE, Counsel, representing the Registrar, *Motor
Vehicle Dealers Act*

DATE OF
HEARING: May 21, 2002 Toronto

ORDER

WHEREAS the Registrar under the *Motor Vehicle Dealers Act* (the "Respondent") issued a Proposal dated January 8, 2002 to revoke the registrations of 1190467 Ontario Ltd. operating as A1 Car Sales, 1296945 Ontario Inc. and Ade Taitlbaum (the "Applicants");

AND WHEREAS pursuant to the provisions of the *Motor Vehicle Dealers Act*, Section 7(4) a hearing to consider the Proposal dated January 8, 2002 was scheduled to take place before this Tribunal at 9:30 a.m. on May 21, 2002 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario;

AND WHEREAS the Applicants' former legal advisor informed the Applicants that the hearing to consider the Registrar's Proposal would not take place on May 21, 2002, but would take place on June 21, 2002;

AND WHEREAS Counsel for the Respondent maintained that he at no time agreed to the hearing being adjourned from May 21, 2002 to June 21, 2002, and that the date for hearing remained as May 21, 2002;

AND WHEREAS the Applicants were not present nor represented when at 9:30 a.m. on May 21, 2002 the hearing commenced into the Respondent's Proposal;

AND WHEREAS Ade Taitlbaum was informed by telephone at 9:40 on May 21, 2002 that the hearing to consider the Respondent's Proposal had been recessed until 11 a.m. on May 21, 2002 so as to enable him to appear before the Tribunal;

AND WHEREAS Ade Taitlbaum did appear before the Tribunal at 11 a.m. on May 21, 2002 and advised the Tribunal that he had been informed by his previous legal advisor that the hearing to consider the Respondent's Proposal had been adjourned until June 21, 2002;

AND WHEREAS Ade Taitlbaum advised the Tribunal that he was presently without legal representation and was not able or prepared to conduct the Applicants' defence to the Proposal;

AND WHEREAS by virtue of the circumstances, it was agreed by consent of the Applicants and the Respondent, that the hearing be adjourned peremptorily against the Applicants, to August 8, 2002 at 9:30 a.m. at the Tribunal's aforementioned premises;

AND WHEREAS by further consent of the Applicants and the Respondent, it was agreed that pending the outcome of the hearing to consider the Respondent's Proposal, the registrations, as motor vehicle dealers, of 1190467 Ontario Ltd. operating as A1 Car Sales and 1296945 Ontario Inc. shall be and remain suspended;

AND WHEREAS Ade Taitlbaum acknowledged that his registration as a motor vehicle salesperson, while not suspended, required the authorization of the Respondent in order to be transferred to another motor vehicle dealer;

NOW THEREFORE, upon the consent of the Applicants and the Respondent, this Tribunal orders that:

1. the hearing of this matter be adjourned peremptorily against the Applicants to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto at 9:30 a.m. on Thursday, August 8, 2002, and
2. pending the outcome of the hearing to consider the Respondent's Proposal, the registrations, as motor vehicle dealers, of 190467 Ontario Ltd. operating as A1 Car Sales and 1296945 Ontario Inc. shall be and remain suspended

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: May 22, 2002

SKINNER

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
GREGORY SKINNER AND CATHERINE SKINNER

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

GREGORY SKINNER AND CATHERINE SKINNER

Applicant

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

CHRIS JOHNSON & ASSOCIATES LTD.

Added Party

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter
on July 3 and 4, 2002;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing
peremptory against all parties to commence at the Tribunal's Chambers, 1 St. Clair
Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Tuesday, July 23, 2002 and
to continue July 24, 2002, if necessary.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: May 21, 2002

DIAMOND

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
ARTHUR DIAMOND

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: May 8, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

ARTHUR DIAMOND

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Arthur Diamond, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: May 22, 2002

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
789 Don Mills Road, Suite 800
Toronto, Ontario M3C 1T5

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Arthur Lee Diamond
25 Dewlane Drive
Willowdale, ON M2R 2P7

Pursuant to subsection 5(2) of the *Motor Vehicle Dealers Act* Arthur Lee Diamond (hereinafter referred to as "the Applicant") and the Registrar, *Motor Vehicle Dealers Act*, (hereinafter referred to as "the Registrar"), in accordance with section 4.1 of the *Statutory Powers Procedure Act*, do hereby waive the requirements of a hearing and consent to an Order of the Licence Appeal Tribunal based upon the following Terms and Conditions:

1. The Applicant agrees, if he is charged in the future, to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.
2. The Applicant agrees if he is convicted under any law of an industry specific offence or if he is convicted under the Criminal Code, the Registrar is directed to and shall carry out the proposal.
3. The Applicant agrees that he will not transfer his registration as a salesperson under the *Motor Vehicle Dealers Act* to another dealer. Should the Applicant wish to transfer his registration, he will be required to submit a new application for registration.
4. The Applicant agrees not to be involved in the process of buying, selling or leasing motor vehicles without the benefit of registration.
5. The Applicant shall not be an officer, director, owner or partner in a dealership.
6. The Applicant confirms that the circumstances surrounding the convictions are substantially as disclosed to the Registrar.
7. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.
8. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.
9. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
10. The Applicant will provide a copy of this order to his employer forthwith.

11. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
12. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
13. The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of this day of 2002.

Arthur Diamond (signature)

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Date:

Carl Compton
Registrar
Motor Vehicle Dealers Act

SCENNA FUNERAL HOMES LTD.

FUNERAL DIRECTORS AND ESTABLISHMENTS ACT
Revised Statutes of Ontario, 1990, Chapter F.36

IN THE MATTER of the REGISTRATION of
SCENNA FUNERAL HOMES LTD.
as a funeral establishment

AND IN THE MATTER OF the PROPOSAL of the
Registrar under the *Funeral Directors And Establishments Act*
made pursuant to section 22(1) of the *Funeral Directors And Establishments Act*

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

SCENNA FUNERAL HOMES LTD.

Applicant

-and-

REGISTRAR, *FUNERAL DIRECTORS AND ESTABLISHMENTS ACT*

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Funeral Directors And Establishments Act*, R.S.O. 1990, Chapter F.36 as amended (the "Act"), Scenna Funeral Homes Ltd. (the "Applicant") initiated an appeal under section 22(4) of the proposal of the Registrar under the Act, dated April 3, 2002 in terms of which the Registrar proposed to revoke registration of the Applicant as a funeral establishment;

AND WHEREAS, the Applicant has failed to pay the filing fee for this proceeding before the Tribunal, required pursuant to section 7 of the *Licence Appeal Tribunal Act*, 1999;

AND WHEREAS, the Applicant has not responded to the Tribunal's Notice of Intent to Dismiss Proceedings sent to the Applicant pursuant to section 4.6 of the *Statutory Powers Procedures Act*, R.S.O. 1990, Chapter S. 22 as amended, and Rule 2.10 of the Rules of Practice of the Licence Appeal Tribunal, whereby a proceeding before this Tribunal may be dismissed without a hearing for failure to pay the required filing fee;

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers and Procedures Act*, as amended, this proceeding, initiated by the Applicant's request for a hearing before this Tribunal, is dismissed;
2. Pursuant to the authority vested in it under section 22 of the *Funeral Directors And Establishments Act*, this Tribunal directs the Registrar, *Funeral Directors And Establishments Act* to carry out his proposal dated April 3, 2002 to revoke the registration of Scenna Funeral Homes Ltd..

LICENCE APPEAL TRIBUNAL

Carl F. Dombek,
Chair

Released: May 15, 2002

SCENNA

FUNERAL DIRECTORS AND ESTABLISHMENTS ACT
Revised Statutes of Ontario, 1990, Chapter F.36

IN THE MATTER of the REGISTRATION of
JOHN M. SCENNA
as a funeral director

AND IN THE MATTER OF the PROPOSAL of the
Registrar under the *Funeral Directors And Establishments Act*
made pursuant to sections 22(1) and 24(1) of the *Funeral Directors And Establishments Act*

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

JOHN M. SCENNA

Applicant

-and-

REGISTRAR, *FUNERAL DIRECTORS AND ESTABLISHMENTS ACT*

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Funeral Directors And Establishments Act*, R.S.O. 1990, Chapter F.36 as amended (the "Act"), John M. Scenna (the "Applicant") initiated an appeal under section 22(4) of the proposal of the Registrar under the Act, dated April 3, 2002 in terms of which the Registrar proposed to refuse to renew the registration of the Applicant as a funeral director and to immediately suspend the Applicant's funeral director's licence;

AND WHEREAS, the Applicant has failed to pay the filing fee for this proceeding before the Tribunal, required pursuant to section 7 of the *Licence Appeal Tribunal Act*, 1999;

AND WHEREAS, the Applicant has not responded to the Tribunal's Notice of Intent to Dismiss Proceedings sent to the Applicant pursuant to section 4.6 of the *Statutory Powers Procedures Act*, R.S.O. 1990, Chapter S. 22 as amended, and Rule 2.10 of the Rules of Practice of the Licence Appeal Tribunal, whereby a proceeding before this Tribunal may be dismissed without a hearing for failure to pay the required filing fee;

NOW THEREFORE, this Tribunal orders that:

3. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers and Procedures Act*, as amended, this proceeding, initiated by the Applicant's request for a hearing before this Tribunal, is dismissed;
4. Pursuant to the authority vested in it under section 22 of the *Funeral Directors And Establishments Act*, this Tribunal directs the Registrar, *Funeral Directors And Establishments Act* to carry out his proposal dated April 3, 2002 to refuse to renew the registration of John Scenna as a funeral director and to immediately suspend John Scenna's funeral director's licence.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek,
Chair

Released: May 15, 2002

YANG and TSUI

MIAN YUN YANG AND KUEN KUEN TSUI

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE *ONTARIO NEW
HOME WARRANTIES PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL: TERENCE A. WARDROP Q.C., Vice Chair

APPEARANCES:

MIAN YUN YANG, Applicant, on behalf of himself and Kuen
Kuen Tsui
KAREN SPECTOR, Counsel, representing the Ontario New Home
Warranty Program
RICHARD COSTIGAN, Agent, representing the Added Party,
EastPine Kennedy Steeles Limited Partnership

DATE OF
HEARING:

February 25 and 26, 2002

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an Appeal by the Applicants, Mian Yun Yang and Kuen Kuen Tsui (the “Applicants”) pursuant to their Request for a Hearing dated July 27, 2001, (the “Notice of Appeal”) to the Licence Appeal Tribunal (the “Tribunal”), from a decision of the Respondent, Ontario New Home Warranty Program (the “Program”) which denied their claim in its Decision Letter dated July 13, 2001, (the “Program’s Decision”). The Applicants are appealing pursuant to Section 16(2) and (3) of the *Ontario New Home Warranties Plan Act* (the “Act”), R.S.O. 1990. Ch. 0.31 and base their claim on the provisions of Section 13(1) and clauses (b) and (c) of Section 14(1) of the Act.

The Applicants, by a letter to Eastpine Steels Kennedy Limited Partnership dated December 18, 1999, (the "Original Complaint") a copy of which was sent to the Program, claimed that the vendor/builder, EastPine Kennedy Steeles Limited

Partnership (the "Builder") was in breach of several of its warranties to construct the new home at 47 Eastpine Drive, Markham, Ontario (the "home"), which it contracted to build on Lot #11, Plan #65M-3297 in a workmanlike manner and free from defects in material, and also that the home was free of major structural defects, as part of the Agreement of Purchase and Sale entered into between the Builder, as vendor, and the Applicants, as purchasers, dated June 3rd, 1999 (the "Agreement"). The Applicants and the Builder closed the transaction contemplated in the Agreement pursuant to its terms and took possession of the home on November 18, 1999.

Correspondence, reports and documentation between the Applicants, the Program and the Builder since the date of the Agreement are contained within the five volumes of the "Book Of Documents Of The Ontario New Home Warranty Program" and cover some 202 separate items under Tabs 1 - 202, and these five volumes were entered as Exhibits #4 to #8, inclusive, at the hearing. Included in these Exhibits was a copy of the Program's Decision, the Notice of Appeal, the Agreement and the Original Complaint. This correspondence, reports and documentation reveal in general a voluminous amount of discussion, personal meetings and time was spent by the parties in an effort to resolve the issues raised by the Original Complaint, including the conciliation services provided by the Program and the necessary inspections (and re-inspections) of the home.

A prehearing consultation was scheduled and heard by the Tribunal on October 29, 2001, from which a prehearing Order was released dated October 31, 2001 (the "Prehearing Order"). The Prehearing Order reduced to twenty-nine the number of issues between the Parties in addition to redefining those issues by ordering a further inspection of the home on November 1, 2001.

At the hearing, one of the Applicants, Mian Yun Yang, gave evidence on behalf of the Applicants but, subsequent to the first day of the hearing, his evidence was interrupted by brief settlement discussions between the Parties which yielded a resolution of all issues between the Parties.

Counsel for the Respondent stated that as a result of such discussions, in consideration of the payment of \$ 3,210.00 to the Applicants, a Full and Final Release dated February 26, 2002, had been executed by the Applicants which was entered in evidence as an Exhibit. It was proposed by all Parties that no further evidence would be produced or testimony given at the hearing save for the filing of the Exhibits already produced and entered as evidence.

DECISION AND ORDER:

Subsequent to hearing from the Applicants, the Added Party and Counsel for the Respondent, the Tribunal gave an oral decision subject to the release of this written order.

Accordingly, this Tribunal, pursuant to the authority vested in it by section 16(3) of the Act:

1. Directs the Respondent to pay to the Applicants the sum of \$3,120.00; and
2. Orders that the claims as set out in the Notice of Appeal be dismissed due to the withdrawal by the Applicants of the Notice of Appeal.

LICENCE APPEAL TRIBUNAL

Terence A. Wardrop, Q.C.,
Vice-Chair

RELEASED: May 13, 2002

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

724471 ONTARIO LIMITED and
HANS & JO CONSTRUCTION LTD.

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE *ONTARIO NEW
HOME WARRANTIES PLAN ACT*

TO SUSPEND REGISTRATION

TRIBUNAL: DOUGLAS MACKINTOSH, Vice-Chair

APPEARANCES: CAROL STREET, representing the Registrar, Ontario New Home
Warranty Program
ANS VAN DEN HANENBERG representing the two Applicants

DATE OF HEARING: May 21, 2002

Ottawa

ORDER

BACKGROUND:

It was agreed by the parties that the hearing for the two Applicant Companies would be heard together as the issues in both cases are identical and the signing authority is the same for both companies.

The hearing commenced and evidence was given by Gregory Baker, Vice-President of Risk Management of the Program. His department deals in the development of policy and he explained the contested changes now in force.

In April 2000 the Program introduced two new agreements, one which has to be signed by vendors of new homes and the other by builders of new homes. The two agreements replaced a shorter prior version which covered both vendors and builders.

Although the terms in the new agreements are unilaterally imposed by the Program, much of the content is taken directly from the sections and regulations of the *Ontario New Home Warranties Plan Act* while other parts were introduced only after long consultations with the industry which was done through a Liaison Committee drawn from the Ontario Home Builders' Association and the Program.

There are, he said, 4,700 registrants, all of whom, except three or four, have signed the new agreement.

From the documentary evidence submitted it is clear that the enterprise concerned here, which has been conducted under different names, has an exceptional record without blemish since 1978. But when the new vendor and builder agreements came into force, both Companies signed but made them subject to a number of conditions unacceptable to the Program.

However, after hearing the evidence from Gregory Baker and taking into account the documents submitted, application was made to the Tribunal by the Applicants, represented by Mrs. van den Hanenberg, and by counsel for the Program for the issuance of a consent order.

This order is to be based on the commitment made to the Tribunal by Mrs. Van den Hanenberg that her signature on the Agreements is to bind the two Applicant Companies without being subject to any added conditions.

In addition, Counsel for the Program agreed to make the following recommendations to the Program:

- (i) to try to get with the Vice-President of Licensing and Underwriting to follow a more consistent approach with respect to the provision of financial security for houses being built with private septic systems;
- (ii) to recommend in such cases that the Program continue to waive security requirements for both Applicant Companies, it being understood that the ultimate decision will be made by the Program.
- (iii) to ensure that the renewal forms for registration be sent to both Applicant Companies;
- (iv) to find out whether the Program's intention was to remove Jo Jensen as a guarantor and to get the Program to provide a letter confirming the situation.

DECISION AND ORDER:

Accordingly, this Tribunal, pursuant to the authority vested in it by section 9(4) of the *Ontario New Home Warranties Plan Act* directs that:

1. The Ontario New Home Warranty Program will withdraw its proposal to suspend the registrations of the two Applicant Companies, and
2. The Ontario New Home Warranty Program accepts the commitment made to the Tribunal that the two Applicant Companies are bound by the terms of the vendor and builder agreements as signed but without being subject to any conditions added by the Applicant Companies.

LICENCE APPEAL TRIBUNAL

Douglas Mackintosh,
Vice-Chair

RELEASED: May 27, 2002

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

917-MED-CARD

**Appeal under section 50(1) of the *Highway Traffic Act*,
R.S.O. 1990, Chap. H.8 as amended, from a Decision of
the Minister pursuant to section 32(12)(b)(i) of that Act.**

TO CHANGE THE CLASS OR CLASSES OF MOTOR VEHICLE IN RESPECT OF WHICH THE LICENCE WAS ISSUED

TRIBUNAL: ROSS C. BENNETT, M.D., Presiding Member

APPEARANCES: LUBA NEUWIRTH,
Representative for the Registrar of Motor Vehicles

Applicant
Counsel for Applicant

DATE OF
HEARING: May 22, 2002 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Minister (the "Respondent") pursuant to section 32(12)(b)(i) of the *Highway Traffic Act* (Ontario).

EXHIBITS:

Exhibit # 1 - Notice of Appeal from the Applicant to the Ministry dated December 20, 2001

Exhibit # 2 - Notice of downgrading of the Applicant's driver's licence dated October 19, 2001

Exhibit # 3 - Copy of Medical Report from Physician #1 dated August 28, 2001

Exhibit # 4 Copy of Medical Report from Physician #1 dated November 27, 2001

Exhibit # 5 - Supplementary Document Brief submitted by Applicant's Counsel

- (1) Notice of Appeal
- (2) Curriculum Vitae of Physician #1
- (3) Canadian Cardiovascular Society Consensus Conference- 1996 Update

(4) Report of Physician #2 dated May 1, 2002

Exhibit # 6- Tabulated File (1-9) from the Ministry received at the Tribunal January 8, 2002

PRELIMINARY MATTERS:

Counsel for the Applicant requested permission for Physician #1, the Applicant's primary Cardiologist, to attend the Hearing and to provide evidence.

FACTS:

The Applicant, a 47 year old truck driver and owner of a Septic Services Company, had his "AZM" driver's licence suspended on July 12, 2001 after applying for an annual renewal of his licence. The Applicant had informed the Ministry that he was under treatment for congestive heart failure as a complication of cardiomyopathy.

On October 17, 2001 the Ministry notified the Applicant that his licence had now been downgraded to a "GM" status, since he no longer met the medical requirements for a commercial "A" licence according to standards set by the Canadian Cardiovascular Society.

Physician #1 informed the Ministry, in his Medical Report of August 28, 2001 (exhibit # 3), that the Applicant's atrial fibrillation and congestive heart failure had been successfully treated and his heart had been in sinus rhythm since January 2001. He stated that the Applicant had a one-year history of dilated cardiomyopathy with normal coronary arteries.

The Medical Advisory Committee remained concerned that the Left Ventricular ejection fraction, a measurement used by the Canadian Cardiovascular Society (CCS), was only 28%. With therapy, it had increased from 21% to 28%, but the CCS recommendation was a minimum of 35%. Physician #1 hoped the ejection fraction would improve with more medication.

In Physician #1's Medical Report of November 27, 200 (exhibit # 4), he states that the Applicant has dilated cardiomyopathy that is non ischemic and has been quite stable on medical management. His LV ejection fraction was now up to 31%. According to CCS standards concerning fitness to drive parameters, he would have a class II ventricle.

Based on his stable clinical status, his reasonably well preserved left ventricular function and his exercise performance, Physician #1 believes there is no cardiac contraindication to him having his commercial licence and he would be supportive of a medical waiver.

On December 11, 2001 the Applicant's family physician sent a Medical Report, which reiterated Physician #1's statements and recommendations.

A MAC case study on December 27, 2001 recommended denying waiver to class "A" licence, because the Applicant did not meet CCS standards. It was felt the LV ejection fraction of 31% puts him at a Class III, which is not sufficient.

Physician #1 then referred the Applicant to Physician #2, an associate at the Toronto General Hospital, who is also a Professor of Medicine at the University of Toronto and specializes in Cardiac Electrophysiology. Physician #2's report (exhibit #5, tab 4) concludes that the Applicant's arrhythmia does not pose a significant commercial driving risk and he hopes the Ministry of Transportation will take this into consideration when reviewing his licence status.

ISSUES:

Should the decision of the Minister to change the class or class of motor vehicles in respect of which the licence is issued be varied, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffer from any mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Regulation 340/94, Section 17 and 18 states:

- 17. (1) Qualifications required by an applicant for a holder of a Class A, B, C, D, E or F driver's licence are that the applicant or holder,
 - (a) has no history or clinical diagnosis of diabetes that requires insulin for control;
 - (b) is not taking any drug that could, in the dosage prescribed or in the dosage recommended by the manufacturer, impair his or her ability to drive a motor vehicle of the applicable class safely;
 - (c) has no established medical history of myocardial infarction, angina pectoris, coronary insufficiency or thrombosis;
 - (d) has no established medical history of heart disease including arrhythmia or of respiratory dysfunction likely to interfere with the safe driving of a motor vehicle of the applicable class;
 - (e) is not suffering from an aortic aneurysm, whether resected or not;
 - (f) is not suffering from hypertension accompanied by postural hypotension resulting in giddiness when under treatment;
 - (g) has no established medical history of loss of consciousness or awareness due to a chronic or recurring condition;

- (h) has no established medical history of a disorder of the musculoskeletal or nervous system that may interfere with the safe driving of a motor vehicle of the applicable class;
 - (i) has no established medical history of an intractable psychotic or psychoneurotic disorder, having particular regard for sustained hostile, aggressive, paranoid, suicidal or other destructive tendencies or depression unless it is medically determined that the condition from which the person has suffered is corrected or controlled;
 - (j) has a visual acuity by Snellen Rating, with or without the aid of corrective lenses, no poorer than 20/30 in the better eye and 20/50 in the weaker eye; and
 - (k) has a horizontal visual field of at least 120 degrees in each eye as measured by confrontation tests.
- (2) An applicant for or a holder of a Class A, B, C, D, E or F driver's licence who fails to meet the qualifications referred to in clauses (1)(a) to (i) may, despite the failure, qualify for the class of licence applied for or held if he or she demonstrated the ability to drive a motor vehicle in the applicable class as safely as any person who meets those qualifications.
- (3) An applicant for or a holder of a Class D driver's licence who fails to meet the qualification referred to in clause (1)(c) may, despite the failure, qualify for that class of licence if it is medically determined that he or she has made a full recovery and there is no established history of a second occurrence of myocardial infraction, thrombosis or recurring angina pectoris.
- (4) An applicant for or a holder of a Class B, C, E or F driver's licence whose hearing in one ear is better than in the other must be able to perceive in the better ear, with or without a hearing aid, a forced whisper at a distance of 1.5 metres or, if an audiometer is used to test the person's hearing, must not have a loss in the better ear of more than 40 decibels at 500, 1,000 and 2,000 hertz.
- 18. An applicant for or a holder of a G, G1, G2, L, M, M1, M2, or R driver's licence must have,
 - (a) in the case of a person whose vision in one eye is better than in the other, visual acuity in the better eye that is no poorer than 20/40 as measured by Snellen Rating; and
 - (b) a horizontal visual field of at least 120 degrees as measured by confrontation tests.

Section 32(12)(b)(i) states:

- 32 No person shall drive a motor vehicle on a highway unless the motor vehicle is within a class of motor vehicles in respect of which the person holds a driver's licence issued to him or her under this Act.
- (12) An applicant for a driver's licence or a person who holds a driver's licence shall submit to the examinations that are authorized by the regulations relating to this section and required by the Minister at the time and places that the Minister may require and the Minister may,
 - (b) in the case of a person who holds a driver's licence,

- (i) impose or remove the conditions or endorsements authorized by the regulations or change the class or classes of motor vehicles in respect of which the licence is issued in accordance with the result of the examinations, or

Section 50 states:

- 50(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or Registrar.

APPLICATION OF THE LAW TO FACTS:

When the Registrar received information that the Applicant was being treated for cardiomyopathy and cardiac arrhythmia, there was no alternative but to suspend his driver's licence under Section 47(1) of the *Highway Traffic Act*, until the matter could be investigated. When it was established that the medical problems only really effected his commercial licence under Regulation 340/94 Section 17, which states:

- (1) Qualifications required by an applicant for a holder of a Class A, B, C, D, E or F driver's licence are that the applicant or holder,
 - ...
 - (d) has no established history of heart disease including arrhythmia or... likely to interfere with the safe driving of a motor vehicle of the applicable class.

The decision was to downgrade the licence from "AM" to a "GM" was under Reg. 340/94, Section 17, which states:

- (2) An applicant for a holder of a class A, B,... or F driver's licence who fails to meet the qualifications referred to in clauses (1)(a) to (i) may despite the failure, qualify for the class of licence applied for or held if he or she demonstrates the ability to drive a motor vehicle in the applicable class as safely as any person who meets those qualifications,

When the Applicant's family physician diagnosed congestive heart failure and cardiac arrhythmia, he immediately referred the Applicant to Physician #1, a specialist in cardiology.

Physician #1 carried out extensive tests and finally diagnosed dilated cardiomyopathy with normal coronary arteries and therefore nonischemic. Based on the Applicant's stable clinical status, his reasonably well preserved left ventricular function and his exercise performance, he stated there is no cardiac contradiction to him having his commercial licence and he supported a medical waiver.

The MAC took exception to the Applicant's left ventricular ejection fraction, which had increased 10% with treatment, to 31%. The standards set by the Canadian Cardiovascular Society recommend an ejection fraction of at least 35%. Physician

#2 repeated the examination and reported in his letter of May 1, 2002, a result of 34%. The MAC has not yet had an opportunity to see this Medical Report.

In Physician #1's evidence, he reaffirmed everything contained in his Medical Reports and stated he had no hesitation in recommending a medical waiver for the Applicant and his return to regular work, as he posed no threat to the public. He further stated the LV ejection fraction of 34% is as good as a 35%, because different methods produce slightly different results. It is also virtually impossible to pigeon hole every case according to arbitrary standards, because of the variables. Most of such cases have complications of coronary artery disease, which the Applicant does not have.

Physician #2's diagnosis was infrequent asymptomatic non-sustained ventricular tachycardia in the setting of nonischemic dilated cardiomyopathy. He added that his arrhythmia does not pose a significant commercial driving risk and he hoped the Ministry of Transportation would take this into consideration when reviewing the Applicant's licence status.

With two such positive Medical Reports from cardiologists who are Professors of Medicine at the University of Toronto, the Tribunal did not find the evidence presented by the Ministry was sufficient to support the Registrar's refusal to upgrade the Applicant's driver's licence from a "GM" to a "AM".

DECISION:

Upon the application by the Applicant to appeal the decision dated October 19, 2001, of the Minister ("Respondent") to change the class or classes of motor vehicle in respect of which the licence was issued pursuant to Section 32(12)(b)(i) and Section 17 Regulation 340/94 of the *Highway Traffic Act* and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be set aside.

LICENCE APPEAL TRIBUNAL

Ross C. Bennett, M.D., Presiding Member

RELEASED: May 27, 2002

DELTA MINIVAN & CARS INC. AND CARLO VERAS

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

CHRISTINA VERA, Agent, representing Delta Minivan & Cars Inc.
CARLOS VERA, representing himself
AVIVA HARARI, Counsel, representing the Registrar under the
Motor Vehicle Dealers Act

DATE OF
HEARING:

May 6, 2002

TORONTO

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") from a Notice of Proposal (the "Proposal") by the Registrar of the *Motor Vehicle Dealers Act* (the "Registrar") pursuant to section 7 of the *Motor Vehicle Dealers Act* (the "Act"). The Proposal dated December 28, 2001 as amplified by the Registrar's Notice of Further and Other Particulars dated February 14, 2002, seeks to revoke the registration of Delta Minivan & Cars Inc. (the "Dealer") as a motor vehicle dealer and of Carlo Vera ("Vera") as a motor vehicle salesperson.

The Proposal sets out the Registrar's reasons for the Registrar seeking an order for the revocation of both registrations. The reasons are stated as follows:

The intention and objective of the Act is to protect the public interest. The requirements of the Act include that Registrants be financially responsible in the conduct of business and that Registrants carry on business in accordance with the law and with integrity and honesty. The Registrant's past conduct is inconsistent with the intention and objective of the Act, and therefore warrants disqualification to registration under the Act. Therefore, the Registrar is unwilling to continue to register Delta Minivan & Cars Inc. and Carlo Vera under the Motor Vehicle Dealers Act.

(Exhibit 3, Tab 1)

The particulars upon which the Registrar relies are stated in the Proposal as follows:

1. Delta Minivan & Cars Inc. is currently registered as a motor vehicle dealer. The dealer has been registered since on or about June 25, 1997. The dealer has Terms and Conditions attached to its registration. Christina Arab a.k.a. Christine Vera is the sole officer and director of the dealership. Christina Arab a.k.a. Christine Vera is not registered as a salesperson pursuant to the Act.
2. Carlo Vera is currently registered as a motor vehicle salesperson under the Act. Carlo Vera has been registered since on or about June 30, 1992.
3. The Dealer has sold motor vehicles to consumers and has misrepresented the distance travelled to the purchasers. In particular
 - a. The dealer purchased a 1994 Jeep, VIN 1J4GZ78S7RC260016 with an odometer disclosure of 228,000 km and subsequently sold same to a consumer with an odometer reading of approximately 148,000. The dealer failed to include the distance travelled on the consumer's bill of sale.
 - b. The dealer purchased a 1996 Cavalier, VIN 1G1JC5245T7230680, with an odometer disclosure of 245,865 km, and subsequently sold same with a disclosure of distance travelled of 145,908 km.
 - c. The dealer purchased a 1995 Nissan, VIN 1N6SD16S9SC34306 with an odometer disclosure of 201,978 km and subsequently sold same with a disclosure of distance travelled of 102,110 km.
 - d. The dealer purchased a 1998 Mazda, VIN 4F4YR12C9WTM30792 with an odometer disclosure of 218,000 km and subsequently sold same with a disclosure of distance travelled of 128,098 km.
 - e. The dealer purchased a 1998 Ford, VIN 1FAFP52U5WG120563 with an odometer disclosure of 198,748 km and subsequently sold same with a disclosure of distance travelled of 99,908 km.
 - f. The dealer purchased a 1996 Ford, VIN 1FALP52U3TG223589 with an odometer disclosure of 183,000 km and subsequently sold same with a disclosure of distance travelled of 120,800 km.
4. A representative of the Registrar attended at the dealer's registered premises and noted that a number of vehicles offered for sale on the dealer's lot had odometer readings that were less than the odometer disclosure made to the dealer at the time of purchase. The following vehicles were on display for sale with lower odometer readings:

1994 Honda, JHMEG8640RS800369 - on display at 162,730 km, purchased by dealer at 262,258 km
1997 GMC, 1GKDT13W0V2514316 - on display at 147,142 km, purchased by dealer at 221,074 km
1997 Ford, 1FMDU34X0VUC30373 - on display at 119,881 km, purchased by dealer at 217,556 km
1995 Jeep, 1J4GZ78S6SC625887 - on display at 155,092 km, purchased by dealer at 224,300 km
1998 Mercury, 1MEFM53S8WG626774 - on display at 142,194 km, purchased by dealer at 171,985 km
1992 Mazda, JM3LV5226N0401271 - on display at 169,572 km, purchased by dealer at 229,321 km

(Exhibit 3, Tab 1)

The particulars in the Registrar's Notice of Further and other Particulars sets forth other particulars upon which the Registrar relies, as follows:

1. The Dealer has sold motor vehicles to consumers and has misrepresented the distance travelled to the purchasers. In particular:

- a) The Dealer purchased a 1997 Chevrolet, VIN 1GNDM19W9VB186126 with an odometer disclosure of 198,143kms and subsequently sold same to a consumer with an approximate odometer reading of 93,000kms.
- b) The Dealer purchased a 1995 Ford, VIN 1FMDU34XSUB05550 with an odometer disclosure of 232,000kms and a notation of "odometer not working". The Dealer subsequently sold same to a consumer with an approximate odometer reading of 135,000kms. The Dealer failed to include the distance travelled on the consumer's bill of sale.
- c) The Dealer purchased a 1998 Ford, VIN 2FMDA5148WBA68949 with an odometer disclosure of 168,400kms and subsequently sold same to a consumer with an odometer disclosure of 128,886kms.
- d) The Dealer purchased a 1987 Mercedes, VIN WDBCA35D3HA354316 with an odometer disclosure of 312,458kms and subsequently sold same to a consumer with an approximate odometer reading of 197,000kms.
- e) The Dealer purchased a 1998 Ford, VIN 2FMDA514XWBA33247 with an odometer disclosure of 144,400kms and subsequently sold same to a consumer with an approximate odometer reading of 112,000kms.
- f) The Dealer purchased a 1995 Dodge, VIN 2B4GH2531SR126735 with an odometer reading in excess of 228,032kms and subsequently sold same to a consumer with an odometer disclosure of 147,921kms.
- g) The Dealer purchased a 1996 Chevrolet, VIN 1GNDM19W8TB116033 with an odometer disclosure of 250,400kms and subsequently sold same to a consumer with an approximate odometer reading of 198,000kms.
- h) The Dealer purchased a 1997 Chevrolet, VIN 1G1JC1249VM108739 with an odometer disclosure of 204,676kms and subsequently sold same to a consumer with an odometer disclosure of 104,383kms.

(Exhibit 3, Tab 2)

At the commencement of the hearing Vera informed the Tribunal that he consented to the revocation of his registration as a motor vehicle salesperson and he consequently withdrew his appeal of the Registrar's Proposal. Vera accordingly signed a consent to the revocation of his registration as a motor vehicle salesperson.

(Exhibit 5)

Counsel for the Registrar informed the Tribunal at the commencement of the hearing that she and Christina Vera, representing the Dealer, had agreed upon certain facts and by consent a written "Agreed Statement of Facts" dated May 6, 2002 was handed in. The Agreed Statement of Facts states as follows:

1. Christina Vera is the sole officer and director of Delta Minivan and Cars Inc. (hereinafter "Delta") and has been at all relevant times.
2. Delta admits that the vehicles listed in the Registrar's Proposal dated December 28, 2001 (Tab 1 Exhibit 3) at paragraph 3a through 3f (inclusive) and in the Notice of Further and Other particulars dated February 14, 2002 (Tab 2 of Exhibit 3) at paragraphs 1a through 1h (inclusive) had the odometers rolled back after the vehicles were purchased by Delta and were sold by Delta to the 14 consumers who did not have knowledge of nor did they authorize the odometer roll back. The consumers did not have knowledge of the odometer roll back at the time they purchased their vehicle

from Delta. Delta offered to make restitution to the consumers after the odometer misrepresentations came to the attention of the Registrar.

3. With respect to the vehicles set out at the Registrar's Proposal dated December 28, 2001 (Tab 1, Exhibit 3) at paragraph 4, on December 8th 2001, OMVIC Investigator Dave Wilson attended at the business premises of Delta and observed the six vehicles displayed for sale on the lot of Delta with the lower odometer set out in paragraph 4. Delta admits that at the time Delta purchased these vehicles, the odometer reading was higher than as at December 8, 2001 when the vehicles were observed by Investigator Wilson.

(Exhibit 6)

THE EVIDENCE:

The evidence presented to the Tribunal by the Registrar consisted of the testimony of David Wilson and Mary Jane South. The evidence presented by the Dealer consisted of the testimony of Christina Vera ("Christina").

Testimony of David Wilson:

David Wilson testified that he is an investigator employed by the Ontario Motor Vehicle Industry Council ("OMVIC"). Prior to his employment with OMVIC he was a police officer for 29 years. He became familiar with the Dealer in the course of his employment with OMVIC when, on December 8, 2001, he conducted an investigation at the Dealer's registered premises. This investigation followed a consumer complaint. As a result of the investigation the Registrar issued his Proposal.

The investigation by Wilson revealed that the Dealer has sold some 12 motor vehicles to consumers. These vehicles are referred to in paragraphs 3 and 4 of the Proposal. In each instance Wilson had ascertained that the vehicles' odometers reflected a lower reading at the time the Dealer sold such vehicles to consumers as compared to when the Dealer purchased the vehicles.

(Exhibit 3, Tab 1, Paragraphs 3 and 4)

Besides the 12 vehicles referred to above, Wilson stated that his investigations revealed a further 8 motor vehicles were sold by the Dealer to consumers and in each instance the odometers of such vehicles read less at the time of their sale by the Dealer than the odometers read at the time of their purchase by the Dealer.

(Exhibit 3, Tab 2)

Testimony of Mary Jane South:

Ms. South testified that she is currently the Deputy Registrar under the Act, having held such appointment since 1997. Ms. South explained that the Ontario Motor Vehicle Council ("OMVIC"), which was established in 1997, is a non-profit corporation with authority and responsibility to oversee and administer the Act. The Act is commonly referred to as consumer legislation and its main purpose is the protection of consumers.

Ms. South discussed and explained the requirements under section 5 of the Act for the regulation of motor vehicle dealers and salespersons and the conditions under which a Registrant can have her or his registration revoked.

Ms. South stated she was familiar with the Dealer's history and proceeded to review its history, as follows:

By Notice of Proposal dated December 17, 1997 the Registrar proposed to revoke the registration of the Dealer. The Dealer appealed the Registrar's proposal to the Commercial Registration Appeal Tribunal and that Tribunal heard the appeal and rendered its decision on June 25, 1998. The decision of that Tribunal was to direct the Registrar to carry out his proposal and to revoke the Dealer's registration as a motor vehicle dealer. The Dealer appealed the Commercial Registration Appeal Tribunal's decision to the Divisional Court but abandoned that appeal on October 12, 1998, and entered into written Terms and Conditions with the Registrar. One of the terms and conditions imposed upon the Dealer was:

- k) The Dealer agrees that it is under a positive obligation to disclose all material facts about the vehicles it sells to its customers. The Dealer agrees to make reasonable efforts to research the history of all its vehicles prior to sale to ensure all material facts are disclosed. The Dealer agrees that should any information come to light, which the Registrar deems to be a material fact, concerning a vehicle the Dealer has sold, the Dealer will comply with all reasonable requests made by the Registrar to provide compensation to the purchaser.

Pursuant to the abandonment of the Dealer's appeal and the signing of Terms and Conditions the Registrar allowed the registration of the Dealer. (Exhibit 3, Tab 5)

On February 5, 1998, the Registrar issued a Notice of Proposal to refuse to grant registration as a salesperson to Hossein Arab, who is the husband of Christina, and who is now known as Carlo Vera ("Vera"). Vera appealed the Proposal.

When the proposal regarding Vera came before the Tribunal for hearing, the Proposal was withdrawn pursuant to the Registrar and Vera signing Minutes of Settlement. One of the terms in the Minutes of Settlement stated:

- e) Hossein Arab agrees that he is under a positive obligation to disclose all material facts about the vehicles that he sells. Hossein Arab will not knowingly misrepresent the true condition or distance travelled of vehicles he buys or sells on his own behalf or on behalf of the dealer.

(Exhibit 3, Tab 6)

Vera was then registered as a motor vehicle salesperson and has worked for the Dealer until he withdrew his appeal to the Registrar's present proposal and consented to the revocation of his registration as a motor vehicle salesperson.

Ms. South went on to state that Christina, being the sole Officer and Director of the Dealer, had the responsibility to ensure that she carried out her duties with diligence

and should have been alive to the fact that Vera, her spouse and the Dealer's salesperson, had already been in difficulties with the Registrar regarding odometer rollbacks and had signed terms and conditions.

Ms. South concluded her testimony by stating that true odometer readings of motor vehicles are important to consumers so as to enable an informed decision being made as to how much to pay for the vehicle and if to enter into a sale at all.

Testimony of Christina Vera:

Christina testified that she is married to Vera and together they have three children. She stated that the present problems regarding motor vehicle odometers came to her attention when David Wilson spoke with her in December 2001.

From the time Terms and Conditions were signed by her in October 1998 until May or June 2001, "things were perfectly fine" at the Dealer. She was doing the Dealer's books and "was actively involved" in the business of the Dealer. Problems started in about summer of 2001 when she found herself overwhelmed with work at the Dealer. Due to the volume of work she had no opportunity to notice any wrongdoing by Vera, who had "built trust" over time. She never imagined that odometer tampering was taking place and believed she acted responsibly in and about her work.

Under cross examination, she stated that she oversees the Dealer's books including all paperwork. She has access to all bills of sale, including those when the Dealer purchases vehicles as well as when the Dealer sells vehicles. She stated that there is "a lot of communication between Carlo and I" and that she put him in charge of day to day operations and watched what he was doing. She testified that she knew there were concerns in the past regarding odometer tampering. She also stated that when she inspected the bills of sale, both those relating to purchases of vehicles by the Dealer as well as sales of vehicles by the Dealer, she observed no difference in the odometer readings as recorded on the bills.

Christina concluded her testimony by stating that since about the summer of 2001, when the building of new premises for the dealer was undertaken, she no longer checked vehicles' odometer readings as shown on bills of sale.

FACTS FOUND PROVEN:

The following are the facts found by the Tribunal to have been proven:

1. The Dealer is currently a registered motor vehicle Dealer under the Act.
2. Christina is the sole officer and Director of the Dealer.

3. Christina and Vera were at all material times married to each other and are currently married to each other.
4. By Notice of Proposal dated December 17, 1997 the Registrar proposed to revoke the registration of the Dealer under the Act.
5. On June 25, 1998 the Commercial Registration Appeal Tribunal under the authority then vested in it, dismissed the Appeal of the Dealer to the Proposal dated December 17, 1997 and directed the Registrar to carry out his Proposal.
6. On October 12, 1998 the Dealer, therein represented by Christina, and the Registrar signed Terms and Conditions pursuant to which the Dealer was registered as a motor vehicle Dealer subject to those Terms and Conditions.
7. The Dealer sold 14 motor vehicles to consumers which motor vehicles are more fully referred to in the Registrar's Notice of Proposal dated December 28, 2001 at paragraph 3 and in the Registrar's Notice of Further and Other Particulars dated February 14, 2002.
8. The odometers of the 14 motor vehicles referred to in paragraph 7 above were rolled back after the vehicles came into the possession of the Dealer and prior to the sale of the vehicles to consumers, who were not informed by the Dealer of the roll backs nor were they aware of such roll backs.
9. The Dealer purchased 6 further motor vehicles more fully referred to in paragraph 4 of the Registrar's Proposal of December 28, 2001. Those vehicles were displayed for sale by the Dealer at its registered premises on December 8, 2001.
10. After the Dealer purchased the 6 vehicles referred to in paragraph 9 above, and while in the possession of the dealer, the odometer readings of all 6 vehicles were rolled back.
11. The Dealer offered restitution to the consumers of the 14 motor vehicles referred to in paragraphs 7 and 8 above after the odometer roll backs were brought to the notice of the Registrar.
12. Vera was a registered salesperson at the Dealer until May 6, 2002, when he consented to the revocation of his registration.

THE LAW:

Section 7.(1) and 7.(2) of the Act states:

7.(1) Where the Registrar proposes to refuse to grant or renew a

registration or proposes to suspend or revoke a registration, the Registrar shall serve notice of the proposal, together with written reasons therefor, on the applicant or registrant.

(2) A notice under subsection (1) shall state that the applicant or registrant is entitled to a hearing by the Tribunal if the applicant or registrant mails or delivers, within fifteen days after service of the notice under subsection (1), notice in writing requiring a hearing to the Registrar and the Tribunal, and the applicant or registrant may so require a hearing.

Section 5.(1) of the Act states:

5.(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

...

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or

(c) the applicant is a corporation and,

...

(ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or

(d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

DECISION AND REASONS:

The onus of proof rests upon the Registrar to prove that the past conduct of the Dealer affords the Registrar reasonable grounds for belief that the Dealer will not carry on business in accordance with law and with integrity and honesty.

The grounds upon which the Registrar bases his Proposal are the rolling back by the Dealer of the odometers of some 20 motor vehicles and the misrepresentation to various consumers of the distance travelled by those vehicles.

In *Brenner v. Ontario (Registrar of Motor Vehicle Dealers and Salesmen)* [1983] O.J. No. 1017, April 7, 1983, it was clearly stated that the Tribunal should only refuse to direct the Registrar to carry out his proposal if it thinks the Registrar was in error in concluding that the past conduct of the Applicant affords reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty. To overrule the decision of the Registrar, the Tribunal must conclude that he was wrong in his decision and that the conduct of the Applicant does not afford

reasonable grounds for belief that the Applicant will in the future carry on activities in contravention of the Act and its Regulations.

The Tribunal's conclusions and the reasons for its conclusions, based on the evidence, follow.

Christina testified that she is the sole Director and Officer of the Dealer. This was also the situation when the Tribunal rendered its decision of June 25, 1998 in which it upheld the Registrar's then Proposal to Revoke the Dealer's registration. Now some four years later, while still the sole Director and Officer of the Dealer, Christina has more experience in the operation of a motor vehicle dealership. According to her evidence she, and she alone, attended to the administration of the Dealer and handled all the paperwork involved in the administration. Not only was Christina the sole Director and Officer of the Dealer but she was the controlling mind of the Dealer. She had *de facto* control of the Dealer.

In the course of her functions, she admitted having access to and control over bills of sale relating to vehicles purchased by the Dealer and bills of sale relating to the subsequent sale of such vehicles to consumers. By having access and control over these bills of sale Christina had the ability to observe the distance travelled by a vehicle at time of its purchase and its sale. She had the opportunity to make herself aware of the discrepancies in odometer readings of various vehicles, yet did nothing to ensure that this situation was not permitted. While she may not herself have been complicit in the roll back of odometers, she was nevertheless, at best, grossly negligent in failing to observe what was transpiring at the business. She knew that Vera had previously been convicted of odometer tampering, yet she failed to remain vigilant to his repeating such misconduct while he was in charge of operations at the Dealer.

Being the controlling mind of the Dealer she knew or ought to have known how material and important this information was. She either chose to ignore this information or was content to permit vehicles being sold by the Dealer well knowing the falsehood of the odometer readings of the vehicles when sold to consumers.

The Act and its regulations stress the importance of odometer readings. As was stated by Cory, J. in *Re Herman Motor Sales Inc and Registrar of Motor Vehicle Dealers and Salesmen* 29 O.R. (d) 431:

There can be no doubt that the readings form the basis for the assessment in value of most vehicles. To tamper or interfere with odometer readings must be considered a grave breach of the duty of the dealer.

As was also stated in the matter of *1280953 Ontario Limited o/a Morato Cars and Radomir Miljkovic* (2001) LAT (released June 4, 2001):

There can be no doubt that when a member of the public purchases a second hand motor vehicle he wishes to make an informed decision before committing himself to a purchase. It is clearly material to any purchaser of a second hand motor vehicle that the vendor has disclosed to him all relevant and material information concerning the vehicle.

It is both relevant and material to the contract that the purchaser knows the true mileage the vehicle has travelled which will help indicate if the price asked is fair and reasonable.

With the benefit of registration comes the obligation to ensure that business is conducted and carried on with honesty and integrity and in accordance with law. The Tribunal finds that this obligation was abrogated by Christina when she failed to be vigilant and diligent.

Regard being had to the Tribunal's findings, the Tribunal believes that the past conduct of Christina is likely to result in future acts or omissions that would or could reasonably give rise to the belief that Christina and therefore the Dealer will in the future not carry on business in accordance with law and with integrity and honesty.

Having regard to the aforesaid, the Tribunal finds no grounds to disagree with the Registrar's Proposal.

ORDER:

Accordingly, the Tribunal pursuant to the authority vested in it by Section 7(4) of the *Motor Vehicle Dealers Act*, directs the Registrar to carry out his proposal dated December 28, 2001 to revoke the registrations of Delta Minivan and Cars Inc. as a motor vehicle dealer and Carlo Vera as a motor vehicle salesperson under the Act.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: May 13, 2002

CANUS AUTO TRADERS LIMITED AND SIMON VAN DUFFELEN

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE MOTOR VEHICLE DEALERS ACT

TO SUSPEND REGISTRATIONS

TRIBUNAL: DAVID J. HUNT, Vice Chair

APPEARANCES:

A. MICHAEL ROTHE, Counsel representing the Registrar under the *Motor Vehicle Dealers Act*.

SIMON VAN DUFFELEN, acting on his own behalf, and as agent for CANUS AUTO TRADERS LIMITED.

DATE OF
HEARING: May 10, 2002 Toronto

REASONS FOR DECISION AND ORDER

This is a hearing before the Licence Appeal Tribunal (the "Tribunal") arising out of a Notice of Proposal issued by the Registrar under the *Motor Vehicle Dealers Act* (the "Registrar", and the "Act" respectively). The Notice of Proposal dated Dec. 18, 2001 proposed to suspend the registration of Canus Auto Traders Limited ("Canus"), and Simon Van Duffelen ("Van Duffelen") under the Act.

BACKGROUND:

The Registrar under the Act proposed to suspend the registration of Canus, and Van Duffelen. The Reasons of the Registrar for the Proposal are set out below:

The intention and objective of the Act is to protect the public interest. The requirements of the Act include that Registrants be financially responsible in the conduct of business and that Registrants carry on business in accordance with the law and with integrity and honesty. The Registrant's past conduct is inconsistent with the intention and objective of the Act, and therefore warrants suspension of registration under the Act. Therefore, the Registrar is unwilling to continue to register **Canus or Simon Van Duffellen** (sic) under the Motor Vehicle Dealers Act until they comply with the Registrar's requests for information.

THE LAW

Section 1 of the *Motor Vehicle Dealers Act* (the "Act") states as follows.

"Motor vehicle dealer" means a person who carries on the business of buying or selling motor vehicles, whether for the person's own account for the account of any other person or who holds himself, herself or itself out as carrying on the business of buying or selling motor vehicles.

Section 3 of the Act states as follows,

- (1) No person shall,
 - (a) carry on business as a motor vehicle dealer unless the person is registered under this Act; or
 - (b) act as a salesperson of or on behalf of a motor vehicle dealer unless the person is registered as a salesperson of such dealer and such dealer is registered as a motor vehicle dealer under this Act

Section 5 of the Act states as follows;

5(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

- (a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
- (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law, and with integrity and honesty; or
- (c) the applicant is a corporation and
 - (i) having regard to its financial position, it cannot reasonable be expected to be financially responsible in the conduct of business, or
 - (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law, and with integrity and honesty; or
- (d) the applicant is carrying on activities that are or will be, if the applicant is registered, in contravention of this Act or the regulations.

(2) A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant, imposed by the Tribunal or prescribed by the regulations.

Section 6 of the Act states as follows;

- (1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion , the applicant is disentitled to registration under section 5.
- (2) Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5 if the registrant were an applicant, or where the registrant is in breach of a term or condition of the registration.

Section 9 of the Act states as follows

(1) Where the Registrar receives a complaint in respect of a motor vehicle dealer and so requests in writing, the motor vehicle dealer shall furnish the Registrar with such information respecting the matter complained of as the Registrar requires.

(2) The request under subsection (1) shall indicate the nature of the inquiry involved.

(3) For the purposes of subsection (1), the Registrar or any person designated in writing by him or her may at any reasonable time enter upon the business premises of the motor vehicle dealer to make inspection in relation to the complaint.

Section 10 of the Act states as follows

(1) The Registrar or any person designated by him or her in writing may at any reasonable time enter upon the business premises of the registrant to make an inspection to ensure that the provisions of this Act and the regulations relating to registration and the maintenance of trust accounts are being complied with.

(2) Where the Registrar has reasonable and probable grounds to believe that any person is acting as a motor vehicle dealer or salesperson while unregistered, the Registrar or any person designated by him or her in writing may at any reasonable time enter upon such person's business premises to make an inspection for the purpose of determining whether or not the person is in contravention of section 3.

Section 13 Regulation 801 states as follows:

...
(11) The Registrar may require further information or material to be submitted by any applicant or any registrant within a specified time limit and may require verification by affidavit or otherwise of any information or material then or previously submitted.

CASELAW:

Brenner v Ontario (Registrar of Motor Vehicle Dealers and Salesman) 1983 O. J. No. 1017 Ontario Supreme Court-High Court of Justice Divisional Court

This was an appeal by the Registrar of Motor Vehicle Dealers and Salesmen from a decision of the Commercial Registration Appeal Tribunal in which the Tribunal directed the Registrar to grant a conditional registration to the Respondent. The Applicant had a very serious criminal record which he had disclosed in his application but he had not disclosed three further convictions which were considered by the Registrar to be minor offences. The Tribunal heard evidence from a potential employer and a criminal lawyer who testified that the Applicant had rehabilitated himself. The Court found that the Tribunal had not applied the proper test, and set out this test in paragraph nine of the judgment as follows:

"...the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error concluding that the past conduct of the applicant

afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was the possibility that he, indeed, might have reformed himself."

**Michael Gerrior and 1080424 Ontario Ltd. and Eastern Auto Wholesale Inc. [2001]
O.L.A.T.D. No. 105**

In this matter the Registrar had revoked the registration of Michael Gerrior as a salesperson, 1080424 Ontario Ltd. and Eastern Auto Wholesale Inc. There were complaints against Michael Gerrior that he had made misrepresentations regarding a vehicle; had failed to comply with the *Retail Sales Tax Act*; had failed to honor his Agreement with the Ministry of Finance; had acted as an unregistered salesperson; had prior convictions under the *Retail Sales Tax Act*; had an outstanding judgment against him; and had failed to repay the Motor Vehicle Accident Claims Fund. He had also failed to keep the books and records for the companies on the business premises and provide them for inspection by O.M.V.I.C. even though he had received several verbal and written notices. In paragraph 92 of the decision, the Tribunal noted that:

"The *Motor Vehicle Dealers Act* is a public protection statute and as such, adherence to its requirements are necessary in order to obtain or to maintain registration under the Act. Mr. Gerrior's failure to allow OMVIC to inspect the books and records of its company denied OMVIC the opportunity to ensure that the objects of the Act were being met and the public was being protected. This in itself was a major breach of the Act and could not be excused on the basis that his Accountant would not give back his records until his account was paid."

1306609 Ontario Inc. and Brandon Wayne Easterbrook

In this matter it was found during an inspection that the Registrant did not have complete books and records, an office, or a sign identifying the dealership. During a meeting Easterbrook said that he had brought the books and records as required but during the meeting it was found that there were no current records, and that the financial records were missing or incomplete. Easterbrook was the proprietor and operating mind of the Corporation. The Tribunal found that the Registrant had made no effort to meet the requirements of the Act and regulations, and was unable or unwilling to carry on business in accordance with law. In the absence of cooperation from the Registrant, the Registrar was unable to carry out his duty to ensure that proper financial arrangements by the Registrant, in compliance with the Act and Regulations, were in place. Which meant he was unable to adequately protect the consumer from potential harm.

ISSUES:

The legal issue in this case is whether the Registrar was wrong in his decision to suspend the Registrants' licences under the Act on the basis of the Registrants' conduct in failing to provide the financial information as requested, and whether the books and records requested are books and records of the Registrants as contemplated by the Act and Regulations.

Witness For The Registrar

Examination in Chief

Mary Jane South testified on behalf of the Registrar and stated that she is the Deputy Registrar of Motor Vehicles under the Act and oversees the registration of dealers and salespersons. She has been employed by O.M.V.I.C. since 1997 and prior to that was the Deputy Registrar when the Act was administered by the Ministry of Consumer and Commercial Relations. She explained that O.M.V.I.C. was created as a non-profit corporation responsible to administer the *Motor Vehicle Dealers Act* which is a public protection statute to ensure compliance by dealers and salespersons with standards of honesty, integrity, compliance with law, and financial responsibility within the motor vehicle industry.

Ms. South stated that the decision to suspend the license of Canus and Van Duffelen was made due to a failure by Van Duffelen, as the sole director, shareholder, and operating mind of Canus, to produce the requested books and records in relation to the operation of Canus as required by the agreement for the registration dated August 24, 2000 (Exhibit 3, Tab 6). The specific information required is one particular bank account and a Mastercard application.

The witness testified that at the time of the initial application, all dealer applications came to her. Additional questions arose due to a reference to Ronald Joseph Muise and the address of the dealership. On the Business Application, (Exhibit 3, Tab 4), the name of Ronald Joseph Muise was initially filled in as a contact person and then crossed out on the page listing officers, directors, partners and sales persons. A copy of the lease for the premises was obtained by Ms. South and she found that Mr. Muise was shown as the lessor of the property to Canus. According to the records of the Ministry, Mr. Muise had been registered as a dealer from 1989 to 1997. In the application by Van Duffelen it showed that he was intending to continue carrying on business as a lawyer. A request was made for an application from Mr. Muise, and he applied as a salesperson. Further concerns were raised when a credit check was carried out on him, and it appeared to the witness that he had serious problems with bad debts and the property was encumbered due to a successful lawsuit against him. His application as a salesperson was refused and Canus was registered as a dealer and Van Duffelen

registered as a salesperson, subject to the terms and conditions set out in the agreement (Exhibit 3, Tab 6)

Ms. South testified that in this agreement paragraph 4 required the disclosure of financial information, and item 5 required the dealer to give free access to his books and records to a representative of the Registrar. The agreement required that Van Duffelen would be in charge of the day-to-day operations of the dealership and would be the sole director, officer signing officer, and shareholder of the dealer, and that all expenses and purchases of the dealer would be financed through his personal resources. The dealer further agreed to provide the Registrar with written notice of any new sources of financing, loans or gifts for the dealer within ten days of their arrangement or receipt, whichever came first.

Ms. South testified that a letter (Exhibit 3, Tab 8) dated April 3, 2001 was received from the Registrant giving notice that arrangements had been made for Canus with Mastercard and that the company was utilizing funds drawn from that source in the operation of the business. The registrant provided this information on the basis that it was given as a courtesy and without any admission that it was required for compliance with the terms and conditions attached to the dealers license, or that O.M.V.I.C. had any jurisdiction over the matters disclosed. At this time the witness had a concern about the clients of the dealership and if they were exporting cars due to a letter dated March 11, 2001 from the Registrant (Exhibit 3, Tab 7). In this letter Van Duffelen advised that the business was to be operated primarily on a fee for service basis. They would obtain instructions from clients to apply the client's funds to a particular purchase and/or sale transaction and upon completion of that transaction, the dealership would be paid a pre-arranged amount as a fee. He stated that all clients' funds would be held in the motor vehicle dealer's trust account and that, after the deduction of the fee, any funds remaining upon completion of the contemplated transactions would be returned to the client. The operation of the dealership would be financed from the fee income received and Van Duffelen's personal resources. This information was again provided on the basis that it did not constitute an admission that it was required to be given under the terms and conditions attached to the dealer's license and was therefore given only as a courtesy.

The witness had concerns over this arrangement, and sent a letter dated April 19, 2001 (Exhibit 3, Tab 9) to the Registrant asking whether the customers referred to were registered motor vehicle dealers or whether he was dealing with individuals and businesses that were not registered under the Act. She requested copies of a sample purchase and sale agreement and also asked for a copy of the application or arrangements made with Mastercard. The registrant replied and in a letter dated May 2, 2001 (Exhibit 3, Tab 10) stated that the clients were individuals and corporations who are not registered under the Act and that the clients provide the funds to be applied to the purchases but never take delivery or title. The Registrant is then instructed to export the vehicle purchased and to sell it. The Registrant retains the discretion to choose the particular vehicle within the general description provided by the client and the vehicles are understood to be late model used vehicles. Van Duffelen explained that the funds

received from the client are held in the trust account, sale proceeds are delivered directly to the client, and any balance remaining in the trust account will be applied to the next purchase for the client or returned to the client. The dealership does not take their fee from the trust account but receives it directly from the client. Vehicles purchased and/or sold are registered in the name of the dealership and duly recorded in the Garage Register of the dealership. He further stated that there were no sample agreements available and that written instructions are received from the clients directing the dealer to apply the funds to the purchase of one or more motor vehicles and export and sell them as may be advantageous. In the event that a motor vehicle is purchased at a price exceeding the funds provided by the client the Registrant would augment the client's funds out of his own personal resources including the credit facility, if applicable, and later be reimbursed by the client from the sale proceeds. No additional fee or interest is charged for this service. This information was again provided on the basis that it was a courtesy and not required by the terms and conditions of the dealer's license and there was no admission that it was within the jurisdiction of O.M.V.I.C.

On June 5 2001 (exhibit 3 Tab 11), a letter was sent by Aviva Harari in her capacity as counsel for O.M.V.I.C. requesting that the Registrant provide O,M,V,I,C. with copies of any applications or agreements with respect to Mastercard. She also requested copies of purchase and sale, bills of sale, the Garage Register, copies of bank statements and all cancelled cheques from all dealership bank accounts for the previous three months.

The Registrant replied by a letter dated June 13, 2001. (Exhibit 3, Tab 12) In this letter, he forwarded the requested copies of bank statements, copies of cheques, and a copy of the Garage Register for the previous three months, together with copies of all bills of sale for all vehicles traded within the past three months. He explained that he was seeking to comply with the requirements to provide written notice of new sources of financing loans or other gifts but refused to provide the copy of the Mastercard application stating that it was beyond the requirements of the conditions and asking for an explanation of why it was being requested. Van Duffelen further explained that the dealership had purchased two vehicles from private individuals and in one case this was done in the course of his professional activities as a lawyer. Both of these vehicles were sold at auction. Any other vehicles were purchased from licensed dealers or through local auctions and were exported to the United States and have been or are in the process of being sold to licensed dealers or sold at auction.

Ms. South testified that when she examined the bank statements she had questions over the fact that within the three-month period covered by the statements provided, over \$75,000 had been transferred into the corporate Registrant's account # 0420-1038-855 from account 0420-1039-356, hereinafter referred to as account 356. These transfers took place on the May 25, 2001 in the amount of \$12,000.00, April 17, 2001 in the amount of \$9,808.67 and April 23 2001 in the amount of \$54,000 00. In the opinion of Ms. South this raised a question of whether there was compliance under the Act and she wished to inspect the records relating to that account as it appeared to her that it was being used to finance the dealership and was therefore a business record which

would be subject to inspection under s.10 of the Act and regulation 801, s. 13(11), as well as paragraph 4 of the terms and conditions of the registration.

Further correspondence followed. In his letter of August 15, 2001 (exhibit 3, Tab 14) Van Duffelen informed O.M.V.I.C. that some of his clients were registered motor vehicle dealers, some were not and that none had purchased more than one vehicle. Some clients request the purchase of a specific vehicle from a pre-sale listing at an auction while others only specified the year, make and model together with any additional criteria. In this letter he explained that used vehicles are generally purchased and that after payment for the purchased vehicle any remaining trust funds for that client are returned to the client after the deduction of applicable fees and charges and allowing for recoverable G.S.T. in cases where they are directed to export the motor vehicle. He stated that when the Canus sells a motor vehicle on the client's behalf, the client is not necessarily a motor vehicle dealer as they would not need the registrant's services if they were, unless the vehicle were to be sold on consignment. The Registrant would sell a vehicle on behalf of the client, if requested, if the vehicle is not a personal vehicle and the client is not registered as a motor vehicle dealer. Van Duffelen also confirmed that all vehicles purchased or sold by Canus were registered in the dealership's garage register.

O.M.V.I.C. responded to this letter in a letter from their counsel Aviva Harari in a letter dated October 26, 2001 (Exhibit 3, Tab 15), repeating the request for the Mastercard information and the records for account 356.

In a letter dated November 8, 2001, (exhibit, 3, Tab 16) Van Duffelen replied that Canus had two bank accounts, being a general bank account and a trust account and that account 356 was not a dealership account and that it holds some of his personal resources. On that basis, he refused to provide the information requested and also took the position that the information about the Mastercard was beyond the ambit of the Act and regulations. He further stated that the Mastercard was not an outside source of financing as contemplated in the terms and conditions of registration. The Registrant provided further details of the method of operation of the business. He explained that the proposed arrangement was to have clients who were primarily in Europe send set amounts of funds through an offshore conduit to the dealership trust account for a specified period during which they would be applied to the purchase of used motor vehicles in Canada which would then be exported for resale to the United States. The clients were to be guaranteed a fixed return on their investment at the end of a set time period when the sale proceeds were received. The dealership was to be paid a fixed percentage fee on each transaction. This arrangement was tried by Van Duffelen using his own resources for a number of transactions. No client funds were actually received or ever utilized at any time, and the Registrant had stopped using this strategy as of the date of the letter. Even though there are no clients to report, the Registrant asserted that under this scenario such clients would not be trading in motor vehicles and would therefore not have to be registered as motor vehicle dealers under the Act, as they have no control over the specific vehicle purchased, would never receive ownership of any vehicle at any time or ever have any control over the timing of the purchase or sale.

They would not be at risk of profit or loss on the motor vehicle trade and the only risk would depend on the ability of their offshore conduit of the funds to carry out its obligation. To the date of the letter, there had been no clients, and the other requests by O.M.V.I.C. were in the opinion of Van Duffelen therefore redundant .

Ms. South responded to this letter with a letter dated November 14, 2001 (Exhibit 3, Tab 17) in which the request for bank statements and Mastercard application were repeated, and she asserted that the account referred to was clearly being used as a trust account to finance the business and the registrar is therefore entitled to receive the information requested. Ms. South referred him to section 11 of the Act concerning documents that inspectors appointed by the Registrar are entitled to access. She also stated that assurances given with regard to the Mastercard arrangement were not sufficient and the Registrar still required a copy of the application. In her opinion the Registrant's customers should be registered as motor vehicle dealers as they are purchasing motor vehicles for the purpose of resale, and were receiving a profit as a result of the sale and on that basis should not escape the scrutiny of the Registrar. She also stated that it was in breach of the O.M.V.I.C. Standards of Business Practice for a dealer to conduct business with unregistered dealers, and she attached a copy of the Standards of Business Practice document, paragraph 5..2.3 of which read as follows:

"Dealers do not knowingly allow anyone other than a registered salesperson to be involved in negotiating or approving motor vehicle transactions or to give information about specific motor vehicles that are for sale or lease. Without limiting the generality of the foregoing such positions include those typically known as business managers, finance and insurance staff, leasing staff, sales staff and all sales and leasing managers."

Van Duffelen responded with the letter dated November 24, 2001 (Exhibit 3, Tab 18) in which he asserted that the dealership was carrying on business in a financially responsible manner and denied that account 356 was a company trust account. He stated that the funds in that account were part of his personal resources, so he refused to make disclosure as he thought there had already been compliance with the condition of registration. He explained that the funds were not borrowed or otherwise obtained from third parties. Further, he stated that after past transactions were completed utilizing funds from this account, further funds were transferred on a "fee for service" basis to the dealership's general account and operating funds. This strategy was set up to attract investment for cross-border sales but was not implemented and is now not intended to be used. He took issue with the right of the Registrar to information concerning the Mastercard application as he said it was not relevant to the dealership's operations if they did not have reason to believe that there were significant misrepresentations on the application or that it would show that the registrant could not be expected to be financially responsible in its conduct of business. No such allegations had been made and he was not aware of any reasonable basis for such a belief. He did agree to provide copies of the monthly statements if requested. He also explained that section 11 of the Act regarding access to documents, referred to in the letter of Ms. South, is a power which comes into play for an inspection under section 9 and 10 of the Act and he stated that under section 9 of the Act, it is specifically triggered only upon the receipt of a complaint, and that in this case he was not aware of any complaints. Van Duffelen

stated that the dealership has only purchased 9 vehicles, 7 at auction and 2 from individuals and that these 2 vehicles were sold at auction and were handled on that basis only. Of the other seven vehicles, one remains in inventory and six were exported to the United States and sold at auction.

At the conclusion of her evidence in chief Ms. South stated that she required the requested documentation to ensure compliance with the Act and the terms and conditions of registration. In her opinion it was within her powers of inspection under section 10 of the Act which allows her access to books and records. The bank account 356 appeared to her as being used to finance the dealership and was therefore subject to inspection pursuant to the power under section 13 of the regulations under the Act. She explained that they did not apply to revoke the registration as they would not know if the statute was being otherwise complied with until they received the information concerning the account and the Mastercard. There was no prosecution under the Act as there was no evidence of wrongdoing.

Cross-examination

In cross examination Ms. South repeated that the intention of the Act is to protect the public interest and that the issue of conduct refers in this case is the past conduct which is the failure to provide the requested information that is necessary to ensure compliance with the Act. This behavior specifically relates to his conduct as the sole director and the operating mind of the dealership and is only the conduct of refusing access to the requested documentation. She agreed that the Act states that a person has a right to registration, subject to the two exceptions in section 5 that relate to financial responsibility and past conduct. The concept of carrying on business with honesty, integrity, and in accordance with the law in this case goes to the issue of meeting the obligations of disclosing the information requested which is necessary within the regulatory framework for the proper supervision of the industry. Initially, there was a delay in the registration because of the involvement of Mr. Muise and a concern over the location of the dealership. Even though Mr. Muise was a dealer for eight years and had never been the subject of the complaint, there were issues concerning his financial situation and whether he would be the directing mind of the dealership. The conditions of the registration were imposed to ensure that he would not be involved and that Van Duffelen would be the operating mind of the dealership. Ms. South agreed that there was nothing in the circumstances to show that this had not been complied with. However she did express concern over the clients and the fact that there were no written agreements or even written instructions. In her opinion the books and records requested were required to ensure that there was compliance and it was a refusal of access to the books and records that caused the Registrar to consider the conduct sufficient that action had to be taken. There was no breach of the terms and conditions of registration prior to the refusal to provide the requested information. In the letter of April 3, 2001 (Exhibit, Tab 8) notice of the Mastercard application was given in compliance with paragraph 4 of the terms and conditions requiring notice of any new source of financing. However, once this was received, the Registrar required access to

the information to properly evaluate the financial status of the Registrant. The witness explained that the Registrar had the right to require information about the capital structure of the company as the Registrar needed to know who would be funding the business. In her opinion, mere notice as provided in the letter was not sufficient since as there were concerns that persons who should be under scrutiny or be registered might be financing the dealer. In this case the issue was the limit of the power of the Registrar to demand information in order to scrutinize the Registrant. She stated that because the card would be used to draw funds for the business it was part of the capital structure and related to the operation and financing of the dealership, thereby becoming subject to disclosure and scrutiny.

She stated that if there is personal information disclosed in the application form it becomes accessible if the money is involved in the financing of the dealership. The witness agreed that there was nothing in the letter of March 11, 2001 (Exhibit 3, Tab 7) setting out the capital structure of the Company which would give grounds to decide that there was non-compliance with the Act or the terms and conditions of registration. However she required the information requested to confirm this. Specifically, she was interested in the statements as to assets and debts in the Mastercard application.

Ms. South disagreed that the statutory declaration was sufficient and stated that there was still a concern that clients might be required to be registered motor vehicles dealers as the vehicles were purchased for the clients for export. She did not know exactly how the Mastercard was going to be used but she wanted the information to know how the business was being financed, just as they needed information about the bank account from which large amounts of money were transferred. Even though they were advised that all of the vehicles were recorded in the Garage Register she was not satisfied with that.

When she was asked if the disclosure was complete after disclosure of the Mastercard application she said it was not, as the information about the bank account 356 was not disclosed and the existence of that account was not known of until the bank records were received and it was found to be the source of transfers. She agreed that there was no particular reason to believe it was not money from personal resources. However, the witness testified that she wanted to have the information about the account to confirm this, and was not willing to simply accept his word on that issue. There was no concern over other deposits and she did not ask for the deposit book as she wanted a document that would give verification independent of the Registrant. She therefore wanted to go beyond the trust ledger even though it would show on whose behalf the Registrant recorded that trust funds were held. When asked if there were reasonable grounds to believe that he had not used his own resources for the transaction, as he claimed in his correspondence, she agreed that there were no grounds but she wanted to see the books to be sure.

Questions in reply

Ms. South was questioned in reply and stated that without seeing the records of the bank account 356 she could not determine if it was a business account or in fact personal funds of Van Duffelen, and she would not simply accept his word on the matter. She explained that the Registrar did not presume that everyone is a crook but the only way they can carry out their function properly is to get confirmation from independent sources.

No evidence was called on behalf of the Registrants Canus and Van Duffelen.

FACTS FOUND PROVEN

The facts found by the Tribunal are that

1. Van Duffelen is registered as a motor vehicle salesperson and is the sole director, sole officer and operating mind of Canus.
2. Van Duffelen signed terms and conditions prior to the registration of himself and the corporate registrant. In paragraph 4 of the terms and conditions he agreed to provide free access to the books and records of the dealership. Further he agreed to operate the business using his own resources and notifying the Registrar of any new source of funding. When he made a Mastercard application on behalf of the company, he notified the Registrar of the application, but refused to provide a copy of the application form although he offered to provide copies of the monthly statements if these were requested. When he provided the bank statements for the dealership's general account and trust account it appeared that over \$75,000 had been transferred within three months from account 356. He denied that this was a business account, and claimed that it contained some of his personal resources. Van Duffelen explained a structure in which foreign investors would arrange for funds to be channelled to his trust account and he would arrange the purchase and export for sale of vehicles based on the clients' instructions to him. The purpose of this arrangement was to return a profit to the client with a fee for service being charged by the dealership. Van Duffelen claimed in his correspondence that this program had been abandoned and that only 9 vehicles had been purchased out of his own resources, with no money being received from outside sources. No testimony was given on this issue.
3. The Tribunal finds that there is no evidence concerning the source of the funds in account 356 and there is therefore a possibility that the funds were in fact solely those of Van Duffelen, in which case he was abiding by the terms and conditions under which he and the company were registered. If that is correct, it means he would have been fronting the money to purchase the vehicles and then receiving compensation out of the sale proceeds. In this case, however, one would expect the sale proceeds to flow into the accounts of the business and the repayment of

funds to Van Duffelen to appear as a payment out of the business accounts and back into account 356. If not, then it would appear that any repayment received must have gone directly into account 356 in which case it would directly be an account of the business, although it would have funds potentially mixed with the personal resources of Van Duffelen.

4. The Tribunal finds that an issue arose for the Registrar upon receipt of the explanation in the correspondence from Van Duffelen as to whether the business arrangement as explained by Van Duffelen which was set up to produce a potential profit for the customer on the dealership's resale of the vehicles meant that customer was acting as a motor vehicle dealer under the scope of the Act. If the customers were simply using the Registrant to buy vehicles specifically for the purposes of earning a profit through the resale the Registrar would have to consider the question of whether the customer is carrying on a business as an unregistered motor vehicle dealer with the registrant acting as an intermediary in a system to produce potential profits to the customer. The Tribunal finds that the system as described in the correspondence was arranged to allow the customers to carry on the business of buying, selling and exporting motor vehicles even though they did not necessarily specify the particular motor vehicle or the method of sale. It was therefore incumbent upon the Registrar to investigate the financial and logistical details of this arrangement to ensure compliance with the Act.
5. The Tribunal finds that the Registrant did send the notice of the Mastercard to the Registrar as required by paragraph 4 of the terms and conditions of registration. However he did not send the copy of the application form when the demand was made for this information by the Registrar. The Registrant did provide copies of the trust and general accounts for the business to the Registrar thereby disclosing the involvement of account 356. The Tribunal finds that the Registrar did make a demand for the particulars of the account and the request was refused by Van Duffelen.

APPLICATION OF LAW TO FACTS

1. The customers in this arrangement were being invited to carry on the business of buying and selling vehicles for profit with the Registrant acting on their behalf in the selection and ultimate disposition of the vehicle. The financing of this arrangement took place and the money eventually found its way to the dealership's trust account through account 356. The intention was that the proceeds of sale together with money from the client would cover the costs of purchasing the vehicle, the fee charged by the Registrant and produce a profit for the customer. The Tribunal finds that money was forwarded from account 356 but there is no evidence of the source of the funds. Van Duffelen in his letters stated that no funds were received from clients but there was no evidence provided to the Tribunal beyond the fact that assertions were made in the correspondence.

2. The Tribunal finds that there were no complaints made about the Registrants and therefore the requests for information by the Registrar were not made under section 11(1) of the Act, having been triggered by section 9 which deals with the investigation of complaints. Section 10 of the Act permits a free inspection by a designated person to ensure that the provisions of the Act and regulations relating to registration and maintenance of trust accounts are being followed. The demand for financial records related to the dealership were therefore justified.
3. The Tribunal finds that the request for further information in this case would also be permitted under section 13(11) of Regulation 801 as a demand for information which is allowed under the Act to verify any information or material then or previously submitted. In this case the information had been provided about the corporate structure, the proposed method of doing business and the information concerning the Mastercard application having been made was given in compliance with paragraph 4 of the terms and conditions of registration.
4. The Tribunal finds that there was no direct proof that account 356 was an account held in the name of the corporate Registrant or what the source of the funds actually was. However this could not be proven one way or the other without access to information regarding the account. It is found that there was activity with account 356 on more than one occasion and it appeared to be involved in the corporate financial structure of the dealership although there was no evidence of whether the account contained the personal assets of Van Duffelen. In the circumstances, where the information provided about the corporate structure and clientele was vague and incomplete, it was reasonable for the Registrar to require information in order to verify the information provided in the letters concerning the arrangements with customers and the corporate financial structure including information involving account 356 and the Mastercard account. In the particular circumstances of this case the information concerning account 356 and the MasterCard application are books and records directly related to the corporate and financial structure of the dealership and are therefore books and records as contemplated by the Act.

The Act provides that the Registrar may suspend or revoke the registration of the Registrant where the Registrant's past conduct affords reasonable grounds for belief that the Applicant will not carry on business in accordance with the law, and with integrity and honesty. The Tribunal finds the following facts to be relevant past conduct.

Prior to the refusal of the Registrant to provide the requested information there was no history of earlier misconduct and the prior conduct referred to specifically relates to the refusal to provide the information concerning account 356 and the Mastercard application. The information concerning the Mastercard application directly relates to the Mastercard which was to be a source of funds for the dealership and the information about account 356 was necessary to provide an understanding of a major source of funds and the financial dealings of the dealership. Both are therefore directly related to

the operation of the corporate Registrant and the information thereby becomes business records and compellable under the Act

In a regulated industry the individual does not have the same level of privacy as they would in their outside life. The fact of the regulation and wide powers of inspection means that the individual and corporation will often be subject, in an intrusive manner, to inspection and the requirement to provide information. This is necessary in an industry where the financial and corporate arrangements of the participants must be transparent and open to inspection in order to maintain the integrity of the industry by ensuring the honesty of the participants.

This is not the case of someone with a criminal record or who has provided false information on their application form and is instead a case of a refusal to provide the materials necessary to verify and clarify statements made in correspondence concerning financial arrangements and corporate structure. Van Duffelen has certainly made some serious efforts at compliance and this refusal to provide the requested information may well be based on a legal interpretation by him of whether the required information constitutes records under the Act.

On the issue of whether the Applicant will carry on business in accordance with the law, the Tribunal finds the following facts to be relevant past conduct. The material requested by the Registrar was necessary for an understanding of the actual corporate and financial structure of the dealership and to determine whether Van Duffelen was carrying out the Terms and Conditions of the Agreement. It is quite possible that he was in fact carrying out the other obligations under the Act, the Regulations and the Agreement. However, the Registrar is obliged to verify this and for that purpose it is necessary for the requested material to be provided. This conduct of refusing to provide the material is a breach of the Act and the Regulations, and is therefore past conduct to be considered for the purposes of the Act. It is a serious breach of the Act as the books and records are necessary for the Registrar to properly carry out his supervisory function under the Act.

The legal test to be used by the Tribunal is whether the Registrar was in error in deciding that the past conduct of the Applicant provided reasonable grounds to believe that the Applicant would not carry on business with integrity, honesty, and in accordance with the law. On the basis of the facts as found, and the application of the law to those facts, the Tribunal finds that the Registrar has met the onus to prove that his decision to suspend the registrations was not in error.

DECISION:

Therefore, by virtue of the authority vested in it under s. 7(4) of the *Motor Vehicle Dealers Act* the License Appeal Tribunal directs the Registrar to carry out his proposal to suspend the registration of the Registrants, and directs that the suspension should not be imposed for a period of 60 days to permit the Registrant to provide the required material. The suspensions shall not be imposed if the information is provided.

LICENCE APPEAL TRIBUNAL

David J. Hunt, Vice Chair, Presiding.

Released: May 23, 2002

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

BRIDGES

PREHEARING

MARGARET BRIDGES

APPEAL FROM A DECISION OF THE COMPLAINTS
COMMITTEE, BOARD OF FUNERAL SERVICES, *FUNERAL
DIRECTORS AND ESTABLISHMENTS ACT*

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

DANIELLE IAMPIETRO, Counsel, representing Margaret Bridges
DON DeLORENZO, Counsel, representing George Darté
JULIE MACIURA, Counsel, representing the Registrar, Board of
Funeral Services

DATE OF
PREHEARING: May 13, 2002 Toronto

ORDER

FOLLOWING attendances on May 13, 2002 at a prehearing before this Tribunal of Danielle Iampietro, Counsel on behalf of Margaret Bridges (the "Applicant") and Don DeLorenzo, Counsel on behalf of George Darté ("Darté") and Julie Maciura, Counsel on behalf of the Registrar, Board of Funeral Services;

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Thursday, June 13, 2002 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario;

1. The Parties to the hearing are the Applicant, Darté and the Director, Board of Funeral Services.

2. There was no settlement of any issues which remain to be decided at the hearing.
3. The following facts contained in the decision letter of the Board of Funeral Services, Complaints Committee, dated December 5, 2001 and referred to under the heading "The Complaint" have been agreed upon by the Applicant and Darte.
 - (a) The first paragraph on the first page.
 - (b) The first bullet on the first page.
 - (c) The second bullet on the first page.
 - (d) The third bullet other than the words "which was sufficient to follow out the necessary duties she had as the executor of her husband's estate."
 - (e) The fourth bullet up to and including the words "Sullivan Mahoney" at the end of the second line of the fourth bullet.
 - (f) The first sentence only referred to in the fifth bullet
4. All parties shall fully comply with the requirements of disclosure of documents or things as set forth in Rule 6.3 or the Rules of Practice of the Tribunal.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: May 13, 2002

DIKS and McALLISTER-DIKS

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
DAN DIKS AND MARY McALLISTER-DIKS

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

DAN DIKS AND MARY McALLISTER-DIKS

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

561732 ONTARIO LTD.

Added Party

ADJOURNMENT ORDER

PURSUANT to the provisions of the *Ontario New Home Warranties Plan Act* R.S.O. 1990, Chapter O.31, as amended, Dan Diks and Mary McAllister-Diks (the "Applicants") appealed a Decision of the Ontario New Home Warranty Program (the "Program") set out in a Decision Letter dated January 17, 2002;

WHEREAS the Applicants filed an appeal with the Tribunal, requesting a hearing;

AND WHEREAS the Tribunal appointed a time and place for a hearing in the above matter from May 27, 2002 to May 31, 2002, inclusive, at the Gillespie Reporting Services, 130 Slater Street, Suite 200, Ottawa, Ontario;

AND WHEREAS the Tribunal was advised that the parties on consent have agreed to adjourn the scheduled hearing;

NOW THEREFORE upon consent of the parties, this Tribunal Orders that:

1. the hearing in this matter is adjourned, *peremptory against all parties*;
2. a prehearing shall be held at the Gillespie Reporting Services, 130 Slater Street, Suite 200, Ottawa, Ontario, commencing at 10:00 a.m., on Friday, May 31, 2002;
3. the hearing dates in this matter will be rescheduled to new dates by the Tribunal at the prehearing.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: May 24, 2002

DI PAOLA

PREHEARING

CARMEN DI PAOLA

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

RICHARD D. HOWELL, Counsel, representing Carmen Di Paola
GEORGE P. DRAMETU, Counsel, representing the Registrar, *Real
Estate and Business Brokers Act*

DATE OF

PREHEARING: May 24, 2002

Toronto

ORDER

FOLLOWING attendances on May 24, 2002 at a pre-hearing before this Tribunal of Richard D. Howell, Counsel, appearing on behalf of Carmen Di Paola, (the "Applicant") and George Drametu, Counsel appearing on behalf of the Registrar, *Real Estate and Business Brokers Act* (the "Registrar" and the "Act" respectively);

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Monday, June 27, 2002 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario and to continue, if necessary, on Tuesday June 28, 2002 at the Tribunal's above Chambers;

1. The Parties to the hearing are the Applicant and the Registrar.
- 2.(a) The facts contained in the undermentioned paragraphs in the Registrar's Notice of Proposal to Revoke the Applicant's registration, dated February 21, 2002, have been agreed upon by the Applicant and the Registrar:

PARAGRAPH

Number 1 through 11 inclusive
Number 13
Number 16
Number 17
Number 19
Number 21 through 24 inclusive
Number 28 through 45 inclusive
Number 49 through 65 inclusive
Number 68

- 2.(b) In regard to the following undermentioned paragraphs in the Registrar's Proposal, the Parties agree:

PARAGRAPH

Number 18 and Number 20

The letters of January 12, 1994 and November 2, 1995 respectively were sent to the Registrar and the contents of those letters are both true and correct.

Number 12, Number 26, Number 27, Number 46, Number 47, Number 48 and Number 67

The Applicant has no knowledge of the contents of these paragraphs and is therefore not able to agree to the facts stated in such paragraphs.

Number 14, Number 15, Number 25

The facts contained in these paragraphs are not agreed to by the Applicant and the Registrar is put to the proof thereof.

Number 66

The Applicant concedes the correctness of the first and second sentences of this paragraph. Save for the aforesaid, the Applicant disputes the balance of the allegations contained in the paragraph.

3. The Tribunal hereby orders that within 10 days of the date of this Order the Registrar shall provide the Applicant and the Tribunal with full particulars, in

writing, of the alleged lack of integrity and honesty of the Applicant and the grounds for the Registrar's belief that the Applicant will not carry on business in accordance with law.

4. The Tribunal further orders that within 10 days of this Order the Registrar shall provide in writing to the Applicant, together with a copy to the Tribunal, true copies of all notes, memorandae and diary entries relating to this matter and presently in the possession or under the control of Registration Officer Nandalal and/or Tom Wright, Director of the *Real Estate and Business Brokers Act*.
5. The Registrar advised the Tribunal that he intends to call as witnesses to testify at the hearing, the following persons:
 - (a) Registration Officer Nandalal
 - (b) The Registrar
 - (c) Mr. Porteous, and
 - (d) certain other individual(s) unknown at this time
6. The Applicant advised the Tribunal that he intends to call as witnesses to testify at the hearing, the following persons:
 - (a) The Applicant
 - (b) Solicitor Vergilio
 - (c) Mr. Wright
 - (d) possibly the Applicant's Trustee in bankruptcy
 - (e) various persons who will attest to the character of the Applicant.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair,
Presiding

RELEASED: May 27 , 2002

1407847 ONTARIO INC. O/A NEW CENTURY TRAVEL CONSULTING SERVICES

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
1407847 ONTARIO INC. O/A NEW CENTURY TRAVEL CONSULTING
SERVICES
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: February 22, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

1407847 ONTARIO INC. O/A NEW CENTURY TRAVEL CONSULTING SERVICES

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by 1407847 Ontario Inc. o/a New Century Travel Consulting Services, the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: May 24, 2002

LICENCE APPEAL TRIBUNAL

BETWEEN:

1407847 ONTARIO INC. O/A NEW CENTURY TRAVEL CONSULTING SERVICES OF CANADA
Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

BACKGROUND

1. 1407847 Ontario Inc. o/a New Century Travel Consulting Services of Canada (hereinafter referred to as "the Registrant") is a company incorporated pursuant to the laws of Ontario and has been registered under the *Travel Industry Act*, R.S.O., c. T-19, as amended (hereinafter referred to as "the Act") as a travel agent, registration number 50008386, since September 12, 2000. The Registrant's fiscal year end is May 31st.

FINANCIAL STATEMENTS – GROUNDS FOR THE PROPOSAL

2. Subsection 24(2) of Ontario Regulation 806/93 made under the Act (hereinafter referred to as "the Regulation") states that if a registrant had sales of less than \$10 million during the previous fiscal year, the registrant shall file within three months of the end of the fiscal year annual financial statements with a review engagement report by a public accountant licensed under the *Public Accountancy Act*.
3. By letter dated May 22, 2001, the Registrant was requested by the Travel Industry Council of Ontario ("TICO") to file financial statements for the fiscal year ending May 31, 2001 by August 31, 2001.
4. On September 20, 2001, a second request was sent to the Registrant, providing the Registrant with a deadline to submit the required filing by September 30, 2001.
2. On September 26, 2001, Mr. John Paccanaro, the Registrant's Accountant telephoned TICO to advise that he had the financial statements ready in draft form and was in the process of finalizing the statements. The estimated submission date given by Mr Paccanaro was October 15, 2001.
3. On October 17, 2001, Mr. Paccanaro called TICO to advise that he must "tidy up the sales issues" for the Registrant, and that "sales were improperly recorded by the Registrant". He gave a further estimated submission date of November 15, 2001, for submission of the Registrant's financial statements.

4. On November 16, 2001 TICO received draft financial statements for the Registrant.
5. On December 10, 2001 TICO sent the Registrant a fax indicating that TICO had received draft financial statements for its company, which were unacceptable. The Registrant was advised to submit finalized financial statements accompanied by a Review Engagement no later than December 31, 2001.
6. On December 17, 2001 the Registrant telephoned TICO to ask if TICO had contacted his accountant. The registrant was advised that it is the Registrant's responsibility to ensure timely submission of its financial statements.
7. On December 29, 2001, TICO received finalized financial statements for the Registrant, accompanied by a Review Engagement. The Review Engagement Report was not, however, signed by a Licensed Public Accountant, as required by the section 24 of the Regulation.
8. By letter dated January 10, 2002, TICO advised the Registrant of the deficiency with its financial statements.
9. On January 14, 2002, the Registrant telephoned TICO to ask why the financial statements were unacceptable and was again advised that the statements required a Review Engagement Report by a Licensed Public Accountant.
10. By letter dated February 4, 2002, the Registrar issued a final due date of February 15, 2002 for the Registrant to file acceptable financial statements for its first fiscal year ended May 31, 2001.
11. By February 22, 2002, the Registrant has failed to file acceptable financial statements for its fiscal year ended May 31, 2001. On that date the Registrar issued a Proposal to Revoke the Registrant's registration.
12. To date, the Registrant has failed to file acceptable financial statements for the fiscal year ended May 31, 2001.
13. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsections 6 (4) and (5) of the *Travel Industry Act* directing that:

1. the Registrar refrain from carrying out the Proposal to Revoke Registration dated February 22, 2002;
2. the Registrant's registration is to be subject to the following terms and conditions:
 - (a) the Registrant shall file complete financial statements as required by section 24 of the Regulation, for its fiscal year ended May 31, 2001, no later than June 30, 2002;
 - (b) If the above-noted financial statements as submitted reveal an insufficient working capital amount or are otherwise deficient, the Registrant will have 30 days from the date of notice of the amount of the deficiency to fully and completely address any deficiency and produce proof of such correction to the Registrar. Thereafter, the Registrant shall maintain the minimum working capital in accordance with section 25 of the Regulation or such subsequent provision as may be in force from time to time. Notice of the deficiency, if any, shall be sent by facsimile, registered mail, or courier to the Registrant;

- (c) The Registrant shall file complete financial statements as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for its fiscal year ending May 31, 2002, no later than August 31, 2002;
 - (d) The Registrant shall file complete financial statements as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for its fiscal year ending May 31, 2003, no later than August 31, 2003; and
 - (e) the Registrant agrees that the Registrar shall hold TICO's \$10,000.00 security until such time as the Registrant has demonstrated to the Registrar that it is in compliance with the requirements of the Regulation.
- 3. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) to (d) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via facsimile transmission, courier or registered mail.
 - 4. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by its signature below that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED this ____ day of May, 2002

Ms Nien Hua Ku
1407847 Ontario Inc. o/a New Century
Travel Consulting Services of Canada
I have authority to bind the corporation

Mr. Michael Pepper
Registrar, *Travel Industry Act*

1042-MED-CARD

**Appeal under Section 50(1) of the Highway Traffic Act,
R.S.O. 1990, Chap. H.8 as amended, from a Decision of
the Registrar of Motor Vehicles pursuant to Section
47(1) of that Act.**

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ROY MELVIN, M.D., Presiding Member

APPEARANCES: LUBA NEUWIRTH
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF
HEARING: May 14, 2002 ***By Teleconference***

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

FACTS:

On April 20, 2002, Physician #1 of Midland Ontario reported to the Ministry of Transportation the medical condition of his patient, the Applicant viz. a cerebro-vascular accident and congestive heart failure. He felt that the Applicant should not be driving.

On May 4, 2001, the Ministry of Transportation suspended his licence to drive on the basis of section 47(1) of the *Highway Traffic Act* and advised the Applicant that this matter would be reconsidered upon receipt of necessary medical reports.

The Applicant submitted a report from Physician #2, Optometrist, dated August 2, 2001 to include visual field tests. This showed a high percentage of Fixation Losses, and some degree of restriction of 120° uninterrupted field of vision. Corrected visual acuity

with lenses is 20/25 which is acceptable. He also submitted a neurological consultation report from Physician #3, Toronto, dated July 7, 2001 describing mild residual weakness of the right arm and minimal weakness of the right hip flexors. Physician #3 offered no opinion regarding his ability to drive but suggested an assessment by a road testing centre.

The Medical Advisory Committee of the Ministry of Transportation agreed with his licence suspension and suggested a repeat of the visual field testing. The Applicant was so advised on October 12, 2001 and again on December 12, 2001.

At the hearing today, information was elicited from the Applicant that he lives alone, is self sufficient, has full use of his hands and does not use a cane or walker. The only medication he takes now is aspirin. His stroke episodes of December 2000 and February 2001 were mild and he was in hospital for only 2-3 days each, attended by his family Physician #1. He has a disable drivers parking permit

Despite several requests from the Ministry of Transportation, the Applicant has not supplied an up to date visual assessment from his optometrist or ophthalmologist.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (f) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

Regulation 340/94 Section 14(a) states that the holder of a driver's licence must not suffer from any disability likely to significantly interfere with his ability to drive a motor vehicle safely.

The medical standards for determining fitness to drive are published by the Canadian Medical Association and are used by the Ministry of Transportation in the application of Regulation 340/94.

When the Ministry of Transportation receives a report that a driver has sustained a cerebro-vascular accident, they will routinely request an assessment of the driver's vision because vision is so often affected by such an attack.

The Applicant's vision does not comply with the standard for visual fields recommended by the Canadian Medical Association (Section 11.1.2 - sixth edition, 2002.)

"Class 5 personal use licence - 120 continuous degrees along the horizontal median and 15 continuous degrees above and below fixation with both eyes open and examined together."

DECISION:

Upon the application by the Applicant to appeal the decision dated February 13, 2002 of the Registrar of Motor Vehicles ("Registrar") to suspend her/his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

Roy Melvin, M.D., Presiding Member

RELEASED: May 23, 2002

MORRIS

PREHEARING

DR. AND MRS. J.R. MORRIS

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, VICE-CHAIR

APPEARANCES:

JACKIE McGAUGHEY-WARD, Counsel for Dr. and Mrs. J.R.
Morris
NETANUS RUTHERFORD, Counsel for the Ontario New Home
Warranty Program
RONALD G. RENZINI, Counsel for Build North Construction Inc.

DATE OF
PREHEARING: May 24, 2002 by teleconference

ORDER

Following attendances by teleconference on May 24, 2002 at a prehearing before this Tribunal of Jackie McGaughey-Ward, Counsel on behalf of Dr. and Mrs. J.R. Morris (the "Applicants"), and Netanus Rutherford, Counsel on behalf of the Ontario New Home Warranty Program (the "Program") and Ronald G. Renzini, Counsel for Build North Construction Inc. (the "Added Party");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Tuesday June 25, 2002 and thereafter, if necessary, to continue on Wednesday June 26, 2002, Thursday, June 27, 2002 and Friday, June 28, 2002 at the Holiday Inn Sudbury, Suite 134, 50 Brady Street, Sudbury, Ontario;

- 1) The Parties to the hearing are the Applicants, the Program and the Added Party;

- 2) The Parties recorded that there had been no resolution of any of the issues in this matter;
- 3) The Tribunal orders that the Applicants' Counsel disclose and deliver to all other parties, within 30 days of the date of this order, true copies of all documents or letters written or received by the Applicants, their solicitors or agents regarding insurance claims in respect of water penetration damage at 360 Maki Avenue, Sudbury.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: May 27, 2002

1090-ADLS-NOMC

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF HEARING: May 21, 2002 Toronto

DECISION

A hearing was held on May 21, 2002, at Toronto, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.
Presiding Member

RELEASED: May 22, 2002

1090-ADLS-NOMC

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF
HEARING: May 21, 2002

DECISION
RELEASED: May 22, 2002 Toronto

REASONS FOR DECISION

A hearing was held on May 21, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on May 22, 2002, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated April 29, 2002, and was received by the Tribunal on April 29, 2002, together with the prescribed fee of \$100.00, paid in cash.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

There were no preliminary matters in dispute between the parties and the hearing proceeded.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice to Registrar dated April 19, 2002
- b) Exhibit # 2 Notice of Appeal Form – received April 29, 2002

By the Respondent:

- a) Exhibit # 3 Ministry of Transportation submissions – received May 16, 2002

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

- 50.1(1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
 - (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
 - (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

- 15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
 - (a) the name, telephone number and address, with the postal code, of the medical practitioner;
 - (b) the name, date of birth and address of the person who is the subject of the report;
 - (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner.”

Finally, section 13 of Regulation 574 (amended) provides:

“A person appealing a suspension has the onus of establishing the merit of the appeal”.

FACTS:

The Applicant's Driver's Licence was suspended '02 04 19" as per Notice of Appeal (Exhibit # 2)

Applicant's Evidence

Page two of the Notice of Appeal is blank.

The Applicant introduced a handwritten note from a physicians' prescription pad, showing the heading, Physician #1.

The note, apparently signed by Physician #1, and dated "2002-04-26" describes the asthma medication that the Applicant is currently on.

At the hearing, the Applicant testified as to the events that led up to the demand for the breath sample. The Applicant told the Tribunal that he was feeling tired from lack of sleep. He fell asleep in his car, while waiting for his girlfriend. When awakened by a knock at the window, by the officer, he was drowsy, confused, did not know what he doing, and became "excited".

After a few attempts to provide a breath sample, the Applicant had difficulty breathing and asked the officer to be allowed to get his puffer. It is the Applicant's belief that the officer did not understand him, but he did make the request twice.

In commenting on the sworn Affidavit of Police Officer #1, the Applicant disagreed with points #5; #15; #21; #26. Respectively, the Applicant did not agree to having "...bleary bloodshot eyes..." if he did, it was from lack of sleep; the Applicant asserted that he was only given four opportunities to blow not five as stated in the Affidavit; the Applicant claims that the right to counsel was not read; the Applicant affirmed that he did tell the Constable he had an asthma condition.

The Tribunal asked the Applicant why his physician had not completed page 2 of the Notice of Appeal. The Applicant replied that he himself filled the top part of the page but was not aware that his physician was required to fill the form.

In cross-examination by the Respondent's Representative, Mr. Biel, the Applicant basically reiterated his previous testimony. When asked specifically how it was possible that, according to Police Officer #1, he was able to blow into the mouthpiece when the

mouthpiece was not connected to the instrument, but not while the mouthpiece was attached, the Applicant proffered that he did not recall being able to blow at all.

The Applicant confirmed that he had not sought medical assistance after the incident. The Applicant saw Physician #1 on the "...26th...", but did not inform him about the fact that he had been stopped by the police and asked to provide a breath sample.

Respondent's Evidence

The Respondent provided the following Documents:

3. Copy of Notice to the Registrar
4. Copy of Driving Record of The Applicant

The Applicant's Driver's abstract shows several offences.

The Respondent did not call the officer involved in the incident as a witness, but introduced in evidence the sworn Affidavit of Police Officer #1 of the Toronto Police Services, Badge number #_____.

Police Officer #1 attested that he has been employed by the Toronto Police Services "...since October 1991...".

After observing the Applicant asleep at the driver's seat of the vehicle with the engine running, Police Officer #1 "...formed a suspicion ...alcohol in his body ...made the demand ...to provide forthwith a sample of breath ...explained ...how to provide a breath sample..."

According to Police Officer #1, the Applicant "...failed to follow ...instructions by allowing air to escape out the sides of his mouth. He was not making a tight seal on the mouthpiece..."

Police Officer #1 "...again explained ...how to provide a proper sample ...had the male remove the mouthpiece from the instrument and blow through it while it was not attached to the instrument. The male was able to blow without any problem..."

During the Applicant's second attempt to blow into the instrument, Police Officer #1 "...observed that no breath entered the instrument."

The Applicant was given four more opportunities to provide a breath sample, but "...did not create a tight seal ...blew a short 2-second blow and then stopped ...no air entering the instrument ...gave a series of short puffs into the instrument resulting in an improper sample ...blew a second short ...then stopped..."

Police Officer #1 was never informed that the Applicant "...suffered from any medical condition..." nor did the Applicant request "...medication or medical assistance..."

The Applicant did not demonstrate any signs of impaired breathing such as "...coughing or wheezing..."

In closing the Applicant simply stated that he is "innocent" and that he needs his license.

The Respondent's Representative pointed out in his closing remarks that whether or not the Applicant had been drinking is not the issue. The issue is whether the Applicant has a medical condition that would prevent him from providing a breath sample.

In order to succeed in an appeal the Applicant has to establish that he has a medical condition that prevented him from providing an adequate breath sample. Mr. Biel maintains that the note provided by the Applicant's physician does not comply with the requirements of Section 15 of Regulation 574, which is specific as to the information required in a medical report.

APPLICATION OF THE LAW TO FACTS:

An appeal was brought by the Applicant under Section 50.1(2)(b) of the *Highway Traffic Act*, which prescribes:

"...person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason..."

Thus, as the Respondent's Representative asserted, at issue is, does the Applicant have a medical condition that could cause the Applicant to fail or not comply with the breath demand?

The Applicant opted to submit a note from his physician Physician #1 in lieu of having page 2 of the Notice of Appeal completed by his physician.

The Respondent claims that the information contained in this note does not meet the criteria set out in Section 15 of Regulation 574, in that it provides none of the information required, such as the Applicant's address and date of birth. The Tribunal concurs.

Further, section 15(1)(c), (d) and 15(2) of Regulation 574 prescribes as follows:

- 15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
....

- (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
- (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
- ...
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

By his own admission the Applicant affirmed that he did not inform his physician that he had been asked to provide a breath sample. The Tribunal finds that Physician #1's handwritten note falls short of the meeting the criteria set out in Section 15(1)(c) of Regulation 574.

Physician #1's note offers no information as to how long the Applicant has been his patient nor any details of last visit, thus, Section 15(1)(d) of Regulation 574 is not met.

Section 15 (2) of Regulation 574 is, perhaps, the most relevant. The essence of this clause requires that the physician established a link between the condition and the inability to provide a breath sample. This clause relates specifically to the detailed information required on page 2 of the Notice of Appeal, which serves as a valuable guideline to the Tribunal as it is designed to provide pertinent details of the Applicant's condition, such as:

- Details and diagnosis of the patient's present condition;
- History of condition;
- Type of Measurements or recent test taken with (date indicated): (Reference to any pathology test (e.g.: PTF represent important corroboration of your medication opinion)).
- Relevant details of last visit and when ... patient was last seen

The Tribunal is left unsure as to why page 2 of the Notice of Appeal is blank, but the fact is that Physician #1's report fails to meet the test of establishing the grounds for appeal under section 50.1.

Physician #1 does not offer any rationalization of how the Applicant's condition affects the Applicant's breathing pattern. Nor, does Physician #1 provide any justification as to how this problem could have affected the Applicant's ability to provide a breath sample.

At the hearing the Applicant was unable to coherently explain why he was unable to provide a breath sample, other than to state that he was "excited" and has "asthma". The Tribunal accepts the Applicant's testimony. Nonetheless, there is insufficient

evidence, medical and viva voce from the Applicant, to explain how the condition prevented the Applicant from providing the demanded breath sample.

As mentioned by the Respondent's Representative, the Applicant's condition was not severe enough to warrant seeking medical assistance immediately after the incident. The Applicant's first visit to his physician was a week after the incident, and at that time he did not feel the incident merited discussing with his physician.

The onus being on the Applicant to establish the merit of the appeal, the Tribunal finds that the Applicant has failed to do so. Thus, the Tribunal finds that the Applicant does not meet the criteria of Section 50.1(2)(b), in that he was not able to demonstrate that he suffers from a medical condition, which would prevent him from providing a breath sample.

DECISION:

Upon the application by The Applicant to appeal the suspension order dated April 19, 2002 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal **confirms** the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.
Presiding Member

RELEASED: May 24, 2002

1094-ADLS-COUGH

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF HEARING: May 22, 2002 Toronto

DECISION

A hearing was held on May 22, 2002, at Toronto, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.
Presiding Member

RELEASED: May 23, 2002

1094-ADLS-COUGH

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF
HEARING: May 22, 2002

DECISION
RELEASED: May 23, 2002 Toronto

REASONS FOR DECISION

A hearing was held on May 22, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on May 23, 2002, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated April 5, 2002, and was received by the Tribunal on May 6, 2002, together with the prescribed fee of \$100.00, paid by certified cheque.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

Prior to the commencement of the hearing the Respondent's Representative requested a grace period be allowed in order to afford time for Police Officer #1 to arrive.

In accordance with the Tribunal's procedure a 30 minutes grace period was granted.

The Representative of the Ministry provided the Tribunal with original certified copies of Ministry of Transportation documents on file.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice to Registrar dated April 3, 2002 - issued by the Registrar of Motor Vehicle.
- b) Exhibit # 2 Notice of Appeal Form received May 6, 2002

By the Respondent:

- a) Exhibit # 3 Ministry of Transportation submissions – received May 17, 2002

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

50.1 (1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

- (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
- (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

- (a) the name, telephone number and address, with the postal code, of the medical practitioner;
- (b) the name, date of birth and address of the person who is the subject of the report;
- (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
- (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;

- (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

The Tribunal notes that the date on the Notice of Appeal is "APRIL 3^d 2003", which appears to be in error. According to the Notice to the Registrar, the Applicant's Driver's Licence was suspended "02/04/03". (Exhibit # 1)

Applicant's Evidence

The medical history portion of the Notice of Appeal has been prepared by the Applicant's physician of "12+" years, Physician #1.

Physician #1 confirms that he saw the Applicant on April 3^d, 2002, presenting signs of "...*bronchitis & sinusitis. Biaxin prescribed ...this infection may render it difficult for the patient to maintain a prolonged exhalation of breath...*"

Physician #1 attaches the results of a sinuses and chest radiological consultation report, from the Lawrence-Kingston Rd. X-Ray laboratory, dated "03 Apr 2002". The said report indicates, "...*There is a slight mucosal thickening throughout the left maxillary antrum consistent with sinusitis which may be acute, sub-acute or chronic. The other paranasal sinuses are clear, as is the posterior nasopharynx ...CHEST: PA AND LEFT LATERAL - Normal...*"

The Applicant testified that he had been suffering from sinusitis and bronchitis for approximately one month prior to the breath demand incident. The Applicant attempted to control the cough with medication purchased off the shelf.

The Applicant affirmed that he was not able to blow because of the cough. In fact, the Applicant stated that this was the reason why the officer gave him seven opportunities to provide a sample when the officer's normal procedure is to allow five attempts.

The Applicant believes that it is possible the officer thought he had been drinking because his eyes were red. The Applicant explained to the Tribunal that his eyes get red every time he coughs, as he needs to cough very hard in order to expel the mucus.

When asked, as a matter of clarification, if he was coughing at the time, the Applicant replied, *"No, I was not coughing at the time of the test, no..."*

Prior to concluding his evidence-in-chief; the Applicant questioned why the officers did not take a blood sample, and stated that his licence is essential.

In cross-examination, the Applicant testified that he had not seen a physician prior to the incident due to lack of time. He suffers quite often from bronchitis, and tries to deal with it himself. The Applicant asserted that his physician chastised him for not seeking treatment sooner.

In reply to the Respondent's Representative's question as to whether his physician ordered any pulmonary function tests, the Applicant noted that "...That was not his main concern ...his main concern was my health...". The Applicant was asked to return for a follow up consultation in two weeks, but was not referred to a respiratologist.

As for medication, the Applicant was prescribed an antibiotic but not an inhaler.

Respondent's Evidence

The Respondent provided the following Documents:

- 1 Notice to the Registrar
- 2 Driving Record of the Applicant,
- 3 Medical report of Dr. Roger Goldstein, MB.ChB, FRCP (UK), FRCP(C), FCCP
- 4 The Applicant's driver's record according to the Ministry of Transportation. (Exhibit #3)

In a letter dated May 1 2002, Dr. Roger S. Goldstein, MB,ChB,FRCP(UK)FRCP(C) FCCP, Director of Program in Respiratory Rehabilitation - University of Toronto, states that he is a "...consultant respiratologist in practice since 1979 with particular interest in chronic respiratory conditions such as: asthma, emphysema and chronic bronchitis ...Director of the University of Toronto, Respiratory Divisional Program in Rehabilitation, ...medical advisor to the pulmonary function laboratories for over 16 years ...familiar with the Alcotest and the Intoxilyzer 5000C having evaluated both machines in ...Pulmonary function laboratory ...have tested both the portable and the station monitor among a variety of individuals (men and women) age range 44-77 years, vital capacity range 1.6 to 4.5 litres, FEV1 range 0.4 to 2.9 litres, FEV1/FVC range 20% to 78% ...The vast majority of individuals, even with an FEV1 of 0.7 are able to satisfactorily provide a breath sample notwithstanding their respiratory condition..." .

After reviewing the medical report prepared by Physician #1, as well as the results of the sinuses and chest X-ray, Dr. Goldstein concluded “...*the presence of bronchitis, even if accompanied by sinusitis, is unlikely to have prevented The Applicant from providing a satisfactory breath sample. The breath sample in question is quite easy to provide and indeed, has been provided in a very satisfactory manner by individuals with very severe lung disease...*”

The Respondent called Police Officer #1, a member of the Ontario Provincial Police – Toronto Detachment as a witness. Police Officer #1 testified that he has been with the Ontario Provincial Police “...*since April 2001...*”

Police Officer #1 described the events that led to the Applicant being stopped and the subsequent demand for a breath sample.

The Applicant was given a total of seven opportunities to provide a breath sample, but failed to do so. Each time the Applicant blew into the machine the screen registered and “E0” indicating that some air was going in but the Applicant was “...*not blowing long enough.*”

During the fourth and fifth attempt the Applicant was observed and admitted to putting his tongue in the mouthpiece.

During his dealings with the Applicant Police Officer #1 noticed: “...*his breathing was quite normal. He was not wheezing or coughing ...not out of breath...*”

In closing the Applicant emphasized that he “*was not under the influence*”. As a bar owner he tells his customers not to drink and drive and would never do so himself. Not having his license and having been charged, is causing the Applicant severe economic hardship.

In his closing remarks, the Respondent’s Representative referred to Physician #1’s report and commented that Physician #1 suggests that the Applicant “may” have difficulty exhaling, but does not give an indication of the severity of the condition. Further, Physician #1 failed to directly connect the Applicant’s bronchitis to his ability to provide a breath sample.

The Respondent’s Representative cited the Applicant’s actions as evidence of the Applicant’s intent to not provide a breath sample. Although, suffering from bronchitis for a month, the Applicant had not visited his physician prior to the incident. The Respondent’s Representative commented that he probably would not have seen his physician had he not been stopped. The fact that the Applicant was heading for the Casino at two o’clock in the morning, is according to the Respondent’s Representative a clear indication that the Applicant’s state of health was not that serious. Lastly, the Respondent’s Representative alluded to the fact that the Applicant admitted to blocking the mouthpiece with his tongue.

In conclusion the Respondent's Representative asked that the Tribunal uphold the Registrar's decision.

APPLICATION OF THE LAW TO FACTS:

Prior to setting out the reasons for the decision, the Tribunal will address the Applicant's issue as to why he was not asked to provide a blood sample. Subsection 48.3 (3) 1 of the Highway Traffic Act, R.S.O. 1990, Chapter H-8 as amended is clear in its provision, the concentration of alcohol in the blood may be obtained "...by an analysis of the person's breath sample or blood taken..." However, the decision to request a blood sample is at the discretion of the officers, according to established policy. At the time, the Applicant showed no visible signs of respiratory impairment, such as wheezing or chocking. Thus, the issue of a blood sample is inconsequential.

At issue, is not whether the Applicant was impaired or had been drinking at all. At issue, is did the Applicant have a medical condition that could cause the Applicant to fail or not comply with the breath demand.

Section 50.1(2)(b) of the *Highway Traffic Act* allows for an appeal in circumstances where a

*"...person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood **because he or she was unable to do so for a medical reason...**"*

The Tribunal concurs with the Respondent's Representative. Dr. Goldstein's experience has demonstrated the breath sample "...has been provided in a very satisfactory manner by individuals with very severe lung disease...". Physician #1 does not mention the severity of the bronchitis; nonetheless, his words appear quite cautious "...this infection may render it difficult ...to maintain a prolonged exhalation...". Further, Physician #1's report is non-specific as to how the Applicant's condition could have prevented him from providing an adequate breath sample.

With all due respect to Physician #1, he is not a respiratologist, Dr. Roger Goldstein is. The Tribunal must accept the evidence of the Respondent's expert, Dr. Roger Goldstein.

The Applicant has not provided the Tribunal with medical reports from any specialists. In fact, it appears that Physician #1, who has known the Applicant for over twelve years, did not feel that the Applicant's history was severe enough to warrant sending him to a respiratologist. This premise is corroborated by the Applicant's own testimony that he has not been prescribed an inhaler.

Since neither Physician #1, nor Dr. Goldstein was at the scene of the roadside breathalyser test session, the Tribunal also considered the evidence of Police Officer

#1. At no time, was the Applicant observed in an afflicted breathing state, nor did the Applicant request medical assistance.

The Tribunal finds that the Applicant is credible, but that the Applicant has failed to substantiate the basis for an appeal on medical grounds.

The onus being on the Applicant to establish the merit of the appeal, the Tribunal finds that the Applicant's testimony although credible, failed to substantiate the basis for an appeal on medical grounds. Thus, the Tribunal finds that the Applicant does not meet the criteria of Section 50.1 (2) (b), in that he was not able to demonstrate that he suffers from a medical condition, which would prevent him from providing a breath sample.

DECISION:

Upon the application by The Applicant to appeal the suspension order dated April 3, 2002 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal **confirms** the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.
Presiding Member

RELEASED: May 28, 2002

ALBERT HOMES LTD.

PREHEARING

ALBERT HOMES LTD.

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: DAVID HUNT, Vice-Chair

APPEARANCES:

J. SOUSA, Counsel for Albert Homes Ltd.
NETANUS RUTHERFORD, Counsel for the Ontario New Home
Warranty Program

DATE OF
PREHEARING: May 30, 2002 Toronto

ORDER

FOLLOWING attendances on May 30, 2002 at a prehearing before this Tribunal of J. Sousa, Counsel, appearing on behalf of Albert Homes Ltd. (the "Applicant"), and Netanus Rutherford, Counsel, and Ron Blanchard, Warranty Representative South-West Regional Office, on behalf of the Ontario New Home Warranty Program (the "Program");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Tuesday, July 2, 2002 at the Ramada Inn London, Churchill "C" Room, 817 Exeter Road, London, Ontario and to continue if necessary to July 5, 2002 at the Ramada Inn London's above address;

1. The Parties to the hearing are the Applicant and the Program.
2. The Parties recorded that there had been no resolution of any of the issues in this matter;

3. Counsel for the Applicant undertook to advise the Program within 7 days of this prehearing, whether the Applicant does or does not dispute the chargeable conciliations set out in the Notice of Proposal;
4. The Tribunal therefore orders that the Applicant's counsel advise counsel for the Program within 7 days whether or not the chargeable conciliations are in dispute;
5. The Tribunal orders that the Applicant's counsel provide the Applicant's financial information to the counsel for the Program as soon as it is available and make best efforts to expedite its preparation.

LICENCE APPEAL TRIBUNAL

David Hunt, Vice-Chair

RELEASED: May 30, 2002

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
995391 ONTARIO INC. O/A AIR LINKS INTERNATIONAL
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: March 8, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

995391 ONTARIO INC. O/A AIR LINKS INTERNATIONAL

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by 995391 Ontario Inc. o/a Air Links International, the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

LICENCE APPEAL TRIBUNAL

BETWEEN:

995391 ONTARIO INC. O/A AIR LINKS INTERNATIONAL

Applicant

- and -

REGISTRAR, TRAVEL INDUSTRY ACT

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

1. 995391 Ontario Inc. o/a Air Links International (hereinafter referred to as "the Registrant") has been registered as a travel agent (Registration No. 4132049/R) since May 4, 1993. Its fiscal year end is June 30th.
2. By letter dated February 28, 1995 the Registrant was advised by the Ontario Travel Industry Inspections Office of its working capital shortfall of \$15,017 reflected in its financial statements for the fiscal year ended June 30, 1994, and given a due date of March 21, 1995 to provide evidence of its correction.
3. By letter dated April 5, 1995, the Registrant was given a final due date of April 18, 1995 to correct the working capital shortfall reflected in the financial statements for fiscal June 1994, failing which the matter would be referred to the Registrar.
4. On April 6, 1995 a letter was sent to the Ontario Travel Industry Inspections Office from the Registrant's accountant, advising that the shareholders had injected \$28,000.
5. On November 29, 1995, the Registrant filed financial statements for the fiscal year ended June 30, 1995, which were due by September 30, 1995. It appeared that working capital requirements were met as at June 30, 1995.
6. On December 10, 1996, the Registrant filed its financial statements for the fiscal year ended June 30, 1996, which were due September 30, 1996. Those statements reflected a working capital shortfall of \$8,797. The Registrant partially addressed the shortfall by injecting \$4,000 on February 11, 1996.
7. By letter dated August 25, 1997 the Registrant was advised that it had failed to file its Form 1 for the period ended June 30, 1997, and to make the required payment to the Fund, and was requested to submit the required filing by September 8, 1997. A final request was sent to the Registrant on September 8, 1997 providing the Registrant with a deadline to file its Form 1 by September 22, 1997.
8. On November 19, 1997, the Registrant filed its financial statements for the fiscal year ended June 30, 1997, which were due by September 30, 1997. It appeared that working capital requirements were met as at June 30, 1997.
9. On March 24, 1998 a proposal to revoke registration was issued to the Registrant for failure to file its Form 1 for the period ended June 30, 1997.

10. On April 9, 1998, the Registrant filed its Form 1 for the period ended June 30, 1997.
11. On April 17, 1998, the Registrant filed an appeal to the proposal to revoke registration.
12. On April 30, 1998, the Registrant signed and acknowledged Terms and Conditions of Registration.
13. On May 15, 1998, the Registrar withdrew the proposal to revoke registration for failure to file its Form 1 for the period ended June 30, 1997.
14. On November 26, 1998, the Registrant filed its financial statements for fiscal June 30, 1998, which were due by September 30, 1998. The statements revealed a working capital shortfall of \$21,040.
15. On January 19, 1999 the Registrant was advised by TICO of the working capital shortfall of \$21,040, and given a due date of February 2, 1999 to provide evidence of correction.
16. The Registrant was visited on March 2, 1999 by one of TICO's Inspectors as the Registrants working capital shortfall was due to repayment of shareholder advances. It was emphasized by the Inspector that working capital must be maintained. It was also revealed that the Registrant was selling airline tickets to other travel agencies without benefit of a wholesale license. A wholesale application was given to the Registrant.
17. On March 5, 1999 the Registrant provided TICO with evidence of a \$22,000 shareholder injection.
18. On November 3, 1999 the Registrant filed its financial statements for the fiscal year ended June 30, 1999, which were due September 30, 1999. The statements revealed a working capital shortfall of \$14,898.
19. By letter dated November 5, 1999, the Registrant was advised of its working capital shortfall and given a due date of November 22, 1999 to correct the shortfall.
20. On December 31, 1999, the Registrant provided TICO with evidence of a shareholder injection totalling \$15,000.
21. On March 3, 2000 the Registrant was visited by one of TICO's Inspectors, as shareholder advances were repaid during 1998 –1999. It was revealed during the visit that the trust account was overdrawn during November and December 1999, and that the Registrant was selling tickets to other travel agencies without benefit of a wholesale license. A return visit was scheduled for June 2000.
22. By letter dated March 28, 2000 the Registrar issued a letter to the Registrant advising that compliance issues noted in March 1999 and March 2000 still exist and corrective measures had not been taken. i.e. selling to other travel agencies without benefit of a wholesale registration, shareholder advances were repaid, the *Travel Industry Act Trust Account* was not designated as such, and the trust account was overdrawn during November and December 1999. The Registrant was requested to file trust account reconciliations for the months of January and February 2000, accompanied by copies of the *Travel Industry Act Trust Account* bank statements for the corresponding periods by April 14, 2000.
23. By letter dated May 24, 2000 the Registrant was issued a final due date of June 2, 2000 by the Registrar, due to no response to the Registrar's letter dated March 28, 2000.
24. By letter dated May 31, 2000 the Registrant was requested by TICO to file its financial statements for the fiscal year ending June 30, 2000, due by September 30, 2000.
25. The Registrant was visited by one of TICO's Inspectors on June 16, 2000 as a follow up visit to March 2000 to ensure that funds injected by the Registrant were still in place. There was no evidence found that the Registrant had removed the shareholder advances. It was revealed during the visit that IATA had lifted its ticket plate and ticket stock due to NSF cheques to IATA, and the trust account was overdrawn. The registrant acknowledged that it would forward copies of its "*Travel Industry Act Trust Account*" bank statements for the months of June and July to TICO.
26. By letter dated October 16, 2000 the Registrant was issued a reminder letter that it had not filed its

financial statements for the fiscal year ended June 30, 2000, and gave a further due date of October 31, 2000.

27. By letter dated November 2, 2000 the Registrant was issued a letter by the Registrar, giving a final due date of November 16, 2000 to file its financial statements for the fiscal year ended June 30, 2000, failing which a proposal to revoke registration would be issued.
28. On November 23, 2000 the Registrar issued a proposal to revoke registration against the Registrant, for failure to file its financial statements for the fiscal year ended June 30, 2000.
29. On November 29, 2000 the Registrant hand delivered its financial statements for the fiscal year ended June 30, 2000, which were due September 30, 2000. Those statements revealed a working capital shortfall of \$4,145. Two of TICO's Inspectors met with the Registrant and advised that if it immediately provided evidence of correction of the working capital shortfall totalling \$4,145, that TICO would withdraw the proposal to revoke its registration.
30. On November 30, 2000, the Registrant provided evidence of a shareholder loan totalling \$4,200.
31. On November 30, 2000 the Registrar withdrew its proposal to revoke registration against the Registrant.
32. On January 17, 2001, the Registrant was visited by one of TICO's Inspectors. It was determined during the visit that the Registrant's trust account was not properly designated as a "*Travel Industry Act Trust Account*". It was further determined that the company's working capital had been reduced subsequent to the injection on November 30, 2000, due to withdrawals of \$12,373.31 paid to the Registrant, for personal and automobile lease. The Registrant stated that it estimated itself to be short on working capital, in an amount approximately \$6,000, which it would correct by January 31, 2001, and forward proof of correction to TICO. The visit concluded that until working capital was maintained the Registrant posed a threat to the Fund.
33. On January 31, 2001 the Registrant forwarded proof of a shareholder injection for \$6,000 to TICO.
34. On April 27, 2001, the Registrant was visited by one of TICO's Inspectors to ensure that the funds injected had not been removed, and to ensure that the trust account was being properly maintained. There was no evidence found that the Registrant had removed the funds injected on January 31, 2001.
35. On October 31, 2001 the Registrant filed its financial statements for the fiscal year ended June 30, 2001, which were due by September 30, 2001. The statements revealed a working capital shortfall of \$50,818.
36. By letter dated December 14, 2001 the Registrant was advised of its working capital shortfall of \$50,818, and given a due date of December 31, 2001 to correct the shortfall, and provide evidence to TICO.
37. On January 11, 2002, a second request reminder notice was sent to the Registrant, to address the working capital shortfall for the fiscal year ended June 30, 2001.
38. By letter dated February 1, 2002 the Registrant was issued a final due date of February 15, 2002 to address the working capital shortfall reflected in its June 2001 financial statements, by the Registrar, failing which a proposal to revoke registration would be issued.
39. On February 21, 2002, the Registrant was visited by one of TICO's Inspectors, to check its working capital position. A re-assessment of the company's working capital revealed that as at June 30, 2001 the working capital shortfall totalled \$25,799. The trust account was overdrawn three times in the three months of November and December 2001 and January 2002. The visit concluded that the Registrant is not maintaining minimum working capital levels as required, and poses a threat to the Fund.
40. On March 28, 2002, the Registrant provided evidence of a shareholder advance of \$25,799 to correct the working capital shortfall reflected in its financial statements for the fiscal year ended June 30, 2001.
41. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsections 6 (4) and (5) of the *Travel Industry Act* directing that:

1. the Registrar refrain from carrying out the Proposal to Revoke Registration dated March 8, 2002;
2. the Registrant's registration is to be subject to the following terms and conditions:
 - (a) The Registrant shall at all times maintain sufficient funds to cover its customer obligations. Such funds shall be maintained in a properly designated "Travel Industry Act Trust Account" and in accordance with the trust accounting requirements as stipulated in section 36 of the Regulation or such subsequent provision as may be in force from time to time;
 - (b) The Registrant shall submit a monthly trust account reconciliation with corresponding bank statements to the Registrar beginning with the month of May, 2002, no later than 30 days after the end of each calendar month, for so long as the Registrar shall so require;
 - (c) At all times, the Registrant shall maintain the minimum working capital as required by section 25 of the Regulation or such subsequent provision as may be in force from time to time;
 - (d) If, at any time, the Registrar has reason to believe that the Registrant is in financial difficulty, the Registrar, in his sole discretion, may require that the Registrant provide a written statement of the Registrant's current net working capital and the Registrant shall do so within the time specified by the Registrar;
 - (e) The Registrant shall file complete financial statements, including a reconciliation of customer funds and customer obligations, as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for its fiscal year ending June 30, 2002, no later than September 30, 2002;
 - (f) The Registrant shall file complete financial statements, including a reconciliation of customer funds and customer obligations, as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time for its fiscal year ending June 30, 2003, no later than September 30, 2003;
 - (g) The Registrant shall file complete financial statements, including a reconciliation of customer funds and customer obligations, as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time for its fiscal year ending June 30, 2004, no later than September 30, 2004;
 - (h) If the above-noted financial statements as filed are incomplete, the Registrant will have 30 days from the date of notice of the deficiency to fully and completely address the deficiency and produce proof of such correction to the Registrar. Notice of the deficiency, if any, shall be sent by registered mail to the Registrant.
 - (i) the Registrant shall file its Form 1 with the corresponding payment to TICO, for its fiscal year ending June 30, 2002 by July 15, 2002 ;
 - (j) the Registrant shall file its Form 1 with the corresponding payment to TICO, for its fiscal half-year ending December 31, 2002 by February 15, 2003; and
 - (k) the Registrant shall file its Form 1 with the corresponding payment to TICO, for its fiscal year ending June 30, 2003 by July 15, 2003; and
 - (l) the Registrant shall not sell travel services to other travel agencies without benefit of a wholesale registration.
3. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) to (l) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.
4. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by its signature below that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED at Mississauga this ____ day of May, 2002

Mr. Baljit Singh Garcha
995391 Ontario Inc. o/a Air Links International
I have authority to bind the corporation

Mr. Michael Pepper
Registrar, *Travel Industry Act*

McCONNELL and FINCH

LORRAINE McCONNELL AND PERCY FINCH

APPEAL FROM A DECISION OF THE BOARD OF TRUSTEES OF
THE MOTOR VEHICLE DEALERS COMPENSATION FUND

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

LORRAINE McCONNELL AND PERCY FINCH, represented by their
Agent, Kenneth Maybee
AVIVA R. HARARI, Counsel, representing the Motor Vehicle Dealers
Compensation Fund

DATE OF
HEARING: June 14, 2002

Toronto

DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") from a decision of the Motor Vehicle Dealers Compensation Fund (the "Fund") dated June 13, 2001 wherein the claim of Lorraine McConnell and Percy Finch (the "Applicants") for compensation was disallowed.

The Fund's refusal to allow the Applicants' claim was set out briefly in the Fund's letter of June 13, 2002 which reads as follows:

Your claim was presented to the Board of Trustees of the Motor Vehicle Dealers Compensation Fund on February 26, 2002.

It was the Board's decision to deny your claim as per Section 12(5) of the Compensation Fund Schedule, which indicates, "that no customer of a participant shall have any vested or absolute right to payment of a claim against the Board, the Trustee or the Fund". The Board continues to maintain their position that due to the non arm's length transaction it is not a bonafide claim.

(Exhibit 4)

The Fund had earlier issued a decision letter dated July 23, 2001 in which letter it refused the Applicants' claim as the Fund denied that the Applicants had dealt with a registered dealer. The Fund withdrew its decision of July 23, 2001 and in its place substituted its decision of June 13, 2002. The Applicants consented to the late filing of the Fund's amended decision letter of June 13, 2002 and consented to the hearing proceeding based upon the June 13, 2002 decision letter.

The Applicants bring their appeal pursuant to section 12 of the Schedule to Regulation 801 to the *Motor Vehicle Dealers Act* (the "Act"). The Applicants' claim for compensation from the Fund is based on the Fund's refusal to pay compensation to the Applicants.

Kenneth Maybee (Maybee) was a registered motor vehicle dealer under the Act and a participant in the Fund. The Applicants had purchased a Dodge Ram truck from Maybee in May 1998. The motor vehicle had been stolen prior to its sale by Maybee to the Applicants. The police, in April 1999, had seized the motor vehicle from the Applicants and returned it to its lawful owner. The Applicants' claim against the Fund is for compensation for their loss arising out of the seizure of the stolen Dodge Ram truck which they had purchased from Maybee.

Maybee filed an assignment in bankruptcy on November 24, 1998. The Applicants accordingly made a claim for compensation to the Fund based on section 12.(3)3 of the Schedule to Regulation 801 to the Act. The Applicants claim is limited to the amount of \$15,000.00 by virtue of section 12.(10)(a) of the Schedule.

THE EVIDENCE:

The evidence in this matter consisted of documents and oral testimony. The documents consist of Exhibits 1 through 7 with Exhibit 5 being the Fund's Book of Disclosure. The only witness for the Applicants was Lorraine McConnell ("McConnell".) The Fund called no persons to testify at the hearing and relied solely on the documents filed.

Testimony of Lorraine McConnell

In her testimony, McConnell stated that on May 15, 1998 she and Percy Finch purchased a 1998 Dodge Ram 4x4 truck from Kenneth Maybee ("Maybee") who then traded as Norwood Auto. The Applicants entered into a written bill of sale with Maybee when purchasing the Dodge Ram.

(Exhibit 5, Tab 8)

The bill of sale provided for a purchase consideration of \$39,995.00 plus \$760.00 for taxes and licence fee of \$760.00. A trade-in allowance of \$34,995.00 in respect of a 1995 Ford Extended Cab diesel truck was given to the Applicants who paid the balance of the purchase consideration, including taxes & licence fee, in all amounting to \$5,760.00, by

means of a credit card. When they purchased the Dodge Ram she had no knowledge that it was a stolen vehicle.

McConnell went on to state that on April 20, 1999 she was visited at her home by a police constable who informed her that the Dodge Ram was a stolen vehicle and at the police constable's request she surrendered possession of the vehicle to the police by delivering it to the premises of Norwood Auto. At the time the police constable instructed her to deliver possession of the vehicle to Norwood Auto, she was informed by the constable that the Applicants could make a claim against the Fund for compensation for their loss due to the seizure of the vehicle.

McConnell further stated that she filed a claim for compensation with the Fund but that the Fund initially refused her claim based upon the dealer, Maybee, not being registered as a motor vehicle dealer in terms of the Act. The Fund subsequently withdrew its decision to deny the Applicants' claim based upon the non-registration of Maybee. Subsequent to the Applicants complying with the requirements under Regulation 810 for the filing of a claim, the Applicants' claim was finally dealt with by the Fund in its decision letter of June 13, 2002.

Under cross examination by the Fund's Counsel, McConnell stated that she submitted all necessary documents to the Fund in order to satisfy the Fund as to the Applicants' claim for compensation. The Applicants supplied the Fund with details of their claim, including a copy of the bill of sale under which the Applicants purchased the Dodge Ram, as well as details of their payment of the balance for the purchase price due in terms of the bill of sale to Maybee by way of a Visa charge card. She also informed the Fund that Maybee was her son.

(Exhibit 5 Tab 8, pages 3 through 17)

She insisted that when the police constable requested her to surrender the Dodge Ram vehicle, that vehicle was in her possession at the Applicants' home and was not in the possession of Maybee or Norwood Auto.

McConnell confirmed, that to her knowledge Maybee had plead guilty to being in possession of numerous stolen motor vehicles, including the Dodge Ram, and in April 2002 was sentenced to imprisonment and 75 hours of community service.

(Exhibit 5 Tab 6)

McConnell was shown by the Fund's Counsel the Canadian Black Book of November, 1997 which listed the then value of various trucks. Her attention was directed to the listing of 1995 Ford Light Duty trucks and specifically to an X35 model with supercab which was the Ford truck the Applicants had traded in and in respect of which they were allowed a credit of \$34,995.00. McConnell noted that the Black Book showed that the value of such Ford truck in excellent condition was \$21, 400.00, a sum far less than \$34,995.00. However, McConnell disputed the value of the Applicants' Ford truck traded in was only worth \$21,400.00 as she contended that there were many extras of an expensive nature on the that truck, including a set of new tires, a diesel engine, trailer hitch and 2 way radio, all

which increased its value over and above the Black Book value. She did not, however, dispute that the extras were worth about \$5,000.00 when this figure was put to her in cross-examination.

The Applicants closed their case without calling further testimony and the Fund's Counsel informed the Tribunal that the Fund would not call any witnesses and that it closed its case.

Counsel for the Fund then made submissions to the Tribunal.

FACTS FOUND PROVEN:

The following are the facts found proven.

1. Maybee was at all relevant times a registered motor vehicle dealer under the Act and was a participant in the Fund.
2. The Applicants and Maybee, the latter operating as Norwood Auto, entered into a bill of sale dated May 15, 1998 in respect of the sale by Maybee to the Applicants as purchasers of a used 1998 Dodge Ram 4x4 truck.
3. The purchase consideration payable by the Applicant for the Dodge Ram truck excluding taxes and licence fee was the sum of \$39,995.00. The Applicants paid Maybee the sum of \$5000.00 by Visa charge card towards the purchase consideration and traded-in a 1995 Ford Diesel Extended Cab truck for which the Applicants were allowed a trade-in allowance of \$34,995.00.
4. The Dodge Ram truck was, to the knowledge of Maybee, stolen property when he sold it to the Applicants.
5. Subsequent to the sale Maybee plead guilty to and was found guilty of being in possession of stolen property, including the Dodge Ram truck.
6. Maybee is the son of McConnell and at all relevant times resided with the Applicants in the Applicants' home.
7. Maybee became a bankrupt on or about November 24, 1998.

THE LAW:

Section 12. (3) of Regulation 801 to the *Motor Vehicle Dealers Act* states:

12. (3) A customer may make a claim against the Fund where the customer gives written notice of the claim to the Registrar within two years of the participant's refusal or failure to

pay, even if the motor vehicle dealer with respect to whom the claim is being made ceased to be a participant after the refusal or failure to pay, and where the claim meets one of the following requirements:

2. The participant has been convicted of an offence under the *Criminal Code* (Canada) involving fraud, theft or false pretences in connection with a transaction out of which the claim arose and the claim is for a liquidated amount and the customer makes an application that is supported by evidence of the conviction and of the correctness of the liquidated amount.
3. The participant has become a bankrupt or a winding-up order has been made or a receiver appointed in respect of the business of the participant under the *Bankruptcy Act* (Canada) and the claim is for a liquidated amount and the customer makes an application that is supported by evidence of the allowance of the claim by the Trustee in bankruptcy, liquidator or receiver, less any amount that may have been paid on account of the claim by the Trustee, liquidator or receiver.

Section 12.(10)(a) of the aforesaid regulation states:

12. (10) Despite subsections (1), (2), (3) and (6) and subsection 15 (3) of this Schedule, there shall not be paid out of the Fund,

- (a) more than \$15,000, exclusive of costs, to each claimant in respect of each transaction, in respect of a claim or claims against any one participant;

Section 15.(1) of the aforesaid regulation states:

15. (1) Where the Board determines that a claim or any part of it made under section 12 of this Schedule is not a proper claim, it shall serve notice of its decision, together with written reasons, on the claimant and the notice shall inform the claimant that the claimant is entitled to a hearing by the Tribunal if the claimant mails or delivers to the Registrar and the Tribunal, within fifteen days after the notice is served on the claimant, notice in writing requiring a hearing.

Section 15.(3) of the aforesaid regulation states:

15. (3) Where a claimant requires a hearing before the Tribunal under subsection (1), the Tribunal shall appoint a time for and hold the hearing and, after affording the claimant an opportunity to be heard, may confirm the determination of the Board or may set aside the determination of the Board with respect to all or any part of a claim and direct the Trustee to pay the amount determined by the Tribunal.

DECISION AND REASONS:

The onus of proof rests upon the Applicants in this matter to prove their case on a balance of probabilities.

The Tribunal finds that there was a contract of purchase and sale between the Applicants and Maybee and that Maybee was a registered motor vehicle dealer at the time of the aforesaid sale as well as a participant who participated in the Motor Vehicle Dealers Compensation Fund. The Tribunal also finds that the contract of Purchase and Sale involved "a trade in of a motor vehicle" and that such contract was breached by Maybee pursuant to which the Applicants have a legitimate claim against the Fund.

Counsel for the Fund submitted that the transaction between Maybee and McConnell, by virtue of their close relationship, was not an arms length transaction and that it must be viewed with suspicion. Counsel did not argue that the Applicants had knowledge of the fact that the Dodge Ram that they were purchasing was in fact a stolen vehicle. Counsel did, however, ask the Tribunal to find that taking into account the cumulative effect of numerous suspicious circumstances in the matter, such circumstances produced sufficient certainty for the Tribunal to find that it is likely that the Applicants knew or ought to have known that they were purchasing a stolen vehicle and therefore they should be denied reimbursement of their loss.

The Tribunal notes that not one fact was brought before the Tribunal at the hearing to indicate that the Applicants either had knowledge, or ought to have had knowledge, that the Dodge Ram truck which they were purchasing was stolen. The Fund chose not to place any oral evidence before the Tribunal and relied upon nothing more than what it termed as suspicions. The various circumstances which Counsel referred to as being cumulatively sufficiently suspicious so as to justify the Tribunal dismissing the Applicants' claim, have not influenced the Tribunal to hold that the Applicants have not discharged the onus of proof.

The Applicants have met the onus and have proven to the Tribunal's satisfaction that they were not aware that the Dodge Ram truck was stolen; that the transaction, despite it not being an arms length transaction, was a legitimate transaction and that they have suffered a loss arising out of that transaction, which loss can be placed directly at the feet of Maybee. The Tribunal accepts the evidence of McConnell and notes that no evidence was submitted by the Fund (other than the Black Book) to contest McConnell's evidence.

The loss suffered by the Applicants translates into a loss of their \$5,000 which they paid by way of a Visa credit card, plus the value of their 1995 Ford truck which they traded in at the time of their purchase of the Dodge Ram truck. If this Tribunal accepts that the value of the Ford truck was only \$21,400 (and not the sum of \$34,995.00) the loss suffered by the Applicants would still amount to \$26,400.00 which is in excess of the \$15,000 limit of liability imposed by Section 12.(10)(a) of Regulation 801 to the Act.

DECISION:

Pursuant to the authority vested in it by the Motor Vehicle Dealers Act, in particular section 15(3) of the Schedule in Regulation 801, the Tribunal sets aside the determination of the Board of Trustees of the Motor Vehicle Dealers Compensation Fund and directs the Fund to pay the Applicants Lorraine McConnell and Percy Finch the amount of \$15,000.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: June 19, 2002

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

BULLEN

DAVID BULLEN

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
MOTOR VEHICLE DEALERS ACT

TO REFUSE REGISTRATION

TRIBUNAL: JOHANNE N. MORISSETTE, Vice-Chair

APPEARANCES:

RICHARD BOSADA, Counsel, representing David Bullen
MARY JANE SOUTH, Agent, representing the Registrar under the
Motor Vehicle Dealers Act

DATE OF
HEARING:

May 22, 2002

OTTAWA

REASONS FOR DECISION AND ORDER

BACKGROUND:

The Applicant appeals a Notice of Proposal dated September 12th, 2001 issued by the Registrar of the *Motor Vehicle Dealers Act* ("the Act") to refuse to grant the registration of David Bullen as a motor vehicle salesperson under the provisions of the Act.

The Registrar's proposal is based on the provisions of section 6(2) of the Act as read with section 5(1)(b) thereof, on the grounds that the past conduct of the Applicant affords reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.

FACTS:

The Tribunal heard evidence from Ms. South, the Deputy Registrar under the Act. No other evidence was presented on behalf of the Registrar. Mr. Bullen, testified, and the Tribunal heard from Mr. Christopher Kuzyk, the Applicant's current employer and owner of "The Car Company". Based on the evidence, the Tribunal makes the following findings of facts:

David Bullen is 33 years old, married and owns, with his wife, their home in Dunrobin. On August 17th, 2001, he applied for registration as a motor vehicle salesperson. At the time of his application, he was on probation, which has terminated in January of 2002. He had been convicted in April of 1996 of "assault with a weapon" and in August 1999 of "conspiracy to traffic in a scheduled substance, and possession of proceeds of crime over \$1000". There is no allegation of non disclosure in this case, nor is there any allegation of lack of financial responsibility with respect to section 5(1)(a).

The Registrar reviewed the application and proposed to refuse registration on the grounds that the intention and objective of the Act is to protect the public interest and that the Applicant's past conduct is inconsistent with that intention. The Registrar is concerned that the past conduct of the Applicant as exhibited by his criminal record, affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

Ms. South noted that the Registrar is concerned with the fact that was transmitted to her, through the solicitor for the Applicant sometime before the hearing, that the Applicant may purchase his employer's interest in the business and therefore would in effect be the controlling mind of the dealer. This situation afforded no supervisory control on a day to day basis. This fact was canvassed at the hearing by counsel for the Applicant and by Ms. South. Mr. Kuzyk testified that "perhaps down the road I may want to have someone like the Applicant purchase a share of my business", but this was only discussions and not a "fait accompli".

Mr. Bullen pleaded guilty to all of the convictions on his record, and gave evidence of admitting responsibility to all of his convictions. He has demonstrated a real sense of remorse to his past conduct.

Mr. Bullen submitted a letter from his parole officer, namely Brigitte Massé who supervised Mr. Bullen's probation from April 1st, 2001 to June 22nd 2001. She says in her letter that Mr. Bullen followed his conditions without any breach and has collaborated with them. She further offers the comments that in her opinion, Mr. Bullen is a "responsible and reliable person".

Mr. Kuzyk testified that he would be prepared to supervise the Applicant, as this is the mode of operation as it stands right now, where only Mr. Kuzyk has authority to sign checks, and has the final say on the purchase and sale of vehicles.

ISSUE:

The sole issue in this proceeding is whether the Registrar has sufficient grounds for refusing to grant the registration of the Applicant.

THE LAW:

The relevant portions of the Act that are applicable to these proceedings are subsections 5(1) and 6(1), which set out the circumstances under which the Registrar may refuse to register an applicant. The powers of the Tribunal are set out in section 7(4).

5.(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

(a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or

(c) the applicant is a corporation and,

(i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, or

(ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or

(d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

6.(1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 5.

7.(4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

The Divisional Court has clearly outlined the proper test to be applied by the Tribunal in *Re Brenner*, 19 C.R.A.T.58 as follows:

"The effect of section 7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that , in its view, the past conduct of Brenner did not afford reasonable grounds for belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner has genuinely reformed and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed , might have reformed himself."

Ms. South argues that the Tribunal cannot find in favor of the Applicant, unless the Tribunal finds that the Registrar erred in its decision. She is quite right. She further argues that any reasonable doubt should go in favor of the Registrar.

Counsel for the Applicant argues that the Registrar erred in failing to investigate the Applicant's circumstances more fully prior to arriving at the conclusion that registration should be refused. He further argues that the Applicant is forthright and has admitted his guilt, accepted his punishment and has demonstrated since 1998 (his most recent conviction) an unrepachable behavior. The Tribunal agrees. The Tribunal finds that the Registrar erred in relying on the fact that perhaps in the future, the Applicant may purchase this enterprise. This seemed to be a factor that gave rise for concern for the Registrar. As well, there is insufficient evidence to corroborate a finding of refusal. Had the Registrar conducted a more thorough investigation of the Applicant, it would not have concluded to refuse registration, but would have offered to register him on conditions.

DECISION:

The Tribunal finds that the Registrar has erred in its conclusion and as such, pursuant to the authority vested in it by section 7(4) and (5) of the *Motor Vehicle Dealers Act*, the Tribunal directs the Registrar to refrain from carrying out its proposal dated September 12th, 2001 to refuse to grant the Applicant's registration and directs the Registrar to:

Register the Applicant subject to the following conditions:

- He must first pass the Certification Test;
- Cannot be the final signatory on any purchase and sale of any vehicle for a period of two years from the date of registration;
- Cannot be registered as a dealer for a period of two years from the date of registration;
- Cannot be a director or officer of any dealer for a period of two years.

LICENCE APPEAL TRIBUNAL

Johanne N. Morissette, Vice-Chair

Released: June 21, 2002

DAGENAIS

DAVID DAGENAIS

APPEAL FROM A DECISION OF THE CORPORATION DESIGNATED
FOR THE PURPOSES OF THE *ONTARIO NEW HOME
WARRANTIES PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD C. DELANEY, Member

APPEARANCES:

MATTHEW TODD, representing the Applicant, David Dagenais
KAREN R. SPECTOR, Counsel, representing the Ontario New Home
Warranty Program
CHRIS THOMPSON, representing the Added Party, Thompson
Homes

DATE OF
HEARING:

April 2 and April 3, 2002

Windsor

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") from a written decision of the Ontario New Home Warranty Program (the "Program") dated January 15, 2002, amending an earlier decision dated September 12, 2001, in which the claim of David Dagenais (the "Applicant") was denied.

BACKGROUND:

This is an Appeal to the Licence Appeal Tribunal (the "Tribunal") by David Dagenais (the "Applicant") from a written decision of the Ontario New Home Warranty Program (the "Program") set out in a decision letter dated January 15, 2002 (the "decision letter"). An earlier letter had been issued in the matter on or about September 12, 2001. However, that letter made reference to a Claim regarding a Major Structural Defect. The Applicant's claim is for Breach of Warranty and the decision letter dated January 15, 2002 is framed with the appropriate legislative references.

The relevant decision letter notes that the applicant's claim falls under Section 14(3) of the Act. Sections 13(1) and 13(2) are also relevant as they contain the statutory warranties and exclusions. The relevant aspects of this Act are dealt with below.

At the outset of the hearing an issue was raised as to the appropriate scope of the matter before the Tribunal. The Program suggested that the claim was a narrow one based on excess mortar. Alternatively, it was narrow in that the decision letter dealt only with the front of the Applicant's home. The Applicant argued that the claim was broader and that the Tribunal had to consider the claim as a breach of warranty claim with respect to the brickwork done on the entire home.

The scope of the claim is obviously relevant to the decision in this matter. The Applicant started the process with a complaint received by the Program on February 12, 1999. That complaint set out a number of issues. However, the relevant issue is at 5) of the letter, which reads:

5) Brick

Front door and trim was to be painted, it has not been done yet. It has been fifty weeks now. My brick is a disaster; it's hard to explain because you would have to see it to understand. The house had been bricked in the winter when it was really cold. They cleaned some joints off but didn't bother with the others which all harden before cleaned. They didn't finish cleaning the mortar between the joints so it's just hanging off the brick. So it doesn't look like a clean-finished job. This problem is all around my house. My house looks 10 years old, not 1 year old. I feel it is an eye sore. I really don't know how they will fix this ugly problem now that the mortar is hard. This should have been done while bricking the house before it gets too hard. It is too late for this now. I know this because I was a bricklayer for 10 years. So here is what they came up with so far, someone came to my house when I was at work and sand blasted the brick and all the joints and mortar which now looks worse than it did before. He says he will be back in the spring to fill in all the joints This is totally unacceptable and unprofessional. This whole ordeal has become a nightmare!

The Applicant is obviously frustrated. The language is not entirely precise as to the nature of the complaint but it is very clear to the Tribunal that the Applicant's complaint is with the brickwork on the entire house. His unhappiness is with the finishing of the mortar-work which "...doesn't look like a clean finished job."

The Builder began some remedial work on the front of the home after the complaint above was filed with the Program. The Applicant requested a conciliation. That conciliation was completed, after several delays, on July 9, 2001. That report identifies the Applicant's complaint as "Builder started doing the work". The conciliation inspector inspected the entire home and commented on the warranty position of all of the brickwork. The conclusion was that the remainder of the home did not represent a warranty claim and that the appearance of the brickwork was acceptable. The front of the home had to be completed as the builder had undertaken but not completed remedial work.

The Program position in the decision letter was stated to be the same as that in the conciliation report.

Therefore, as the Applicant's claim was very clearly initiated with reference to the brickwork on the entire home and the conciliation was conducted with a review of the brickwork on all of the house, it is the Tribunal's position that the scope of the appeal is properly with respect to the entire home. The Program's position is that the sides and rear do not constitute a breach of warranty and that the front of the home, as it has been started, must be completed in accordance with the Act.

THE EVIDENCE:

David Dagenais

The Applicant lives at 3438 Treeline Court, which is the address of the new home that is the subject of this hearing.

David Kevin Dagenais contracted to purchase a newly constructed home pursuant to an Agreement of Purchase and sale executed on or about May 14, 1997. The original completion date was scheduled for September 26, 1997. However, the home was not ready in time for that date and the completion date was extended to February 1998.

The builder completed the exterior of the home in December 1997 and January 1998. The brickwork was done during this time frame.

The front of the home is entirely brick. The other three sides are half brick and half siding. The front of the home faces west.

The Applicant was not satisfied with the brickwork as the time for completion approached in February 1998. He was growing reluctant to close on that date. He brought this displeasure to the attention of Chris Thompson of Chris Thompson homes (the builder). Dagenais recalled that he had a meeting with Mr. Thompson in foyer of the home prior to the February 10, 1998 move in and was advised "...not to worry, he would take care of it". Satisfied with that assurance, Dagenais completed the deal on February 10, 1998.

The Applicant had taken a variety of photos depicting the home and the impugned brickwork. He indicated that the photos revealed joints that were not clean and had not been tooled. His complaint with respect to all the photos collectively submitted as Tab 21 of Exhibit 4 was that the joints were not clean and had been improperly tooled.

When referring to the second photo of Tab 21, Exhibit 4, the Applicant observed that there was evidence of frozen mortar. He believed that there should be no holes whatsoever in the mortar.

Mr. Dagenais had been a bricklayer in the construction industry for approximately ten years.

Mr. Dagenais was referred to Page 8 of Tab 21, Exhibit 4, which depicts a peak at the rear of the home. He described it as cracking and concluded that if the mortar is not repaired it will fall out and the joints will continue to crack. He also stated that the peak was visually and aesthetically unpleasant.

The Applicant was a regular at the site during the construction of his home and brought the cracks and holes to the builder's attention in December 1997 and January 1998. He was assured not to worry about the concerns and that they would be fixed. The Applicant understood these assurances to mean that the mortar would be ground out and re-tooled. He also understood that the whole house was a problem.

Mr. Dagenais testified that Mr. Thompson stated something to the effect that "Sal did a shitty job" of the brickwork. Apparently, Sal was the bricklayer that did the Applicant's home. That conversation occurred in February 1998.

Mr. Dagenais estimated that he had about one dozen conversations with Mr. Thompson respecting the brickwork during 1998. He recalled that the builder did not repair it in 1998 because the builder was busy. He also recalled that he was advised the brickwork would be fixed throughout his 1998 conversations with the builder.

In 1999 the Applicant reluctantly filed his claim. He was aware that he had one year to make such a claim on items of this nature with the Program.

The Applicant filed his claim as it appears at Tab 2 of Exhibit 4. There were a variety of complaints made in that letter. However, the relevant section appears at page 2 under the heading "Exterior". He stated as follows:

5) Brick

Front door and trim was to be painted, it has not been done yet. It has been fifty weeks now. My brick is a disaster; it's hard to explain because you would have to see it to understand. The house had been bricked in the winter when it was really cold. They cleaned some joints off but didn't bother with the others which all harden before cleaned. They didn't finish cleaning the mortar between the joints so it's just hanging off the brick. So it doesn't look like a clean-finished job. This problem is all around my house. My house looks 10 years old, not 1 year old. I feel it is an eye sore. I really don't know how they will fix this ugly problem now that the mortar is hard. This should have been done while bricking the house before it gets too hard. It is too late for this now. I know this because I was a bricklayer for 10 years. So here is what they came up with so far, someone came to my house when I was at work and sand blasted the brick and all the joints and mortar which now looks worse than it did before. He says he will be back in the spring to fill in all the joints This is totally unacceptable and unprofessional. This whole ordeal has become a nightmare!

When asked what he meant by this passage, the Applicant stated that the brick for the home is not a flat brick, but a rough brick and that the repair work would have to be completed with a

tool. Some of the joints had been done; some had not been done. However, once the mortar freezes it cannot be easily cleaned out.

The Applicant estimated that he had as many as ten conversations with the builder during 1999. He mentioned the brickwork every time that he saw the builder and was still keen to resolve the issue directly with the builder. He recollected that there was no repair work undertaken on the bricks in 1999.

During the spring of 2000, the Applicant was still having conversations with the builder. Mr. Dagenais recalled that Mr. Thompson indicated he would start with the front, grind out all of the joints and re-point the bricks. He thought this work was started in June 2000 but it was not completed. In fact, there were joints ground out and then not refilled. These joints remain open as of the hearing date.

The previous letter was followed up with a handwritten fax to the Ontario New Home Warranty Program Customer Service in July 2000. There are several numbered complaints in the letter. However, number two is relevant and states as follows:

2. My brick still not been finished and is seeping water into the brick and holding moisture. Since they sandblasted the finish off the brick. (Exhibit 4, Tab 3)

In response to that letter, the Applicant received a letter from the builder indicating the following:

- Item 2: We have spoke with George at Arsticraft Corporation where the brick is manufactured. He told us there is no surface sealer and the contents of that brick is 100% uniform throughout. Therefore, George guarantees that power washing that brick will not affect any moisture adsorbent ratings of the brick. (Exhibit 4, Tab 4).

Mr. Dagenais stated that he did not consent to the sandblasting/powerwashing of the exterior that was undertaken by the builder.

On November 17 2000, the Applicant completed a Conciliation request form (Exhibit 4, Tab 5). The Applicant stated as follows:

"Builder started doing the brick he sent a worker there 5 days in three weeks and did a spot in the front of house 6FT by 4FT and he has not been around in two weeks and will not return my calls. And he has not done anything else. Gave Builder two more chances to finish house, but he has not shown progress".

The builder responded to the request with a letter to the Applicant dated December 7, 2000, which stated as follows:

"Re: Exterior brick work

Due to weather conditions we are unable to complete the exterior brick work and we will resume this work this coming spring. Sorry for any inconvenience but it is out of our control."

A conciliation meeting between the parties had been scheduled for January 10, 2001. Mr. Dagenais recalled that bad weather conditions were the main problem. He agreed to a change in the date provided that the builder agreed to give him a letter stating that he would actually do the work. According to the Applicant, the builder advised a letter to this effect would be forthcoming. On that basis, the Applicant agreed to adjourn the conciliation process. However, no such letter was received from the builder.

According to the Applicant, the conciliation was to be adjourned to not later than May 30, 2001 to permit the builder to complete the desired repairs beforehand.

Eventually, a conciliation meeting did occur on July 9, 2000. Mr. Doug Irvine, who is a warranty representative with the Program, did the report. The report of the conciliation appears at Tab 9, Exhibit 4.

The Applicant was asked if he was satisfied with the findings of the conciliation report and responded "No". In response to the report, the Applicant faxed a typed letter to the Program indicated his opposition to the contents of the July 9, 2001 conciliation report.

It was the Applicant's recollection that the conciliator was only present at the site for 10 minutes. He recalled Mr. Irvine asking the builder why the work was not yet completed. The builder apparently responded that he was too busy. Mr. Irvine then walked around the house and took a few photos and departed.

Mr. Dagenais received a decision letter dated September 12, 2001 denying his claim for a Major Structural Defect Claim. This was incorrect and was followed up with an amended Decision Letter dated January 15, 2002 denying his claim for a Breach of Warranty. The latter Decision Letter alleged that Mr. Dagenais had refused to allow the builder or his trades to carry out the repairs noted unless the entire home was completed. Mr. Dagenais denied ever refusing to allow access to the property. He also denied refusing access to the property by ONHWP people.

In preparation for this hearing, Mr. Dagenais obtained several quotes for repair work. He obtained the names by randomly selecting names from the phone book.

On cross-examination, the Applicant confirmed that photos submitted were recent and a fair representation of the home. He was standing two or three feet away from the cracks and holes when the photos were taken. If the observer moves further away the offending work becomes less apparent but still visible. He added that there had been some additional cracking since the time of the photos. The front of the home has been completely ground out. The sides and the rear brickwork are of approximate equal condition.

Mr. Dagenais stated that the open joints revealed by the photos had been present from the start. However, since the brickwork was done some mortar has fallen out and there has been some additional evidence of cracking.

The Applicant stated that his primary complaints were that the mortar was ugly and that moisture appeared to be entering the joints.

Mr. Dagenais testified that tooling, if properly done, seals the joints between the bricks. The holes in the photos submitted as evidence reflect open joints in the mortar-work. These holes will expand if moisture enters. He believed that there was a prevailing standard for tooling and that standard required that joints should be sealed.

Mr. Dagenais re-iterated that he had brought the shoddy brickwork to the attention of the builder in advance of the completion of the home purchase. When directed to the defects sections of the ONHWP Certificate of Completion and Possession, Mr. Dagenais could not explain why the state of the brickwork was not mentioned. This form is completed by new home purchasers at or just prior to the completion of the transaction.

In respect of the various quotes for repair work submitted as evidence, Mr. Dagenais stated that he had no friends or colleagues among the group. He did confirm that he knew of Rob Monaghan at Monaghan Masonry (Ex. 4, Tab 18) as an acquaintance for approximately ten to fifteen years. He recalled paying for one of the quotations although he was uncertain which quote. In that respect, he was paying the mason for his time to prepare the quote.

Peter Baker

Peter Baker is a self-employed mason who owns and operates Baker's Masonry Restoration. He does not engage in new home construction. He has been repairing and restoring brickwork for twenty-one years. The last eighteen years have been as a self-employed mason.

Mr. Baker described the process of bricklaying in a summary form and concluded by indicating that the mortar is like glue to hold the bricks in place. The bricks are also fastened to the walls with ties.

There are seasonal implications to the brick-laying process. In particular, if the outside temperature drops below freezing then tarps and heating are required for the process. According to Mr. Baker, mortar is weakened when frozen and will not properly set. It also deteriorates faster when frozen during the setting process. The problems associated with freezing during the laying process arises five to ten years later.

Mr. Baker indicated that finished joints help keep water out of the brick. When moisture penetrates the mortar there will be expansion or contraction with outside temperature conditions.

Mr. Baker prepared the quote for repair work that appears at Exhibit 4, Tab 16. Mr. Dagenais did not prompt Mr. Baker with his own opinions on the problem but asked Mr. Baker to "...tell me what you see". After reviewing the home, Mr. Baker prepared an estimate and concluded the relevant observed problems were as follows:

- The majority of the mortar joints are cracked, open, and not properly tooled;
- Some sills are not properly angled and do not allow for proper drainage;
- Evidence of frozen mortar joints.

His evidence was that these problems could have been caused by freezing, delays in tooling or that the job was just done improperly.

Mr. Baker observed the poor brickwork to be present on all sides of the home. He was shown a selection of photos and observed cracks and holes where he concluded that some tooling had occurred and some had not. He stated that each and every joint must be tooled and sealed to the brick. Whether or not the brick design was rough face or smooth face, each joint must be sealed and tooled. If it is not tooled properly, it will appear that there is excess mortar.

In order to effect the repairs, the mortar will need to be ground out and re-pointed with proper tools. The joints will then be tooled and re-sealed.

Mr. Baker stated that houses will shift and cracks will appear in bricks and mortar as a result. However, he stated that a four-year-old house should look like day one.

Mr. Baker confirmed that he was paid \$50.00 for his time to prepare the estimate.

On cross-examination, Mr. Baker indicated that he was retained to prepare the estimate after a phone call from the Applicant. He was asked to come to the house as the owner felt it needed some work. His inspection of the home lasted about half an hour.

Mr. Baker advised that he usually charges to perform an evaluation and that he did tell the Applicant that he would charge him a small fee. Mr. Baker decided what to charge the Applicant.

The witness indicated that the photos as submitted did not reveal the evidence of frozen mortar. However, it presents itself as a discolouration of the mortar. He took his key and was able to dig in with the key about 1/8th of an inch. The application of the key caused the mortar to fall away.

Mr. Baker had not seen the report of the respondent's expert prior to his testimony.

When asked about a standard for proper tooling, Mr. Baker indicated the work should appear "...neat, clean and tight..." By "tight" he means no cracks. He was not aware that there was a tooling standard in the Building Code.

Mr. Baker was questioned on the valuation he provided for repairs, a total of \$7,000.00 plus applicable taxes. He usually does it on the basis of time and square footage. In this case, he did not recall the square footage but stated that \$7,000.00 was what the project was worth to him. He does not keep the notes he makes when preparing his estimates.

John Bringas

John Bringas is self-employed and owns and operates A-1 Brick and Roof Systems. He is a mason and has been for fifty years. Mr. Bringas has a few workers in his business and his primary role is to sign contracts and give estimates.

Mr. Bringas observed that the Applicant's home was a cement brick made of clay. It is crucial to a cement brick that it not be allowed to absorb water. There are a variety of mortar types and the decision on which type to use is usually made by the bricklayer depending on the season. In the winter, the bricklayer should mix in an accelerator to keep the mortar from freezing. If the temperature falls below freezing the bricklayer should mix in accelerator.

Upon observing the Applicant's home, Mr. Bringas concluded, "...whoever did the tooling did not know what he was doing." He also observed evidence of freezing in the mortar which it manifested itself as shrinkage. He also observed lumps of cement that was additional evidence of freezing and shrinkage.

On cross-examination, Mr. Bringas advised that the need for brick restoration is usually apparent to the eyes as opposed to any fixed time in the life of the brick or mortar. Typically, bricks are 50-60 years old before restoration is needed. He also indicated that when water penetrates the voids in the mortar and brick there will be an expansion and contraction. Apparently, damage to bricks can travel to the front or face from the rear of the brick.

As regards his repair quote of \$8,220.00 plus applicable taxes, Mr. Bringas stated that he based that amount on his experience, the height of the building, proximity of other homes, and the number of people needed. He estimated the work, which is labour intensive, would take 14-16 days. He attended at the Dagenais home for approximately 2 ½ hours to prepare his quote.

Ontario New Home Warranty Program – Respondents' Evidence.

Doug Irvine

Doug Irvine is an inspector and conciliator with the Ontario New Home Warranty Program. He has been with the Plan since 1979 and has been a field inspector for the last eleven years. In 2001, Mr. Irvine inspected 296 homes. During these inspections he attends at newly constructed homes and provides an opinion as to the requirement *Ontario New Home*

Warranty Plan Act and Ontario Building Code requirements. He works out of a home-based office in Kitchener where he is the local representative for the Plan.

Prior to joining the Program, Mr. Irvine was a project manager and customer service representative for a new homebuilder.

Mr. Irvine was assigned this home to inspect because he was covering due to local workload issues. He was assigned to the role from the South West Regional Office in London.

He had no dealings with the home prior to 1999.

Mr. Irvine's characterization of the problem with the Applicant's home was that there was a dispute over design and mortar brickwork at the front of the home. He understood that the builder, as a goodwill gesture, had agreed to rake the mortar at the front of the home.

Mr. Irvine attended upon the home on July 9, 2001 to conduct an inspection. The builder and the applicant were present during the inspection. Upon attending, he explained the procedure to the Applicant and then walked around the house. He took photos at the side and at the rear. He was looking for building code infractions and warrantable defects in materials and workmanship.

His conclusion, after an inspection of about ½ hour, was that the work commenced by the builder at the front of the home had to be completed but that no further repairs to the house were warranted. He found no defects elsewhere on the house. He usually allows about one hour for each inspection.

Mr. Irvine did state that if the front of the house had looked like the remainder of the house prior to the raking of the mortar by the builder, he would not have ruled it a warrantable item.

The witness reviewed Tab 17 of Exhibit 3 (the respondent's book of documents). Mr. Irvine took these photos at the time of his inspection. The first picture revealed the front door and a transom window above. He indicated that this area was the specific area that needed work. Some of the photos revealed visible cracks (page 2) and slight discolouration (page 4). The photos were taken about 3-6 feet away from the subject matter and were fair representation of the state of the photo subject at the time of the photo.

With respect to the mortar and brickwork, Mr. Irvine was asked if there was an industry standard. He replied that there was not and that it was a judgment call. If he feels there was poor work done he will order the builder to have it repaired. Some shrinkage will occur and dirt accumulation and water stains can cause staining or discolouration.

Mr. Irvine was shown the corner photo at Exhibit 4, Tab 21. He stated that the different colours could be a shadow effect. He stated that corners do catch more moisture that will accumulate and soak in or be absorbed by the brick and mortar.

Mr. Irvine did not observe any building code violations during his inspection.

Mr. Irvine did not recall that the May 30 date was selected to allow the builder to effect the repairs. He did add that he could extend required dates if seasonal issues are presented.

He stated that the onus is on the homeowner to prove their case and keep ONHWP up to date even if the builder does not respond.

On cross-examination, Mr. Irvine stated that he has never done any brick laying despite the fact his decision pertains to the good and workmanlike manner of the bricklaying at the applicant's new home.

He denied the Applicant's recollection that he was there less than 10 minutes. He believed he was there 20 minutes to half an hour minimum. He was looking for defects in workmanship and in the process reviewed the brickwork on all sides of the home.

Mr. Irvine stated that poor tooling is not a defect in workmanship but is a design issue. Defects are holes and cracks. He agreed that if a job is done right, there ought to be no defects.

The witness reviewed the photos in Exhibit 4 at Tab 21, Page 1 and observed visible holes. He was not certain that the holes had not occurred since his inspection. However, he did agree that, based on the photo, it was possible that the work had been improperly completed.

He reviewed the photo at page 4 of the same exhibit that reveals discolouration on the north side of the house. He felt that the darker mortar appeared to be repair work and that there was evidence of cracking.

Mr. Irvine stated that he disagreed with the other bricklayers' opinions.

Although he cross-references material in a file after he conducts his inspections, Mr. Irvine stated he does not review a file prior to attending on the inspection. He does this to keep an open mind about the issues.

He stated that the Program does not take any samples or do any testing and that the owner must prove their case.

As regards the requirement to complete the job at the front of the home, Mr. Irvine stated that when joints are ground out and not finished there is potential for further damage. As a result, it was requested that the builder complete the remainder of the job.

Mr. Irvine had no idea if the Applicant ever kept anybody away from the front of the house. He stated that he attended because there was a dispute over how much of the work on the home had to be done.

Mr. Irvine was shown the complaint sent by Mr. Dagenais to the Program. He stated that he saw this after his inspection and report. He had no knowledge of the complaint being about excess mortar and did not even look for excess mortar at the time of his inspection.

The Act provides for a number of exclusions to coverage for warranty claims. They include Acts of God and improper maintenance. Mr. Irvine stated that there was no evidence to support these exclusions.

Based on his process of estimating the value of a claim, the witness would have placed the repair cost at \$4,800.00 plus applicable taxes. However, he did agree that local quotes are a better reflection of the true cost to effect repairs.

Glenn Grainger

Glenn Grainger is a Civil Engineer graduate of the University of Windsor. Presently, he is a partner with Albert Schepers Engineering Limited where he has worked as a professional engineer for the last six years. His tasks with his employer included project management, civil design, underground work and some inspection work. His employer, Albert Schepers, is President of the Ontario Home Builders Association.

He has held a variety of employment positions since graduation from Windsor in 1994. At Golder and Associates in 1994 he performed, among other work, concrete and cement-related testing. Following that stint he was employed at Giffles Associates Ltd. in Toronto Ontario where, among other tasks, he performed construction inspection for all areas of construction.

He indicated that he was out on a job site that he had designed when he was contracted by Chris Thompson to see if he had time to look at a house. He was told that the owner had lodged a complaint over workmanship of the brick.

Mr. Grainger indicated to the builder he was prepared to attend but that he would only do so on an unbiased basis, as there was the potential that he may concur with the homeowner.

Mr. Grainger provided a report and opinion regarding the home dated March 11, 2002 (Exhibit 3, Tab 15). He indicated his belief that he was able to offer such an opinion. Placing the "P.Eng." designation next to his signature on the report reflects his certitude in that.

He indicated his inspection took approximately 10 minutes and that he conducted the same on the 10th or 11th of March 2002. He prepared his report a short time after conducting the inspection. His inspection involved reviewing the front of the house and the two sides. He observed most of the mortar joints on the front of the house to be ground out to a depth of about one-half inch from the face of the brick. He did not go to the rear of the home, as he did not want to raise suspicion among the neighbours. He checked the brick and mortar and in various locations he did a key test.

He observed that visually the mortar was not placed in an aesthetically pleasing manner and that the work looked sloppy. In fact, the sides of the home did not look good at all. Where the mortar was ground out at the front of the house he was able to observe that, beyond the surface, the mortar joints looked pretty good and that he observed no cracks and saw contact between the top and bottom of bricks with the applied mortar.

Mr. Grainger concluded in his report that there was "...no evidence to suggest that the mortar was improperly mixed or that it froze shortly after it had been placed." Had this occurred, Mr. Grainger stated that he would have expected to observe softness in the mortar or discolouration. He stated that it was more likely the mortar hardened before it was tooled rather than frozen.

He did not observe any evidence of improper mixing of the mortar. This would have produced powdery or sandy spots.

When he conducted a key test the mortar was hard. He stated that where the tooling was rough it was possible to scratch it off. This was likely the result of the rough texture rather than a flaw. The key test was performed at three locations along each of the front and both sides.

He did not observe any cracks that went from front to rear of the bricks. There were surface cracks and separations, which occur through shrinkage. These were stated to be normal. Apparently, the stress associated with the mortar curing process forces bricks to separate at some point.

Mr. Grainger stated that the holes complained of by the Applicant were imperfections in the surface of the mortar. What he saw were "pits".

Mr. Grainger was asked to comment on whether improper tooling had anything to do with water penetration. He stated this was a false and misleading view. A brick wall is like a sponge and no amount of tooling will prevent water absorption. This is why weep holes are inserted to allow a point of release for water and moisture.

Apparently, the brick is not really needed at all on modern home construction and is purely an aesthetic feature of the home. He did not observe any defects in the ability of the mortar to hold bricks.

As to concern about the development of mold as a result of added water penetration, Mr. Grainger stated water is expected to get in to the rear of bricks and mold will not develop as a result.

Mr. Grainger was aware of no standards regarding tooling. Some joints are convex and some are concave. Tooling is a personal preference.

On cross-examination, Mr. Grainger advised that his firm was to be paid for the report he prepared. He was not sure how much and indicated that the hearing date was the first time he actually met the builder in person.

He attended on the Applicant's home without the knowledge or permission of the Applicant, likely on the 10th or the 11th of March 2002. He had no reason to believe that he should not have been on the property. In fact, he preferred not to have spoken to the owner as his assessment of the brick and mortar was enhanced by less prior information.

He confirmed that he was asked to look at the brick and mortar to see if there were any warrantable defects. In this regard, he stated that he had some knowledge of the Building Code and the ONHWP Act and that he also consulted his employer Mr. Schepers.

In his review for the report, Mr. Grainger reviewed a guideline published by the Warranty program. He did not review the Act or the regulations. He could not recall the title of the booklet he reviewed.

Although he conceded that the tooling work on the home was done sloppily, he stated that there was nothing else wrong with it.

He stated that it was possible there was frozen mortar, he just did not see evidence of it. He stated that freezing is an interruption in the mortar curing process. If frozen, it could be weakened or there could be no problem at all. In some extreme cases freezing of mortar may cause damage.

Mr. Grainger suggesting that the pitting he observed was caused by the way it was tooled. What may have happened was the bricklayers waited too long to tool and pulled away bits and pieces of mortar. Once mortar is frozen or hardened it cannot be tooled. If this occurs, it may appear as the Applicant's home appears.

Chris Thompson

Chris Thompson is the President and owner of Thompson Homes. He has three employees and has been in the home building business for ten years. Prior to having his own business he was in a carpentry crew doing wood framing and contraction. Over the last fourteen years in the industry, he estimated that he had been associated with the construction of two hundred homes.

In his role at Thompson Homes, Mr. Thompson signs and reviews contracts and offers, arranges for permits and is site supervisor. He performed these functions with respect to the Dagenais home and was in the subject subdivision on a regular basis.

He testified that the alleged shoddy brickwork was not an issue prior to move in at the home. It only became an issue two or three months after the sale was completed.

When the issue arose, they sandblasted and powerwashed the bricks then proceeded to grind out the joints at the front of the home. He understood he was only doing the front of the home. He did it because Mr. Dagenais was a customer and he wanted to keep the customer happy.

He estimated that the remainder of the work to be completed would cost him approximately \$1,500.00. This amount represents three bricklayers occupied for three full eight-hour workdays.

His recollection of the Doug Irvine inspection in July 2000 was that it lasted about one half-hour. He recalled that Mr. Irvine advised all parties of the conciliation procedure.

When Mr. Thompson walked around with Mr. Irvine he observed surface cracks at the back and sides but no holes.

Mr. Irvine advised Mr. Thompson that the Applicant was unhappy with the conciliation report and that was the reason they stopped further work. They did not want to complete the front if the owner's expectation was that the whole house was to be completed. He is still willing to go back to the home and complete the repair work at the front of the home.

Mr. Thompson noted that he had seen a variety of tooling approaches in his experience such as convex, concave, slick and raked. He noted there was nothing in the Agreement of Purchase and Sale respecting the manner of tooling.

The brick on Mr. Dagenais' home is an uneven faced brick, rough, round and with broken looking edges. He felt the tooling was consistent with the type of brick selected for the home. He felt the photos submitted by both the Applicant and the Program were consistent with his review and recollection of the home.

On cross-examination, Mr. Thompson stated that the quotes presented by the Applicant for repairs seemed reasonable under all of the circumstances because profit is built in to the process.

He did the final walk through with Mr. Dagenais just before closing and had no recollection of a conversation or comment about the brickwork. He felt the first conversations were likely in March or April of 1998 following the completion of the sale. When that conversation did occur, it was at the house where Mr. Dagenais showed the builder the offensive areas. Mr. Thompson recalls asking the Applicant what it would take to make him happy and was told the front of the house had to be fixed.

Mr. Thompson confirmed that the same bricklayer, Sal Albano, did the brickwork all the way around the home. He stated that the brickwork was consistent all the way around the home.

The builder had no recollection that he stated to the applicant that the bricklayer had done a poor job. In fact, Mr. Thompson stated that he thought there was nothing wrong with the brickwork. He did not think the work was done poorly at all.

The repairs were not done until 2000 because of a local labour shortage. Mr. Thompson was not able to get anyone to go to the site and effect repairs. He did call the original bricklayer to return but Mr. Albano did not feel that he did anything that needed repair. The builder likely would have paid Mr. Albano to return and effect the repairs.

Mr. Thompson stated that he tries his best to address customer complaints. However, if there is nothing wrong, he tells his customers there is nothing wrong. However, sometimes builders have to do things that are not otherwise required just to maintain good customer relations.

Mr. Thompson was directed to a letter from his business at Tab 8 of Exhibit 4. The letter is signed by his wife for the company and refers to "exterior brick work". He was at a loss to explain why the wording did not limit the work to the front, as was his understanding of the scope of repairs. A handwritten note to the Ontario New Home Warranty Program using the same wording is dated January 4, 2001 (Exhibit 4, Tab 9).

When asked to review some of the photos submitted by the Applicant, Mr. Thompson conceded that while he felt the mortar work was consistent with the type of brick selected, he did not disagree with the various bricklayers opinions as to the quality of the workmanship based on the varying amounts of mortar applied.

FACTS FOUND PROVEN:

The Tribunal notes that all of the witnesses appeared to testify with candor and a concern for accuracy. Many of the events that lead to this hearing were well over three years old. Some inconsistencies were present as between witnesses. Those inconsistencies require some analysis.

The Applicant testified that he had numerous conversations regarding the mortar-work with the builder prior to close and following completion of the transaction. His recollection was that the builder assured him the whole home would be repaired. The Applicant understood this to mean grinding out and re-tooling the mortar-work. The builder did not recall such conversations but had a recall of a meeting in March or April following the close of the transaction. He met the Applicant at the home and they reviewed the problem areas. The builder recalled asking the Applicant what it would take to make him happy and being told that the front of the house had to be fixed.

The builder and the Applicant disagree on the scope of the repair work. In that respect, the Tribunal accepts the evidence of the Applicant. On cross-examination, the builder testified that while he does his best to address all customer complaints he tells his customers there is nothing wrong when there is nothing to be repaired. In this case, the builder stated that he wanted to keep Mr. Dagenais happy. With respect, it does not make much sense that Mr. Dagenais would accept that only the front of the home be repaired. The same bricklayer did all

of the work around the home. The witnesses Bringas and Baker both concluded that the tooling was done poorly and that the mortar job required repair work. They drew these conclusions by observing the whole of the house. In fact, the respondent's witness Grainger also conceded that the mortar-work had been done in a sloppy manner and did not look good at all. The witness observed this with respect to the sides and rear of the home as the front had been ground out.

There was no evidence that Mr. Dagenais received anything of value in exchange for foregoing repair work on the remainder of the home. It is difficult to accept that the Applicant would have any incentive to accept such a proposal. The witnesses Bringas, Baker and Grainger all agreed that the remaining mortar-work appeared sloppy.

The builder testified that the brickwork was consistent all the way around the home. In that respect, the front, prior to being ground out, would have resembled the sides and rear as they now exist. He further stated that he did not think the job had been done poorly at all and that there was nothing wrong with the brickwork. Despite this situation, the builder agreed to an expensive and unnecessary repair job.

Interestingly, the documentary evidence produced at the hearing does not make any distinction between repairing the whole house or just the front of the home until the conciliation report in July 2001. In that report, the author, Doug Irvine of the Program, states that the Applicant's concern "...is that he was not happy with the mortar joints and in some areas where mortar splashes have left excessive mortar on brick and joints." Mr. Irvine goes on to conclude that he observed no warrantable defects in the remainder of the home but that the front, having been started must be completed. Moreover, in letters from the builder to the Applicant and the Program dated December 7, 2000, there are references by the builder to "...exterior brick work" without any additional words of limitation.

The Tribunal finds that the evidence supports the conclusion that the builder had undertaken to repair all of the brickwork. For whatever reason, this repair-work stopped prior to and precipitated the conciliation report.

The Tribunal was presented with a variety of quotations regarding the amount required to effect repairs on the home were the same to be ordered. There was some disparity in the amounts. Mr. Irvine for the Program suggested that his best estimate was \$4,800.00 plus applicable taxes. This was based on the size of the job and the application of a suggested price range from a document entitled "The Home Buyers Guide to Renovations and Repair Costs" (Exhibit 7). Mr. Irvine did concede that local quotes were a better reflection of the true cost associated with making repairs. The local masons that testified provided estimates ranging from \$7,000.00 plus GST. (Peter Baker of Baker's Masonry Restoration) to \$8,220.00 (John Bringas of A-1 Brick and Roof Systems). The Applicant provided two other written estimates. No one was called to testify on these estimates but the Tribunal notes that Mr. Bringas and Mr. Baker's estimates fell within the range of the other two estimates. The quotes are essentially identical in scope of work. Therefore, the Tribunal finds that the cost to repair

the brickwork is \$7,000.00 plus applicable taxes. Of that amount, \$3,000.00 is associated with the cost to complete the front of the home.

The Applicant and his witnesses testified that the poor tooling and workmanship on the mortar work would cause the risk of water penetration and the development of mold. The peril associated with water penetration is that mortar will expand and contract with changes in temperature. This expansion and contraction will compromise the integrity of the brickwork. Glenn Grainger testified that water penetration had nothing to do with improper tooling. He stated that a brick was like a sponge and that no amount of tooling will prevent water absorption. In this respect, the Tribunal prefers the evidence of Mr. Grainger who is a professional engineer. His evidence was of great assistance to the Tribunal more so than the largely anecdotal observations of the Applicant's witnesses on these issues.

There was little or no persuasive evidence that the mortar had frozen. Mr. Grainger testified that freezing would have been evidenced by discolouration in the mortar or softness. He applied a key to the mortar and observed the mortar to be hard. Where the tooling was rough, he was able to break it off with the key. The breakage was likely the result of rough texture rather than a curing process flaw. It was his conclusion that the most likely explanation for the state of the mortar was that the mortar hardened before it was tooled. Mr. Baker also applied a key test and stated that he was able to dig about 1/8th of an inch causing mortar to fall away. He did not state how many spots were tested. Mr. Bringas concluded freezing had occurred because he observed shrinkage in the mortar. This had caused cracks.

Where the evidence of these witnesses differs on this point, the Tribunal prefers the evidence of Mr. Grainger for the same reasons mentioned above. As such, the Tribunal finds that the mortar which fell away when a key test was applied was most likely caused by the texture of the mortar as applied rather than freezing.

No evidence was called as to local temperature conditions during the bricklaying process. The bricklayer, Sal Albano, was not called to testify about the conditions when he did the mortar work.

There is one item upon which most of the witnesses seemed to agree. The Applicant felt that the job had been done poorly and that the tooling was not done properly. Mr. Baker concluded that the cracked mortar joints were not properly tooled and that the cracks may have been caused by "...freezing, delays in tooling or that the job was done improperly." Mr. Bringas attributed the lumps of mortar as evidence of freezing but also as evidence that "...whoever did the tooling did not know what he was doing." Mr. Irvine, when presented with certain photos revealing obvious holes, stated that it was possible that the work had been improperly completed. Mr. Grainger concluded that the mortar likely hardened before it was tooled. He also stated that although there was nothing wrong with the integrity of the work on the home, it had been done sloppily. Only Mr. Thompson felt there was nothing wrong with the brickwork, although repairs were started on the front of the home as a goodwill gesture.

The bottom line of all this evidence seems to be the inescapable conclusion that a very poor job was done on the tooling. The photos presented by Mr. Irvine and Mr. Dagenais reveal a rather unsightly collection of mortar gobs, cracks, pits and inconsistencies in tooling presentation. While there may be disagreement on the long-term effects of this state of affairs, there can be no doubt that the mortar work on the Applicant's home is aesthetically unpleasant.

Based on the evidence, both oral and documentary, the Tribunal finds the following facts to be proven:

- 1) The Applicant's appeal with respect to this breach of warranty claim was made within the time limits prescribed by the Act. There was no dispute from the Program in this regard;
- 2) The Applicant's claim was framed to mean the brickwork on the entire home;
- 3) The amount required to repair the mortar work is \$7,000.00 plus taxes. Of that amount, \$3,000.00 is for the front of the home;
- 4) The brickwork on the home was done in an aesthetically unpleasant manner;
- 5) There was insufficient evidence adduced to establish that the discolouration or status of the mortar-work had been caused by freezing;
- 6) The evidence suggested that improper tooling was an aesthetic concern rather than a performance issue;
- 7) There was no evidence that the problems associated with the brick work was excluded under section 13(2) of the Act.

THE LAW:

The *Ontario New Home Warranties Plan Act* states as follows:

13(1) Every vendor of a home warrants to the owner,

- (a) that the home,
 - (i) is constructed in a workmanlike manner and is free from defects in material,
 - (ii) is fit for habitation, and
 - (iii) is constructed in accordance with the Ontario Building Code;

(b) that the home is free of major structural defects as defined by the regulations; and

(c) such other warranties as are prescribed by the regulations.

...

(2) A warranty under subsection (1) does not apply in respect of,

(a) defects in materials, design and work supplied by the owner;

(b) secondary damage caused by defects, such as property damage and personal injury;

(c) normal wear and tear;

...

(4) A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed.

...

14(3) Subject to the regulations, an owner of a home is entitled to receive payment out of the guarantee fund for damages resulting from a breach of warranty if,

...

(b) the person has a cause of action against the vendor or the builder, as the case may be, for damages resulting from the breach of warranty.

Counsel provided a number of cases for consideration by the Tribunal. These cases were quite helpful in coming to a decision in this matter.

Counsel for the Program directed the Tribunal to pages 25-26 of the decision in *Saporita v. Ontario New Home Warranty Program* (1999). In that section of the case, the Tribunal suggests that the standard in workmanship is not one of perfection. Moreover, "If imperfections exist in the Applicant's home they are, from the evidence tendered, minor in nature and do result in aesthetically displeasing results." The Tribunal in that decision associated itself with the remarks in the *Mark Teitelman* (1987) CRAT 179 matter wherein it was stated that minor imperfections are to accepted and expected and that "All that can be done is to keep these imperfections at reasonable acceptable levels."

The Tribunal in *Saporita* concluded that the imperfections in the work were minor and did not result in aesthetically displeasing results. As stated above, in this case, this Tribunal has concluded that the mortar work is aesthetically displeasing.

Program Counsel also cited the *Breen* (CRAT, 1999) case as authority for the application of a de minimis rule in these matters. Specifically, at page 17 of the *Breen* decision, the Tribunal states:

The mark is only visible on an extremely close inspection. A microscopic examination is not the appropriate standard of testing. In law this type of mark could be considered "de minimis non curat lex" meaning that the law does not take notice of nor care about very small or trifling matters.

In that case, the alleged defect was a banding mark on the bottom of a cupboard door. The warranty representative recalled the banding marks being an issue when he did his inspection but "...it was not visible to him when installed in the cabinets and he believed it was not an issue."

It cannot be said that the sloppy mortar work on this home is a "...very small or trifling..." matter. Tiny banding marks on a cupboard door on the inside of a home are not the same as very poor workmanship on the exterior of a home. Consumers purchase homes for a variety of

reasons. The exterior appearance is clearly an important consideration. The outward appearance of the home is seen everyday by the owner and the neighbours. When the owners sell their homes the exterior appearance or “curb appeal” is an element of the sale price.

Additionally, the photos that were taken and submitted by the Program and the Applicant are rendered from a variety of distances. The Applicant’s photos were taken from a closer range and tend to focus in on very bad spots. Mr. Irvine took the Program photos, usually from a range of 3 – 6 feet. He stated that they were a fair representation of the home. Excluding the photos of the ground out areas and the great entrance, there is evidence that the defects in the mortar work are visible without a microscopic inspection.

Counsel for the Applicant pointed the Tribunal to the case of *Goulet (Re)* [2000] O.C.R.A.T.D. No. 51 where the Tribunal considered the concept of “workmanlike” manner. The case of *Belvedere v. Ontario New Home Warranty Program* (CRAT, 1997) was cited for the proposition that the appearance of the work of aesthetics plays a role in the concept of workmanlike manner. The aesthetic appearance of work is neither of the highest importance or of the lowest importance, but it has some importance.

In *Belvedere*, the workmanship issue arose with respect to some ceramic tiling. Vice Chair Hiley, after extensively reviewing definitions of workmanship, rejected the decisions in *Russo* and *Uludamar* and stated the following at page 12:

“Workmanship” does not just mean that the item is functional. There is the element of quality to be found in the concept of “workmanship”. There is the element of skill to be found in the concept of “workmanship”.

She continues,

“For example, one can see that a handcrafted wooden desk can still function as a desk even if the top of the desk is slanted slightly or has a rather rolling surface. But would a member of the public wish to purchase it in that condition? No. Is it a product of a skilled worker? No. A skilled worker would ensure that the wooden top of the desk has no angles or rolls to it. The desk could still be used to write on. It can hold papers and books and a computer or a telephone but it has not been constructed in a skilled or expert fashion” (page 13)

The same holds true for the mortar work on Mr. Dagenais’ home.

DECISION:

Accordingly, pursuant to the authority vested in it by section 16(3) of the *Ontario New Home Warranties Act*, the Tribunal directs the Ontario New Home Warranty Program to have the necessary action taken to repair the mortar work on the entirety of the Applicant's home in a proper and workmanlike manner to meet the warranty requirements of the Act. Furthermore, it shall be a condition of this order that the Applicant shall allow the Program and such person or persons that the Program may arrange to complete the required work all reasonable and necessary access to the premises for this purpose. If the Applicant refuses this latter condition then the Program shall have no further obligation in this matter.

This latter condition is added to permit the Program to select the builder to effect the repairs, if appropriate.

LICENCE APPEAL TRIBUNAL

Richard C. Delaney,
Member

Released: June 20, 2002

CLASSIC COUNTRY HOMES

933891 ONTARIO LIMITED o/a CLASSIC COUNTRY HOMES

APPEAL FROM PROPOSAL OF THE REGISTRAR UNDER
THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*

TO SUSPEND REGISTRATION

TRIBUNAL:

MARJORIE HILEY, Vice Chair

APPEARANCES: BARRY MILLS, Agent, representing 933891 Ontario Limited o/a
Classic Country Homes
CAROL STREET, Counsel, representing the Registrar, Ontario New
Home Warranty Program

DATE OF
HEARING:

April 3, 2002

Toronto

REASONS FOR DECISION AND ORDER

Background:

This matter was commenced by a Notice of Proposal dated October 31, 2001. The Registrar wished to suspend the registration of 933891 Ontario Limited o/a Classic Country Homes due to the failure of the registrant to execute the Vendor and Builder Agreements. The registrant, through its president, Barry Mills, filed a Notice of Appeal dated November 8, 2001. In the Notice of Appeal the registrant stated a number of grounds for appealing the decision. The first ground stated was that the ONHWP Vendor Agreement and the ONHWP Builder Agreement and the regulations under the *Ontario New Home Warranties Plan Act* violated the *Canadian Charter of Rights and Freedoms*.

A prehearing was held with the Registrant and the Program on January 24, 2002. A prehearing order was released by the Tribunal on January 25, 2002. Attached to the order was a Statement of Facts. The parties were in agreement as to paragraphs 1 through 14 of the Statement of Facts. There was no agreement as to paragraph 15. The prehearing order set out the procedure and time lines for the parties to proceed on the Charter challenge. The Applicant was to serve the Program and the Attorney Generals of Ontario and Canada with its

documents, including a statement of issues, fact and law, by February 15, 2002. The Program was to serve the Applicant and the Attorney Generals of Ontario and Canada with its documents and its statement of issues, fact and law, by March 4, 2002. Then the parties had from March 6 through 22, 2002 to conduct cross examinations on the affidavits and until March 28, 2002 to file transcripts of the cross examinations. There would be no viva voce evidence permitted on the Charter issue at the hearing unless the Tribunal consented. Failure to comply with the procedures and time lines as set out in the prehearing order would result in the Tribunal not hearing submissions from the parties at the hearing regarding Charter issues. The parties were to comply with the Tribunal's Rules of Practice as it relates to disclosure requirements for the hearing.

Both parties were in attendance at the hearing on April 3, 2002. A preliminary issue was raised by the Program as regards the Charter issue.

Preliminary issue:

Counsel for the Program raised the issue of whether or not the Charter argument could be considered in this hearing. It was the submission of Counsel for the Program that the Applicant had not complied with Rule 8 of the Tribunal's Rules of Practice, with the prehearing order of January 25, 2002 and with s.109 of the *Courts of Justice Act*. Therefore the Applicant could not proceed with the Charter arguments.

Counsel for the Program spoke of Rule 8.1 of the Rules of Practice, in particular the subsection dealing with the content of the notice. It was the submission of Counsel that the Applicant had not complied with this requirement. Such failure to comply should result in no remedy being granted by the Tribunal.

It was stated by Counsel for the Program that the Applicant had stated in his Notice of Appeal that he wished to make a Charter argument and that he would need to serve the Attorney Generals of Ontario and Canada at least 15 days prior to the hearing date. Again at the prehearing held on January 24, 2002 the Applicant was informed by the Tribunal that notice had to be given to the Program and the Attorney Generals of Ontario and Canada by February 15, 2002. The Applicant was aware of the time frames and of the reasons for the order made at the prehearing.

Counsel for the Program stated that the Applicant objected to the prehearing order in his letter of February 7, 2002 to the Registrar of the Tribunal. The Registrar informed the Applicant that there would be no changes to the prehearing order. The Applicant did not provide notice as required under the prehearing order. As a consequence the Program could not prepare its case. It should be noted that the Rules of Practice of the Tribunal echoes the wording in section 109 of the *Courts of Justice Act*. Notice shall be done "as soon as the circumstances requiring it become known and, in any event, at least fifteen days before the day on which the question is to be argued, unless the court orders otherwise."

It was submitted by Counsel for the Program that the Applicant had not provided the material facts on which to support the argument. For example, paragraph 4 of the Applicant's materials speaks of abuses of search and seizure powers of the Program but there are no facts or particulars provided as to when these powers had been abused and under what circumstances.

In the exhibits filed by Counsel for the Program was a letter of Beth Symes dated April 2, 2002 stating that Ms. Goldberg of the office of the Ministry of the Attorney General for Ontario had informed Ms. Symes that no notice of constitutional question had been filed with the Ministry. The Applicant had responded to that letter by providing a fax sheet which showed that a document of seven pages in length had been faxed directly to the office of the Ontario Attorney General on March 26, 2002. It was the submission of Counsel for the Program that even if that had occurred the notice was only eight days in advance of the hearing date, not the fifteen days as required by the Rules of Practice for the Tribunal and under section 109 of the *Courts of Justice Act*. Nor was there any evidence that the Attorney General for Canada had been served. It was the opinion of Counsel that the notice was insufficient.

Counsel for the Program referred to the case of *The Brant County Board of Education and the Attorney General for Ontario v. Carol Eaton and Clayton Eaton et al*, a decision of the Supreme Court of Canada as of February 6, 1997. Chief Justice Sopinka spoke of the purpose of section 109 of the *Courts of Justice Act* and the entitlement of the governments to notice so they can protect their legislation. The absence of notice is prejudicial to the public interest.

Counsel also referred to *Family and Children's Services of Guelph and Wellington County v. K.F.* a decision of the Ontario Court of Justice of November, 2001. In that decision Mr. Justice Caspers found that "The failure of the respondents to comply with the notice requirements of subsection 109(1) of the *Courts of Justice Act* is fatal to the application in accordance with subsection 109(2)."

Counsel referred to the LAT case of *T Mag Marketing* of May, 2001 where the Tribunal held that there was a need to have proper notice of constitutional issues.

Besides objecting to the hearing of the Charter issues Counsel for the Program objected to the improper notice disclosure of the Book of Documents of the Applicant which was served approximately a week prior to the hearing date which is not in compliance with both the prehearing order or the Rules of Practice of the Tribunal as it relates to disclosure requirements. Tabs 4 through 8 dealt with Charter issues and tabs 10 & 11 dealt with irrelevant matters, that being letters of reference from satisfied consumers. The Program stated on the record that it had no problems with the competency of the Registrant, just with its non compliance in not executing the Vendor and Builder Agreements.

Mr. Mills, as agent for the Registrant, stated that he is primarily a builder. Though he had attended at the prehearing conference he had been unhappy with the order and had objected by his letter of February 7th to the Registrar of the Tribunal. There are Charter ramifications in

the insistence of the Program that he sign these Agreements. Mr. Mills stated that he had also faxed the Attorney General for Canada on March 26, 2002.

Mr. Mills stated that the cases referred to by Counsel for the Program all dealt with situations whereby no notice had been given to the Attorney Generals. Here he had given notice to both the Attorney General for Ontario and that for Canada. He had not mentioned any specific facts as he had not signed the Vendor or Builder Agreements. He noted that in the *Brant Board of Education* case the Court of Appeal had permitted argument on Charter issues even though proper notice had not been given.

Decision of preliminary issue:

The Tribunal finds that the Registrant had not provided proper notice of its intention to argue Charter issues. Though it is evident that the Registrant did inform the Attorney General for Ontario that notice was outside of the fifteen days stipulated in the *Courts of Justice Act*. The Registrant has stated that he had faxed the Attorney General for Canada on March 26th. It is quite likely that he did so even though he had no documentation to verify his statement. But again that notice was outside the fifteen days stipulated in the *Courts of Justice Act*.

The cases provided by the parties do show that the higher courts value the concept of proper notice being given to the parties. They also show that in some instances even if the proper notice had not been given the Charter issues can be advanced to the court for consideration. But in this case the Registrant was well aware of its responsibilities to provide notice and to provide the proper foundation for any constitutional arguments. The Tribunal at the prehearing and as shown by its prehearing order did go to great lengths to inform this unrepresented Registrant as to what is required if one wishes to advance a constitutional challenge at the hearing. The prehearing order could not have been any more detailed as to what the Registrant must accomplish in order to present its Charter challenge at the hearing. Whether or not the Registrant liked the order it is an order of this Tribunal. One ignores it at one's own peril. The Registrant knew there were deadlines in order to advance its case for the Charter challenge. The Registrant choose to ignore those deadlines and indeed to ignore the limitation periods as stated in both the Rules of Procedure of the Tribunal and under s.109 of the *Courts of Justice Act*. Accordingly this Tribunal refused to hear submissions at the hearing in regards to any Charter issues.

Though the Registrant had failed to disclose its documents to the Program at least ten days prior to the Hearing date the Tribunal permitted the documents of the Registrant found in Exhibit 4 to the hearing, being Tabs 1 through 3 and tab 9 to be entered as exhibits to this proceeding. Tabs 4, 5, 6, 7 and 8 are not entered as they deal with the Charter issue which is not before this Tribunal. Tabs 10 and 11 are not entered as they deal with the competency of the Registrant which is not an issue before this Tribunal. Tabs 4, 5, 6, 7, 8, 10 and 11 are not relevant to the issue before the Tribunal.

Issue:

Does the failure of the Registrant to sign the new Vendor and new Builder Agreements provide the Registrar of the Ontario New Home Warranty Plan with the grounds to refuse to renew the registration of the Registrant?

Testimony:

The parties had agreed at the prehearing on January 25, 2002 to an Agreed Statement of Facts paragraphs 1 through 14. Evidence was not led on the matters covered by this Agreed Statement of Facts which was appended to the prehearing order as Exhibit B.

Testimony of Gregory Baker:

Mr. Baker testified that he is the vice president of Risk Management for the Program. He has held that position since 1998. In 1997 he was the manager of business analysis for the Program.

Mr. Baker testified that his responsibilities include the preparation of policy for the Program. He has four staff members in his department. He has a degree in Finance and a Master of Business Administration degree. He has a law degree from an American University but he is not qualified to practice law in Ontario.

According to Mr. Baker the Program began to look at its Vendor/Builder Agreement in 1995. There was consultation with the builders and the Program's Board of Directors to review the Agreement. In 1998 this consultation became more intense with the Ontario Home Builders Association. This is a provincial association of homebuilders comprised of builders, trades and suppliers. It provides formal institutional representation to the Program. The Ontario Home Builders Association has fifteen chapters in Ontario. Approximately fifty per cent of its members are registrants with the Program.

There are approximately five thousand registrants with the Program. All have signed the new Builder and Vendor Agreements except for eight registrants.

The Liaison Committee, which has geographical representation throughout Ontario, had met quarterly to consider the new Agreements. In 1999 there was a joint Communique from the Liaison Committee/Program to all members of the Ontario Home Builders Association and all registrants of the Program. As well during 1999 all registrants of the Program were faxed information sheets on three or four occasions. The drafts of the new Agreements were distributed to the members of the Ontario Home Builders Association. Any issues or changes then went to the Board of Directors of the Program.

Mr. Baker testified that under the bylaws of the Program there is a Board of Directors of fifteen people. Approximately eight Board members are registered builders who work in the industry and are members of the Ontario Home Builders Association.

The Program consulted with the building industry and got input from those in the industry. It was evident that builders wanted as much information in the draft agreements as possible. The draft agreements were expanded to be more specific as to rights and responsibilities.

Mr. Baker testified that there had been a Vendor/Builder Agreement in place from 1976 to 1987. From 1987 to April, 2000 that same agreement was in place with some minor changes.

Prior to the release of the new Builder Agreement and new Vendor Agreement registrants of the Program would have to read the Act and its Regulations in order to know precisely what were their rights and responsibilities. The Program would issue Builder Bulletins as communication tools which were basically interpretations of the Act and its Regulations. Though initially there was a combined agreement the builders made it clear during the consultations that they wanted two separate agreements, a Builders Agreement and a Vendors Agreement.

Though the new agreements are longer and more detailed than the old combined agreement they do not contain any different obligations. There are no surprises to the registrants but the new agreements are more specific in their language. Indeed it was the opinion of Mr. Baker that the Program now has more limitations on it under these new agreements. For example under the new Vendor Agreement section 2.3 the Program is now responsible for any major structural defects from years 3 through 7 and the Registrant is responsible only for years 1 and 2.

Mr. Baker explained that initially in the Builders Agreement under section 1.4 there was language related to after sales service. After consultation with the builders that section was amended in June, 2001 to take out the wording "after sales service". But the types of documentation itemized in section 1.4 was all in the older Vendor/Builder Agreement. What has happened is that the language is more specific at the request of the industry which wanted the requests for documentation to be more consistent.

Mr. Baker stated that the Registrant had signed the former Vendor/Builder Agreement. Under that Agreement in section 4.4(e) there is listed the same type of documents as are listed now under 1.4 of the new Builders Agreement. The provision of such documentation by the builders to the Program was an existing obligation of builders prior to the new Agreements coming into force. Under the Act section 7(2) there can be terms and conditions prescribed by the Regulations. Regulation 894 lists the terms and conditions of registration of builders and vendors.

Mr. Baker stated that if the registrant is a corporation and there is no personal guarantee in place then the Program is unable to pierce the corporate veil as regards the indemnity clause in section 1.4 of Regulation 894. It is the historical practice of the Program to facilitate registration by doing an assessment of the assets of the corporation registrant. Usually it is the practice to ask for a personal guarantee. Small builders can get their registration without a security requirement by using the personal guarantee. In order to do a personal guarantee it is

required that a personal net worth statement be filed. There needs to be some sort of financial statement or the Program cannot assess the financial strength of the registrant.

Mr. Baker testified that under Builder Bulletin #28 the Program has provided the information on how it does a risk assessment. There is a point system which is based on size, tenure, performance history etc. This is analogous to the insurance industry's underwriting process.

Those in the condominium industry have a different scheme as there is a risk to the purchasers deposits which are to be held in trust.

Under these internal processes you can go to the higher levels of management. Of there is an external appeal to the Tribunal.

Mr. Baker then reviewed the issues mentioned on the Notice of Appeal, commencing with issue #2 and the first issue dealt with the Charter issues.

Issue #2 – personal information not protected

Mr. Baker did not think that the Registrant was required to provide letters of security. Often the Program will ask for a copy of the driver's licence to verify identity. All personal information is kept confidential. The staff and Board members sign confidentiality agreements on an annual basis. As well the Program has a policy not to disclose information without a subpoena. What the Program can disclose are the names and addresses of the place of business.

Issue #3 – overcharging buyers for warranty coverage

Mr. Baker stated that this is not covered under the new Agreements.

Issue #4 – non disclosure of all material implications

Mr. Baker referred to section 3.9 of the Builders Agreement and 3.10 of the Vendors Agreement. There is no retroactive effect of new provisions in future Bulletins. This was not changed in the amended versions dated June of 2001. The Builders Bulletins are traditionally communication vehicles in which the legislation is interpreted or where the risk assessment process is outlined. For example under Bulletin 19 there is a field review required for condominium construction by an engineer and then security can be released. There is no retroactive effect of these Bulletins unless it comes from judicial decisions. As well the Liaison Committee can bring up any issues or you can go to the Tribunal.

Issue #5 – new financial or fiduciary requirements are imposed by the new Agreements

Mr. Baker stated that the Act and Regulations permit the Program to ask for additional securities if necessary. Then if there is no compliance the Notice of Proposal can be issued. For example if a builder has been building five homes a year and now wants to build fifty homes then the Program can ask for more information and possibly want additional security from that builder.

Issue #6 (found on last page of March 18th/02 letter) - builds homes under contract and these homes not eligible for registration

Mr. Baker stated that the Agreements do not apply if it is found that the builder is not covered under the definition of builder in the Act.

Issue # 7 (found on last page of March 18th/02 letter) equity per unit and risk assessment

Mr. Baker stated that the risk assessment does not have anything to do with the new Agreements. Equity per unit is a term of art, a way of looking at assets of a corporation. The more invested in a corporation the less likely that a company will walk away from its obligations.

Under cross examination Mr. Baker stated that perhaps fifty per cent of those registered as members of the Ontario Home Builders Association are builders. There are just eight builders who have not signed the new agreements. In the Board of Directors of the Program there are eight builder designated positions and he believes that five are practicing builders.

The issues of administration fees on invoices and interest on debts come from the Regulations attached to the Act

Regarding the issue of confidentiality Mr. Baker stated that the Program does report to credit reporting agencies if there is a duty to disclose. That is part of the consumer protection practices in the Agreements found in section 4.3 and 4.4 and 1.5 of the Builder Agreement.

Regarding the non material disclosure issue Mr. Baker stated that section 3.9 of the Builders Agreement is in accordance with the Act and its Regulations.

Regarding new financial requirements issue Mr. Baker stated that the Builders Agreement could result in the builder being responsible for more security at mid stream. The Program does complicated assessments similar to the *Insurance Act* practice to determine liabilities. Then the Program looks at anticipated enrolments. In the past two years the fees have been reduced by forty per cent. This has been achieved through better risk management procedures. The Program may or may not release guarantees.

Regarding the issue of homes being built under contract this means that those homes that fit under the definition of builder in the Act would come under the Builders Agreement. The new agreements are more specific but not so that new obligations would be added by the builders.

Regarding the risk assessment issue the Program does look at the company's financial position as a whole and it will often say to small builders that they require additional guarantees. It is done on an individual basis for the assessment but the liabilities remain the same under the Act.

Testimony of Barry Mills:

Mr. Mills testified that he has been in business since 1991 and has worked in the industry since 1988. He used to work with Upper Canada Beam doing shell packages and then progressed to constructing homes. He has been registered with the Program since 1994. He has been the sole shareowner of Classic Homes since 1998. He has done 31 homes: 9 have been shells; 18 have been fully completed in the Muskoka area; and he has 5 homes registered under the Program. He signed the Vendor/Builder Agreement in 1994.

Mr. Mills felt that it was an invasion of privacy to provide the personal information required by the Program. He realizes that the Program needs a mechanism to check on builders.

He has no problem with the provision of a certificate of completion and possession. He does have a problem with signing an agreement and then finding it has changed and he has no recourse to oppose the change.

Mr. Mills feels the new Agreements are discriminatory to the smaller builder due to the financial requirements.

He has a problem knowing whether or not he fits under the definition of builder and whether or not he should register his homes. Currently he has registered five homes.

He felt that Mr. Baker had through his testimony clarified the risk assessment process and how points are assessed to the smaller builder.

Under cross examination Mr. Mills stated that he was worried that personal information he gave to the Program would be given to a third party. He has no problem with the Program doing an assessment of his financial status and providing financial information to the Program. Indeed he has done a personal net worth statement on himself for the Program. He agreed that to date there has been no problem with disclosure of this personal information. He has no knowledge of complaints about disclosure of personal information.

Mr. Mills agreed that he had signed the Vendor/Builder Agreement and that it contained a clause under section 5.1 which permitted the Program to change the agreement. He agreed that he could go to the Tribunal if there was such a problem.

Though Mr. Mills had received the Builder Bulletins he felt that there was a difference between receiving information and being told how to do things. He did agree that the Bulletins have been primarily informational in character.

Mr. Mills still had concerns that the new agreements would allow the Program to reconsider its security terms at other times other than the renewal of the agreement. Mr. Mills agreed that he had no experience with security as he had never been required to provide it.

Mr. Mills had concerns about the unpredictability of the definition of builder. The warranty of the home depends on this definition. He agreed that the Program had never commented that he had acted in a non appropriate manner in not enrolling the other homes.

Mr. Mills stated that he was satisfied with the clarification by Mr. Baker as to the term "equity". He agreed that the size of a builder is a factor. He had no difficulties with his own risk assessment. He is concerned that future Bulletins will have unknown obligations. He agreed his concerns were of a hypothetical nature.

Closing Statements:

By Program:

The Program is asking for the suspension of the registration of the Registrant under section 8(2) of the Act on the basis that it has breached a term or condition of its registration.

Under section 7(2) there can be terms and conditions prescribed by the Regulations. In this case the Registrant had signed previous Vendor/Builder Agreement. Section 23(1)(a) of the Act permits bylaws that govern registration such as (f) agreements for Vendor and Builder; (l) bonded or provide other security; (o) prescribe forms. Under the general legislation there is a right for the Program to have agreements and forms.

Under Regulation 892 section 9(3) the applicant may be obliged to furnish information. This is the basis for which the Program required the initial applicant to sign an agreement.

The pre-existing Vendor/Builder Agreement allowed under section 5.1 that the registrant sign further agreements and under section 4.4(e) supply information.

Regulation 894 specifics terms and conditions for registration. Section 1.3(3) speaks of compliance with obligations. Other obligations are specified in 1.5 and 1.10(1).

Counsel for the Program submitted that there were prima facie grounds for the Registrar to suspend the Registrant's registration. The test is on the balance of probabilities.

Counsel stated that Mr. Baker had testified that the new agreements codify the Program's

practices. Indeed Mr. Mills had agreed that the Program must have some process to assess builders. The confidentiality concerns of Mr. Mills are hypothetical at this point. His concerns are the same whether one looks at the old agreement or the new agreements.

Mr. Mills had stated that Bulletins were a concern. But his concerns deal with some unknown future obligation. Again they are hypothetical. This point is the same whether under the old agreement or under the new agreements. Counsel stated that the Bulletins must be in accordance with the Act and its Regulations.

Counsel stated that the Program put into place the practice of being able to reassess security requirements during the period of registration in order to fine tune the registration process. It is a beneficial process to a builder as before the only recourse was to go for revocation of the registration. This helps to regulate the builders and protect the public interests.

Counsel stated that the definition of builder and its interpretation is not a problem dealing with the new agreements. This was a concern under the old agreement as well.

The risk assessment formula helps the builder to understand the process. It is not related to signing of the new agreements.

Counsel referred to *T-Mag Marketing Inc.* a LAT decision of August, 2001. In that decision the Tribunal found that failure to execute the new agreements meant the Program had the authority to refuse to renew the builder's registration. In the LAT decision of *Dynasty Homes Ltd.* of June, 2001 the Tribunal found that the builder was in breach of Regulation 894 by failing to sign the new Agreements.

Counsel submitted that the new agreements are reasonable and within the jurisdiction of the Program.

By the Registrant:

Mr. Mills submitted that by signing the Vendor/Builder agreement in 1994 he had complied with the Act and its Regulations. He submitted that the new Vendor's agreement has the potential of addressing issues which could be significant in the future.

Mr. Mills submitted that the definition of builder is still a concern as is the confidentiality issue. The Program can still provide information to other agencies with which it has business relations.

LEGISLATION:

Ontario New Home Warranties Plan Act

s.1 “builder” means a person who undertakes the performance of all the work and supply of all the materials necessary to construct a completed home whether for the purpose of sale by the person or under a contract with a vendor or owner;

s.7 (2) A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant or imposed by the Tribunal or prescribed by the regulations.

s.23 (1) The Corporation may make bylaws,

- (a) governing applications for registration of vendors and builders and the expiration and renewal of registration;
- (b) prescribing terms and conditions of registration;
- (f) governing agreements entered into between the Corporation and vendors;
- (l) requiring vendors and builders to be bonded in such form and terms and with such collateral security as are prescribed, and providing for the forfeiture of bonds and the disposition of the proceeds;
- (n) prescribing any matter required or authorized by this Act to be, or referred to in this Act as, prescribed by the regulations;

Regulation 892

Part III Registration

s.9 (3) The applicant shall furnish to the Registrar:

1. An agreement between the applicant and the Corporation providing for the respective rights and obligations of the parties as to the enrolment of homes under the Plan, the performance of work by builders, the sale of homes by vendors and such other matters as the Corporation may reasonably require, such agreement to be in such form as may be required by the Corporation and to be fully completed and executed by the applicant in duplicate;
5. Such additional documentation related to the application as the Registrar may reasonably require.

Regulation 894

1. The following are conditions of every registration under the Plan;
3. The registrant shall diligently perform or cause to be performed all obligations imposed under the Plan and under any agreement made with the Corporation in respect of the Plan.
5. The registrant shall from time to time, at the registrant's expense, furnish the Registrar with such documents relating to the Plan as the Registrar may reasonably require.
6. The registrant shall furnish the Registrar with such information relating to the registrant's financial affairs and position as the Registrar may reasonably request.

Courts of Justice Act as amended:

s.109(1) Notice of a constitutional question shall be served on the Attorney General of Canada

and the Attorney General of Ontario in the following circumstances:

1. The constitutional validity or constitutional applicability of an Act of the Parliament of Canada or the Legislature, of a regulation or bylaw made under such an Act or of a rule of common law is in question.
2. A remedy is claimed under subsection 24(1) of the *Canadian Charter of Rights and Freedoms* in relation to an act or omission of the Government of Canada or the Government of Ontario.

(2) If a party fails to give notice in accordance with this section, the Act, regulation, bylaw or rule of common law shall not be adjudged to be invalid or inapplicable or the remedy shall not be granted, as the case may be.

(2.1) The notice shall be in the form provided for by the rules of court, or in the case of a proceeding before a board or tribunal, in a substantially similar form.

(2.2) The notice shall be served as soon as the circumstances requiring it become known, and, in any event, at least fifteen days before the day on which the question is to be argued, unless the court orders otherwise...

(6) This section applies to proceedings before boards and tribunals as well as to court proceedings.

ANALYSIS:

This is a case whereby the registrant has refused to sign the new Vendor Agreement and the new Builder Agreement. The registrant had signed the old Vendor/Builder Agreement when it was registered with the Program in 1994. It is agreed by all the parties that there are no concerns with this registrant as to quality of work. The company has currently five homes registered with the Program. The only issue that led to the Notice of Proposal by the Registrar was the refusal of the registrant to sign the new agreements.

The Registrant had noted six areas of concern when appealing this Notice of Proposal. Attached to the Notice of Appeal had been an Exhibit A which noted six issues. The first issue dealt with validity concerns and the *Charter of Rights and Freedoms*. The Tribunal had held that it would not entertain any arguments at the hearing based on the Charter. That left the Registrant with the four other issues noted in Exhibit A to this Notice of Appeal plus two additional non Charter issues as stated on the last page of the letter of March 18th, 2002 by the Registrant to the Registrar of this Tribunal. These six issues will be dealt with as follows:

Issue # 1 – confidentiality of personal information

The Registrant throughout this proceeding has stressed his concerns with the sections of the new Agreements that deal with personal information. Sections 1.2, 1.4, 1.5, 4.3, 4.4, 4.6 of the Vendor Agreement of February, 2000 and 1.3, 1.5, 1.6, 4.3, 4.4, 4.6 of the Builder Agreement of June, 2001 all deal with disclosure of information and credit reporting. Mr. Baker had testified as to the measures taken by the Program with its staff and Board of Directors to ensure that information provided to the Program remains confidential. He testified that the new Agreements merely codified the existing practices of the Program.

The Act itself and its Regulations do not directly give any rights for confidentiality of information

provided to the Program. They speak of the duty of the registrants and applicants to provide all manner of personal and financial documentation that the Registrar might reasonably require. It would appear that the new Agreements actually provide the applicants and registrants with greater protection by stating in plain language the obligation of the Program to protect the personal and financial information given to it and outlining in what circumstances the Program is permitted to disclose such information to a third party.

The Tribunal finds that the Program has shown in the wording of its agreements and through its internal practices as stated by Mr. Baker that it is doing its best to protect the personal and financial information given to it by applicants and registrants. The Tribunal does not find this to be a concern which would permit the Registrant to fail to sign the new Agreements.

Issue # 2 – overcharging new home buyers for warranty coverage

This is a matter which is not dealt with in the wording of the new Agreements nor was it part of the old Vendor/Builder Agreement. Therefore it is not a reason for this Registrant not signing the new Agreements. This is a matter which could be dealt with in other ways such as having it brought before the Liaison Committee of the Ontario Home Builders Association and the Board of Directors of the Program.

Issue #3 new agreements do not disclose all material obligations etc.

Sections 3.9 of the June, 2001 Builder Agreement and section 3.10 of the February, 2000 Vendor Agreement state that the registrants will diligently comply with the Bulletins issued by the Program. It is agreed that this type of wording is not found in the old Vendor/Builder agreement. What the old agreement does state is in section 5.1 ...”provided that the Vendor shall enter into such further agreements with the corporation as the Registrar may require for the purpose of modifying or supplementing any of the provisions hereof or for the purpose of superseding this agreement.”

Mr. Baker had spoken of the importance of the Builder Bulletins as a communication tool. The clauses speak of there being no retroactive effect unless so ordered by the courts. There has always been the obligation of registrants to deal with the unknown as evidenced by the former section 5.1 of the old agreement. If the registrant does not wish to comply with some future obligation as set out in a future Bulletin than it can utilize the Liaison Committee or perhaps through a Notice of Proposal have the matter dealt with by the Tribunal. This is a hypothetical concern and the Tribunal cannot deal with it. As such it is not a valid reason for not signing the new Agreements.

Issue # 4: New financial or fiduciary requirements

Section 1.4 of the June, 2001 Builder Agreement and section 1.3 of the February, 2000 Vendor Agreement does contain a clause which permits the Program to ask for additional financial documentation and security between the renewal dates. This is not found in the old Vendor/ Builder agreement. But section 1.4 and 1.5 of Regulation 894 permits the Registrar to ask a registrant for any documents at any time as the Registrar might reasonably require them. So though the old Agreement did not specify this matter it formed part of the agreement through compliance with the Act and its Regulations. The Tribunal finds that this is not an additional burden to builders but is permitted under the wording of the Act and its Regulations. Mr. Baker has stated that though improved risk management procedures the fees have been reduced by forty percent in the past two years. These sections form part of the risk management procedures. The Tribunal does not find this to be a sufficient reason to fail to sign the new Agreements.

Issue # 5: definition of builder

Mr. Mills had a problem with the definition of builder as found in the Act. This is not a matter under the new Agreements. Whether or not you are a builder as per the definition depends on the specific facts of your situation. This is not an issue that warrants not signing the new Agreements.

Issue #6: equity per unit

The registrant had some problems with the concept of equity per unit. It is a term of art that is used in determining how to look at the assets of a corporation. Again it is not something which is addressed within the new Agreements. It is not an issue that permits the Registrant to not sign the new Agreements.

The Tribunal has found on all of the issues before it that there are no matters which warrant the Registrant not signing the new Agreements. These new Agreements might be more specific in their wording but they do little to change the situation as it exists between builders and the Program. The Registrant is working within an industry that is regulated through legislation and its regulations. The Act and its Regulations govern the powers provided to the Program. The new Vendor Agreement and the new Builder Agreement put in a more specific manner the powers already inherent to the Program through the Act and its Regulations. The Tribunal does not find that the new Agreements invalidate any authority provided to the Program. The Registrant is obligated under the Act and under Regulation 892 and 894 to comply with the authority given to the Program.

The Tribunal finds the Registrant to be sincere in its arguments though it has rejected those arguments. The Tribunal hopes that the Registrant will in the future reassess its position and agree to sign the new Agreements. It is unfortunate that the Registrant did not have a complete understanding of the legalities of working in an industry that is regulated by legislation and its

regulations. The Act is there to protect the new home buying public through registration of builders. The new Agreements are in compliance with the powers given to the Program under the Act and its Regulations. The Registrant must comply with the requirements of the Program and sign the new Agreements if it wishes to work in this particular industry.

ORDER:

Accordingly, based on the evidence and under the authority of section 9(4) of the *Ontario New Home Warranties Plan Act* the Tribunal confirms the Notice of Proposal of the Registrar, Ontario New Home Warranties Program, to suspend the registration of 933891 Ontario Limited o/a Classic Country Homes Limited.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley, Vice-Chair Presiding

Released: June 18, 2002

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

RIOUX

JEAN FRANCOIS RIOUX

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE *ONTARIO NEW
HOME WARRANTIES PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL: E. ALAN GARBE, Vice-Chair

APPEARANCES:

JEAN FRANCOIS RIOUX, Applicant,
KAREN JONES, Counsel, representing the Ontario New Home
Warranty Program

DATE OF

HEARING: April 3, 2002

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") from a written decision of the Ontario New Home Warranty Program (the "Program") dated November 6, 2001, which disallowed the Applicant's claims relating to a variety of issues with respect to a newly constructed home. This appeal is based upon the provisions of ss. 13(1)(a) and 14(1)(b) of the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O.31, as amended (the "Act") and Regulation 892, Part VI, s. 14.

The Applicant entered into an agreement of purchase and sale ("APS") with 1236059 Ontario Inc. carrying on business as Silverfox Building Group, accepted on the 24th day of November, 1997, for the purchase of a single family home located at 130 Bayview Avenue, Keswick, Ontario.

The house was completed for possession on December 4, 1998 and since taking possession, the Applicant has raised a variety of complaints with respect to the dwelling.

The builder built approximately 18 homes in the immediate vicinity, however, for reasons that were not explained, the builder left the site without doing any repair work.

The decision letter of November 6, 2001 addressed eight different claims and for the purposes of convenience the hearing proceeded with reference to the numbering sequence used in the Program's decision.

The reasons for denying the Applicant's claim fall into three categories:

1. the defect in workmanship or material is not apparent with respect to the claim;
2. the claim was not reported within the applicable warranty period; and
3. the subject matter of the claim is beyond the scope of warranty.

THE EVIDENCE:

At the opening of the hearing, counsel for the Program tendered the Program's Book of Documents which was made Exhibit 4 in this matter and the Applicant's Book of Documents was made Exhibit 5.

The evidence of the Applicant was given by the Applicant himself who use a Power Point presentation to identify his concerns as shown on photographs contained in Exhibit 5 and enlarged by the use of the Power Point presentation. In addition, the Applicant provided a video tape of certain of the alleged defects.

1. Cracking Floor

The first claim refers to "cracking floor" which it was agreed should have read "creaking floor" and related to the floors in the livingroom, diningroom, kitchen, second bedroom and the main washroom. It was the Applicant's position that the floors were nailed rather screwed down as required by the APS and that the floor joists did not properly overlap nor did the floor joists make proper contact with the I-beam. In addition, the Applicant suggested that there was evidence that the nails had missed the floor joists in certain areas which could be seen from the basement of the home looking at the exposed undersurface of the subflooring of the livingroom, diningroom, kitchen, second bedroom and the main washroom.

The Applicant testified that the grout surrounding the ceramic tiles in the entrance way was cracking and breaking loose because of the movement of the subfloor due to the aforesaid defects.

2. Improper Installation of Baseboard in Livingroom

The Applicant testified that a wall in the livingroom bowed in and out in places as much as $\frac{1}{2}$ ". In addition, there are gaps or cracks between the wall and the baseboard and between the bottom edge of the baseboards and the carpeting or tile where the floor covering abuts the subject wall changes from carpeting to tile and that this discrepancy is particularly noticeable when compared to the other location where the floor covering also changes from carpet to tile.

3. Floor Ceramic Installation

The Applicant testified that the ceramic floor in the kitchen sloped as much as $\frac{3}{4}$ " when a straight edge was laid along the floor. This gap which was caused, according to the Applicant, because of the height difference between the top of the beam and the sill plate.

8. Check Foundation and Brick for Mortar

The Applicant next addressed the issue, out of sequence from the numbering in the Program's decision letter, which relates to concerns regarding a possible structural defect with respect to the lintel between the garage doors being too narrow and too weak. The Applicant stated that this defect appeared in other houses in the immediate vicinity built by the same builder and was listed on the municipality's inspection list. The Applicant had no evidence other than an engineering drawing with respect to this problem and testified that this item had not yet been deleted with respect to the Applicant's residence.

4. Refund Grading Damage Deposit (\$500.00)

The Applicant testified that paragraph x on page 3 of the APS required the purchaser to pay an amount not to exceed \$500.00 for grading and subdivision damage which amount was to be refunded to the purchaser but that he had not received such a refund. In response to the Applicant's letter to the Town of Georgina, the Applicant was advised by the Office of the Mayor (Exhibit 5, Tab 7) that the Town had to utilize all funds that were held from the builder and that there were no longer any funds to reimburse home purchasers.

5. No Door on Laundry Room

The Applicant referred to a brochure showing a floor plan of the style of house which was built for the Applicant which does appear to show a door on the laundry room in the basement of the dwelling. The Applicant testified that there was no door on the laundry room in his house.

6. Broken Ceramic Tiles, Loose Ceramic Tiles, Cracking Joints in Main Washroom

The Applicant testified that a wall section in the shower cubicle moved, that there was cracked grout and water damage between the tiles in the shower, that there was a gap of approximately 3/8" between the floor tiles and the wall tiles along one section of the shower wall. Further, grouting between the floor tiles was cracked and breaking away and there are gaps and cracking around the door to the shower stall and a second area where the wall seems to flex. There were also broken ceramic tiles both inside the shower stall and in the area outside the shower stall near the tub. The Applicant also testified that certain of the ceramic tiles were lifting and that there may be water penetration through the framing and water damage under the sill of the doorway into the shower stall. Also, there was missing grouting and cracked and chipped grouting around the tile floor where the floor meets the shower and tub.

The Applicant referred to a quote from Home Depot dated March 9, 2002 (Exhibit 5, Tab 10) which indicated a cost of \$3,457.50, including taxes, to repair the problems in the bathroom but that the estimate did not include the carpentry work necessary prior to redoing the tile work.

The Applicant testified that he obtained another estimate from BathKrafters of \$3,400.00 plus \$850.00 for replacement tub and \$1,600.00 to replace the glass shower enclosure, a copy of this estimate was forwarded to the Program on or about November 27, 2000, by the Applicant (Exhibit 4, Tab 14).

7. Wall Not Straight - Mud Room

The Applicant testified that the wall running perpendicular to the hallway door bowed in and out over the length of the wall of the mud room and where it abutted a narrow exterior wall on the north side of the east door, there was approximately a 1/2" difference between the space between the mud room wall and the door jam around the door at the top and the bottom.

At Tab 12, Exhibit 5, the Applicant provided a statement of the amount requested to settle his claims which totals \$8,572.00.

Under cross-examination, the Applicant acknowledged that certain of the pictures contained in Exhibit 5 were taken in or around March 2002 while others were taken prior to the inspection in September 2000 and that the video tape provided was taken on or about March 17, 2002.

The Applicant testified that he worked as a technical specialist for Yamaha in the service division and previously had worked building cabinet doors and general cabinetry in 1987 and 1988. The Applicant did acknowledge that he was aware of the need for timely reporting of deficiencies to the Program.

With respect to certain of the items, the Applicant acknowledged that the Program had agreed to warrant certain repairs however the Applicant stated that he did not believe the cash settlement was sufficient to make the necessary repairs.

The Applicant testified that four members of the household used the shower on a daily basis.

The Applicant did acknowledge that the amount requested to settle his various claims was based on his estimates only.

The first witness called on behalf of the Program was Wendy Skyba whose credentials included having built approximately 100 homes, acting as a construction site supervisor, being employed as a building official and having taught courses with respect to the construction industry. Ms. Skyba was the warranty representative with respect to the Applicant's claim.

Ms. Skyba testified that the large number of claims raised with respect to this dwelling had gradually been reduced to the matters raised at this hearing.

1. Creaking Floor

Ms. Skyba indicated that it was a minor squeak and that one had to consider whether it was a major or minor problem and whether it was seasonal or pervasive as building materials change due to interior heating during winter drying out the materials and possible humidity. The witness testified that it is a natural property of wood materials for there to be shrinkage and as this was a normal expectation, it was not considered to be a defect. Ms. Skyba expressed the opinion that the floor joists did sit securely and have reasonable overlap.

2. Improper Installation of Baseboard in Livingroom

Ms. Skyba testified that the shrinkage which created the bowing was minor and not readily visible and suggested that the pictures produced by the Applicant were taken to emphasize the bowing of the walls beyond what would normally be observed. It was Ms. Skyba's testimony that the problem complained about was not a defect in workmanship and materials and noted that the initial complaint related only to the baseboard and that the complaint with respect to the wall was not reported within the warranty period.

3. Floor Ceramic Installation

The witness testified that there was often a "crown" where there was a transition from a beam to the foundation wall and that the manner in which the Applicant had measured the slope was exaggerated. Her investigation of the matter indicated that the crown was only 3/8" which was not unusual and therefore not a defect in workmanship or material.

8. Check Foundation and Brick for Mortar

Ms. Skyba testified that other houses in the area had been inspected and that there were concerns with the bearing capacity as the centre column between the garage doors was not wide enough to support the brick work above. An engineer had been hired to look at all the homes however, the Applicant's house was not identified as having this design problem and the conclusion was that there was no defect.

4. Refund Grading Damage Deposit (\$500.00)

Ms. Skyba testified that this claim was not a warranty matter and therefore was outside that for which the Program was responsible.

5. No Door on Laundry Room

The witness testified that this matter was raised after the end of the one year warranty period and therefore was too late and not to be considered by the Program.

6. Broken Ceramic Tiles, Loose Ceramic Tiles, Cracking Joints in Main Washroom

Ms. Skyba testified that upon investigation of the bathroom it was observed that certain tiles were cracked and recommended that the damaged or loose tiles be repaired which she estimated would be approximately \$300.00. Ms. Skyba testified that she had done numerous estimates over a period of the five years and that her estimate was based on a removal and replacement of approximately 20 tiles and that the tiles being replaced were builder grade white glazed ceramic tiles. The material cost should be approximately \$50.00 and the labour of \$30.00 per hour would be approximately \$250.00 for eight hours labour.

When asked to respond to the estimate given by BathKrafters, Ms. Skyba testified that the base frame appeared level and square with equal grout lines however, she acknowledged that she was not able to look under the frame as there was no way to make this observation at that time.

The witness testified that certain of the items the Applicant was now claiming were not raised at the time of her first inspection and suggested that there had been deterioration since the inspection.

7. Wall Not Straight - Mud Room

With respect to this item, Ms. Skyba testified that it was felt that the bowing was excessive and the recommended corrective work was to cut into the stud to remove material and that the cost of such work and material were minimal. The witness testified that she estimated the work to cost approximately \$250.00 which she felt was a generous amount. Ms. Skyba testified that

there could be an acceptable amount of bowing in a wall and in such situations, one wall might be repaired where another wall would not be repaired.

The witness testified that in order for work to be warrantied it must be reported on time and be visible and measurable and that the complaint raised with respect to where the wall of the mud room met the wall where the door is, was a new complaint which was out of time and in any event, was minor in nature and not readily visible.

On cross-examination, Ms. Skyba indicated that with respect to floor joists, it was not unusual for wood to shrink at different rates. Ms. Skyba testified that she did not know why the tiles lifted under the glass door in the main bathroom. When asked if she had taken pictures, the witness stated she had no pictures but had extensive notes.

In reply, Ms. Skyba suggested that one of the reasons the tiles may have lifted was because they were incorrectly installed or that the glass partition was put in place before the tiles had had an opportunity to set.

Chad Foresheew was called as a witness for the Program and was qualified as a construction expert having trained as a civil engineer, had given courses in building sciences and been a building inspector and presently is the manager, dispute resolution for the Program. Mr. Foresheew testified that he had been called in as the Applicant had challenged the results of the first inspection conducted by Ms. Skyba.

1. Creaking Floor

With respect to the complaints regarding the creaking floor, Mr. Foresheew had walked the floors with the Applicant and there had been no squeaks or creaking. The witness testified that, in his opinion, there was nothing out of character in the manner in which the floor joists were installed and that the work conformed with normal framing practice.

2. Improper Installation of Baseboard in Livingroom

With respect to the bowing in the livingroom, it was the witness's evidence that the bowing of the baseboards was minimal and not readily visible. Mr. Foresheew suggested that the pictures taken by the Applicant were a "worm's eye view" which accentuated the condition. It was the witness's opinion that, although there was some slight bowing, it was not a defect.

Mr. Foresheew testified that he had stretched a string along the livingroom wall moving from the bottom to the top and although he detected a certain amount of bowing there was very little at the top and felt that overall this was normal and not a defect.

3. Floor Ceramic Installation

With respect the ceramic installation, the witness testified that he used the same approach

to determine the amount of dip or slope and expressed the opinion that it was only slight and could not be felt nor seem. It was the witness's evidence that this was not unusual and not a discernable defect.

6. Broken Ceramic Tiles, Loose Ceramic Tiles, Cracking Joints in Main Washroom

Mr. Foreshew testified that there appeared to be very little change, if any, between the first inspection and the inspection conducted by him on October 24, 2000. A hole had been cut in the floor in the basement to form a small inspection point and the witness could detect no evidence of water, mould or the blackness which might form on wood where there is moisture. There appeared to be no rotten wood and the framing seemed sound.

With respect to the letter from BathKrafters, the witness testified that he could see no basis for statements made the letter containing the estimate. The witness suggested that certain of the problems experienced by the Applicant around the doorsill of the shower could be as a result of a crack or rip in the "wiper" which would permit water to seep out of the shower under the shower stall door. The witness acknowledge that he could not say with certainty that this was the problem however, it did appear to be a reasonable possibility given the state of the door and the door sweep or wiper.

LAW

Section 13 of the Act provides:

(1) Every vendor of a home warrants to the owner,

(a) that the home,

(i) is constructed in a workmanlike manner and is free from defects in material,
.....

(2) A warranty under subsection (1) does not apply in respect of,
.....

(d) normal shrinkage of materials caused by drying after construction;

(e) damage caused by dampness or condensation due to failure by the owner to maintain adequate ventilation;

(f) damage resulting from improper maintenance;
.....

(4) A warranty under subsection (1) applies only in respect to claims made thereunder within one year after the warranty takes effect, or such longer period of time under such conditions as are prescribed.

ISSUE

The issue before the Tribunal is whether or not the claims raised by the Applicant fall within one of the categories for which the Program is responsible to provide compensation and were made within the time allowed under the Act.

FACTS FOUND

1. The Applicant and the builder entered into the APS pursuant to which the builder constructed the Applicant's home in Keswick, Ontario.
2. The Applicant made certain claims to the Program within the time permitted under the legislation.
3. Certain other claims raised by the Applicant were not raised in a timely fashion.
4. The requirement to install a door on the laundry room was not part of the APS and was raised outside of the required notice period.
5. The request for compensation for the refund of the grading deposit was a matter of contract and not of warranty pursuant to the statute and therefore was not a warrantable by the Program.

DECISION AND ORDER

The Applicant must be complimented on his efforts to provide a clear presentation for his claims. Unfortunately, the Program can not warrant perfection and therefore a certain level of imperfection must be accepted by the purchaser of a new home.

In response to the Program's position that certain of the Applicant's claims were not raised within the required time, the Applicant testified that the delay was because the first inspection occurred after the one year period. Although there may be situations where, as a result of an inspection, the degree of a problem claimed may expand, it is not the purpose of an inspection to provide an opportunity for an owner to expand the claims giving rise to the inspection.

With respect to the claims raised by the Applicant at the hearing, the Tribunal finds as follows:

1. Creaking Floor

The creaking complained of by the Applicant is minor in nature and does not represent a defect in material or workmanship but is consistent with the normal shrinkage of material which would be experienced in a new home.

2. Improper Installation of Baseboard in Livingroom

The cracks between the baseboard and the wall is minor in nature and not readily visible and is consistent with the normal shrinkage of material caused by drying after construction and therefore is excluded from the warranty coverage. The height differential between the ceramics and the carpeting is unavoidable and therefore acceptable.

The bowing of the wall is not readily noticeable and is not a defect in workmanship or material.

3. Floor Ceramic Installation

Once again, this condition is considered to be minor and not readily visible and therefore no defect in workmanship or material.

4. Refund Grading Damage Deposit (\$500.00)

This is matter of contract and outside warranty coverage provided by the Program.

5. No Door on Laundry Room

As there is no evidence that this was part of the APS, this is not a matter of warranty and is beyond the scope of the Program.

6. Broken Ceramic Tiles, Loose Ceramic Tiles, Cracking Joints in Main Washroom

It is clear that there was a defect in workmanship and material with respect to the ceramic tile in the main bathroom however, the Applicant did not feel that the amount offered by the Program was sufficient. This Tribunal finds that the amount initially offered by the Program was sufficient to correct the problem and any increase in the cost of repairing the bathroom arises as a result of the failure of the Applicant to promptly deal with the problem and the continued use of the bathroom notwithstanding the defects.

7. Wall Not Straight - Mud Room

The Program found that there was a defect in material with respect to this complaint but the Applicant felt that the cost of repairing it would be greater than the amount offered by the Program.

8. Check Foundation and Brick for Mortar

There is no evidence that this is a problem with the Applicant's house and therefore no defect in workmanship or material is present.

Accordingly, for the reasons stated above and pursuant to the authority vested in it by s. 16(3) of the Act, the Tribunal directs that the Program to pay to the Applicant the sum of \$598.50 with respect to the claims relating to the mud room and the main bathroom but in all other respects, to disallow the claims of the Applicant.

LICENCE APPEAL TRIBUNAL

E. Alan Garbe, Vice-Chair

Released: June 18, 2002

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Divisional Court is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

K&K AUTO SALES

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
1269791 ONTARIO INC. o/a K&K AUTO SALES AND KENNETH MABEE

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATIONS
- Proposal dated: November 5, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal
1269791 ONTARIO INC. o/a K&K AUTO SALES AND KENNETH MABEE

Applicants

-and-

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT ORDER

WHEREAS upon the consent of the parties, the Tribunal adjourned the hearing in the above matter to June 18, 2002 *peremptory to the Applicants*;

AND WHEREAS the Applicants have requested a further adjournment as the Applicants were given notice of further particulars of the Respondent's proposal to revoke the Applicants' registrations on June 7, 2002, but due to court commitments, the Applicants' counsel has not had an opportunity to review the further particulars with his client, which request for an adjournment is opposed by the Respondent;

THE TRIBUNAL ORDERS that, in the interest of fairness and to permit a full and complete hearing of the issues, this hearing be adjourned *peremptory to the Applicants* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m. on Monday, August 26, 2002.

LICENCE APPEAL TRIBUNAL

E. Alan Garbe, Vice Chair

Released: June 20, 2002

KADARA MOTORS

1346333 ONTARIO INC. o/a KADARA MOTORS AND SAMSON AWODAMOLA

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: JOHN ORT, Member

APPEARANCES: No-one appearing for the Applicants
AVIVA HARARI, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: April 29, 2002 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") from a Notice of Proposal (the "Proposal") issued by the Registrar, *Motor Vehicle Dealers Act* (the "Registrar") pursuant to Section 7 of the *Motor Vehicle Dealers Act* (the "Act"). The Proposal dated November 30, 2001 seeks to revoke the registrations of Samson Awodamola and 1346333 Ontario Inc. o/a Kadara Motors (the "Applicants") under the Act.

In the Proposal, the Registrar alleges that the intention and objective of the Act is to protect the public interest, that the Act requires registrants to carry on business in accordance with the law and with integrity and honesty, and that the Applicants' past conduct is inconsistent with the intention and objective of the Act and, therefore, warrants disentitlement to registration under the Act.

No-one appeared for the Applicants at the scheduled start of the hearing at 1:30 p.m. on April 29, 2002. The hearing was adjourned for thirty minutes in case the Applicants were delayed. When the hearing resumed at 2:08 p.m. no-one appeared for the Applicants. The Tribunal proceeded to hear the evidence of the Registrar in the absence of the Applicants.

ISSUE:

Should the Tribunal direct the Registrar to carry out the Proposal to revoke the registration of

one or both of the Applicants, 1346333 Ontario Inc. o/a Kadara Motors and Samson Awodamola?

FACTS:

The evidence presented by the Registrar consisted of the testimony of Officer Ross Price and Amanda Dempsey as well as documentary evidence introduced through them.

TESTIMONY OF OFFICER ROSS PRICE:

Officer Price testified that he has worked with the York Regional Police for twenty years. He stated that he has been a detective constable for the last three years. Officer Price said that he is familiar with the Applicant Samson Awodamola, also known as Samson Awodamola-Davies, also known as Samson Davies. He arrested Mr. Awodamola, who had previously falsely identified himself as Anthony Robinson, for fraud over \$5,000. Officer Price testified that Mr. Awodamola pled guilty to attempted fraud over \$5,000 and was convicted on July 6, 2000 as set out at tab 5 of exhibit 4.

Furthermore, Officer Price stated that he had been advised by Peel Regional Police that the Applicant Samson Awodamola was convicted on September 13, 2001 for possession of a fraudulent credit card.

TESTIMONY OF AMANDA DEMPSEY:

Ms. Dempsey said that she has been with the Ontario Motor Vehicle Industry Council ("OMVIC") since 1997 and that she is now the manager of inspections.

Ms. Dempsey testified that the Applicant Samson Awodamola is an officer and director of the Applicant 1346333 Ontario Inc. o/a Kadara Motors (exhibit 4, tab 6).

Ms. Dempsey also stated that Mr. Awodamola did not properly disclose his conviction for attempted fraud over \$5,000 on his application to be registered as a salesperson under the *Motor Vehicle Dealers Act* dated June 2, 2001. Ms. Dempsey testified that Mr. Awodamola answered "no" on the application in response to the question "Are there currently any charges pending or has the applicant ever been found guilty or convicted under any law?".

LAW:

The *Motor Vehicle Dealers Act* states in part the following:

5(1) An applicant is entitled to registration by the Registrar except where,

...

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law, and with integrity and honesty; or

(c) the applicant is a corporation and

...

(ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or

...

6(2) Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5, if the registrant were an applicant, or where the registrant is in breach of a term or condition of the registration.

...

7 (4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

Rule 14 of the Licence Appeal Tribunal Rules of Practice partly states the following:

14.1 Where a party believes that another party in proceedings before the Tribunal has acted unreasonably, frivolously, vexatiously, or in bad faith, the party may make a request to the Tribunal for costs, which request shall be made with notice to all other parties to the proceedings and prior to the release by the Tribunal of its final order in the proceedings.

14.2 The Tribunal in determining whether a party has acted unreasonably, frivolously, vexatiously, or in bad faith shall consider all of the circumstances, including, without limiting the generality of the foregoing, circumstances such as a party:

(a) failing to attend a hearing before the Tribunal or to send a representative when properly given notice, without contacting the Tribunal and other parties to the hearing;

APPLICATION OF LAW TO FACTS:

The Applicant, Samson Awodamola, was convicted of attempted fraud over \$5,000. Mr. Awodamola failed to disclose the conviction on his application to be registered as a salesperson under the Act. Later Mr. Awodamola was convicted for possession of a fraudulent credit card. The Tribunal therefore finds that the past conduct of the Applicant Samson Awodamola affords the Registrar reasonable grounds for the belief that Samson Awodamola will not carry on business in accordance with law and with integrity and honesty.

The Applicant Samson Awodamola is an officer and director of the Applicant 1346333 Ontario Inc. o/a Kadara Motors. Given Mr. Awodamola's conduct, the Tribunal finds that the past conduct of the applicant corporation's officer and director affords reasonable grounds for the belief that its business will not be carried on in accordance with law and with integrity and honesty.

Accordingly, the Tribunal finds that the Registrar is not in error and may revoke the registrations of both the Applicant Samson Awodamola and the Applicant 1346333 Ontario Inc. o/a Kadara Motors pursuant to section 6(2) of the Act.

COSTS:

Counsel for the Registrar requested costs pursuant to rule 14 of the Licence Appeal Tribunal Rules of Practice on the grounds that no-one appeared on behalf of the Applicants. Counsel argued that failure to attend is in itself sufficient evidence that the Applicants acted unreasonably, frivolously, vexatiously, or in bad faith. The Tribunal disagrees. According to the rule, the Tribunal must consider all of the circumstances including, without limiting the generality of the foregoing, failure to attend. The Tribunal notes that the Applicants requested a pre-hearing conference. The Registrar refused and no such conference was held. The Tribunal declines to find that the Applicants acted unreasonably, frivolously, vexatiously, or in bad faith. The Tribunal, therefore, refuses to grant costs to the Registrar.

DECISION:

Thus, by virtue of the authority vested in it under section 7(4) of the *Motor Vehicle Dealers Act*, the Licence Appeal Tribunal directs the Registrar to carry out the Proposal dated November 30, 2001 to revoke the registrations of both the Applicant Samson Awodamola and the Applicant 1346333 Ontario Inc. o/a Kadara Motors.

LICENCE APPEAL TRIBUNAL

John Ort, Presiding Member

Released: June 11, 2002

ELWOOD

ROBERT A. ELWOOD AND BARBARA E. ELWOOD

APPEAL FROM A DECISION OF THE BOARD OF
DIRECTORS OF THE ONTARIO TRAVEL
INDUSTRY COMPENSATION FUND CORPORATION
UNDER THE *TRAVEL INDUSTRY ACT*

TO DISALLOW A CLAIM

TRIBUNAL: JOHN ORT, Member

APPEARANCES: ROBERT A. ELWOOD AND BARBARA E. ELWOOD, appearing on
their own behalf
TREVOR BRANION, Counsel, representing the Travel Industry Council of
Ontario

DATE OF
HEARING: May 2, 2002 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the “Tribunal”) under the *Travel Industry Act* (the “Act”) from a decision by the Travel Industry Council of Ontario (“TICO”) dated December 21, 2001, wherein the Applicants’ claim for reimbursement from the Travel Industry Compensation Fund was denied.

PRELIMINARY ORDER:

On motion made at the hearing by the Applicant Robert A. Elwood, on consent of the parties, the Tribunal ordered that Barbara E. Elwood be added as Applicant.

ISSUE:

Should the Tribunal allow the claim, in whole or in part, and direct the Travel Industry Council of Ontario to pay the amount allowed out of the Travel Industry Compensation Fund?

FACTS:

The evidence presented by the Applicant consisted of the testimony of Robert A. Elwood and

Barbara E. Elwood as well as documentary evidence introduced through them.

TESTIMONY OF BARBARA E. ELWOOD:

Mrs. Elwood testified that in February 2000 she authorized payment by Visa of \$1,825.31 to Marine Expeditions Inc. for a June 2000 Summer Solstice cruise together with a payment of \$771.76 to Blyth & Company for the air fare portion of the trip (exhibit 3, tab 7, page 2). The Visa account was in the names of Mr. & Mrs. Elwood.

Mrs. Elwood stated that the Applicants were notified that the June 2000 trip was cancelled due to mechanical problems. Later they found out that Marine Expeditions Inc. was bankrupt. Mrs. Elwood said that in August 2000 they received a credit voucher for US\$2,050.00. They also received a credit for the air fare portion of the 2000 trip on their Visa from Blyth & Co. for \$773.52 in November 2000 (exhibit 3, tab 7, page 16).

Mrs. Elwood said that in March 2001 the Applicants booked a June 2001 Summer Solstice cruise with Marine Expeditions Travel. She stated that they used the credit voucher for US\$2,050.00 (exhibit 3, tab 4, page 2) and they paid an additional US\$592 for air fare as \$930.10 in Canadian funds by Visa (exhibit 3, tab 7, page 3).

Mrs. Elwood testified that she and her husband were notified on June 6, 2001, that their June 2001 trip was cancelled due to the bankruptcy of Marine Expeditions Travel.

The Applicants submitted a claim to the Travel Industry Council of Ontario for \$2,755.41, the sum of \$1,825.31 and \$930.10. The Applicants acknowledged receiving \$216.82 of their claim from TICO (exhibit 3, tab 11).

The evidence presented by the Travel Industry Council of Ontario consisted of the testimony of Lori Furlan as well as documentary evidence introduced through her.

TESTIMONY OF LORI FURLAN:

Ms. Furlan stated that she has been a claims coordinator for TICO for over ten years. She said that her job is to process claims against registrants that have ceased operations.

Ms. Furlan testified that there were three companies with the name "Marine Expeditions". She stated that the first company failed in the fall of 2000 and the second company failed in February 2001. Ms. Furlan said that only the third company, Canadian Venture Travel Ltd. o/a Marine Expeditions Travel, was a registrant under the *Travel Industry Act*. Ms. Furlan admitted that the Applicants booked their 2001 trip with Canadian Venture Travel Ltd.

Ms.. Furlan explained that the refund of \$216.82 issued to the Applicants by TICO was calculated as follows (exhibit 3, tab 9):

payments by claimant:	
VISA (US\$592)	\$ 930.10

voucher (US\$2,050)	3,220.76
less non—claimable: voucher (insurance and taxes from exhibit 3, tab 4,page 1:)	(3,220.76)
insurance (US\$64)	(100.55)
taxes (US\$390)	<u>(612.73)</u>
verified claim amount	\$216.82

LAW:

Ontario Regulation 806/93 (the “Regulation”) under the *Travel Industry Act* then stated

49. The board of directors shall determine whether a claim, or a part of one, meets the requirements of this Part and shall determine the eligible amount of the claim.

50.(1) A customer is entitled to be reimbursed for travel services paid for but not provided if,

- (a) the customer made payment for the travel services directly to or through a registered travel agent;
- (b) the customer had made a demand for payment from the registered travel agent or the appropriate registered wholesaler; and
- (c) the customer has not been reimbursed by,
 - (i) the registrant because the registrant is unable to pay by reason of bankruptcy or insolvency,
 - (ii) any other person...

(2) A reimbursement under subsection (1) is limited to the amount paid by the customer to the travel agent for those travel services that were not provided

(3) A customer is not entitled to be reimbursed for the following or in the following circumstances:

1. For a claim arising out of the failure of an end supplier to provide the travel services.
2. For losses or damages incurred by a customer as a result of a failure of an end supplier to provide the travel services...
5. If the travel services were received as a prize, an award or a goodwill gesture.
6. If the customer used a voucher, certificate, coupon or other similar document to obtain the travel services or did not pay for the travel services with cash or by a cheque, credit card or other similar cash payment method.
7. For any taxes, fees or levies imposed by a government or government body.
8. For any insurance premiums....

62.(6) The Tribunal may,

- (a) allow the claim, in whole or in part, and direct the Council to pay the amount allowed out of the Compensation Fund; or
- (b) refuse to allow the claim in whole or in part.

APPLICATION OF LAW TO FACTS:

The Applicants testified that they paid for travel services that they did not receive. Furthermore, their only reimbursement was \$216.82 from TICO. Section 50 of the Regulation states that a customer is entitled to be reimbursed for travel services paid for but not provided if, the customer made payment for the travel services directly to or through a registered travel agent. Such was not the case with respect to the \$1,825.31 paid for the June 2000 trip. That payment was made by the Applicants directly to Marine Expeditions Inc., which was not a registrant under the Act. Section 59 of the Regulation says that a customer is not entitled to be reimbursed if the failure to provide travel services is due to the failure of an end supplier. Thus, the Tribunal finds that TICO properly disallowed the claim for \$1,825.31 paid for the June 2000 trip.

The Applicants submitted a credit voucher for US\$2,050.00 and paid a further \$930.10 for the June 2001 trip. According to the Statement of Account dated April 24, 2001, provided by Marine Expeditions Travel, US\$390.00 of the total was for port dues & taxes and a further US\$64.00 was for medical insurance (exhibit 3, tab 4). Section 50 of the Regulation states that a customer is not entitled to be reimbursed if the customer used a voucher, certificate, coupon or other similar document to obtain the travel services. The section also states that there is no reimbursement to a customer for any taxes and insurance premiums. No evidence was presented to contest the conversion of American dollar sums into Canadian dollar amounts by TICO. Therefore, the Tribunal finds that the calculation by TICO of the verified claim in the amount of \$216.82 is correct and refuses to allow the Applicants' claim for additional funds.

ORDER:

Accordingly, pursuant to the authority vested in the Licence Appeal Tribunal by the *Travel Industry Act* and regulations thereunder, the Tribunal directs the Board of Trustees of the Travel Industry Council of Ontario to disallow the Applicants' claim.

LICENCE APPEAL TRIBUNAL

John Ort, Presiding Member

Released: June 13, 2002

FARRELL

RAY FARRELL

APPEAL FROM A DECISION OF THE BOARD OF
DIRECTORS OF THE ONTARIO TRAVEL
INDUSTRY COMPENSATION FUND CORPORATION
UNDER THE *TRAVEL INDUSTRY ACT*

TO DISALLOW A CLAIM

TRIBUNAL: JOHN ORT, Member

APPEARANCES: RAY FARRELL, appearing on his own behalf
TREVOR BRANION, Counsel, representing the Travel Industry
Council of Ontario

DATE OF
HEARING: May 2, 2002 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") under the *Travel Industry Act* (the "Act") from a decision by the Travel Industry Council of Ontario ("TICO") dated December 27, 2001, wherein the Applicant's claim for reimbursement from the Travel Industry Compensation Fund was denied. The decision states in part "It appears that you have dealt directly with Marine Expeditions Inc (cruise line), which was not registered with the Travel Industry Council of Ontario."

ISSUE:

Should the Tribunal allow the claim, in whole or in part, and direct the Travel Industry Council of Ontario to pay the amount allowed out of the Travel Industry Compensation Fund?

FACTS:

The evidence presented by the Applicant consisted of the testimony of Ray Farrell and Joan Farrell as well as documentary evidence introduced through them.

TESTIMONY OF RAY FARRELL:

Mr. Farrell stated that he and his wife never received the trip that he paid for and that they have not been reimbursed. Mr. Farrell said that he was eventually advised that the trip was not

provided because Marine Expeditions failed.

Mr. Farrell testified that he and his wife dealt with Marlin Travel, which later became a Thomas Cook office (exhibit 3, tab 8, page 2). He said that he first dealt with Vanessa Reid. After Ms. Reid left the travel agency, he stated that he mainly dealt with Ligia Cuervo, the branch manager.

Furthermore, Mr. Farrell stated that he did not deal directly with Marine Expeditions. He said that Marlin Travel dealt with Blyth & Company Travel (exhibit 3, tab 3 and exhibit 3, tab 8, page 3), which dealt with Marine Expeditions.

Mr. Farrell admitted that charges of \$4,158.92 for the trip appeared on his MasterCard statement and were in favour of Marine Expeditions. Mr. Farrell stated that he never signed the credit card charge slip dated May 2000 (exhibit 3, tab 12, page 12). He said that he was surprised that the payment was to Marine Expeditions, but he did not challenge the charges because he recognized the dollar amount as relating to his trip. Mr. Farrell testified that Ms. Cuervo of Thomas Cook was also surprised that the charges were in favour of Marine Expeditions. Her letter of February 8, 2002, states, "This is to confirm that the booking and payment for Mr. and Mrs. Raymond Farrell only with Blyth and Company... This booking was paid by Mr. Farrell's mastercard through our agent - Vanessa in may 2000.... When talking with Marine Expeditions came into play, all monies on this booking were already received for this booking, through Marlin Travel Eaton Centre and charged by our supplier, Blyth & Company with Mr. Farrell's authorization. The passenger was travelling with Marine Expeditions so at some point Blyth & Company would have submitted payment on this booking to Marine Expeditions."

Mr. Farrell stated that the trip was originally scheduled for September and October 2000, but his wife was diagnosed with cancer and had an operation in July 2000. Mr. Farrell cancelled the trip in September 2000 because his wife was to receive radiation treatment and the time of the treatment was uncertain.

On cross-examination, Mr. Farrell admitted that on a Confirmation/Statement of Account form dated May 10, 2000, that stated "I have been offered travel Insurance and have accepted: ...declined: ..." (exhibit 3, tab 12, page 7), he circled "accepted" and filled in "medical only".

Mr. Farrell's attention was drawn to Terms & Conditions of Sale (exhibit 3, tab 12, page 11) stating, "If notice of cancellation is received by Blyth & Company Travel in writing 120 days before departure or earlier, payments are refundable, less a cancellation fee. If such notice is received after 120 days prior to departure, then the payment is non-refundable.

TESTIMONY OF JOAN FARRELL:

Mrs. Farrell testified that the Statement of Account dated May 12, 2000 from Blyth & Company Travel (exhibit 3, tab 12, page 10) states, "Cancellation insurance declined 2.0 (units] Incl. [under 'Total' column]". She said that Blyth & Company Travel did not want to give them a

refund after they cancelled the initial trip. Mrs. Farrell claimed that Blyth & Company Travel agreed to give them a substitute trip in September 2001 only because the Statement of Account set out "Incl." under the total or charges column (exhibit 3, tab 12, page 8).

The evidence presented by the Respondent consisted of the testimony of Lori Furlan as well as documentary evidence introduced through her.

TESTIMONY OF LORI FURLAN:

Ms. Furlan testified that she has been a claims coordinator for TICO for eleven years. She stated that she processes claims against travel industry registrants that cease operations.

Ms. Furlan said that there were three companies with the name "Marine Expeditions". She stated that the first company is the one that Mr. Farrell dealt with. It failed in the fall of the year 2000. The second Marine Expeditions also failed, in February 2001. Ms. Furlan testified that only the third company, Canadian Venture Travel Ltd. o/a Marine Expeditions Travel, was a registrant under the *Travel Industry Act*.

Ms. Furlan admitted that Marlin Travel, Thomas Cook, and Blyth & Company Travel were all registrants under the *Travel Industry Act*.

Ms. Furlan argued that providing a substitute trip for September 2001 was a goodwill gesture and is not a refundable item under the Act.

Ms. Furlan referred to a claim calculation (exhibit 3, tab 10) that deducted insurance of \$99.20 and taxes of \$604.50 from payment amount of \$4,159.92 to get a verified claim amount of \$3,455.22. Ms. Furlan confirmed that the TICO board disallowed the claim.

LAW:

Ontario Regulation 806/93 (the "Regulation") under the *Travel Industry Act* then stated

49. The board of directors shall determine whether a claim, or a part of one, meets the requirements of this Part and shall determine the eligible amount of the claim.

43. In this Part, ...

"end supplier" means a person who supplies travel services but does not include a travel agent or travel wholesaler; ...

50.(1) A customer is entitled to be reimbursed for travel services paid for but not provided if,

(d) the customer made payment for the travel services directly to or through a registered travel agent;

- (e) the customer had made a demand for payment from the registered travel agent or the appropriate registered wholesaler; and
 - (f) the customer has not been reimbursed by,
 - (j) the registrant because the registrant is unable to pay by reason of bankruptcy or insolvency,
 - (ii) any other person...
- (2) A reimbursement under subsection (1) is limited to the amount paid by the customer to the travel agent for those travel services that were not provided
- (3) A customer is not entitled to be reimbursed for the following or in the following circumstances:
1. For a claim arising out of the failure of an end supplier to provide the travel services.
 2. For losses or damages incurred by a customer as a result of a failure of an end supplier to provide the travel services...
 5. If the travel services were received as a prize, an award or a goodwill gesture.
 6. If the customer used a voucher, certificate, coupon or other similar document to obtain the travel services or did not pay for the travel services with cash or by a cheque, credit card or other similar cash payment method.
 7. For any taxes, fees or levies imposed by a government or government body.
 8. For any insurance premiums....
59. (1) A customer or registrant is not entitled to be reimbursed if the failure to provide travel services is due to the failure of an end supplier and not to the bankruptcy or insolvency of a registrant.
- 62.(6) The Tribunal may,
- (c) allow the claim, in whole or in part, and direct the Council to pay the amount allowed out of the Compensation Fund; or
 - (d) refuse to allow the claim in whole or in part.

APPLICATION OF LAW TO FACTS:

The Applicant mentions both the 2000 and the 2001 trips in his claim.

The Marine Expeditions that was scheduled to provide the initial trip in the year 2000 went bankrupt. That Marine Expeditions was not a registrant under the Act; it was an end supplier. Section 59.(1) of the Regulation states that a customer is not entitled to be reimbursed if the failure to provide travel services is due to the failure of an end supplier.

The September and October 2000 trip was cancelled by the Applicant. Although the Applicant initially asked for a refund, he accepted a substitute trip scheduled for September 2001. The

2001 trip was to be provided by Canadian Venture Travel Ltd. o/a Marine Expeditions Travel. That company received no payment from the Applicant. The Tribunal finds that the 2001 trip was received as an award or goodwill gesture. Section 50(3)5. of the Regulation states that a customer is not entitled to be reimbursed if the travel services were received as a prize, an award or a goodwill gesture. Therefore, the Tribunal finds that the Applicant's claim should be disallowed.

ORDER:

Accordingly, pursuant to the authority vested in the Licence Appeal Tribunal by the *Travel Industry Act* and regulations thereunder, the Tribunal directs the Board of Trustees of the Travel Industry Council of Ontario to disallow the Applicant's claim.

LICENCE APPEAL TRIBUNAL

John Ort, Presiding Member

Released: June 13, 2002

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

BANK STREET METRO SALES

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER

1030017 ONTARIO INC. o/a BANK STREET METRO SALES and PETER KOSCH

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATIONS
- Proposal dated: January 8, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

1030017 ONTARIO INC. o/a BANK STREET METRO SALES
and PETER KOSCH

Applicants

-and-

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT ORDER

PURSUANT to the provisions of the *Motor Vehicle Dealers Act* R.S.O. 1990, Chapter M.42, as amended, 1030017 Ontario Inc. o/a Bank Street Metro Sales and Peter Kosch (the "Applicants") appealed a Proposal of the Registrar, *Motor Vehicle Dealers Act* (the "Registrar") set out in a Notice of Proposal dated January 8, 2002;

WHEREAS the Applicants filed an appeal with the Tribunal, requesting a hearing;

AND WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on June 4, 2002, at the Gillespie Reporting Services, 130 Slater Street, Suite 200, Ottawa, Ontario;

AND WHEREAS at the commencement of the hearing the Tribunal was advised that the parties had agreed to petition for an adjournment of the hearing;

NOW THEREFORE, this Tribunal Orders that:

1. the hearing in this matter is adjourned, *peremptory against all parties*;
2. the hearing shall be held at the Gillespie Reporting Services, 130 Slater Street, Suite 200, Ottawa, Ontario, commencing at 9:30 a.m., on Tuesday, August 27, 2002.

LICENCE APPEAL TRIBUNAL

John E. Ort, Presiding Member

Released: June 5, 2002

CHERS A1 AUTO SALE

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
CHERYL GRACE LADD O/A CHERS A1 AUTO SALE AND MICHAEL KENNY

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATIONS
- Proposal dated: January 23, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

CHERYL GRACE LADD O/A CHERS A1 AUTO SALE
and MICHAEL KENNY

Applicants

-and-

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT ORDER

PURSUANT to the provisions of the *Motor Vehicle Dealers Act* R.S.O. 1990, Chapter M.42, as amended, Cheryl Grace Ladd o/a Chers A1 Auto Sale And Michael Kenny (the "Applicants") appealed a Proposal of the Registrar, *Motor Vehicle Dealers Act* (the "Registrar") set out in a Notice of Proposal dated January 23, 2002;

WHEREAS the Applicants filed an appeal with the Tribunal, requesting a hearing;

AND WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on June 7, 2002, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario;

AND WHEREAS at the commencement of the hearing the Tribunal was advised that the parties had agreed to petition for an adjournment of the hearing due to the Applicants' having recently retained new Counsel;

NOW THEREFORE, this Tribunal Orders that:

3. the hearing in this matter is adjourned, *peremptory against all parties*;
4. the hearing shall be held at the Tribunal's above address, commencing at 9:30 a.m., on Thursday, August 29, 2002 and to continue on Friday, August 30, 2002, if necessary.
5. All terms and conditions agreed upon between the parties in writing shall remain in full force and effect until further order of this Tribunal.

LICENCE APPEAL TRIBUNAL

Brian K. Marotta, Vice-Chair

Released: June 12, 2002

POLARIS RESTORATIONS INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*
TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: RICHARD C. DELANEY, Member

APPEARANCES:
MASSIMO ROVAZZI, Counsel, representing Polaris Restorations Inc.
KEN ROSENBERG, Counsel, representing the Registrar, Ontario
New Home Warranty Program

DATE OF
HEARING: June 17, 2002 Toronto

ORDER

Pursuant to the provisions of the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, Chapter O.31, as amended, Polaris Restorations Inc. (the "Applicant") appealed a Notice of Proposal dated January 11, 2002 of the Registrar of the Ontario New Home Warranty Program (the "Registrar") to refuse to renew registration of the Applicant;

WHEREAS the Applicant appealed the proposal to the Licence Appeal Tribunal requesting a hearing;

AND WHEREAS the hearing was held on June 17, 2002, to be continued on June 18 and 19, 2002 and to be further continued on July 8, 9, 10 and 11, 2002;

AND WHEREAS the hearing commenced on June 17, 2002 and Counsel for both parties advised the Tribunal that they had arrived at a settlement of all issues;

NOW THEREFORE this Tribunal orders that the proceedings in this matter are hereby settled in accordance with the terms agreed to by the parties and attached to this Order as Schedule "A".

LICENCE APPEAL TRIBUNAL

Richard C. Delaney, Member,

Released: June 20, 2002

TAKAMI

HIROYUKI TAKAMI

APPEAL FROM A DECISION OF THE BOARD OF
DIRECTORS OF THE ONTARIO TRAVEL
INDUSTRY COMPENSATION FUND CORPORATION
UNDER THE *TRAVEL INDUSTRY ACT*

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

HIROYUKI TAKAMI, Applicant, by written submission only
TREVOR BRANION, Counsel representing the Travel Industry Council
of Ontario, by written submission only

DATE OF
HEARING:

June 7, 2002

Written

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is a written appeal by Hiroyuki Takami (the “Applicant”) to the Licence Appeal Tribunal from a written decision dated November 23, 2001 of the Board of Directors of the Ontario Travel Industry Compensation Fund Corporation (the “Fund”) to deny the Applicant’s claim for compensation in the amount of \$3,240.00 (U.S.).

The Applicant bases his claim on Section 50(1) of Regulation 806/93 (the “Regulation”) made under the *Travel Industry Act* (the “Act”).

The Parties consented to this hearing being held as a written hearing before this Tribunal in terms of Rule 10.3 of the Rules of this Tribunal. The Tribunal accordingly ordered that these proceedings be conducted as a written hearing in terms of the Tribunal’s Rules of Practice and that the Parties exchange written documents within the time stipulated by the Rules of Practice. The Parties have exchanged written documents and have made written submissions to the Tribunal which documents and submissions have been considered by this Tribunal and have been entered into evidence as exhibits.

THE EVIDENCE:

The evidence in this matter was written and documentary.

The evidence of the Applicant was that on or about January 2001 he booked a "classic Antarctic voyage" with Marine Expeditions of Toronto. Marine Expeditions, by way of its letter dated May 8, 2001, acknowledged receipt of payment of \$3,240.00 (U.S.) which it received from the Applicant in respect of the voyage. Marine Expeditions letter of May 8, 2001 stated as follows:

Thank you for booking your December 27th Classic Antarctica voyage with us.

I'm pleased to advise that we have arranged for all bookings to be handled by Marine Expeditions Travel, a registered travel agency in the Province of Ontario (Retail No. 50009128, Wholesale No.50009132).

Your deposits to Marine Expeditions Travel are subject to the very strict consumer protection legislation, administered by the Travel Industry Council of Ontario (T.I.C.O.) and the industry-financed Ontario Travel Industry Compensation Fund.

Your earlier payments, totalling \$3,240.00 were paid to Marine Expeditions. To extend the protection of T.I.C.O. to your earlier deposits, please sign the enclosed form and return it to us in the enclosed self-addressed envelope or fax it to (416) 964-2366.

Please feel free to call me at any time, should you have any questions about your upcoming trip.

(Exhibit 1)

The departure date of the voyage was to be December 27, 2001. The voyage was to depart from New York and was to consist of travel by air and ship. Payment in the sum of \$3240.00 U.S. was made by the Applicant to "Marine Expeditions" on January 22, 2001 by way of a Visa card in the name of the Applicant.

(Exhibit 2)

By an undated written "cancellation notification" from the Travel Industry Council of Ontario ("TICO"), the Applicant was notified that "1414847 Ontario Inc. operating as Marine Expeditions, a cruise line" had, as of June 6, 2001, ceased operations. In that letter TICO stated that "it appears you may have dealt directly with Marine Expeditions Inc. (cruise line), which was operating as an end-supplier of travel services, and was therefore, not required to be registered with the Travel Industry Council of Ontario."

(Exhibit 3)

On November 23, 2001 TICO addressed a further written notification to the Applicant in which letter it stated that in terms of Section 50.(2) reimbursement to a customer under Section 50.(1) is limited to the amount paid by the customer to a travel agent for the services that were

not provided. The letter goes on to state that a customer is not entitled to be reimbursed for a claim arising out of a failure of an end supplier to provide travel services and that as Marine Expeditions was an end supplier with which the Applicant dealt directly, the Applicant is not entitled to reimbursement.

(Exhibit 4)

The evidence introduced by the Fund consisted of documentary evidence and is referred to in the "Respondent's Application Record.

(Exhibit 5)

By letter dated November 23, 2001, TICO wrote to the Applicant acknowledging the Applicant's claim against Canadian Venture Travel Ltd. o/a Marine Expeditions Travel in the amount of \$3,240.00 (U.S.). In that letter TICO rejected the Applicant's claim on the basis that it considered the claim "not eligible for reimbursement." The letter of November 23, 2001 went on to state as follows:

The Ontario Travel Industry Compensation Fund is governed by legislation under the Ontario *Travel Industry Act*. The Fund is totally financed by registered travel agents and travel wholesalers in Ontario. The purpose of the Fund is to reimburse consumers for travel services paid for to a registered Ontario travel agent when the travel services are not provided, and a refund cannot be obtained, due to the bankruptcy or insolvency of an Ontario registered travel agent or an Ontario registered travel wholesaler. In order for a claim to be eligible, the consumer must be able to demonstrate proof of direct payment to an Ontario registered travel agent.

Section 50 (1) of Ontario Regulation 806/93 enacted under the *Travel Industry Act* outlines the provisions for a customer to claim and states, in part, that a customer is entitled to be reimbursed for travel services paid for but not provided if the customer made payment for the travel services directly to or through a registered Ontario travel agent. Section 50 (2) states that a reimbursement under subsection (1) is limited to the amount paid by the customer to the travel agent for those services that were not provided. In addition, Section 50 (3) 1 states that a customer is not entitled to be reimbursed for a claim arising out of the failure of an end supplier to provide travel services. Section 59(1) states, in part, that a customer is not entitled to be reimbursed if the failure to provide the travel services is due to the failure of the end supplier and not to the bankruptcy or insolvency of a registrant.

It appears that you have dealt directly with Marine Expeditions Inc. (cruise line), which was not registered with the Travel Industry Council of Ontario.

(Exhibit 5, Tab 1)

FACTS FOUND PROVEN:

The following are the facts found by the Tribunal to have been proven.

1. Neither Marine Expeditions nor Marine Expeditions Inc. were at all relevant times registered with the fund as either travel agent or travel wholesaler.

2. In or about January 2001, the Applicant booked a "Classic Antarctic Voyage" through Marine Expeditions, which voyage was to depart in December 2001.
3. The Applicant paid Marine Expeditions by means of a VISA credit card for the voyage due to depart in December 2001. The amount paid by the Applicant to Marine Expeditions for the voyage was the sum or \$3,420.00 (U.S.)
4. The voyage that was due to depart in December 2001 was cancelled effective June 6, 2001 when 1414847 Ontario Inc., operating as Marine Expeditions, a cruise line, ceased operations and failed to provide the travel services to the Applicant.
5. Reimbursement of the amount of \$3,240.00 (U.S.) has not been made to the Applicant by Marine Expeditions or by Marine Expeditions Travel.

THE ISSUE:

Does the Applicant's claim fall within the terms of Regulation 806/93 to the Act?

THE LAW:

The relevant portions of Regulation 806/93 to the Act that are applicable to these proceedings are:

- 50.(1) A customer is entitled to be reimbursed for travel services paid for but not provided if,
- (g) the customer made payment for the travel services directly to or through a registered travel agent;
 - (h) the customer had made a demand for payment from the registered travel agent or the appropriate registered wholesaler; and
 - (i) the customer has not been reimbursed by,
 - (k) the registrant because the registrant is unable to pay by reason of bankruptcy or insolvency,
 - (ii) any other person who has received the customer's money, or
 - (iii) any other person who may be legally obliged to reimburse or compensate the customer, including a person obliged under a contract for insurance.

Section 50(2), which reads as follows:

(2) A reimbursement under subsection (1) is limited to the amount paid by the customer to the travel agent for those travel services that were not provided

Section 50(3), which reads as follows:

(3) A customer is not entitled to be reimbursed for the following or in the following circumstances:

1. For a claim arising out of the failure of an end supplier to provide the travel services.
2. For losses or damages incurred by a customer as a result of a failure of an end supplier to provide the travel services.

Section 59.(1), which reads as follows:

59.(1) A customer or registrant is not entitled to be reimbursed if the failure to provide travel services is due to the failure of an end supplier and not to the bankruptcy or insolvency of a registrant.

Section 62.(1), (2) and (6) which respectively read as follows:

62.(1) If the board of directors of the Council determines that a claim, or any part thereof made under section 50, 51 or 52 is not eligible for reimbursement, the Council shall immediately serve notice of the decision on the claimant.

(2) A person who receives notice under subsection (1) is entitled to a hearing before the Tribunal if, within 15 days after notice is served, the person mails or delivers a written request for a hearing to the Registrar, the Council and the Tribunal.

.....

62.(6) The Tribunal may,

- (e) allow the claim, in whole or in part, and direct the Council to pay the amount allowed out of the Compensation Fund; or
- (f) refuse to allow the claim in whole or in part.

APPLICATION OF LAW TO FACTS:

The Applicant in his written claim directed to the Fund claims reimbursement from the Fund in respect of travel services that were not provided to the Applicant. The travel services that were not provided related to a December 2001 voyage which the Applicant had paid for in the sum of \$3240.00 (U.S.). Payment of this sum was made by the Applicant to Marine Expeditions.

The Tribunal finds that the payment of \$3240.00 (U.S.) was made to Marine Expeditions and that Marine Expeditions was not a registered travel agent. Section 50.(1)(a) of Regulation 806/93 states that a customer is entitled to be reimbursed by the Fund for travel services paid

for, but not provided, if;

"the customer made payment for the travel services directly to or through a registered travel agent"

The Applicant made payment to Marine Expeditions which was, at all relevant times, not a registered travel agent. This payment was not made in compliance with Section 50.(1)(a) of Regulation 806/93 and accordingly the Applicant is not entitled to reimbursement from the Fund in the amount of \$3240.00 (U.S.) or in any amount.

DECISION:

Accordingly, pursuant to the authority vested in it by the *Travel Industry Act* and Regulations thereunder, the Tribunal upholds the decision of the Board of Trustees of the Travel Industry Council of Ontario to refuse the Applicant's claim

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair,

RELEASED: June 11, 2002

The period to appeal a decision to the Superior Court of Justice is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

CHAN

YEE WAN CHAN

APPEAL FROM A DECISION OF THE CORPORATION DESIGNATED
FOR THE PURPOSES OF THE *ONTARIO NEW HOME
WARRANTIES PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, Vice Chair

APPEARANCES:

YEE WAN CHAN, representing herself
KAREN JONES, Counsel, representing the Ontario New Home
Warranty Program
CARL MELVIN BURRILL, Agent, representing the Added Party,
NATIONAL HOMES (MAPLE) INC.

DATE OF
HEARING: May 28 & 29, 2002 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") from a written decision of the Ontario New Home Warranty Program (the "Program") dated January 24, 2002 in which the claim of Yee Wan Chan (the "Applicant") was denied.

BACKGROUND:

The Applicant's claim against the Program is based upon section 14(3) of the *Ontario New Home Warranties Plan Act* (the "Act"). section 14(3) reads as follows:

14. (3) Subject to the regulations, an owner of a home is entitled to receive payment out of the guarantee fund for damages resulting from a breach of warranty if,

- (a) the person became the owner of the home through receiving a transfer of title to it or through the substantial performance by a builder of a contract to construct the home on land owned by the person; and

- (b) the person has a cause of action against the vendor or the builder, as the case may be, for damages resulting from the breach of warranty.

The Applicant and National Homes (Maple) Inc. (the "builder") entered into a written agreement of Purchase and Sale in terms of which the builder agreed to sell to the Applicant certain lands in the City of Vaughan in the Regional Municipality of York, Ontario and to erect thereon a single family residential dwelling (the "home") for an agreed price of \$223,900.00. The date of the Agreement of Purchase and Sale was November 12, 1999.

Pursuant to the Agreement, the closing of the transaction and the Applicant taking possession of the home on January 14, 2002, the Applicant noted certain deficiencies in the home. The Applicant contends that the deficiencies that she noted and brought to the builder's attention were not all satisfactorily attended to, although most of the deficiencies were rectified. This appeal arises in respect of those deficiencies that the Applicant claims have not been satisfactorily rectified or attended to by the builder.

Prior to this appeal being brought, the Applicant enlisted the assistance of the Program in an attempt to resolve her claims in respect of the deficiencies. Accordingly, the Applicant requested the Program to conciliate the items that the Applicant claimed to be in dispute. On December 6, 2000 the Program held a conciliation inspection at the home at which were present the Applicant, Ms. Marj Donaldson, the builder's representation and Warren Northcott, the Program's warranty representative. Pursuant to that meeting Warren Northcott ("Northcott") authored a written conciliation report dated December 11, 2000 in which report the Program found 4 items to be covered under the warranty and required the builder to rectify those items. A further 43 items were dealt with in the report, each of which the Program considered to be not covered under warranty and did not require remedial action by the builder for the various reasons given in the conciliation report.

The builder attended at the home from time to time after the December 11, 2000 conciliation report but the Applicant was not satisfied that the deficiencies were being resolved. As a result, the Applicant again approached the Program in October 2001 and requested that a further conciliation be undertaken by the Program in relation to 8 remaining issues. Pursuant to this request, a reinspection of the home took place on December 18, 2001 at which inspection the Applicant and Northcott were present as well as the builder's representative, Armenio Cesario. On December 19, 2001 the Program issued a reinspection report authored by Northcott. That report dealt with 10 issues including the 8 issues raised by the Applicant in her October 2001 request for a conciliation reinspection of the home. In the December 19, 2001 report the Program denied 9 of the 10 issues raised by the Applicant. One issue relating to water entering the home's garage was warranted by the Program. This issue had previously been warranted by the Program in its December 11, 2000 conciliation report but was still found to be a warrantable issue as it was considered to be a violation under the Ontario Building Code.

Subsequent to the December 19, 2001 reinspection report, further correspondence was addressed by the Applicant to the Program and on January 23, 2002, Northcott again reinspected the Applicant's home. Pursuant to this reinspection the Program issued its

January 24, 2002 decision letter in which it dealt with 4 issues only. Those 4 issues are the remaining issues that are still in contention and this hearing flows from those 4 unresolved issues.

At the commencement of the hearing, the Applicant and the Program's Counsel agreed that the date of completion and possession of the Applicant's home was January 14, 2000.

THE EVIDENCE:

The only witness for the Applicant was the Applicant herself, Christina Yee Wan Chan. The only witness for the Program was its warranty representative, Warren Charles Northcott. The builder's representative, Carl Melvin Burrill, testified for the builder. The evidence of these individuals follows:

Christina Yee Wan Chan

First Claim

The Applicant testified that the first issue related to "a receipt for the repairs to a side door lock of the home."

She stated that on January 24, 2001 her husband came home and was not able to open the side door leading from the garage to the home. A locksmith was called and he opened the door. The locksmith, Armor Lock and Safe, charged the Applicant \$73.83 for "picking open" the lock.

(Exhibit 3, Tab 23)

This charge by the locksmith was paid by the Applicant but the Program has refused to reimburse the Applicant.

The Applicant stated that her husband had used a key that in the past had caused trouble when it failed to work properly, and on this occasion it again would not open the door. The Applicant stated that her husband did not have a key to the home's front door and only had a key to the side door from the garage to the home.

Under cross examination by the Program's Counsel, the Applicant stated that "I agree the warranty expired and then I sent letter to the Program. The Program is right when it says the claim too late."

Claim Two

The second issue related to "chips off at exterior cold room."

The Applicant stated that the cold room is located beneath the front entrance to the home.

The front entrance was constructed of concrete. The exterior surface of the concrete was "rough" on all three sides of the concrete entrance. However, during the last week, the builder had "patched" the cement and it now looks better but it is still "out of my expectation", which expectation was that the concrete entrance should have been constructed with brick around the three sides of the front entrance between grade and the top of the concrete.

Under cross examination the Applicant conceded that there was nothing in the Agreement of Purchase and Sale that indicated that there was to be brick surrounding the three sides to the concrete front entrance. She further stated that she did have the opportunity, before taking occupation of the home, to observe that there was no brickwork around the concrete sides of the front entrance. Despite this she had not raised this issue when she noted deficiencies upon taking occupation. She stated she did not report the "missing bricks" to the Program, nor was such report made to the Program by the "home inspector" she had employed to inspect the home in order to determine and identify deficiencies. The Applicant was not able to produce any document that indicated a report being made to the Program regarding the lack of brickwork. She conceded her concern was patchiness of the concrete.

(Exhibit 3, Tab 30)

Claim Three

The third issue related to "chips and nicks on the garage door."

The Applicant stated that the paint on the garage door was thin and a person is able to see the wood under the paint. There are chips in the paint, particularly near the door handle.

Under cross examination the Applicant stated that she reported this complaint in writing to the Program in her letter of December 27, 2001. She stated, however, that there was a prior letter to the Program dated June 13, 2000 in which she complained of chips and nicks on the garage door. She, however, was not able to produce such letter.

(Exhibit 3, Tab 29)

Claim Four

This last issue related to the basement floor of the home not being level.

The Applicant stated that she did initially report this issue to the Program in her letter of June 13, 2000, which she stated she did not have with her but which letter was at her home. The Applicant was desirous of the opportunity to produce this letter and was not prepared to close her case before she had the opportunity to do so. She accordingly requested that the matter stand over until the following day so as to enable her to produce the letter when the hearing resumed. The Program's Counsel informed the Tribunal that rather than delay the hearing, the Program was prepared, only insofar as this 4th claim was concerned, to concede that this claim was initially reported to the Program within the warranty period.

However, Counsel stated that the Program reserved its right to continue to contest the 4th claim based upon the Program's alternative defence which was that the floor was installed in a good and workmanlike, manner free of defects in workmanship and materials.

On this understanding the hearing continued and did not stand over until the following day.

The Applicant stated in her further testimony that the first occasion she reported this particular issue to the Program was when Northcott attended at the home on December 6, 2000 during the conciliation inspection. Her concerns were regarding the floor not being level.

(Exhibit 3, Tab 17, item 36)

The Applicant denied that the washing machine in the basement was not level and stated that it was the floor that was not level. She did observe Northcott using a level to measure the level of the basement floor and she did receive a copy of the December 6, 2000 conciliation report. She observed Northcott's observations therein relating to this issue, which were that there was no defect observed in regard to the level of the floor, but that the problem lay with the clothes washer's supporting legs which required adjustment so as to make it level

(Exhibit 3, Tab 17, item 36)

During the cross examination of the Applicant, Counsel for the Program took the Applicant through numerous letters she had addressed to the Program, specifically, letters dated January 4, 2001, February 28, 2001, May 24, 2001 and the conciliation request for reinspection of the home dated October 13, 2001. The Applicant conceded that in all these letters and the conciliation request, there was no complaint regarding the level of the basement floor.

(Exhibit 3, Tab 19, Tab 21, Tab 24 and Tab 25)

The Applicant stated further that when Northcott came to her home on December 18, 2001 to conduct a reinspection of the complaints made by her, she still did not report a concern regarding the level of the basement floor.

The Applicant, upon being given the opportunity to study the home inspector's report of her inspector, was not able to point out to the Tribunal that that inspection report made reference to the basement floor not being level.

(Exhibit 5)

Warren Charles Northcott

Northcott testified that he has a Diploma in Architectural Technology from an Ontario College. He also stated that he was a building official employed by certain Ontario municipalities over a period of some ten years until 1998. In his duties with the municipalities, he had to ensure Builders complied with the Ontario Building Code ("O.B.C."). Northcott also stated he has taken various courses regarding the O.B.C. and holds a Certificate as a Building Official. In his capacity as a Building Official he has inspected some 400 residential homes. Since 1999 he has been employed by the Program as a Warranty Representative.

On December 6, 2000 he attended at the Applicant's home so as to inspect the home and prepare a Conciliation Inspection Report. The Applicant was present at the inspection. He, subsequent to the inspection, authored the Conciliation Inspection Report of December 11, 2000.

(Exhibit 3, Tab 17)

Northcott stated as follows regarding the 4 issues raised by the Applicant and now before the Tribunal

Claim One

Northcott stated that this claim was reported beyond the expiration period of the one year warranty. section 13.(4) of the Act requires that warranty claims made under section 13.(1) of the Act be made within 1 year after the warranty takes effect on the taking of possession. The warranty commenced on January 14, 2000 and expired one year later. However, the Applicant, whose claim was made under section 13.(1) of the Act, was only reported on May 25, 2001 when the locksmith's invoice was received by the Program from the Applicant. Further, that the date on the invoice itself indicated that services were rendered on January 24, 2001, some ten days beyond the expiration of the 1 year warranty period.

Northcott also stated that, quite apart from the claim not being made within the required warranty period, the claim itself did not arise out of a defect in materials or workmanship nor was there a violation of the O.B.C.

Claim Two

Northcott stated there were two aspects to this claim. One related to "concrete spillage visible on the foundation wall, along the underside of the porch slab." The second aspect related to a "chip in the exterior corner of the cold room" concrete slab.

Northcott testified he observed minor chips or bubbles in the exterior of the concrete. This was not at all unusual, for poured concrete does not show as a smooth unblemished surface. He also stated that the Applicant complained of there being no course of brick beneath the porch as was the case with a neighboring home whose home did have a course of brick.

Northcott stated that there were no visible signs of erosion to the concrete. He also stated that he had seen the concrete porch during the last week and had noted that the builder had been in attendance at the Applicant's home and had applied a parged coat over the concrete surface. The parging was done to improve the appearance of the concrete itself. The concrete spillage, that had been complained of previously, had also been rectified by the Builder and was no longer visible. Northcott took the opportunity of photographing the remedial work done by the builder in the last week in regard to parging the concrete and removing spillage of concrete. This remedial work done by the builder has been successful in alleviating, in Northcott's mind, the complaints regarding spillage and the appearance of the concrete. He

stated that there never was and there is not at this time, any question of defects in workmanship or materials or a violation of the O.B.C.

Insofar as the Applicant's complaint that there was no course of brick beneath the porch, Northcott stated there was nothing in the Agreement of Purchase and Sale that called for any bricks to be used. Additionally, it would not have been reasonable, nor permissible under the O.B.C., to install bricks around the concrete due to there being only 8" from grade to the concrete lip on the porch. This left insufficient room for brickwork and it would have violated the O.B.C. had the builder used bricks as requested by the Applicant.

Claim Three

In regard to the chips and nicks on the overhead garage door, Northcott stated he did observe dents and nicks on the door's surface. Such dents and nicks, as observed, were normal wear and tear for a two year old garage door.

There was no observed defect in workmanship or materials and the nicks and chips, besides not being readily visible, are minor in nature. Furthermore, this claim was not reported within the first year of warranty and is therefore not warrantable by virtue of section 13.(4) of the Act.

Claim Four

This issue related to the basement floor. Northcott stated that at the December 6, 2000 conciliation inspection the Applicant complained the floor was not level and pointed to the washing machine as evidence of the floor not being level. On closer inspection Northcott observed that the washing machine was not level and that one of the adjusting screws of the washing machine's legs was broken, as a result of which the machine was not sitting level. He measured the floor to see if it was itself level and used a "torpedo level" to ascertain the degree of levelness of the floor. He found the floor to be level except in the area adjacent to the drain where he found the floor sloped towards the drain.

Northcott testified further that he again inspected the basement floor level January 23, 2002, when the owner indicated that, after washing the basement floor, water accumulated in the south-east corner of the basement and did not drain down the floor drain itself. He again used a torpedo level to measure the floor for slope and again was satisfied that the floor was level. He stated that basement floors are not constructed so as to ensure drainage of all water that falls on the floor and that small patches of water may be left on a floor which then evaporates. Small patches of water are normal with a basement floor and does not indicate that there is a defect in workmanship or materials or a violation of the O.B.C. There was no defect in workmanship or materials observed in the basement floor of the Applicant's home nor was there any violation of the O.B.C.

Carl Melvin Burrill

Burrill testified on behalf of the builder that he has been employed in the construction industry

for over forty years and that for the past thirty years he has held the position of supervisor and has inspected, on average, between 350 and 500 houses per year. He is familiar with the O.B.C. and the standards of practice in the industry and has taken continuing education courses to keep up to date within the industry.

He became familiar with the Applicant's home in September 2001, after he joined the builder as its service manager. He reviewed the Applicant's file kept by the builder and was involved in only two outstanding issues. One issue related to the lock on the door from the garage to the home and the other issue related to the cement porch above the cold room.

On the issue of the lock on the garage door he determined from his review of the builder's file that the claim was reported beyond the first year warranty period and the complaint was therefore not warrantable. He told the Applicant of his determination that this issue was not warranted.

Insofar as the second issue was concerned, he went to the Applicant's home in about September 2001 to investigate the complaint. He was told by the Applicant that the concrete was "rough" at the north-east corner of the front porch. He observed bubbles in the concrete and also saw "overflow" of concrete. The Applicant said that there were "chips" in the concrete. The "chips" that the Applicant pointed to were minor indentations due to popped bubbles in the concrete which left surface marks. He stated that concrete is generally not smooth and this was the case with the concrete at the Applicant's home. This was quite normal and was not indicative of defects in workmanship or materials and was not a violation of the O.B.C.

Burrill went on to state that when last week the builder was in attendance at the Applicant's home so as to attend to the garage floor, he instructed the work crew to parge the foundation walls at the exterior of the front porch so as to give it a "nice clean appearance." He also instructed the work crew that the accumulation of concrete under the lip of the porch be removed and cleaned up. Since the parging and removal of concrete spillage Burrill has reinspected the work and in the course of this reinspection he took two photographs of the north-east area of the porch. He is satisfied that the complaint regarding the second issue has been taken care of and that the complaints are not justified and that the aesthetics of the concrete porch are satisfactory.

(Exhibits 7 and 8)

The Applicant complained to Burrill at the time of his September 2001 inspection regarding the lack of brickwork around the porch. He inspected a neighbour's home which did have brickwork but noted that the homes were different. In the case of the neighbour's home, that did have brickwork around the foundations to the porch, he noted that the concrete slab to the front porch of that home was some 13" to 14" above grade and that with this amount of space brick could be used without violating the O.B.C. However, in the case of the Applicant's home the space was only about 7" which, and if bricks were used in such a confined space, it would result in a violation of the O.B.C.

FACTS FOUND PROVEN:

The following are the facts found to have been proven.

1. The Applicant's home was completed for possession on January 14, 2000 upon which date the Applicant was given possession.
2. The Applicant's claim in respect of services rendered by Armor Lock and Safe to the Applicant in terms of its invoice dated January 24, 2001 was not reported in writing to the Program until May 25, 2001.
3. The chips at the exterior of the cold room are not due to defects in material or workmanship and are not a violation of the O.B.C.
4. The concrete spillage on the concrete foundation wall, along the underside of the front porch slab of the Applicant's home have been satisfactorily removed by the builder prior to the hearing and prior to removal did not constitute defects in material and workmanship and are not a violation of the O.B.C.
5. The "chips" in the exterior concrete of the cold room room at the north-east corner of the front porch were minor in nature and occur naturally in concrete and did not, nor do they now, constitute defects in material and workmanship nor do they violate the O.B.C.
6. The minor "chips" on the exterior concrete of the cold room have been satisfactorily removed by the parging of the concrete surface by the builder prior to the hearing of this matter.
7. The Agreement of Purchase and Sale entered into between the Builder and the Applicant in relation to the Applicant's home does not call for brickwork to be provided around the concrete foundations to the front porch of the home and would have been, if the builder did provide same, in violation of the O.B.C.
8. The concrete spillage on the concrete foundation wall, along the underside of the front porch slab of the Applicant's home, was not reported in writing by the Applicant to the Program within one year of the Applicant taking possession of the home.
9. The Applicant's complaint regarding chips and nicks in the garage door was due to normal wear and tear, was minor in nature and was not reported in writing by the Applicant to the Program within one year of the Applicant taking possession of the home.
10. The concrete floor in the basement of the Applicant's home was constructed in a workmanlike manner, free of defects in material and was not in violation of the O.B.C.

THE LAW:

The *Ontario New Home Warranties Plan Act* states as follows:

13(1) Every vendor of a home warrants to the owner,

(a) that the home,

(i) is constructed in a workmanlike manner and is free from defects in material,

(ii) is fit for habitation, and

(iii) is constructed in accordance with the Ontario Building Code;

(b) that the home is free of major structural defects as defined by the regulations; and

(c) such other warranties as are prescribed by the regulations.

...

(3) A warranty under subsection (1) does not apply in respect of,

...

(c) normal wear and tear;

...

(4) A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed.

...

14(3) Subject to the regulations, an owner of a home is entitled to receive payment out of the guarantee fund for damages resulting from a breach of warranty if,

...

(b) the person has a cause of action against the vendor or the builder, as the case may be, for damages resulting from the breach of warranty.

REASONS FOR DECISION:

The onus of proof rests upon the Applicant to satisfy the Tribunal on a balance of probabilities.

There are 4 issues that require determination by the Tribunal and each will be considered and dealt with separately.

Issue 1: Receipt for Repairing Side Door Lock

This issue arose out of an incident that occurred on January 24, 2001 when a locksmith was engaged by the Applicant to open a door from the garage to the home. This incident took place some ten days beyond the one year period of warranty under section 13.(4) of the Act. The Applicant during the course of her evidence before the Tribunal conceded that this claim arose after the expiration of the warranty period of one year. Possession of the home took place on January 14, 2000 and the Program was notified in writing of this claim on May 25, 2001.

The Applicant's claim in respect of this issue clearly falls outside of the one year warranty and on that basis alone the Applicant's claim under this heading must fail.

Issue 2: Chip off at Exterior Cold Room

The Applicant did not produce evidence to support her allegations regarding the "chips" on the concrete at the exterior of the cold room. The one copy of a photograph that the Applicant referred to was of poor quality and no detail was visible when viewing that photograph. A clearer and more detailed photograph may have been of assistance to the Tribunal. No building expert testified to corroborate the Applicant's statements and observations. Opposed to the Applicant's evidence, the Tribunal was left with the testimony of Northcott and Burrill both individuals with many years of experience in the building industry. The Tribunal accepts their testimony based upon their experience and the fact that their testimony was not disputed by the Applicant or put in issue by evidence of any witnesses in the building industry who the Applicant could have called to testify but did not do so.

Both Northcott and Burrill testified that there were no defects in material or workmanship and no violation of the O.B.C. The exterior concrete surface of the cold room was what one would normally expect of poured concrete and the spillage of concrete under the sill was not visible unless one specifically looked for such spillage. Even if there was spillage of concrete which produced an unsightly appearance (which is not a finding of the Tribunal) and even if there was a chip in the concrete (which is also not a finding of the Tribunal) such spillage and chips were satisfactorily remedied by the builder before the hearing by the removal of the spillage and the paring of the entire area where the Applicant contended there was a chip. The photographs taken after the remedial work (Exhibits 7 and 8) clearly indicate that there is now no visible spillage, and the paring has produced an acceptable level of workmanship and has produced an aesthetically pleasing appearance.

The "chip" was never indicated to the Tribunal by the Applicant by way of a photograph. From the evidence of Northcott and Burrill the appearance of the exterior surface of the concrete was acceptable according to industry standards and accords with what is to be expected of poured concrete. The mark or chip indicated by the Applicant was clearly minor in nature and extent and would be considered "de minimus non curat lex" of which the law does not take notice as it is of insignificant matter. The Tribunal believes that the Applicant seeks an unrealistic standard of perfection. One does not live in a perfect world and allowances must be made for minor imperfections.

The Tribunal finds, as well, that there is nothing in the Agreement of Purchase and Sale that calls for the builder to supply a course of brick around the concrete at the front entrance and that even if the builder had supplied such brick it would have resulted in a violation of the O.B.C.

Accordingly, for the reasons stated above the Applicant's claim under this heading fails

Issue 3: Chips and Nicks on Overhead Garage Door

The Applicant produced no photographs to substantiate this claim. She was not able to produce a document to indicate that this complaint was made to the Program within the one year warranty period as required by section 13(4) of the Act.

The evidence of Northcott was that he did observe dents and nicks on the door's surface. However, the door was two years old when he observed the nicks and dents and constituted what one would expect from normal wear and tear over that period. The nicks and dents were not readily visible and were minor in appearance.

The Tribunal finds that the Applicant has not discharged the onus of proof regarding this claim being made within one year of possession in terms of section 13.(4) of the Act. Further, the "chips and nicks" were due to normal wear and tear in connection with the use of the door over a period of some 2 years. Accordingly, a warranty is excluded and does not apply by virtue of section 13.(2)(c) of the Act. The Tribunal also finds that the "chips and nicks" were minor in nature and that the comments made by the Tribunal under the second issue above apply equally to this issue.

Accordingly, the Tribunal finds that the Applicant's claim under this heading fails.

Issue 4: Basement Floor not Level

The Tribunal accepts the evidence of Northcott and Burrill in that the basement floor was constructed in a workmanlike manner, free of defects and was not constructed in violation of the O.B.C.

The Applicant produced no evidence to show that the floor was not level. She did not either herself, or through an expert, do any tests to ascertain whether the floor is level. The Program did investigate whether the floor is level when Northcott measured it by way of a "torpedo level" which indicated that the slope of the floor was level and in accordance with acceptable industry standards and practice and that it only sloped in the vicinity of the drain, which is where the floor should slope. Northcott also testified that the washing machine in the basement was not level due to a defective leg at one corner of the machine. This, according to the uncontraverted evidence of Northcott is what the Applicant relied upon when alleging to Northcott during his inspection, that the floor was not level. There was no evidence introduced by the Applicant that the floor was not level. It was only her opinion and observations unsupported by any tests. The fact that after washing down the basement floor, as alleged by the Applicant, there were

patches of water left standing on the floor (that subsequently evaporated) does not indicate that the floor is constructed in an unworkmanlike manner, is defective in materials or is in violation of the O.B.C.

The Tribunal accordingly finds the Applicant's claim under this heading fails as well.

DECISION:

Accordingly, pursuant to the authority vested in it under section 16.(3) of the *Ontario New Home Warranties Plan Act*, the Tribunal directs the Ontario New Home Warranty Program to disallow the Applicant's claims.

LICENCE APPEAL TRIBUNAL

Derek Israel,
Vice-Chair

Released: June 11, 2002

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

UPTOWN USED CARS

MOHEBALI MOJARRAB O/A UPTOWN USED CARS

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF THE
MOTOR VEHICLE DEALERS ACT

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

PAUL RAUSCH, Counsel, representing the Applicant
AVIVA HARARI, Counsel, representing the Registrar, *Motor Vehicle Dealers Act*

DATE OF
HEARING: June 11, 2002 Toronto

ORDER

WHEREAS the Registrar under the *Motor Vehicle Dealers Act* (the "Respondent") issued a Proposal dated January 7, 2002 to revoke the registration of Moheballi Mojarrab o/a Uptown Used Cars (the "Applicant") under the *Motor Vehicle Dealers Act*;

AND WHEREAS the Applicant has delivered to the Registrar and the Tribunal a notice in writing appealing the Proposal and requiring a hearing;

AND WHEREAS the Tribunal, by written notice dated March 1, 2002 addressed to the Applicant's Counsel of record and the Registrar's Counsel of record, appointed June 11, 2002 as the date for the hearing of the Applicant's appeal;

AND WHEREAS when the hearing of the appeal commenced before the Tribunal on June 11, 2002, the Applicant's Counsel moved that the hearing be adjourned to July 2, 2002 at 10:30 a.m.;

AND WHEREAS Counsel for the Registrar made a request to the Tribunal for costs in the sum of \$800.00;

AND WHEREAS Counsel for the Applicant consented to an Order being made by this Tribunal that the Applicant pay the Registrar's costs in an agreed sum of \$800.00;

NOW THEREFORE, this Tribunal orders that:

1. The hearing of this matter shall, by consent of the parties' Counsel be adjourned peremptorily against the Applicant to commence at 10:30 a.m. on Tuesday, July 2, 2002 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, and
2. The Applicant shall, by consent of the parties' Counsel, pay to the Registrar the sum of \$800.00 in respect of agreed costs arising out of the adjournment, by no later than Friday June 21, 2002.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: June 11, 2002

COSTANTINO

ALDO COSTANTINO

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSE OF THE ONTARIO NEW
HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM.

TRIBUNAL: DAVID J. HUNT, Vice Chair

APPEARANCES:

CAROL STREET, Counsel representing the Ontario New Home
Warranty Program.

MARY DI FELICE, Agent representing the Applicant.

DATE OF
HEARING:

June 7, 2002

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND

This is an appeal from the decision of the Ontario New Home Warranty Program ("the Program") dated January 31, 2002, wherein the Applicant's claim for damages for the return of his deposit based on a breach of the Agreement of Purchase and Sale by the Vendor was disallowed. The claim was for a total of \$20,000.00 for the return of the deposit claimed to have been paid pursuant to Agreement of Purchase and Sale dated May 23, 2001 for the sale of 1579 Heatherglenn Crescent. As set out herein, the Tribunal found that the funds paid January 3, 2000 to the vendor and credited towards the purchase of another property did not qualify as a deposit for the purchase of the subject property. Accordingly, the Applicant is not entitled to succeed in his claim against the Program for the reasons hereinafter set out.

FACTS

It is not disputed by the parties that the Applicant signed an Agreement of Purchase and Sale for a home located at 1546 Heatherglenn Crescent on January 3, 2000 and that the deposit listed on that Agreement was \$60,000.00. The cheque in the amount of \$60,000.00 was given by the Applicant to the Vendor on January 4, 2000. The closing date on the Agreement of Purchase and Sale was May 15, 2000, but the transaction did not close, and the property was later sold by the Vendor to another purchaser. The Applicant received \$30,000 from the

Vendor at the time of that sale.

A request for compensation dated November 15, 2001 was sent by the Applicant to the Ontario New Home Warranty Program, by which a claim was made on the following basis.

In his letter dated November 15, 2001, the Applicant stated that he wished to obtain a refund as soon as possible for the deposit and enclosed a copy of the Agreement of Purchase and Sale for 1579 Heatherglen Crescent, dated May 23, 2001, with the closing date of July 30, 2001 and a deposit shown as \$20,000.00. There was also a copy of a certified cheque dated January 4, 2000 in the amount of \$60,000.00 which he said was a deposit on more than one house. Further he advised that he had not been able to contact Combined Group of Trades o/a Castlemark Homes.

The Program disputes the entitlement of the Applicant to compensation under Section 14(1) of *Ontario New Home Warranties Plan Act* (the "Act"). The grounds asserted on behalf of the Program in the Decision Letter are that the \$60,000 was a loan made to the company when it was needed to purchase some lots that would be lost if the company did not succeed in obtaining the necessary cash. The cheque was provided on January 4, 2000 and, as security for the loan, the Applicant was given the first Agreement of Purchase and Sale for 1546 Heatherglen Crescent in Tecumseh. This Agreement of Purchase and Sale stated that there was to be a deposit of \$60,000 but the Registrar found that that this was a loan he had made and there was no separate payment for the deposit. The house at 1546 Heatherglen Crescent was sold on July 28, 2000 to a different purchaser according to O.N.H.W.P. records and, out of the closing proceeds, the builder paid the Applicant \$30,000, reducing the balance owing to \$30,000.00. The Applicant received a further payment of \$10,000, thereby reducing the debt to \$20,000. As security for the remained debt, in the month of May, 2001, the Applicant entered the second Agreement of Purchase and Sale for the purchase of 1579 Heatherglen Crescent which stated that the deposit of \$20,000 was paid forthwith. The Program took the position that no separate payment of the deposit was made, the vendor had now gone out of business, and the debt was still outstanding, so the Applicant was attempting to now collect it from O.N.H.W.P.

WITNESSES FOR THE APPLICANT

Aldo Costantino

The first witness was Mr. Aldo Costantino, who testified that his understanding with the builder was that he was buying a house and he did have to close the deal. He understood the legal implications and that he would have to have the money to close the deal. His line of credit allowed him to have sufficient funds to cover the full amount. When he found that the house was not completed, and the return of the deposit was not forthcoming, he called Mr. Di Felice and was told that the house had not been finished. He didn't know what to do and decided he should enter a new Agreement and buy a house to get the funds back. He knew that he was buying a semi detached house which was almost completed and he knew where it was and he

knew what he was getting, but he did not take the Agreement of Purchase and Sale to a lawyer. He had concerns over the situation, as the builder appeared to have problems, but he thought the best decision was to buy the house as it was too expensive to hire a lawyer to pursue legal action.

On the issue of the cheque for \$60,000, he said that Mr. Di Felice had asked him around Christmas if he wanted to buy a house, and told him that it was a good opportunity. Mr. Costantino testified that it was like a favour to Mr. Di Felice, and explained that the contract had a May closing date. He had purchased houses before, for himself and parents, but he had never been in a deal like this. At the end of it, he expected to get a house, and believed it was legal. He said that he had concerns about how he would be able to sell the house, but Mr. Di Felice said not to worry as they had people who would be able to help.

In cross examination Mr. Costantino explained that he was approached by Mr. Di Felice, whom he had known socially. They had only met a few times but since that they did become closer, and their wives were good friends. When he was asked if Mr. Di Felice asked him if he would do a favour, he said that he was asked if he would buy a house. He stated that the \$60,000 was for a house and that the favour was regarding having a contract for Purchase and Sale. The witness did agree that Mr. Di Felice told him that the company would lose the lots if they didn't get the \$60,000, but stated that this was after the contract was signed. When he was shown the Agreement of Purchase and Sale signed January 3, 2000, (Exhibit 4) the witness agreed that it was dated the day before the date of the \$60,000 cheque to Combined Group of Trades. He explained the different dates by saying that the cheque had to be certified and he had to go and get a cheque certified the day after the contract was signed. He stated that the signing of the contract took place in an office in a trailer at the site and was done with Mr. Di Felice and two other individuals from the company. The witness agreed that there was interest at a rate of 9 percent per year to be paid to him on the \$60,000.

Mr. Costantino testified that at the time he signed the Agreement of Purchase and Sale he did not know that \$20,000 was the maximum deposit covered by the Act.

The witness agreed that the property at 1546 Heatherglen Crescent in Tecumseh, is near Windsor, Ontario and that he and his family are residents of Mississauga and did not intend to move into the home as his intention was to resell. Mr. Costantino testified that the date of closing of the Agreement of Purchase and Sale for 1546 Heatherglen Crescent was supposed to be May 15, 2000 but the deal did not close on that date. He did not retain a lawyer in preparation for the closing date and did not present a cheque on the date listed for the closing to tender and to try to get the deal closed. The witness dealt with the matter by simply speaking to Mr. Di Felice and was advised that the house was not ready at that time and there was no discussion of arrangements for the closing. He explained that when the house was finished he thought the agreement was still good and did not know that the house had been sold to someone else who was willing to purchase and move into the house. Mr. Costantino made no real effort to close the deal. When the deal was eventually closed with the other purchaser he agreed that he was paid \$30,000 in September 2000.

Mr. Costantino testified that when his son a was buying a house and he was in need of funds he called Mr. Di Felice and was told he would have to meet with the other partners to get the money. Finally he did get a further cheque for \$10,000 from Mr. Di Felice, two days before Mr. Di Felice died during the first few days of January 2002. The witness stated that when he found that the original house had been sold, his concern was about getting his money, not about getting the house. He had received part of his money and the interest to September 2000 on the full amount but he received no more. The amount owed now is \$20,000 plus interest based on the Agreement of Purchase and Sale for 1546 Heatherglen Crescent. He disagreed that this was simply the balance of a debt owed. Even though the debt was over \$30,000 in September 2000, he stated that he did not sue the vendor and simply dealt with the matter by speaking with Mr. Di Felice who he hoped would get him what he could, although he knew that the vendor was in financial difficulty.

He explained that by September 2000 the vendor owed over \$20,000 and his security in the house was gone and his only security was in Mr. Di Felice. The witness stated that he wanted further security, and the safest thing he could do was to buy another house. As a result he entered the second agreement of purchase and sale for the house at 1579 Heatherglen Crescent. In late December 2001, he got the last \$10,000 when there was still a balance of \$30,000 owing. He stated that when he signed the Agreement of Purchase and Sale for the home at 1579 Heatherglen Crescent on May 23, 2001, the deposit for that home was shown as \$20,000.00 as he was trying to buy two homes and the sum owed to him was to be split between the two homes at \$20,000.00 for one home and \$15,000 for the other to make up the total of \$35,000. The Agreement and Purchase and Sale for the second home was never done as the partners in the company had problems.

Mr. Costantino testified that Mr. Di Felice didn't answer questions about the problems properly but it was still his intention to buy a house and resell it to recover the money he had invested. He did not attend at the site to inspect either house or walk through what was completed so far. On the second Agreement of Purchase and Sale he agreed that he did not pay the \$20,000 shown, as it was part of the debt. That transaction was to close July 30, 2001 but he was advised the house was never completed and he took no steps to pursue the issue other than to call the vendor's office, but by that time the phone was not being answered. He did not take legal steps to try to close the deal and did not tender or retain counsel. The witness explained that his calls to the builder began about a week before he was told the house had not been completed.

When he found himself with no house and no money, his best option was to make a claim with the Program. He made the claim in November 2001 and was advised that the maximum available was \$20,000. Then, in December 2001, Mr. Di Felice paid him \$10,000. Following receipt of these funds he called the partners and was simply advised that a lot of people had lost money in this transaction and he was just another casualty. He denied that the vendor had told him the amount he could claim, and to go to the Program to try to settle the debt.

In re-examination the witness stated that he did not understand what it meant to 'tender' in a real-estate transaction.

Antonia Di Felice

The last witness for the Applicant was Antonia Di Felice who testified that she was aware of the dealings of Paul Di Felice and knew of this transaction. She understood that when Paul Di Felice asked the Applicant to put money into the property it was intended that the deal would close. She confirmed that she had met the other partners in the vendor company and had tried to find out the status of the company but had no success.

In cross-examination she stated that she was not part of the company and only knew what her husband told her. In late 1999 she knew the company was in deep financial trouble and she knew nothing about the hearings at the Tribunal concerning the company's registration.

WITNESSES FOR THE PROGRAM

Brian Haskett

The only witness called by the Program was Mr. Brian Haskett who testified that he was the manager of the London, Ontario New Home Warranty Program office. He had been employed by the Program for 14 years and as the manager of the office personally deals with claims involving deposits. The witness explained that the first communication from the Applicant was on November 22, 2001. The office received a letter with a copy of the Agreement of Purchase and Sale dated May 23, 2001 for the property at 1579 Heatherglen Crescent. He did not get a copy of the second Agreement. At that time he did not know of the first Agreement of Purchase and Sale and investigated the matter by having a warranty representative contact the Applicant. The information given to the warranty representative was put into the decision letter as he had no other sources of information. Based on the information received, he understood that the Applicant had told the warranty representative that he had loaned the vendor \$60,000 that was needed to help the company buy some building lots. If this money was not received, they would have lost the lots. The debt would be secured by an Agreement of Purchase and Sale. On this basis, the witness formed the opinion in the Decision Letter that the claim should be denied. Through the records of the Program, he discovered that the home had been sold to another purchaser on July 28, 2000. He further found that the builder was subject to a Notice of Proposal at this time. A hearing was held on the Notice of Proposal on Jan. 22, 2001 at which time it was clear that the builder was in serious financial trouble. The Program had paid 2 claims for lost deposits in amount of \$20,000. The builder was put on notice of this, as builders are given 30 days notice after a claim is paid. At this time the builder would know the maximum limits, and that the Program would pay claims.

In cross-examination the witness explained that the registration of the vendor had been in jeopardy due to problems with deposits, claims regarding workmanship and based on the financial analysis. He explained that unless there is a claim, the Program does not receive a copy of the Agreement of Purchase and Sale, as they normally only receive a notice of possession within 14 days of possession of the home. He was aware that 2 claims had been

made for \$20,000 but was not aware of the \$60,000 deposit until the information came out in the hearing. Mr. Haskett explained that when the Warranty Representative calls there is no standard script to follow and they just advise that they are calling from the Program and ask questions appropriate to the situation. He explained that the builders are interested in the claims as well as there are generally guarantees as security for financial losses.

ISSUES

The legal issue in this proceeding is whether the Applicant has satisfied the burden of proof to show that the Registrar was wrong in his decision to deny the claim for the refund of the deposit claimed by the Applicant for the Agreement of Purchase and Sale dated May 23, 2001.

APPLICABLE LAW

Section 1, *Ontario New Home Warranties Act*:

"home" means,

- (a) a self-contained one-family dwelling, detached or attached to one or more others by common wall,
- (b) a building composed of more than one and not more than two self-contained, one-family dwellings under one ownership,
- (c) a condominium dwelling unit, including the common elements ...

and includes any structure or appurtenance used in conjunction therewith, but does not include a dwelling built and sold for occupancy for temporary periods or for seasonal purposes;

Section 13 *Ontario New Home Warranties Act*:

13. (1) Every vendor of a home warrants to the owner,
- (a) that the home,
 - (i) is constructed in a workmanlike manner and is free from defects in material,
 - (ii) is fit for habitation, and
 - (iii) is constructed in accordance with the Ontario Building Code;
 - (b) that the home is free of major structural defects as defined by the regulations; and
 - (c) such other warranties as are prescribed by the regulations.
- (2) A warranty under subsection (1) does not apply in respect of,
- (a) defects in materials, design and work supplied by the owner;
 - (b) secondary damage caused by defects, such as property damage and personal injury;
 - (c) normal wear and tear;
 - (d) normal shrinkage of materials caused by drying after construction;

- (e) damage caused by dampness or condensation due to failure by the owner to maintain adequate ventilation;
- (f) damage resulting from improper maintenance;
- (g) alterations, deletions or additions made by the owner;
- (h) subsidence of the land around the building or along utility lines, other than subsidence beneath the footings of the building;
- (i) damage resulting from an act of God;
- (j) damage caused by insects and rodents, except where construction is in contravention of the Ontario Building Code;
- (k) damage caused by municipal services or other utilities;
- (l) surface defects in work and materials specified and accepted in writing by the owner at the date of possession.

(3) The vendor of a home shall deliver to the owner a certificate specifying the date upon which the home is completed for the owner's possession and the warranties take effect from the date specified in the certificate.

(4) A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed. Privity of contract

(5) A warranty is enforceable even though there is no privity of contract between the owner and the vendor.

(6) The warranties set out in subsection (1) apply despite any agreement or waiver to the contrary and are in addition to any other rights the owner may have and to any other warranty agreed upon.

Section 14 *Ontario New Home Warranties Act*:

- (1) Where,
 - (a) a person who has entered into a contract with the vendor for the provision of a home has a cause of action in damages against the vendor for financial loss, resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;
 - (b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty; or
 - (c) the owner suffers damage because of a major structural defect as defined in the regulations for the purposes of section 13, and the claim is made within four years after the warranty expires or such longer time under such conditions as are prescribed,

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

(2) In assessing damages the Corporation shall take into consideration any benefit, compensation or indemnity payable to the person or owner from any source.

(3) The Corporation may perform or arrange for the performance of any work in lieu of or in mitigation of damages claimed under subsection (1).

Regulation 892, Section 1, *Ontario New Home Warranties Plan Act*:

"deposits" mean, in respect of a home, all money received before the date of possession by or

on behalf of the vendor from the purchaser on account of the purchase price payable under the purchase agreement, and the case of a condominium dwelling unit, includes money received by or on behalf of the vendor after the date of possession and prior to the date of transfer but does not include money;

- (a) paid under the purchase agreement as rent or as an occupancy charge and not part of the purchase price, or
- (b) specified in the purchase agreement as money paid under subsection 51 (6) of the Condominium Act.

...

"major structural defect" means for the purposes of clause 13 (1)(b) of the Act, any defect in work or materials,

- (a) that results in failure of the load-bearing portion of any building or materially and adversely affects its load-bearing function, or
- (b) that materially and adversely affects the use of such building for the purpose for which it was intended.

including significant damage due to soil movement, major cracks in basement walls collapse or serious distortion of joints or roof structure, and chemical failure of chemicals, but excluding flood damage, dampness not arising from failure of a load-bearing portion of the building, damage to drains or services, damage to finishes and damage arising from acts of God, acts of the owners, and their tenants, licensees and invitees, acts of civil and military authorities, acts of war, riot, insurrection or civil commotion and malicious damage.

Regulation 892, Section 4, *Ontario New Home Warranties Plan Act*:

- (1) Each person with a claim under the Plan shall give written notice of the claim to the Corporation.

Regulation 892, Section 6, *Ontario New Home Warranties Plan Act*:

- (1) A purchaser who has a claim under clause 14 (1) (a) of the Act in respect of the purchase agreement entered into after the 30th day of June, 1988 is entitled to be paid out of the guarantee fund and amount for damages arising from the breach of the Agreement by the vendor that does not exceed \$20,000.

- (3) In the case of a home of a type referred to in clause (a) or (b) of the definition of "home" in section 1 of the Act, the maximum amount payable to the owner out of the guarantee fund in respect of a claim made after August 1, 1989 under clause 14 (1)(b) or (c) of the Act is \$100,000.00

CASE LAW

McDonagh and Joseph Palmerio - Supreme Court of Ontario (Divisional Court) November 12, 1980

In this case the applicants were the principals of a construction company operating as Leader Construction Ontario Ltd. ("Leader") which was owed a debt by the builder Marvo Construction Co. ("Marvo") due to prior business dealings on a specific condominium project. The debt was assigned by Leader to the applicants who each entered into an Agreement of Purchase and Sale with Marvo for a condominium unit in the project whereby a portion of the debt, was written off, by setting off against the debt, the cost of acquiring the condominium units. The builder had financial difficulties and the project was transformed into a rental building instead of a condominium. There was no indication of when the parties knew of the builder's financial difficulties and knew that the project would not proceed as a condominium. The applicants sought to recover from the guarantee fund the full purchase price set out in the Agreement of Purchase and Sale. The tribunal found that there was no proof that Leader owed any money to the applicants; that there was no proof that moneys were paid by the applicants to Marvo by way of deposit or otherwise; or that Leader's interest in the units was transferred to the applicants. The tribunal found that the contra account 11 months after the Agreements were signed was not a deposit within the meaning of the Act or regulations; and that there was no proof that the applicants suffered a financial loss.

At p. 145 of the decision the court states that:

"the Tribunal found that the statute was designed to guarantee damage or financial loss arising out of a contractual relationship between the vendor and an owner in relation to a specific property it was not designed to guarantee debts owing between such parties that have no bearing or relation to such a contractual relationship as exists in the present case. Debts between contractors and subcontractors unrelated to a specific Agreement of Purchase and Sale of a specific property are clearly not within the scope of the legislation. In this case the tribunal found as a fact that there was no proof of a transfer of the interest of Leader Construction in the subject properties to the applicants and that the applicants suffered no financial loss. These findings were supported by the evidence before the tribunal "

The appeal was dismissed.

Estate of John Frederick Earle v the Corporation Designated for the Purposes of the Ontario New Home Warranties Plan Act March 1994

In this case the parties had invested money earlier in a building project to secure the purchase price of land. The applicants admitted that the money was given to the builder not be used for the purchase of any houses but was to be returned to each applicant together with a home for free. When the applicants discovered that the money was no longer in trust they signed purchase agreements to secure their investments. The claim was made by the applicants prior to the vendor being in breach of the agreements. The money was advanced one year before

the agreements of purchase and sale as an investment in land. No deposits were paid by the applicants and their claim was dismissed.

Don and Joyce Kennedy v the Corporation designated for the purpose of the Ontario New Home Warranties Plan Act - March 1995

In this matter the Tribunal found that there was no proof that the applicants paid money by way of deposit at the time of entering into the Agreement of Purchase and Sale. A debt owed by the builder to a company owned by the applicants was set off with respect to the first deposit, and the cheque for the second deposit was paid to a company which was not proven to be related to the builder. At p. 198 of the decision, the case was dispensed on the basis that the program was not established to guarantee debts owed between parties unrelated to the specific Agreement of Purchase and Sale on a specific property.

Aristides Indio - 1998, Commercial Registration Appeal Tribunal

In this matter the applicant was a member of the partnership which completed the pouring of basements on a residential construction site on behalf of the builder. By December 1993 the builder owed the applicant's company approximately \$300,000. Some of this debt was paid by the builder, leaving a balance of approximately \$97,000. On March 28, 1995 the applicant entered an Agreement of Purchase and Sale with a purchase price of \$126,000 and a deposit listed of \$20,000. The applicant did not pay the builder the deposit of \$20,000 as required but the builder's debt to the applicant's Company was reduced by \$20,000 so no funds changed hands. The value of the property was approximately \$186,000 but in the Agreement of Purchase and Sale it was described as \$126,000 and in this \$60,000 benefit was also used to lower the debt owed by the builder. The project was not completed and builder breached the agreement. The claim for the deposit of \$20,000 was rejected by the Tribunal as the deposit was not actually paid to the builder and the applicant did not therefore suffer a financial loss within the meaning of the Act. The debt owed by the builder was unrelated to the subject property and did not arise under the agreement but was a debt previously owing and the claim was rejected.

Anita Paliwal and Suman Paliwal, 1998 License Appeal Tribunal

In this case the Tribunal found that there was a prior investment by the applicants and the deposits were not found to have been normal modify the commitments to buy condominium units and were rather contrived to attempt to salvage the applicants' financial interests in their investments and the claim was dismissed.

On appeal to divisional court the court found that the transactions were loans secured by the agreements and were therefore not properly within section 14 of the Act, and the appeal was dismissed.

Stephen and Gayle Madely, 1996 Commercial Registration Appeal Tribunal

In this matter an Agreement of Purchase and Sale was entered between the parties with a deposit of \$10,000 shown in the agreement. No money was paid by the applicant towards the deposit but the Agreement of Purchase and Sale was conditional upon the execution of personal services agreement between the builder and the applicant under which the applicant, who was a known radio personality, would do promotional work for the builder. The payment for the personal services contract was to be broken up into three payments of \$10,000. On the date on which the deposit was due the applicant did not make payment and on the same date the builder failed to make a payment under the personal services contract as required. The tribunal found against the applicant on the basis that there was not sufficient evidence to establish that the amount payable under the personal services contract was to be applied against the money due under the Agreement and Purchase and Sale. In this case \$20,000 of the \$30,000 of the personal services contract was due after the closing date in the agreement.

On appeal to the Divisional Court, the court held that there was a financial loss of \$10,000 suffered by the applicant as he was obliged to pay \$10,000 deposit on January 2, 1995, but by oral agreement between the parties that deposit was to be paid out of the funds due contemporaneously to the applicant from the vendor. The court found that based on the oral agreement the vendor held the purchaser's deposit and there was therefore no failure by the purchaser to satisfy the deposit requirement

FACTS FOUND PROVEN

The Agreement of Purchase and Sale dated May 23, 2001 for the property located at 1579 Heatherglen Crescent in paragraph 1(g) lists a deposit in the amount of \$20,000, followed by a paragraph stating:

"paid to the Vendor forthwith, pending completion or other termination of this Agreement to be credited against the Purchase Price on closing, plus such further deposits specified by the schedule "A" to this Agreement."

This qualifying paragraph is found to specifically refer to the future or proximate payment of funds, as shown by the use of the word "forthwith", and does not contemplate the crediting of monies owed by the vendor to the purchaser. It therefore refers to funds specifically paid for this property and there is nothing in the evidence to suggest that any monies were received in addition to the initial payment of \$60,000 by a cheque dated January 4, 2000.

The schedule "A" on the signature page states:

"This offer is conditional on the purchaser arranging financing by June 23, 2001 failing which this offer shall become null and void in the event no notice

is received to the vendor by June 23, 2001 this condition shown the considered automatically waived by the purchaser"

There was a reference in the evidence to the matter of interest payable for the deposit in the Agreement of January 3, 2000. On a close inspection by the Tribunal of the Agreement of Purchase and Sale for the residence at 1579 Heatherglenn Crescent, the Tribunal observed in Schedule "A", on the signature page of the Agreement, there was an interest rate of 10 percent per annum and a right of cancellation set out under the following conditions:

" the purchaser shall have the right to declare this agreement null and void up to and including May 14, 2000, upon return of his deposit plus accrued interest re-paid to him at the rate of 10 percent per annum"

In the first Agreement of Purchase and Sale, the purchaser was provided with an absolute right of termination upon the re-payment of the deposit and interest, at an interest rate of 10 percent, so if the deposit plus interest were repaid he was under no obligation to arrange financing and close the deal on the house. His protection for his deposit was that so long as the deposit was not returned, he had the right to purchase the house so that he could resell it and hopefully get his money back plus a profit.

In the later Agreement of Purchase and Sale dated May 3, 2001, the purchaser had an absolute right of termination by simply notifying the vendor that he had failed to arrange financing. So long as he arranged financing, the purchaser had security in the right to the home, but if he no longer wanted the home, he could free himself of his obligations under the contract quite simply by giving notice that he was not able to arrange financing.

The Tribunal finds that based on the terms of the 2 Agreements of Purchase and Sale, the transaction was arranged so that there was a one time payment of \$60,000 to the vendor with a significant interest rate of 10 percent per annum to be paid to the Applicant. If this was repaid by the vendor the contract was structured so that the Applicant would be under no obligation to carry out the purchase of the home and would have the right to terminate the Agreement when he was fully paid. If the principal and interest were not paid to the purchaser, his security was his right to purchase the home. His security was provided by the Agreement of Purchase and Sale. In his evidence, the Applicant referred to his security several times, and stated that it was in the home and also in Mr. Di Felice. Throughout the entire transaction the actions of the Applicant did not demonstrate any real interest in closing the transaction. He did not inspect the property or monitor the progress of the building process, and did not even retain the services of a lawyer to take the necessary steps to be ready to close the transaction.

There is evidence that on the original closing date of May 15, 2000 he did not offer to close by tendering upon the vendor. In his evidence he stated at different times that his intention was to buy a house and close the deal, but his actions throughout the course of events are not consistent with this, and the transaction was structured to give him some protection and profit for his payment rather than to close a real-estate transaction. When he spoke to the Warranty Representative, the facts recorded from the conversation and put into the Decision Letter are much more consistent with the \$60,000 being an investment or a loan rather than a deposit.

even if it was a deposit on the first property, it was not a deposit on the home for which he made a claim.

The Applicant has denied that these facts are an accurate representation of what happened. However, when the transaction is examined in detail, they appear to better reflect the documentation and actions of the parties and are found to be correct. The Tribunal therefore finds that the Applicant made a onetime payment of \$60,000 by way of a loan or investment, although it was listed on the Agreement of Purchase and Sale as the deposit, and that the Agreement of Purchase and Sale was only a method of obtaining some security for the money. No separate amount was paid for the second Agreement of Purchase and Sale dated May 23, 2001 and the amount listed for the deposit in that Agreement was merely part of the outstanding balance on the loan or investment by the Applicant. By this point, it is clear that the vendor had knowledge of the amount that would be paid for a lost deposit under the Act and Regulation, and it is found that the figure of \$20,000 is consistent with the vendor trying to find an alternate way to clear their pre-existing debt.

APPLICATION OF LAW TO FACTS

It is found that the \$20,000 deposit listed on the Agreement of Purchase and Sale signed May 23, 2001 was part of the pre-existing \$60,000.00 debt owed to the Applicant, and not funds paid for a deposit on that Agreement of Purchase and Sale. It was therefore not a deposit under the definition provided for in section 1 of Regulation 892 under the Act, as it was not received on account of the purchase price payable under the Agreement of Purchase and Sale. Although there appears to be a debt owing it does not qualify as a deposit under the Act as it is a loan or investment predating the Agreement of Purchase and Sale, and is, therefore, not a financial loss attributable to the Agreement of Purchase and Sale, and thereby not subject to coverage pursuant to section 14 of the Act. The Tribunal finds that the Registrar was correct in his finding to deny the claim.

DECISION

Therefore, by virtue of the authority vested in it under section 16(3) of the *New Home Warranties Plan Act*, the Tribunal directs the Registrar of the Ontario New Home Warranty Program to disallow the claim.

LICENCE APPEAL TRIBUNAL

David J. Hunt,
Vice Chair, Presiding.

Released: June 18, 2002

TRI-STAR SALES AND LEASING

1012265 ONTARIO INC. O/A TRI-STAR SALES AND LEASING AND VASILIOS
MITROPOULOS AND PARTHENIA MITROPOULOS

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE MOTOR VEHICLE DEALERS ACT

TO REVOKE REGISTRATION

TRIBUNAL: DAVID J. HUNT, Vice Chair

APPEARANCES:

AVIVA R. HARARI, Counsel representing the Registrar under the *Motor
Vehicle Dealers Act*

KEVIN MacDONALD, Counsel representing the Applicants

DATE OF

HEARING:

May 23, & 24, 2002

Toronto

REASONS FOR DECISION AND ORDER

This is a hearing before the Licence Appeal Tribunal (the "Tribunal") arising out of a Notice of Proposal issued by the Registrar under the *Motor Vehicle Dealers Act* ("the Registrar", and "the Act" respectively). The Notice of Proposal dated February 1, 2002 proposed to revoke the registration of Tri-Star Sales and Leasing as a dealer, Vasilios Mitropoulos as a sales person, and Parthenia Mitropoulos as a sales person under the Act.

BACKGROUND:

The Registrar's reasons for this Proposal are stated as follows:

The intention and objective of the Act is to protect the public interest. The requirements of the Act include that Registrants be financially responsible in the conduct of business and that Registrants carry on business in accordance with the law and with integrity and honesty. The Registrant's past conduct is inconsistent with the intention and objective of the Act, and therefore warrants disqualification to registration under the Act. Therefore, the Registrar is unwilling to continue to register 1012265 Ontario Inc. o/a Tri -Star Sales and Leasing and Vasilios Mitropoulos and Parthenia Mitropoulos under the Motor Vehicle Dealers Act.

The particulars upon which the Registrar relies are stated in the Proposal as follows:

1. The dealer, Tri-Star Sales and Leasing was first registered as a motor vehicle dealer on or about May 12, 1993.
2. Parthenia Mitropoulos was first registered as a salesperson on or about October 28, 1987.
3. Vasilios Mitropoulos was first registered as a salesperson on or about November 30, 1982 and is currently in officer and director of the dealer.
4. The Parthenia Mitropoulos and Vasilios Mitropoulos Were (sic) officers and directors of another motor vehicle dealership, 314309 Ontario Ltd. c.o.b. as Trust Motor Sales. Trust Motor Sales was registered as a motor vehicle dealer since on or about August 22, 1983. Trust Motor Sales and and Vasilios Mitropoulos had their registrations pursuant to the Motor Vehicle Dealers Act revoked by order of the Commercial Registration Appeal Tribunal dated February 18, 1999. Parthenia Mitropoulos registration had expired in April, 1998.
5. The registration of Tri-Star Sales and Leasing was revoked by order of the Commercial Registration Appeal Tribunal, now known as the Licence Appeal Tribunal, dated October 19, 1998.
6. The 1012265 Ontario Inc. o/a Tri -Star Sales and Leasing and Vasilios Mitropoulos and Trust Motor Sales appealed the decisions of the Commercial Registration Appeal Tribunal to the Divisional Court and filed stay motions with the Tribunal.
7. The appeals were settled. The terms of settlement included, inter alia, that the appeals would be abandoned and that 1012265 Ontario Inc. O/A Tri -Star Sales and Leasing and Vasilios Mitropoulos and Parthenia Mitropoulos would submit new applications for registration to the Registrar, MVDA. It was further agreed between the parties that the Registrar would issue a Proposal to refuse the registrations, pursuant to Section 7 of the MVDA, but that the Registrar would subsequently settle the Proposal. To effect the settlement, the applicants, 1012265 Ontario Inc. O/A Tri -Star Sales And Leasing and Vasilios Mitropoulos and Parthenia Mitropoulos and the Registrar agreed that certain Terms and Conditions would be imposed on the applicants' registrations.
8. The terms of the Consent Order, include, inter alia, the following:
 10. The Dealer will not conduct any purchases or sales with anyone who is in the business of buying and selling motor vehicles without confirming that they are registered as a dealer under the Motor Vehicle Dealers Act.
 12. The Dealer will not purchase vehicles without ensuring that the vehicle is registered to the seller.
9. 1012265 Ontario Inc. O/A Tri -Star Sales And Leasing And Vasilios Mitropoulos and Parthenia Mitropoulos have breached the consent order, and in particular paragraphs 10 and 12.
10. On or about January 10, 2002, the Registrar's office received a complaint from another motor vehicle dealer, Halton Auto Lease Inc. regarding certain transactions. Upon a review of the complaint and the documentation provided by Halton Auto Lease Inc. 1012265 Ontario Inc. O/A Tri -Star Sales And Leasing and Vasilios Mitropoulos and Parthenia Mitropoulos have breached the terms of the consent order.

11. Upon the review of the documents provided to the Registrar from Halton Auto Lease Inc. it was apparent that certain vehicles were acquired by Tri- Star Sales and Leasing when the vehicles that were acquired were not registered in the name of the party purporting to sell the vehicles to Tri-Star Sales and Leasing. In particular Tri-Star Sales and Leasing acquired vehicles from a company known as Chariots of Hire when the vehicles were registered in the name of Halton Auto Lease Inc.
12. The following vehicles had their registrations with the Ministry of Transportation transferred from Halton Auto Lease Inc. directly to Tri-Star Sales and Leasing:
 - 2GHEJ668YH925693 2000 Honda - lien registered against the vehicle
 - 1HGCG1656YA802965 2000 Honda - lien registered against the vehicle
 - 2HGEJ6680YH929908 2000 Honda - lien registered against the vehicle
 - 1HGCG1651YA803098 2000 Honda - lien registered against the vehicle
 - 2HGEJ6685YH922601 2000 Honda - lien registered against the vehicle
 - 2HGEJ6681YH929903 2000 Honda - lien registered against the vehicle
 - 2HGEJ6680YH922618 2000 Honda - lien registered against the vehicle.
13. At no time had Halton Auto Lease Inc. agreed to sell or transfer any vehicles to Tri-Star Sales and Leasing and no time did Halton Auto Lease Inc. have any dealings with Tri-Star Sales and Leasing with respect to the above listed vehicles.
14. All of the vehicles listed in paragraph 12, above were leased to Chariots of Hire and there were liens registered against the vehicles. The liens listed Chariots of Hire, Nazir Jinnah and Shairoz Jinnah as debtors. In all cases the secured party was Halton Auto Lease Inc.
15. The following vehicles had their registrations with the Ministry of Transportation transferred from Kerr Cadillac directly to Tri-Star Sales and Leasing:
 - 3VWCS21C01M432319-2001 Volkswagen
 - 2HGEJ6686YH925328 - 2000 Honda
 - 2HGEJ6680YH920237 - 2000 Honda
 - 2HGEJ6680YH928290 - 2000 Honda
 - 2HKRL18641H004179 - 2001 Honda
 - 2HGEJ6681YH924751 - 2000 Honda
 - 2HGEJ6681YH928282 - 2000 Honda
16. At no time had Kerr Cadillac agreed to sell or transfer any vehicles to Tri-Star Sales and Leasing and at no time did Kerr Cadillac have any dealings with Tri- Star Sales and Leasing with respect to the above listed vehicles.
17. The following vehicles had their registrations with the Ministry of Transportation transferred from North York Chevrolet Oldsmobile Ltd. directly to Tri-Star Sales and Leasing:
 - 3VWCA21C4XM461611 - 1999 Volkswagen Beetle
 - 1HGCG5642WA804112 - 1998 Honda Accord
 - 2T1BR12E1YC785076 - 2000 Toyota Corolla
 - 2T1BIR12EXYC786193 - 2000 Toyota Corolla
 - 2T1BR12E6YC785381 - 2000 Toyota Corolla
 - 2C3HH46R4YH143845 - 2000 Chrysler Intrepid
 - 2C3HH46R5YH123040 - 2000 Chrysler Intrepid
 - JMIBJ2225YO196139-2000 Mazda Protégé
 - JMIBJ2229YO196841 -2000 Mazda Protégé
 - 2HGEJ668XYH9004 - 2000 Honda Civic
 - JH4DC4442YS800228 - 2000 Acura Integra

- 2HHMB4642YH900660 - 2000 Acura 1.6
 - 2HGEJ6656WH907740 - 1998 Honda Civic
 - 3VWCC21VOI M801128 - 2001 Volkswagen Cabriolet
 - 1GNDM19WXWB156652 - 1998 Chevy Astro Van
 - 1GNDM19W9WB1 57436 - 1998 Chevy Astro Van
 - 3VWRA29M8XM009796 - 1999 Volkswagen Jetta
 - 1G2JB5243X7515446 - 1999 Pontiac Sunfire
 - 3VWCA21C1XM446869 - 1999 Volkswagen Beetle
 - 2HKRL1862XHOO6666 - 1999 Honda Odyssey
18. At no time had North York Chevrolet Oldsmobile Ltd. agreed to sell or transfer any vehicles to Tri-Star Sales and Leasing and at no time did North York Chevrolet Oldsmobile Ltd. have any dealings with Tri-Star Sales and Leasing with respect to the above listed vehicles.
19. Chariots of Hire is not, and never has been a registered motor vehicle dealer.
20. The Registrar also received a complaint from a dealer, Lease-Well Inc. that a number of the vehicles that it had leased were, without the consent or authorization of Lease-Well Inc. transferred to Tri-Star Sales and Leasing.
21. The following vehicles had their registrations with the Ministry of Transportation transferred from Lease-Well Inc. directly to Tri-Star Sales and Leasing:
- 2HGEJ6682XH904703 1999 Honda
 - 2HGEJ6687XH904020 1999 Honda
 - 2HGEJ6685XH904260 1999 Honda
 - 2HGEJ6680XH904716 1999 Honda
 - 2HGEJ6688XH903927 1999 Honda.
22. At no time had Lease-Well Inc. agreed to sell or transfer any vehicles to Tri-Star Sales and Leasing and at no time did Lease-Well Inc. have any dealings with Tri- Star Sales and Leasing with respect to the above listed vehicles.
23. Many of the vehicles listed above were subsequently transferred from Tri-Star Sales and Leasing to other motor vehicle dealers and/or consumers. Some of the vehicles transferred by Tri-Star Sales and Leasing had liens registered against the vehicles.

THE LAW

Section 3 of the *Motor Vehicle Dealers Act* (the "Act"), states as follows:

(1) No person shall,

(a) carry on business as a motor vehicle dealer unless the person is registered under this Act; or

(b) act as a salesperson of or on behalf of a motor vehicle dealer unless the person is registered as a salesperson of such dealer and such dealer is registered as a motor vehicle dealer under this Act

Section 5 of the *Motor Vehicle Dealers Act* (the "Act"), states as follows:

- 5(1) An applicant is entitled to registration by the Registrar except where,
- (a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
 - (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law, and with integrity and honesty; or
 - (c) the applicant is a corporation and
 - (i) having regard to its financial position, it cannot reasonable be expected to be financially responsible in the conduct of business, or
 - (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or
 - (d) the applicant is carrying on activities that are or will be, if the applicant is registered, in contravention of this Act or the regulations.
- (2) A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant, imposed by the Tribunal or prescribed by the regulations.

Section 6 of the Act states as follows:

- (1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion, the applicant is disentitled to registration under section 5.
- (2) Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5, if the registrant were an applicant, or where the registrant is in breach of a term or condition of the registration.

CASELAW

Brenner v Ontario (Registrar of Motor Vehicle Dealers and Salesman) 1983 O. J. No. 1017 Ontario Supreme Court-High Court of Justice Divisional Court

This was an appeal by the Registrar of Motor Vehicle Dealers and Salesmen from a decision of the Commercial Registration Appeal Tribunal in which the Tribunal directed the Registrar to grant a conditional registration to the Respondent. The Applicant had a very serious criminal record which he had disclosed in his application but he had not disclosed three further convictions which were considered by the Registrar to be minor offences. The Tribunal heard evidence from a potential employer and a criminal lawyer who testified that the Applicant had rehabilitated himself. The Court found that the Tribunal had not applied the proper test, and set out this test in paragraph nine of the judgment as follows:

"the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error concluding that the past conduct of the applicant afforded

reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was the possibility that he, indeed, might have reformed himself."

Shine Car Sales Inc [2001] O.L.A.T.D. No. 286.

In this matter the Applicant had been convicted of odometer tampering and there were allegations that he had failed to disclose material information to purchasers of vehicles and he also had a minor criminal record which was not related to his work in the industry. The Tribunal found in that his practices were careless but that he was not acting without integrity and honesty and in accordance with the law in his dealings with the public. He had purchased vehicles with digital odometers and at the time of the sale to him the readings were unknown and when the batteries were connected, the odometer reading became visible and was put on the bill of sale although in one case in error was made. His behaviour subsequent to the inspection and prior to the notice of proposal was found to demonstrate that he was able and willing to implement better procedures when he was advised to do so. The Tribunal found that the Registrar was in error and ordered that he be registered subject to specified terms and conditions.

Constantin Tofan and Dumitrel Tofan [May 6, 2002]

In this matter there were problems that the dealer was purchasing vehicles with certain odometer readings which appeared not to be accurate and customers were being advised that the true mileage was unknown. Vehicles were being sold which were branded salvage, and the customers were not being informed. The Tribunal found that the dealer was not carrying on business with honesty, integrity, and in accordance with the law.

ISSUES:

The legal issue in this case is whether the Registrar was wrong in his decision to revoke the Applicant's registration under the Act on the basis of the Applicant's conduct respecting the allegations of breaches of the Terms and Conditions of registration..

Witnesses For The Registrar

Paul Pittaway

The first witness for the Registrar was Mr. Paul Pittaway who has been the leasing manager for two years at Halton Autolease which is the leasing division of Halton Honda. He stated that

he has been employed by Halton Honda for 17 years. During his tenure with Halton Honda, he leased 10 motor vehicles to Chariots of Hire ("Chariots") commencing in May 2000. Originally 6 vehicles were leased followed by 4 more. He stated that Nazir Jinnah ("Jinnah") was an officer of Chariots and appeared to be a reliable business man, and his wife Shairoz Jinnah was a practicing dentist in Toronto. They acted as guarantors on the leases, and this was quite acceptable to him. He referred to 7 leases (Exhibit 3, Tabs 25 - 31) dated in May and June and, 2000 for lease periods of 24 and 30 months in which motor vehicles were leased by Halton Auto Lease Chariots.

Mr. Pittaway explained that when a vehicle is leased, the ownership document stays with Halton Honda, and the plate portion of the ownership document is given to the lessee and put into their name. The ownership portions of the document were kept in the file by Halton Honda. However, the vehicles had been transferred into the name of Tri-Star Sales and Leasing ("Tri-Star") even though Halton Honda had registered liens, and had never signed over the vehicles; given releases of the liens, or ever agreed to the transfers. When he was shown a letter of release purportedly signed by him concerning a Honda Civic. (Exhibit 5, Tab 10) he explained that the letter was not from Halton Honda, and was definitely not signed by him. The letter appeared to be on a piece of blank paper with part of the Honda Autolease letterhead design at the bottom and a fax transmission line from Chariots of Hire at the top. At (Exhibit 5, Tabs 11 & 12) there were two more letters of release purportedly from Halton Autolease Inc. and the witness again stated that it was not his signature on them, and that they were not on the letterhead of Halton Autolease Inc. At (Exhibit 5, Tabs 13, 14, 15) there were further letters of release purportedly from Halton Autolease Inc. He stated that they were not authentic letters from Halton Autolease, and certainly not his signatures.

To his knowledge there had been no attempt by Tri-Star to verify the authenticity of the letters. The used car division of Halton Honda did have dealings with Tri-Star as they were always looking for used late model Hondas, and on occasion did sell vehicles to Tri-Star. He confirmed that Mr. Mitropoulos had always made proper payment for any vehicles purchased and on some occasions even brought in payments from Chariots when payments were overdue. The witness had discussions with Mr. Mitropoulos about the fact that there were issues and financial problems in the dealings with Chariots. When purchases were made by Halton Honda from Tri-Star, he explained that they were not advised of any liens and did not look into the matter themselves, as it was not considered necessary in a transaction with a dealer although it is automatic in any dealings with the public.

In cross examination, Mr. Pittaway stated that it was Mr. Mitropoulos who introduced Nazir to Halton Honda, and based on what they saw, he looked reputable. A background check was conducted on both Nazir and Chariots. He seemed to be financially stable, had three and later four locations, and his wife was a practicing dentist. On the issue of the letterhead on some of the letters of release, he explained that it did not look like their company letterhead as the company name was not in the middle of the top of the page.

He asked questions of some people within the company to find out if anyone gave them letterhead. The witness could not find that anyone did give them letterhead. However, he could

not be sure that it couldn't have happened. The witness confirmed that he was the one who received the payments by Chariots delivered by Mr. Mitropoulos, however, he could not say which of the 10 leased vehicles to payment payments were for. He anticipated, however, that the payments would be applied across all of the vehicles as necessary by the accounting department.

Late in the year 2000 or early in the year 2001 he discovered that there were problems with Chariots and he placed a call to the Ontario Motor Vehicle Industry Council ("O.M.V.I.C.") He explained that he might have spoken to Mary Jane South and told her that there were serious problems as they found that 7 vehicles had been transferred out of the name of Halton Honda without his knowledge for permission. Mr Pittaway was not sure what documentation he had sent to her other than the lien searches. Although he had made a note that there had been a conversation, he did not take notes of the contents of the conversation. He was also unsure if the lease payments on the vehicles were up to date at the time of the transfer. By the late autumn of 2001, he was aware that arrears of payments had become an issue. His standard practice during this time, was that he did not do checks of the fleet of leased vehicles to keep track of whether there were problems. The police became involved in the matter, and charges of fraud were brought against Chariots but he did not know the status of it or whether Halton Honda had brought civil proceeding against them.

Mr. Pittaway agreed that during his 17 years in business he had seen letters of release used in the transfer of leased vehicles. The policy at Halton Honda was to keep the ownership in the file and not to give both sides of the document to the lessee. He agreed that at the time of the transaction there were to his knowledge no written standards published by O.M.V.I.C. concerning the proper procedures for the sale of a leased vehicle and that the suggested procedures were later set out in the Dealer Standard in April 2002 (Exhibit 7). As a result of this publication, Halton Autolease has since made of changes to their procedures.

Michael Goba

The second witness for the Registrar was Mr. Michael Goba the stated that he is the leasing manager for North York Chevrolet Oldsmobile Ltd. and has worked there in that capacity since April 2001. He was not involved in the original leasing arrangements with Chariots as it was before his time, but he was involved in the extensions of the leases. To his knowledge there were over 40 leases to Chariots. North York Chevrolet Oldsmobile Ltd. had leased in excess of 40 vehicles to Chariots.

Mr. Goba was aware that some of the vehicles which were leased in 1999 had been bought out, but 37 or 38 could not be accounted for, and he was aware that some had been transferred into the name of Tri-Star. In January 2002 he received a call from another dealer advising him to do motor vehicle history searches as some of the vehicles had been transferred out of the name of North York Chevrolet Oldsmobile Ltd. He testified that when he did the searches based on this information, he found that of the current leases all but 3 had been transferred and that some had been transferred to Tri-Star. According to the records he found in the files, and the information he obtained, the dealership had never agreed to the

transfers or that the ownerships be signed over. At the time of the transfers there were liens registered on virtually all of the vehicles except for one or two where there were lien extensions which were not registered. There was no record of any release letters being given or of any inquiries having been made by Tri-Star concerning the transfers. He explained that for the ownership documents, the right side is given to the person having the plate but the left side stays with the leasing company and was not released to the lessee. The witness examined copies of leasing documents at (Exhibit 3, Tabs 39 to 58) that show the dates and durations of the leases vary. When he was shown copies of letters of release, (Exhibit 5, Tabs 24 to 43) he stated that when he searched the files he found no record of the releases and explained that the company will not release a lien prior to the vehicle being paid for in full. In addition, the format of the letter was not one use by the dealer for their letters of release. There was also a problem with the signatures on the letters of release and he saw that the name C. Monro was incorrectly spelled when it was typed at the bottom of the letters. The name of the actual person was Monroe, and he observed that the signature was incorrect and assumed that if the documents had been prepared by the proper person, they would spell their own name correctly.

In cross-examination Mr. Goba agreed that he would have had no dealings with Chariots prior to April 2001 when he joined the company. The fact that there were over 40 leases to Chariots meant that they were a significant customer for North York Chevrolet Oldsmobile Ltd. and at the time he joined the dealership he had no reason to believe that Chariots was not a reputable company. It was not until after he was with the dealership for a period of time that problems began to surface. He knew that C. Monroe worked for the accounts receivable office of the dealership and would have dealt with Chariots concerning overdue accounts and receivables. The letterhead appeared to be the type used by the dealership and he spoke to people in the dealership to try to find out where Chariots could have obtained letterhead but was unable to discover anything, although he did speculate that the letterhead could have been obtained from a fax or a copy of a prior release that was given. Chariots had continued to make sporadic payments on some of the vehicles, but major issues arose surrounding arrears of payments.

On January 10, 2002 the dealership was advised that they should do searches on the leased vehicles and this showed that transfers that occurred. He did not know if he had called O.M.V.I.C. at that time. Mr. Goba did know that charges had been brought against Chariots and that the dealership was seeking compensation but did not know the status of it although he did not know if anything had been received yet.

The witness testified that he had been in the car business for 20 years and had spent between 14 and 15 years in leasing, and agreed that it was a common practice to use letters of release in the sale of leased vehicle. As a result of the experience in this case, he now asks for V.I.N. searches on all vehicles.

Joe Wade

The next witness called by the Registrar was Mr. Joe Wade who is the owner of Leasewell Inc ("Leasewell") and testified that he had been registered as a motor vehicle dealer for between 13 and 14 years and had leased 5 vehicles to Chariots. These leases all ran until January 2001 and were reproduced in (Exhibit 4, Tabs 59 - 63). He explained that the practice of his company is to retain the ownership side of the ownership document at the dealership and to release only the license plate side of the ownership document to the lessee and he believed that his dealership still had the ownership portion of the documents. On the expiry of the leases in January 2001 there was an automatic renewal for a one year period pursuant to item 25 of the lease agreement, in the absence of notice to the contrary being given to the lessor within the prescribed time. For the vehicles leased by Chariots, the extensions were never put into effect as the cars were missing. They were advised that the cars were missing, so he contacted the License Bureau and found that the cars were no longer in the name of Leasewell and had been sold two or three times. Of the 5 vehicles, 4 of them had been registered to Tri-Star. These transfers had taken place without the knowledge or consent of Leasewell and there were no liens still registered on the cars as the liens had expired.

In cross-examination, Mr. Wade confirmed that he did credit checks on Chariots and they appeared to be reputable. At the beginning of the business relationship they were a good client. When the witness was shown letters of release purportedly from Leasewell, he stated that they were not authentic, and it were not on their Leasewell's letterhead. Further, he pointed out that they were signed by Mary Munroe and that there was no one at his company by that name. It was not his practice to do periodic spot checks on the status of his vehicles, but when he did do the checks in 2001 he found that the transfers had taken place. As a result of this, he called the police and was not sure if he called O.M.V.I.C. at that time. Although he had sought compensation, he had received nothing so far, and was pursuing Chariots, the owners and other people as well.

In his experience of between 13 and 14 years in the leasing business, he said it was not common to his knowledge that release of lien letters were used for the sale of vehicles but he was not really aware of prevailing industry standards.

V. Jay Kholsa

The next witness on behalf of the Registrar was Mr. V. Jay Khosla who was the leasing manager at Kerr Cadillac, ("Kerr"). He testified that he has been with the dealership since November 1, 1996 and has been in the industry since 1981. In May 2000 the began leasing vehicles to a numbered company operating as Chariots of Hire and over his dealings with them, leased a total of 64 vehicles.

In his evidence he referred to the document at (Exhibit 3, Tabs 32 -38) and stated that the original ownership would have been retained by the dealership in a safe. It was also the policy of the dealership to keep a photo copy of the license plate. When he was alerted by Halton Honda in January 2002 to the fact that there could be a problem with the vehicles, he conducted vehicles searches and found that all 6 of these vehicles had been transferred into

the name of Tri-Star even though he had never agreed to the transfers. He had no knowledge of anyone at the dealership giving consent and stated that there was still a lien on the vehicles, and that there was still a lien at time of the sale. The witness stated that he is the only one who does lien releases for the dealership, and he only does them when the vehicles are paid out.

When he saw the letters of release purporting to be from Kerr he explained that he did not sign the documents and the wording in them was not the wording used by the dealership. In this case he stated that he did not authorize the releases and assumed that the document was falsely produced using part of an invoice. At no time did Tri-Star contact him to try to verify the letters.

In cross-examination Mr. Kholsa testified that he did not know Mr. Jinnah, and did not know anything about Chariots until he personally visited their office. He dealt with them in the normal manner and did usual checks. The witness found that Mrs. Jinnah was a practicing dentist and that they owned substantial property. He visited with them periodically until October of 2001 to check on the vehicles and stated that there were 7 leases in issue and for the other vehicles, all but 2 were in the possession of Kerr. When he was shown the letter of release at (Exhibit 5, Tab 20) he explained that it looked like an invoice, however the letters at (exhibit 5, Tabs 19 & 21) are what the letterhead actually look like. He was not aware how they came into the possession of letterhead, but assumed it was a cut and paste from an authentic letterhead. Mr. Jinnah would also have had a sample of his signature from the leasing documents. Until the discovery of the problem in January 2002, the payments were being made properly.

When the problem was discovered his employer contacted the police and he was unaware of any efforts being made to obtain compensation. In March 2001 he knew that Chariots was having problems as there were difficulties with cheques being returned N.S.F., however they were replaced by certified cheques the same day. He was not aware of any industry standard at the time concerning the giving of letters of release.

Amanda Dempsy

The next witness called on behalf of the Registrar was Amanda Dempsey. She has been the manager of inspections at O.M.V.I.C. since 1999 and was originally hired in 1997 as an inspector. Her evidence was that she had inspected Tri-Star in the past, and in 1997 and 1998 her inspection lead to a Proposal to revoke the registration of Tri-Star and eventually a decision by this Tribunal. When she attempted to inspect in August 2000, the dealer did not appear to be at the premises and on September 1, 2000 she attended with Elizabeth Browning who was a trainee. The purpose of this inspection was to ensure compliance with the Act and the terms and conditions as agreed to on February 1, 2000 (Exhibit 3, Tab 2). A short report and notes were made concerning the inspection. Mr. Mitropoulos met with them and they explained the purpose of their visit. They reviewed the bills of sale since August 2000 and requested approximately 16 bills of sale as they had a RIN. number printout showing all the registered transfers. They also reviewed the terms and conditions in the Consent Order of February 1, 2000 and discussed the issue of a sign which was supposed to be up to advise

clients of their right to contact O.M.V.I.C. if they were having problems. When they left, they told Mr. Mitropoulos that they would return the books and records and that he was in breach of the Agreement due to the lack of the sign, but it was not their decision as to what to do about it. Due to the fact that his prior problems involved odometer readings which had been whited out and changed on the paperwork, they primarily focused on checking the odometer reading on the bills of sale and compared them with the Odessa Auction contracts to ensure that sufficient disclosure was made to customers. She was unsure if they discussed anything else during the inspection.

In cross-examination Ms. Dempsey testified that when she was a full time inspector she annually she did about 800 to 900 inspection, but in the year 2000, only did about 56 and in 2001, a few less. She testified that she did remember this inspection as she was there to ensure compliance with the Consent Order. It was particularly important to her to see the Garage Register, and all the bills of sale. She had obtained an R.I.N. search showing all of the registrations for the particular dealer but she did not have it now, as it was probably thrown out.

Her evidence was that she was not aware of transactions with Chariots. When she was shown the copy of the Garage Register and the record of 20 transactions with Chariots she stated that she would have seen the transactions along with others but was unsure of what pages she looked at, although she does know what deals she looked at. Mr. Mitropoulos provided the information and records as requested. Her recollection was that she did not discuss Chariots with him however she did agree that one of the deals taken by her did involve Chariots. When she was shown the paperwork for the deal involving Chariots at (Exhibit 3 Tab 17) she stated that she did not remember that the dealer number for Chariots was missing and did not remember if it was discussed. Her recollection is that she did not have to ask for more information and simply photocopied the paperwork relating to the 16 transactions to follow up the issue of the odometer reading. She stated that the Registrant is entitled to purchase autos from a non dealer so the fact that Chariots was not a registered dealer did not raise a red flag with her. In her opinion at that time, the Registrant was not offside with the Terms and Conditions of his registration.

A colored photocopy of the Terms and Conditions (Exhibit 8) was produced and she stated that she may have highlighted it in yellow. The paragraphs highlighted were 1, 6, and 15, as there were breaches of them. However, she did not highlight paragraphs 10 or call as she did not know at that time that there was non-compliance. She explained that the R.I.N. printout shows the transaction dates for vehicles transferred into the company name but does not have the name of the seller. At the end of the inspection, she simply brought to his attention that there was non-compliance with regard to the sign. The witness had not seen problems with the Chariots transactions so based on her information at that time, it would not have been inappropriate to continue dealing with them.

Re-examination

In the re-examination, she stated that Chariots was not registered and therefore she had no

jurisdiction over them. She simply took the paperwork on the deals so that she could examine the odometer readings. Several of the documents were missing the dealer number for the vendor or the purchaser or the sales person's number and several of the bills of sale were incomplete. She took the bills of sale to consider the transactions and follow up with the purchasers. When she explained the Terms and Conditions she didn't specifically explain to him what was the most important.

Mary Jane South

The final witness called by the Registrar was Mary Jane South who testified that she has been the Deputy Registrar of O.M.V.I.C. since 1997. Prior to that she was employed by the Ontario government for two years with the Ministry of Consumer and Commercial Relations and was the Deputy Registrar for Motor Vehicles. Before that she held a financial position relating to the administration of the *Motor Vehicle Dealers Act*. She explained that the Act is a public protection statute to ensure that people within the industry are financially responsible and carry on business with honesty, integrity and in accordance with the law.

Ms South testified that Mr. Mitropoulos has his registration previously revoked for odometer tampering and he was finally registered subject to terms and conditions as set out in the Consent Order issued February 1, 2000 (Exhibit 3, Tab 2). At that time the primary concern was fraudulent transfers as there had been problems with odometer tampering and the fabrication of books and records, and auction bills of sale. The terms and conditions applied to the company as well as the individual registrants. The Registrar's position was that the terms and conditions had been breached, specifically under paragraph 10 as the Registrant was not permitted to conduct any purchase or sale with anyone who is in the business of buying or in selling motor vehicles without confirming that they are registered as a motor vehicle dealer under the Act. The Registrant did not confirm that Chariots was registered under the Act. Further, under paragraph 11 of the Terms and Conditions, the Registrant was to confirm that the vehicles sold were registered in the name of the purchaser prior to releasing the vehicle to the purchaser. Under paragraph 12 of the Terms and Conditions, the Registrant was required to ensure prior to purchasing a vehicle, that the vehicle was registered in the name of the seller. The Registrant also agreed that he would register the transactions himself.

The witness reviewed the chronological history of some of the transactions from (Exhibit 3, Tabs 25 to 31 and 32 38) which showed a series of transactions in which vehicles under lease to Chariots were purchased by Tri-Star when they were not registered to Chariots, in contravention of paragraph 12 of the Terms and Conditions. There was also a problem with some of the letters of release as they were dated after payments, so that the money had been paid prior to obtaining the release.

For the transaction set out at (Exhibit 5, Tab 16) there was no letter of release and in the transaction at (Exhibit 5, Tab 17) a partial payment was made prior to the letter of release, as the letter of release was dated December 12 and the cheques were dated December 5, and

14. The bill of sale was dated December 10, 2001 so the deal was clearly consummated prior to the receipt of the letter of release.

At (Exhibit 5, Tab 10) the bill of sale from Chariots to Tri-Star was dated July 4, 2001, cheques were dated July 6, 2001 and July 12 2001 and the letter of release was dated July 9, 2001, showing that the deal had clearly closed prior to the letter of release being received.

At (Exhibit 5, Tab 12) the bill of sale from Chariots to Tri-Star was dated July 4, 2001, the cheques were dated July 6, 2001 and July 12, 2001 and there was no letter of release relating to any of the for vehicles purchased. The letter of release was for a 2000 Honda Civic serial # 2HGEJ6680YH929908 whereas the bill of sale related to one 2000 Honda Civic serial # 2HGEJ6680Y4929908 and three other 2000 Honda Civics with completely dissimilar serial numbers.

At (Exhibit 5, Tab 14) there was a bill of sale from Chariots to Tri-Star dated April 2, 2000 a bank draft dated March 29, 2001 and a cheque dated April 9 2001 as well as a letter of release dated April 5, 2001. The payment was therefore made and the deal was signed prior to the letter of release being obtained.

At (Exhibit 5, Tab 15) there was a bill of sale from Chariots to Tri-Star dated July 4, 2001 for 4 2000 Honda Civics . Cheques were given dated July 6, 2001, July 12, 2001, and bank drafts dated July 11 2001, and July 6 2001, and there was a letter of release dated July 9, 2001 referring only to the fourth vehicle listed of the four vehicles on the bill of sale.

At (Exhibit 5, Tab 16) there was a bill of sale from the Chariots to Tri-Star and a copy of the cheque, but there was no letter of release.

At (Exhibit 5, Tab 17) there was a bill of sale from Chariots to Tri-Star dated December 10, 2001, cheques dated December 5 and December 12, 2001 and a letter of release purportedly from Kerr dated December 12, 2001, so it post dated the sale. The fax transmission information at the top of the page shows that it was sent from Chariots.

At (Exhibit 5, Tab 18) the bill of sale from Chariots to Tri-Star was dated March 4, 2001, the cheque stub was dated March 15, 2001, 11 days later, and there was no letter of release.

At (Exhibit 5, Tab 25) there was the bill of sale from Chariots to Tri-Star dated June 23, 2000, the bank draft was dated July 7 2000 and a letter of the release dated June 28, 2000 so the car would have been received prior to payment.

At (Exhibit 5, Tab 29) there was a bill of sale from Chariots to Tri-Star dated June 7 or 2, 2000 as the date is partially obliterated. The bill of sale is for two vehicles, the payment was made by a cheque dated June 2, 2000, and the letter of release was dated June 29, 2000, so the transaction was completed before the letter of release was produced.

At (Exhibit 5, Tab 31) there was a bill of sale from Chariots to Tri-Star dated January 26, 2001

and a payment made by a cheque dated January 29, 2001, and a letter of release which was not dated until March 21, 2001 so the transaction was completed prior to the date of the letter of release. The fax transmission line at the top of the letter of release was from Chariots rather than North York Chevrolet Oldsmobile who were the purported originators of the letter.

At (Exhibit 3, Tabs 12, 13, 22 & 24) there was correspondence stating that there had been a spot inspection and it appeared that the dealer was not operating at the registered address. A letter dated March 24, 1997 was sent and a notice was given from an inspection on July 20, 2000 setting out concerns that the business was not operating at the proper address. There was a follow-up inspection on May 21, 2001 and it was reported that there was no one there, and a note was left asking for the registrant to notify them and arrange a time for an inspection. At this time there was a person on the premises who appeared to be a mechanic and was able to provide a telephone number to contact the registrant.

Cross-examination

In cross examination Ms. South testified that she did not have a direct involvement in the original case against the Registrant. She was not the inspector and was only involved in her capacity as the Deputy Registrar. When she was asked if she considered Tri-Star to be in compliance with the terms and conditions as of December 31, 2001 she explained that they had not been, as there was a problem with the sign. Even though she had received this information in September 2000, as shown by the reports at (Exhibit 3, Tab 16) she did not decide to revoke at that time. When she met with Ms. Dempsey she found out that Tri-Star had put up the necessary sign, but had done so two years after the date of the Order. At this point she did not see the other particular concern and it appeared that Tri-Star was in compliance and as far as she knew, business was being conducted properly.

On January 8, 2002 things changed drastically and the Notice of Proposal was issued as they had received the complaint from Halton Honda and there were concerns over compliance with paragraph 10 of the terms and conditions (Exhibit 3, tab 2) which required that the registrant confirm that anyone he conducts a purchase or sale with who is in the business of selling motor vehicles, is a registered dealer under the Act. In addition to the complaint by Halton Honda there was concern expressed by a representative of the Used Car Dealers Association over vehicles transferred to Tri-Star without the knowledge or consent of the owner or a valid release of the lien from the owner. Mr. Pittaway had advised them of the problem. These vehicles had been leased to Chariots and liens registered, however they had been transferred into the name of Tri-Star. Notes of the conversations were made by the witness on the computer but there was no record made by hand which could be produced at this hearing. Mr. Wade had expressed concern that Tri-Star was paying Chariots for the vehicles while the vehicles were still registered to Leasewell .

On Thursday January 8, 2002 the witness checked the registration history of one of the vehicles with the Ministry of Transport and received a copy of the lease and the lien search (Exhibit 3, Tab 25). She did not call Tri-Star to get their explanation of this. By this time she

knew that the police were investigating the matter as fraud, and she dealt with it as an administrative matter, so did not investigate it separately as a fraud. Her concern was whether there was a breach of the terms and conditions, or of the Act, and she did not advise Tri-Star that she was investigating. She agreed that she was under a duty to act fairly and stated that she issued the Final Notice on January 15 2002 (Exhibit 3, Tab 6) as there were a lot of assets at stake and she had to move quickly. The witness agreed that she had not given the Registrant the right to a hearing prior to the issue of the Final Notice, and said that under clause 19 of the Consent Order she was entitled to carry out the proposal to revoke the registration once there was a breach of the Terms and Conditions (Exhibit 3 Tab 2). Her understanding was that a hearing was not necessary as it had been dispensed with on consent in the third paragraph of the Consent Order. The revocation could take place without a hearing when there was a breach of the terms and conditions as there had been agreement that if the Terms and Conditions are breached, that the Registrar is authorized and directed by the Order to carry out the Proposal to revoke the registration. Her justification for believing that the breach was of a serious nature was that the term in paragraph 12 had been breached which required the registrant to ensure that vehicles sold were registered in the name of the vendor. Also paragraph 11 had been breached which required that any vehicles sold were registered in the name of the purchaser before releasing the vehicle to the purchaser. When the Final Notice was given the witness explained that she did not take into account the findings at the inspection as the issues arose out of the complaints of other dealers. The focus of the inspection had not been the issue of the release of liens or the name of the owner at the time of the purchase of the vehicles. She did not discuss the issue of the proposal with Ms. Dempsey or with the Applicant. In September 2001, they knew that he was buying from Chariots but the problem was that he was buying a lot of cars with liens so they were not simply isolated transactions. She explained that the problem was with the way of doing business not with the fact of doing business. If it had been a "1 off deal" it would not have been as likely to raise the issue of making inquiries of whether Chariots was a registered dealer. Ms. South agreed that Chariots is an offender but they had no jurisdiction over him and did not prosecute him.

Ms. South was not personally aware of the proper practice to release liens by letter but did say that O.M.V.I.C. has been working since then to tighten the standards. She recognized (Exhibit 7) which was a copy of the Dealer Standard published by O.M.V.I.C. and was involved with its development. It does refer to letters being used to release liens, but sets out other procedures to check the veracity of them with the lienholders.

The points made in the publication suggested that before purchasing a vehicle a check should be made for liens, whether or not there was a wholesale transaction, and if there is a lien to obtain an original letter of release from the creditor and call to verify the authenticity of the letter of release as many dealers had been given forgeries. The last point was that the seller should provide an original vehicle permit showing that the vehicle is registered in his name. These suggestions were considered best practices. However the witness was not sure if the failure of Mr. Mitropoulos to follow these practices prior to the publication of the document by O.M.V.I.C. meant that his practices fell below the prevailing industry standard at the time.

Witness For The Applicant

Mr. Vasilios Mitropoulos was the only witness who testified on behalf of the Registrants. He stated that he was 54 years of age, has been married for 33 years to Parthenia Mitropoulos. He has a grade 6 education and had been in the industry for between 22 and 23 years as he was first licensed in the autumn of 1982 with Sun Motor Sales. Following that, he obtained his dealer's license with Trust Motor Sales in 1983, and started Tri-Star Sales and Leasing in 1992. He is an officer and director, sales person and the controlling mind of Tri-Star. His wife is registered as a sales person and works at the dealership. However, her role is very limited. She basically runs errands out of the office such as going to the bank and picking up ownerships. The business is located at 3252 Danforth Avenue. The witness estimated that the business of the dealership is about 99.9% wholesale and that in the last 2 years he has only sold between 5 and 10 cars retail. He did have the difficulty when the registrations of the dealership, of himself and his of wife as sales persons were revoked for problems relating to odometer readings. When that matter was before the Tribunal, he took responsibility for it and it ended up being settled by entering into terms and conditions once an appeal was launched after the Tribunal upheld the revocation. Pursuant to this agreement, Tri-Star was registered as a dealer again and he and his wife were registered as sales persons. Mr. Mitropoulos stated that he did read the terms and conditions over prior to signing them on February 1, 2000 and that they were explained to him. In his opinion he had complied with them.

Mr. Mitropoulos testified that he met Mr. Nazir Jinnah in 1997 when Mr. Jinnah was working in a dealership. He later found that Mr. Jinnah was going to be opening a business near him and in 1999 he saw that Mr. Jinnah had opened a rental business 2 or 3 doors away from Tri-Star. Mr. Jinnah was renting cars to the public on a daily, weekly or monthly basis, and by March or April he started dealing with him. Mr. Jinnah had cars to sell and the witness was interested in purchasing good cars so they would negotiate prices, come to an agreement and conclude the deals. He knew that Mr. Jinnah was operating Chariots from two locations and then he got a third and fourth location. Mr. Jinnah told him that the company was doing well, and that a one time he had a fleet of up to 230 vehicles.

Mr. Mitropoulos referred to his Garage Register (Exhibit 5, Tab 9) and explained that it records the date of purchases, the name of the seller, and the date the vehicle is sold and the name of the purchaser. He pointed out some transactions with Chariots and said that there could be some mistakes on the dates. During the transactions Mr. Jinnah told him that he was the owner of the vehicles and the witness would attend at Chariots so that he could see the vehicle and evaluate the price he was prepared to pay. There would be a negotiation of the appropriate price with Mr. Jinnah and once that had been settled Mr. Jinnah would prepare a bill of sale, sign it and then the witness would pay for the car. Mr. Jinnah would provide a signed ownership for him and a letter of release. In his opinion there were no problems with the transaction and he obtained the letter of release as he was concerned over the liens. During his time in the motor vehicle business, the witness became quite familiar with the use of letters of release and estimates that he had used them at least 500 times over 20 years. When he had the signed ownership he would attend to the registration himself to transfer it into the name

of Tri-Star. He would later attend for the transfer into the name of the new purchaser once he had sold the vehicle. He did not call to confirm the ownership of the vehicle as everything with the transactions seemed okay to him. When he sold the cars, they were sold wholesale to other dealers. The purchasers from him required the ownership to be signed over to them, and they also wanted a letter of release. He provided them with the same letter of release that he had been given, and to his knowledge no one contacted the original owner to confirm the release.

When the inspection took place September 1, 2000 he remembered that the inspector looked at approximately 20 transactions. At that time he was doing business with several other companies the same way that he was dealing with Chariots. After the Consent Order was signed, a representative from O.M.V.I.C came to his premises and left a note and business card (Exhibit 5, Tab 4). They wanted to see his Garage Register and the bills of purchase and sale after the date of the Consent Order February 1, 2000 so he called them and set up a time for the appointment for September 1, 2000. When they came in they had a printout for certain vehicles, and wanted the documentation for them. They took the invoices and went over the Garage Register with him and he recalls showing them the bills of purchase and sale for approximately 16 - 18 vehicles. His recollection was that they did discuss Chariots. When Ms. Dempsey asked him if Chariots was registered as a dealer he was advised that they were not, and he replied that it didn't matter as it was a rental company and not a dealership. He was asked about the transaction at (Exhibit 3 Tab 17) a Honda Odyssey and he produced the invoice showing who he had sold it to.

There was discussion concerning the lack of a sign displaying the name and phone number of O.M.V.I.C. for anyone with a complaint. He was advised what would be done if he did not immediately put up the sign, as required, and that nothing would be done if he put the sign up. The inspectors did not explain that there was anything else wrong, and he did review the terms of the Consent Order. Ms. Dempsey highlighted the parts of it to be drawn to his attention. They discussed the terms and conditions and that if there was a breach there could be the revocation of the registration. It did not seem at that time that he had breached anything serious. He was not advised of any problems with regard to terms 10 for 12 of the terms and conditions. The inspectors reviewed the bills of sale and the invoices as well as the money orders and the inspectors did not ask to see the letters of release. They had a printout, and discussed the fact that the vehicle was not registered to Chariots. When the inspector came back 7 days later to bring his documentation back and check the sign, he was not told that he was not in compliance, so after that he continued business as unusual and did 55 or 60 more deals with Chariots. In these transactions he had letters of release. However, after the sale of the vehicle, he had to give the letter of release to the purchaser either through the auction or to a used car dealership so he often than did not have one in the file as he didn't have time to make copies. Most of the letters received by him from Chariots, were by fax. He testified that he believed that he was in compliance with the Terms and Conditions and was surprised when he heard about the problem in January 2002.

During that time a representative from O.M.V.I.C. passed by his office to check he was still at the same location. In January 2002 he received telephone calls from other dealers asking if he

had paid for vehicles and it was not until he was at Halton Honda that he was told that his license was revoked and he advised them that as far as he knew it was in good standing. Finally in mid January he got the letter from O.M.V.I.C. advising him of the revocation. This document he received was the Final Notice (exhibit 5, Tab 6) and when he contacted Mary Jane South at O.M.V.I.C. to find out why he was revoked he was simply advised to call his lawyer. On page 2 of the Final Notice he was told that he had to liquidate his inventory through a wholesale dealers to dealer auction.

He had a letter sent by his lawyer to Mr. Jinnah at Chariots seeking compensation but as yet he has received no reply. The police had spoken to him concerning the charges against Mr. Jinnah and Chariots and Mr. Mitropoulos explained that no charges were brought against him or his company and the officer told him that he was another victim.

Recently he received the Dealers Standard (Exhibit 7) from O.M.V.I.C. setting out the best practices for purchasers of vehicles dealing with lessees. However, prior to that, there was no written directive on how to conduct the transactions and he thought it was sufficient as long as there were bills of sale and letters of release as were commonly used. Even in the Dealers Standard publication itself it mentioned that many dealers had been stung with forgeries so he knew he was not alone.

In cross examination he repeated that he had taken responsibility for the odometer problem in the prior hearing as the odometer reading on some of the paperwork had been changed but he maintained that it was not by him. When Ms. Dempsey had requested the documentation he gave her everything he had and reviewed the terms and conditions with her. At the time that they were signed on February 1, 2000 he had reviewed them with his lawyer.

At the time of the inspection no steps were taken regarding non-compliance except that he was told that he should have had the sign up but he had not done so as he didn't think it was needed because he was not dealing with the public. When he was asked about the transactions for a person named Bill and a person named JoAnne on March 16, 2000, he said that these were simply buyouts of existing leases and were therefore not the sale of vehicles to the public. He agreed that paragraph 2 of the terms and conditions required a sign of a certain size and with specific contents to be in position at all times but he stated he did not post it as he was not selling retail. He stated that he did have a retail and wholesale registration but that no one had walked in to inquire about the vehicles. He stated that he had applied for a wholesale registration only but that he had been given the retail registration as well but has never applied to be changed to wholesale. His evidence was that he had been operating at the same location since February 2000.

Mr. Mitropoulos explained that he had met Mr. Jinnah when Mr. Jinnah was employed at an Accura dealership as a new car manager so he had no direct business dealing with him. In March or April 1999 he met Mr. Jinnah when the rental business was a few doors from Tri-Star and he discussed the possibility of purchasing vehicles as Chariots was operated as a rental business and had cars to sell after the period of rental use. When he was asked what steps he took to ensure that Chariots was a reputable business he repeated that they had over 230

vehicles in the fleet, had four locations, and were carrying on business with viable dealers. He did not do credit checks or searches with the Ministry. The witness explained that he did not do lien searches although he knew of the liens, as he was selling to other dealers who did do lien searches so there was no need to do them twice. He felt it was sufficient to simply get the letters of release. His policy was that when buying from dealers he did not need to do lien searches, and when he was selling the vehicles to other dealers, they would advise him of the liens. He stated that when he sold vehicles he told the purchasing dealer that the vehicle might have a lien as it was a leased vehicle. The witness also agreed that he was signing agreements of purchase and sale to sell the vehicles free and clear prior to getting the letters of release. Most of the letters of release were sent to him by fax, and he believed had been originally sent to Mr. Jinnah who then forwarded a copy to him. He agreed upon examining the letters of release in the exhibits that the only fax transmission lines were from Chariots and there was no indication that they had originated with the lessors..

Mr. Mitropoulos agreed that in some instances he had given money prior to obtaining the letter of release for the liens. At this point the witness said that he;

" did not always call the lessor to confirm the lien release"

He continued by explaining that he did not conduct the lien search to ensure the liens were removed and didn't take steps beyond receiving the letter of release to verify that the liens were removed. When he was in the leasing business he was involved in lease to own transactions, and stated that he would only give a letter when the lien was paid. He usually gave a letter stating that the lien was paid rather than registering anything to remove it. In his experience he did not give a letter of release to anyone other than a lessee when he was acting as the lessor.

On the issue of ownership of the vehicles he clearly stated that for the vehicles purchased from Chariots he knew that they were not the registered owners of the vehicles. He explained that he knew that the terms and conditions required that he only purchase vehicles from the registered owner and that he was obliged to ensure that the seller was the registered owner but he explained that if they had the lease they had the right to own the vehicle when it was paid for and that was good enough for him. He understood that only when the person was the owner, the registration would be in their name. The witness stated that he knew that the vehicles were not registered in the name of Chariots and he was satisfied that the ownerships were signed by someone at the dealerships and, as far as he knew, it was given to Mr. Jinnah. Again he made no effort to contact the dealer to confirm that it was properly signed over. Mr. Mitropoulos explained that he was not worried about registering the vehicle prior to the lien being formally being removed as in his experience it took approximately 30 days for a company to register the release of a lien.

When Mr. Mitropoulos was asked about purchases from other rental companies such as Roots Car Rental, he explained that it was the same situation and that some cars were registered to Roots Car Rental and some were not. In (Exhibit 10) it was shown that for one of the vehicles, Roots Car Rental was the registered owner prior to the car being sold to Tri-Star.

The witness testified that when Ms. Browning came on September 1, 2000 she had a printout of the vehicle histories which gave the V.I.N. number and asked for those specific documents. He got the bills for the purchases and sales of those 16 to 20 deals for her, and when she came back a week later she brought those documents with her, and checked to make sure that he had put up the required sign. When he was asked about 'x' marks which appeared beside certain transactions in his Garage Register primarily for July and August 2000 he said that he was unsure why they were there. Ms. Browning and Ms. Dempsey asked for deals up to the end of August 2000 and he did not know if they looked at the deals before that as he did not make notes of which papers they took. During the inspection Ms. Browning asked if Chariots was a registered dealer and Ms. Dempsey said no that they were a rental company. He stated that he was told that they would be satisfied if he put the sign on his wall and this was the only violation of the terms and conditions mentioned to him. He believes that the prior owner of the vehicles was not Chariots and Ms. Dempsey said it was not a problem so long as the contract was signed by whoever he purchased the vehicle from. The only other discussion was that the books seemed a lot better now since the last inspection. Ms. Dempsey raised the issue of the Chariots transactions and wanted specific documents based on the printout she had brought with her. There was nothing in writing from them indicating that it was not a problem that the vehicles had not been registered to Chariots. His recollection was that they had primarily dealt with the sign and that it was sufficient if it was put up within the week

Mr. Mitropoulos was asked why he had considered himself a victim in dealings with Chariots and he explained that this is what he was told by the police. He explained that even though he was paid for the vehicles had sold them and had not paid the dealers back, he was a victim as he had suffered a loss of credibility within the industry and said that his name had been in the publication of the Used Car Dealers Association.

Re-examination

In re-examination, he explained that the matter had been taken up with the Used Car Dealers Association and there was ongoing litigation over the losses.

FACTS FOUND PROVEN:

The facts found by the Tribunal are that at the time of these transactions Tri-Star and the individual registrants were subject to the terms and conditions set out in (Exhibit 1).

Chariots was not a registered dealer and was in the business of renting cars to consumers. Chariots acquired vehicles on lease and did not become the registered owner. The vehicles were subject to liens which were registered and the vehicles in the transactions before this Tribunal were sold during the term of the lease; during the extension period of the lease; or after the expiration of the lease. There was a practice in the industry of vehicles subject to lease being sold with the prior written permission of the lessor by the use of a letter of release. The companies involved in the leasing of vehicles in this case had policies of not issuing

letters of release until the liens were paid out. The letters of release from Halton Honda, Leasewell, North York and Kerr were not issued by the registered owner, and were created fraudulently. Tri-Star purchased vehicles on the strength of the false documents and no efforts were made to check their veracity. Tri-Star had a policy of not checking for the registration of liens but would have had knowledge that there were liens on the vehicles as some form of letter of release was requested and obtained from Chariots on most of the vehicles.

No efforts were made to contact the lessor or to have a search conducted on the vehicles to ensure that they were registered in the name of Chariots who was the vendor. It is clear that Mr. Mitropoulos knew that these vehicles were on lease as he knew that there were liens and advised the purchasers that they could be leased vehicles. It is found that Mr. Mitropoulos understood that he was obliged to purchase only from the registered owner, and he knew that the lessee was not the registered owner. However, he was willing to deal with the lessee on the basis that they would have the right to own the car when it was paid for. Unfortunately he did not ensure the payment was directed to the lessor so that the person that he was paying for the vehicle would be the registered owner of the car. Despite this knowledge, he chose to proceed with the transactions and relied upon the letters of release. The lessee may have had the right to pay off the lien and thereby take title to the vehicle, but Mr. Mitropoulos made no provision to ensure that the lien was paid and the lessee became the owner with the result that due to a fraud by Chariots and a failure to follow the Terms and Conditions by Tri-Star, the owners were deprived of their vehicles. Aside from the fraudulent nature of the letters of release and the breaches of the Terms and Conditions, the use of the letters of release in many cases was improper, as there was a pattern of deals being concluded, and money being paid prior to the date of the letters of release in any event. Mr. Mitropoulos registered the deals himself, and would have been aware that the name on the ownership was not Chariots, from whom he was buying the vehicles. There was also the matter of the lack of a sign which was a clear breach of the Terms and Conditions. However, Mr. Mitropoulos decided that he was not dealing with the public so that it was not necessary and did not put up the required sign until it was brought to his attention during an inspection. Unfortunately, when the inspection was done, it focussed on the issue of the odometers and a comparison of the bills of sale with the documents for the acquisition of the vehicles, since in the past Mr. Mitropoulos had problems related to odometer readings

There was no clear industry standard at the time by which it was a well-documented practice to checked on the authenticity of the letters of release. However, in this case, there was a total disregard for the liens as he not only did not verify the letters, but he had repeated instances of proceeding with a deal in the absence of a release of lien letter. In some cases these were obtained later but in other cases they were not obtained at all. Most of the letters which were obtained appeared to be faxed from Chariots and were not even sent from the lessor so no effort was made to obtain a copy directly from the lessor. Even if the industry standard was very low at this time, this particular Registrant was subject to the terms and conditions which imposed specific duties which were clearly set out in the document and which held this Registrant to a particular standard. He was a person with extensive experience in the motor vehicle industry, and chose to get the deals closed rather than comply with the Terms and Conditions. This was not an isolated failure to follow an unclear or confusing requirement, and

even if he had not been subject to terms and conditions, his willingness to close a deal without a letter of release might give reasonable grounds to have serious doubts about his honesty and integrity.

This is not a case of mere carelessness or an isolated incident, but shows a pattern of behaviour which lacked the level of honesty and integrity necessary in a regulated industry which deals with the sale to the public of goods of high value.

It is found that Mrs. Mitropoulos took no part in the selling of the vehicles or the purchases. Her role was limited to running errands such as picking up ownerships and minor tasks. Aside from this there is no mention of her during the evidence as to the events in this case.

APPLICATION OF LAW TO FACTS:

The Act provides that the Registrar may revoke the registration of the Applicant where the Applicant's past conduct affords reasonable grounds for belief that the Applicant will not carry on business in accordance with the law, and with integrity and honesty. The Tribunal finds the following fact to be relevant to the credibility of the Registrant.

In the examination in chief, Mr. Mitropoulos made it clear that he did not phone to confirm the letters of release but in cross examination he tried to imply that he did call some of the time by saying that he; "did not always call the lessor to confirm the lien releases.

On the issue of whether the Applicant will carry on business in accordance with the law, the Tribunal finds the following facts to be relevant past conduct.

The Registrant was aware of the requirements set out in the Terms and Conditions in the Consent Order, and was a person of substantial experience within the industry. In this case, it is clear that he specifically knew that the motor vehicles were leased and that Chariots was not the registered owner. He therefore knowingly, and willingly, proceeded with the transactions with knowledge that he was failing to meet a term to which he was subject. Under paragraph 12 of the Consent Order, he was obliged to ensure that vehicles he purchased were registered to the seller. In this case, he didn't simply fail to make the necessary inquiries, it is clear that he had actual knowledge that the vehicles were not registered to the seller as required, and chose to proceed with the transaction in any event, so it is not a case of negligence or carelessness. Similarly, he decided that it was not necessary for him to put up the sign even though it was required in paragraph 1 of the Consent Order. He chose not to comply because he did not think he should have to do so as he said he was not selling retail, although he was licenced to do so, and took no steps to have that changed. Fortunately, there is no proof that anyone suffered any losses due to this action. However, it does again show a course of conduct which is not consistent with meeting the obligation to carry on business according to the law

Mrs. Mitropoulos appears to have played a very minor role in the day-to-day business of the dealership. However, there was evidence that one of her tasks involved picking up ownerships

for transactions. If this is the case, she would have been in a position to take note of the name of the owner of the vehicle and would have known that Chariots was not the owner and would know that the dealership was buying cars from someone other than the registered owner. There is no evidence as to which transactions she was involved with by picking up the ownerships. She also failed to take steps to put up the sign required by the terms and conditions. Even though she was apparently not out making the deals, it is clear that she took no steps to ensure compliance.

The legal test to be used by the Tribunal is whether the Registrar was in error in deciding that the past conduct of the Applicant provided reasonable grounds to believe that the Applicant would not carry on business with integrity honesty and in accordance with the law. On the basis of the facts as found, and the application of the law to those facts, the Tribunal finds that the decision by the Registrar was not in error.

DECISION:

Therefore, by virtue of the authority vested in it under s. 7(4) of the *Motor Vehicle Dealers Act* the Licence Appeal Tribunal directs the Registrar to carry out his proposal to revoke the registration of the Applicants.

LICENCE APPEAL TRIBUNAL

David J. Hunt,
Vice Chair, Presiding.

Released: June 12, 2002

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

LUONG

VIHN H. LUONG

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
MOTOR VEHICLE DEALERS ACT

TO REFUSE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

There was no appearance for VIHN H. LUONG
A. MICHAEL ROTHE, Counsel, representing the Registrar under the
Motor Vehicle Dealers Act

DATE OF
HEARING:

June 17, 2002

TORONTO

REASONS FOR DECISION AND ORDER

BACKGROUND:

This hearing arises out of a written Notice of Proposal dated January 29, 2002 issued by the Registrar under the *Motor Vehicle Dealers Act* (the "Act") to refuse the registration of Vihn H. Luong (the "Applicant") as a motor vehicle salesperson under the provisions of the Act.

The Applicant was not present at the hearing nor was he represented at the hearing. The matter was called at 9:30 a.m. on Monday, June 17, 2002 and when the Applicant was not present or represented the matter stood down for 30 minutes in terms of the practice of the Tribunal. When the matter was again called at 10:15 a.m. the Applicant was still not present nor was he represented. The Tribunal then heard preliminary evidence as to the service of the Notice of Hearing upon the Applicant and after satisfying itself that service had been effected on the Applicant, the hearing proceeded.

The Registrar bases his Proposal to Refuse the Applicant's registration as a motor vehicle salesperson on Section 6.(1) of the Act, which reads as follows:

6.(1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 5.

The Registrar further bases his Proposal to Refuse registration in terms of section 5.(1)(b) of the Act, which reads as follows:

5.(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

...

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or

...

(d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

In support of the Notice of Proposal to refuse registration to the Applicant the Registrar furnished particulars therein, which read as follows:

PARTICULARS

The reasons for this proposal are:

1. The Applicant applied for registration as a motor vehicle salesperson on or about January 4, 2002. He proposes to work for 970910 Ontario Inc. o/a Prestige Motors.
2. On the application to become a registered salesperson question 9 asks:
"Have you ever been found guilty or convicted of an offence under any law or are any charges pending? (This includes those instances where a conditional or absolute discharge has been ordered)."

The Applicant answered, "Yes", indicating:

"Possession — pending controlled substance
Conspiracy to Import — pending controll (sic) substance
- cases are pending in court, been remanded 5 times
already, co-accused has been fully drop (all charges), no
preliminary date has been assigned hopefully within the
next year."

3. A criminal record search found that the Applicant has the following charges pending:

September 17, 2001: Conspiracy to Import Ecstasy 465(1)(C) - **6 (1) CDSA**
Conspiracy for the Purpose to Traffic 465(1)(C) - **5(2) CDSA**
Possession for the Purpose to Traffic 5(2) CDSA
Possession of Marihuana 4(1) CDSA

4. The Applicant has failed to comply with the *Motor Vehicle Dealers Act* and in particular with section 5.

(Exhibit 3)

THE EVIDENCE:

The evidence introduced by the Registrar consisted of the testimony of Alan Joseph Prytula. In addition the Registrar introduced documentary evidence.

Testimony of Alan Joseph Prytula

Alan Joseph Prytula ("Prytula") testified that he is a member of the Drug Section of the Royal Canadian Mounted Police ("RCMP") stationed at Niagara Falls, Ontario.

Prytula testified that criminal charges were laid against the Applicant and two other persons, namely Jodie Tse and Thieu Trinh. The charges were that they:

between the 1st day of August, 2001, and the 13th day of September, 2001 inclusive, at the City of Amsterdam in the Netherlands, in the City of Mississauga, the City of Niagara Falls and elsewhere in the Province of Ontario, did conspire together the one with the other or the others of them and with a person or persons unknown, to commit an indictable offence, namely to import into Canada a Schedule III Controlled Substance to wit 3,4-methylenedioxyamphetamine, contrary to Section 6(1) of the Controlled Drugs and Substances Act, thereby committing an indictable offence contrary to Section 465(1)(c) of the Criminal Code of Canada;

AND FURTHER THAT Vinh Hung LUONG, Jodie TSE and Thieu TRINH, between the 1st day of August 2001 and the 13th day of September 2001 inclusive, at the City of Amsterdam in the Netherlands, in the City of Mississauga, the City of Niagara Falls, and elsewhere in the Province of Ontario, did conspire together the one with the other or the others of them and with a person or persons unknown to commit an indictable offence, namely to have in their possession a Schedule III Controlled Substance to wit 3,4-methylenedioxyamphetamine, for the purpose of trafficking, contrary to Section 5(2) of the Controlled Drugs and Substances Act, thereby committing an indictable offence contrary to Section 465(1)(c) of the Criminal Code of Canada;

AND FURTHER THAT Vinh Hung LUONG, Jodie TSE and Thieu TRINH on or about the 13th day of September 2001 at the City of Niagara Falls in the Central South Region, unlawfully did have in their possession a Schedule III Controlled Substance, to wit: 3,4-methylenedioxyamphetamine, for the purpose of trafficking contrary to Section 5(2) of the Controlled Drugs and Substances Act;

AND FURTHER THAT Vinh Hung LUONG, Jodie TSE and Thieu TRINH on or about the 13th day of September 2001 at the City of Niagara Falls in the Central South Region, unlawfully did have in their possession a Schedule II Controlled Substance, to wit: Cannabis (marihuana) contrary to Section 4(1) of the Controlled Drugs and Substances Act;

The current status regarding the criminal charges is that all such charges have been withdrawn against Tse and Trinh and that the Applicant has been committed for trial on the first three of the four charges referred to above.

Prytula went on to state that he has knowledge of the facts to which he testified before the Tribunal and that on August 21, 2001 Canada Customs intercepted a package mailed from Amsterdam and addressed to 6516 Monroe Street, Niagara Falls, Ontario. The package was

handed over to the Drug Section of the R.C.M.P. who attended at the above address and noted 3 motor vehicles parked outside the residence, one of which, it was determined through a C.P.I.C. search, was registered to the Applicant, whose address was given as 6516 Monroe Street, Niagara Falls. The package was submitted by the R.C.M.P. for analysis to the Department of Health & Welfare. The result of the analysis was that the package contained some 7,000 tablets of 3,4 methylenedioxyamphetamine, commonly referred to as Ecstasy.

Following receipt of the analysis of the package, a general search warrant was obtained to search the residence at 6516 Monroe Street, Niagara Falls. Prior to the execution of the general search warrant the package containing the 7,000 tablets of Ecstasy was on September 13, 2001, delivered by a police constable, posing as a private courier, to 6516 Monroe Street. Upon delivery of the package the Applicant opened the front door to the residence. The Applicant advised the courier that he resided at the residence but that the addressee named on the package was not then at the residence but would be returning shortly. The Applicant accepted and signed for the package. The name of the address on the package was not that of the Applicant.

At approximately 4 p.m. on September 13, 2001 the general search warrant was executed at 6516 Monroe Street, Niagara Falls. The Applicant was present at the time of the search of the premises at 6516 Monroe Street. The package delivered by the courier earlier that day was found unopened in a bedroom in the residence. The Applicant identified the bedroom as his bedroom. Also found in the bedroom occupied by the Applicant were some 29 pills. These 29 pills were found in an open clay box on a table in the bedroom. The 29 pills were seized and sent for analysis, which analysis confirmed the pills to be Ecstasy. The street value of the 7000 Ecstasy tablets was estimated at between \$175,000 and \$350,000.

On a search of the back yard of the residence 5 marihuana plants were observed and were seized.

The Applicant was arrested and charged with the four counts referred to above.

FACTS FOUND PROVEN:

The following facts were found by the Tribunal to have been proven:

1. By written application dated December 22, 2001 the Applicant applied for registration under the *Motor Vehicle Dealers Act* as a motor vehicle salesperson.
2. In the written application dated December 22, 2001 the Applicant disclosed that certain charges were pending against him in respect of possession of a "controlled substance", and conspiracy to import a controlled substance.
3. On or about August 31, 2001 Canada Post intercepted a package mailed from Amsterdam in the Netherlands to 6516 Monroe Street, Niagara Falls, Ontario.

4. The contents of aforementioned package were inspected and analysed by Health and Welfare Canada who determined that the package contained some 7,000 tablets of 3,4 methylenedioxyamphetamine commonly known as Ecstasy.
5. On September 13, 2001 the aforesaid package was delivered to 6516 Monroe Street, Niagara Falls where such package was handed to the Applicant.
6. On September 13, 2001, subsequent to the delivery of the package to the Applicant a general search warrant was executed by the R.C.M.P. at the premises at 6516 Monroe Street, Niagara Falls, Ontario. Those premises were searched and the unopened package containing some 7000 tablets of 3,4 methylenedioxyamphetamine was found in the bedroom of the residence at 6516 Monroe Street, Niagara Falls, Ontario. The aforesaid bedroom was the bedroom occupied by the Applicant.
7. At the time of the search of the residence at 6516 Monroe Street, Niagara Falls, Ontario some 29 tablets of 3,4 methylenedioxyamphetamine were found in an open clay box on a table in the bedroom occupied by the Applicant.
8. The 7000 tablets of 3,4 methylenedioxyamphetamine as well as the further 29 tablets of 3,4 methylenedioxyamphetamine found in the bedroom of the Applicant were drugs and/or narcotics listed in Schedule III of the *Controlled Drugs and Substances Act* 1996, Chapter 19.
9. The Applicant was present during the search of the above premises by the R.C.M.P.

THE LAW:

Section 5.(1)(b) and (d) of the *Motor Vehicle Dealers Act* states as follows:

5.(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

...

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or

...

(d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

Section 6.(1) of the *Motor Vehicle Dealers Act* states as follows:

6. (1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section

Section 7.(1) of the *Motor Vehicle Dealers Act* states as follows:

7.(1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the Registrar shall serve notice of the proposal, together with written reasons therefor, on the applicant or registrant.

Section 7.(4) of the *Motor Vehicle Dealers Act* states as follows:

7.(4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

DECISION AND REASONS:

The onus of proof rests upon the Registrar to satisfy the Tribunal that he has reasonable grounds to believe that registration of the Applicant ought to be refused based upon the past conduct of the Applicant and which past conduct affords the Registrar reasonable grounds for belief that the Applicant will not carry on business in compliance with Section 5 of the Act.

The Divisional Court decision released April 7, 1983 of *Brenner*, reported in 19 CRAT 58, held that the Tribunal should only refuse to direct the Registrar to carry out his proposal if it thinks the Registrar was in error in concluding that the past conduct of an Applicant afforded reasonable grounds for belief that such Applicant would not carry on business in accordance with law and with integrity and honesty. Southey J. for the Court reviewed the authority of the Tribunal under section 7(4) of the *Motor Vehicle Dealers Act* respecting the proposal of the Registrar under *Brenner* at Section 5(1)(b) of that Act. He states at page 60:

The effect of Section 7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of *Brenner* did not afford reasonable grounds for the belief that *Brenner* would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not *Brenner* had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself.

In the *Brenner* case, due to the particular facts in that case, Southey J. sent it back for a rehearing. However, he adds in the third last paragraph:

The proper question at the rehearing remains, however, whether the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal.

To overrule the decision of the Registrar, the Tribunal must conclude that he was wrong in his decision and that the conduct of an Applicant does not afford reasonable grounds for the Registrar's belief that the Applicant will in the future carry on activities in contravention of the Act and its Regulations. This was confirmed by Divisional Court in the matter of *Albert Fascenda (1994) 26 CRAT Part II 1050* where that court on appeal quashed the Tribunal's decision to direct a Registrar not to carry out his proposal and in sending the matter back for re-hearing stated at page 1051.

It follows that the Tribunal should have refused to direct the Registrar to carry out his proposal only if it thought the Registrar was in error in his belief.

The Tribunal's analysis of the evidence before the Tribunal and the Tribunal's conclusions pursuant to the analysis follow.

The uncontroverted evidence of R.C.M.P. officer Prytula is that a package containing Schedule III drugs under the *Controlled Drugs and Substances Act* were addressed to and delivered to 6516 Monroe Street, Niagara Falls, Ontario where such package was accepted by the Applicant who was an occupant of the home. It is noted by the Tribunal that the package was not addressed to the Applicant himself although he accepted same, stating that the addressee of the package was not in at the time the package was delivered but would be returning shortly. The package was later that same day found unopened in the Applicant's bedroom when a search warrant was executed by the R.C.M.P.

Insofar as the package is concerned it is noted that such package was unopened when found in the Applicant's bedroom. It is also noted that it was not addressed to the Applicant and that the Applicant, in accepting delivery of the package advised the courier that he would accept delivery for the addressee who would be returning shortly. It would in the Tribunal's opinion, be manifestly unfair to the Applicant, to conclude that he was the owner of the package and its contents or that he knew or ought to have known of the contents of the package. If and when the Applicant faces criminal charges for possession and trafficking in drugs and narcotics he would do so under Section 4(1) of the *Controlled Drugs and Substances Act* in terms of which simple possession is an offence. However at this stage there is no conviction of which the Tribunal could take cognizance.

Accordingly, the Tribunal does not accept that the unopened package addressed to a third party that was found in the Applicant's bedroom is sufficient evidence to satisfy the Tribunal that reasonable grounds exist to deny registration to the Applicant. The Tribunal accordingly

believes the Registrar was in error in concluding that the Applicant should be denied registration solely on the facts that the package contained Ecstasy.

However, the fact that 29 tablets of Ecstasy were found in an open clay box in the bedroom of the residence occupied by the Applicant does give the Tribunal serious concerns. The Tribunal finds in this regard that the overwhelming probability is that the Applicant knew that the pills were Ecstasy and that he was the actual possessor of such Ecstasy, a clearly dangerous drug. The Applicant chose not to attend the hearing and the allegations of the Registrar stand uncontested.

The Tribunal accordingly finds that the Registrar is not in error in concluding that the conduct of the Applicant in being found by the police to be in possession of 29 tablets of Ecstasy afford reasonable grounds for the belief that the Applicant will not carry on business in accordance with law and with integrity and honesty. Having regard to the finding of the Tribunal insofar as the 29 tablets of Ecstasy are concerned, the Tribunal believes that such past conduct is likely to result in acts or omissions that would or could reasonably give rise to the belief that the Applicant will in the future not carry on business in accordance with law and with integrity and honesty.

The Tribunal therefore sees no grounds to interfere with the Registrar's proposal.

DECISION:

Accordingly, the Tribunal pursuant to the authority vested in it by section 7(4) of the *Motor Vehicle Dealers Act*, the Tribunal directs the Registrar to carry out his Proposal dated January 29, 2002 to refuse the registration of Vinh H. Luong as a motor vehicle salesperson under the Act.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: June 25, 2002

DALDIN

R.C. GERRY DALDIN

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF THE
MOTOR VEHICLE DEALERS ACT

TO REFUSE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

PATRICE CÔTE, Counsel, representing the Applicant
YOVANKA McBEAN, Agent, representing the Registrar, *Motor
Vehicle Dealers Act*

DATE OF

HEARING:

June 24, 2002

Toronto

ORDER

WHEREAS the Registrar under the *Motor Vehicle Dealers Act* (the "Respondent") issued a Proposal dated February 8, 2002 to refuse the registration of R.C. Gerry Daldin (the "Applicant") under the *Motor Vehicle Dealers Act*;

AND WHEREAS the Applicant gave notice that he required a hearing before the Licence Appeal Tribunal (the "Tribunal") in terms of section 7.(2) of the Act;

AND WHEREAS the Tribunal scheduled a hearing of this matter to commence at the Tribunal's Chambers in Toronto at 9:30 a.m. on Monday, June 24, 2002;

AND WHEREAS at the commencement of the hearing of this matter on June 24, 2002, the Applicant's Counsel moved that the hearing be adjourned to 9:30 a.m. on Wednesday, July 17, 2002;

AND WHEREAS the Agent representing the Respondent consented to the aforesaid adjournment subject to the payment by the Applicant of costs in an amount of \$100.00;

NOW THEREFORE, this Tribunal orders that:

3. This matter is adjourned, peremptorily against the Applicant, to commence on Wednesday, July 17, 2002 at 9:30 a.m. at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto.
4. By consent of the Applicant and the Respondent, the Applicant shall by no later than 10 days after the date of this Order, pay the amount of \$100.00 to the Registrar in respect of costs.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: June 25, 2002

AKINNIYI

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
AYO-DEJI AKINNIYI

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: January 29, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

AYO-DEJI AKINNIYI

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Ayo-Deji Akinniyi, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: June 25, 2002

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
North York, ON, M2P 2E9

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON, M4V 1K6

FROM: Ayo-Deji Adeoti Akinniyi
5-1334 Queen Street East
Toronto, ON M4L 1C5

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereinafter the "Act") the parties to the proceeding, Ayo-Deji Adeoti Akinniyi (hereinafter referred to as "the Applicant"), and the Registrar, *Motor Vehicle Dealers Act* (hereinafter the "Registrar") waive the requirement of a hearing and hereby consent to an Order of the Licence Appeal Tribunal (hereinafter the "Consent Order") based on the following terms and conditions to their registrations as a motor vehicle salesperson:

1. The Applicant agrees that if he is criminally charged or convicted in the future, he will immediately notify his employer in writing of the charges or convictions against him and provide a copy of the notification signed by his employer to the Registrar, giving the particulars of the charges or convictions.
2. The Applicant agrees that if he is convicted under the Criminal Code or convicted of any industry specific offences under any Statute in the future, he will be automatically revoked.
3. The Applicant agrees to provide full and accurate disclosure on any applications, documents, statements or other form of communication or information provided to the Registrar or his authorized representatives regardless of previous disclosure.
4. The Applicant acknowledges that the Registrar is relying upon the accuracy of the disclosure provided by the Applicant in entering into these terms and conditions.
5. The Applicant agrees that his explanation of the circumstances of his criminal record, are substantially correct.
6. The Applicant agrees not to be a partner, shareholder, officer, director or sales manager of a dealership.
7. The Applicant agrees not to be the final signatory on any sales contracts on behalf of the dealer.
8. The Applicant agrees to find a new sponsoring dealer who is acceptable to the Registrar, *Motor Vehicle Dealers Act*, within sixty (60) days of the date of this order.
9. The Applicant agrees not to transfer his registration as a motor vehicle Salesperson to another dealer without having first obtained the prior written consent of the Registrar.
10. The Applicant agrees to immediately enrol in the Ontario Motor Vehicle Industry Council Certification Course and to be responsible for all fees in relation to enrolment. The Applicant further acknowledges that enrolment in the course entitles him to a sixty (60) day conditional registration period that allows for his successful completion of the course (including passing the exam).

11. The Applicant agrees not to be involved in the process of buying or selling motor vehicles without the benefit of registration.
12. The Applicant will comply with the Ontario Motor Vehicle Industry Council's Code of Ethics and Standards of Business Practice as may be amended from time to time.
13. The Applicant acknowledges and understands that his registration will not be used to buy or sell motor vehicles where the Applicant knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
14. The Applicant agrees that his registration will not prevent the Registrar from taking administrative action, including a proposal to revoke his registration, arising from matters that may have occurred or may occur in the future related to his financial circumstances and honesty and integrity.
15. The Applicant acknowledges that his registration as a motor vehicle Salesperson will not prevent the Registrar from taking legal action, including a Provincial Offences prosecution arising from matters that may have occurred or may occur in the future related to his financial circumstances and honesty and integrity.
16. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
17. The Applicant will provide a copy of this order to any future employer.
18. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
19. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
20. The Applicant acknowledges that he has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____, this _____ day of _____ 2002

(Signature) Ayo-Deji Adeoti Akinniyi

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Date:

Carl Compton
Registrar
Motor Vehicle Dealers Act

GRAND METROPOLITAN HOMES INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*

TO REVOKE A REGISTRATION

TRIBUNAL: MARJORIE L. HILEY, Vice-Chair, Presiding
SIMON DANN, Member (as Observer)
MALCOLM FEALING, Member (as Observer)

APPEARANCES: STEVEN STARKMAN, Agent, representing Grand Metropolitan
Homes Inc.
CAROL STREET, Counsel, representing the Registrar, Ontario New
Home Warranty Program

DATE OF
HEARING: June 21, 2002 Toronto

ORDER

Following the attendances on June 21, 2002 at a prehearing before the Tribunal of Steven Starkman, Counsel representing Grand Metropolitan Homes Inc. (the "Applicant") and Carol Street, Counsel, representing the Ontario New Home Warranty Program (the "Program");

The Tribunal makes the following Order:

- 1) The Parties to the hearing are the Applicant and the Program.
- 2) There is no dispute between the Parties as to the amounts claimed under Schedule A to the Proposal.
- 3) It is agreed that the outstanding amounts under Schedule A of the Proposals, that being invoice #4368 in the amount of eleven hundred sixty-eight dollars and ninety-eight cents (\$1,168.98) and invoice #4446 in the amount of four thousand six hundred and eight dollars and twenty-two cents (\$4,608.22) will be paid by the Applicant to the Program by way of certified cheque by Friday, June 28, 2002.

- 4) It is hoped by the Parties that the payment of the outstanding invoices under Schedule A of the Proposal will result in the settlement of the matters dealing with Grand Metropolitan Homes Inc. There will be further discussions by the Parties to facilitate such a settlement
- 5) There will be further discussions by the Parties in the hopes of facilitating a settlement as regards the issues concerning 22 Balmoral Inc. and the outstanding invoice as set out in Schedule B of the Proposal.
- 6) The Parties agree to comply with the Disclosure requirements as set out in Section 6 of the Rules of Practice of the Tribunal.
- 7) The Parties are in agreement that only two days need be set aside for this hearing, those being July 22 and 23, 2002.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley, Vice-Chair
Presiding

Released: June 26, 2002

MORRIS

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
RICHARD AND LINDA MORRIS

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

RICHARD AND LINDA MORRIS

Applicant

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

BUILD NORTH CONSTRUCTION INC.

Added Party

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter on June 25, 26, 27 and 28 2002;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against all parties* to commence at the Holiday Inn Sudbury, Suite 134, 50 Brady Street, Sudbury, Ontario, at 9:30 a.m., on Monday, November 4, 2002 and to continue until Friday, November 8, 2002, if necessary, and to further continue Wednesday, November 13, 2002 through Friday, November 15, 2002, as required.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: June 21, 2002

BRITAIN'S GATE RESIDENCES LIMITED

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*

TO REVOKE A REGISTRATION

TRIBUNAL: MARJORIE L. HILEY, Vice-Chair, Presiding
MALCOLM FEALING, Member (as Observer)

APPEARANCES: VILKO ZBOGAR, Counsel, representing Britain's Gate Residences
Limited
NETANUS RUTHERFORD, Counsel, representing the Registrar,
Ontario New Home Warranty Program

DATE OF
HEARING: June 21, 2002 Toronto

ORDER

Following the attendances on June 21, 2002 at a prehearing before the Tribunal of Vilko Zbogor, Counsel representing Britain's Gate Residences Limited (the "Applicant") Babak Amid, agent of the Applicant, Netanus Rutherford, Counsel, representing the Ontario New Home Warranty Program (the "Program"), Adel Darr, Patty Lutz and Dorothy La Croix, agents of the Program;

The Tribunal makes the following Order:

- 1) The Parties to the hearing are the Applicant and the Program.
- 2) The Parties are quite close to settlement and expect the matter to be concluded by approximately mid July, 2002.
- 3) The matter was originally scheduled for five hearing days: July 29, 30 and 31; and August 1 and 2, 2002. The parties had agreed that the hearing would not commence at that time due to a witness of the Program being unavailable.
- 4) Though the parties were agreeable to a hearing during the last week of August 2002 those dates had not been scheduled by the Tribunal at the time of the prehearing.

- 5) If settlement is not achieved then the parties must advise the Tribunal by July 15, 2002 whether or not they wish to utilize the morning of July 29, 2002 for a prehearing. If no prehearing is desired by the parties then they must advise the Tribunal by July 15, 2002 of dates that the Parties will be available in the Fall of 2002 so the Tribunal can reschedule the hearing.
- 6) The hearing dates of July 29, 30 and 31; and August 1 and 2 are vacated. A prehearing can be scheduled for the morning of July 29, 2002 if so desired by the parties.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley, Vice-Chair
Presiding

Released: June 26, 2002

**R&S TRANSPORTATION INC.
590029 B.C. LTD.
HARJ-MIN EXPRESS CARRIERS INC**

PREHEARING

IN THE MATTER OF an application by R&S Transportation Inc., 590029 B.B. Ltd., and Harj-Min Express Carriers Inc., dated March 14th, 2002 for a hearing before the Licence Appeal Tribunal pursuant to section 50(1) of the *Highway Traffic Act*, to consider the appeal of the Cancellation and Seizure Order for the Commercial Vehicle Operator's Registration Certificates by the Registrar of Motor Vehicles dated March 7th, 2002;

AND IN THE MATTER of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8 as amended;

AND IN THE MATTER of the safety record of R&S Transportation Inc., 590029 B.C. Ltd., and Harj-Min Express Carriers Inc.

TRIBUNAL: STUART CORK, Presiding Member

APPEARANCES: PATRICK MOORE, Counsel for the Respondent
CHRISTOPHER CHOP, Counsel for the Applicant
ANTONIO DIMILTA, Assistant Counsel for the Applicant

DATE OF
PRE-HEARING: April 19th, 2002 Toronto

ORDER

A Pre-hearing between the parties was held on April 19th, 2002, 2002 in Toronto at 1 St. Clair Avenue West, 12th Floor as set forth in the Tribunal's Notice of Pre-hearing Conference dated March 25, 2002.

The Tribunal makes the following Orders respecting the hearing:

1. The hearing dates have been set for 9:30 a.m. commencing on **July 15th, 16th, 17th and 18th, 2002**, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

2. It was determined that the filing dates with the Tribunal of submissions and documents to be used in the hearing by both parties would occur **on or before July 4th, 2002.**

Both parties will file five copies with the Tribunal and deliver one copy to all parties. It was confirmed that the Tribunal requires full disclosure 10 days prior to the hearing.

3. The Respondent will present evidence and testimony from one witness, Carrier Safety Rating Administrator Bernadette McKenna. Ms. McKenna will provide evidence of all the Applicant's records and information, including notes taken at a show cause meeting on March 6th, 2002, the Applicant's history and safety records, MTO correspondence, warning letters and interviews.

Further evidence will include all data relating to accidents, convictions and inspections for R&S Transportation Inc. back to 1997, and 590029 B.C. Ltd., and Harj-Min Express Carriers Inc. back to the year 1999. Ms. McKenna's evidence will also include the history of the Applicant companies performance in Ontario before and after a Suspension and Seizure Order served in the end of 2000, the analysis for the current Cancellation and Seizure Order from 2000 until February 2002, and information from a United States data base.

4. The Applicant will present evidence and testimony from three witnesses. Among the witnesses anticipated, will be either Mohinderpal Virk, Director of the Applicant companies, or Art Wong, Manager of the Applicant companies, and George Simpson, Safety Supervisor. The Applicant also expects to present a Safety Consultant as an expert witness.

The witnesses for the Applicant will present evidence of the initiatives that the Applicant companies have taken to improve the safety record of the companies, the history of the fines, and explanations and clarification of the Applicant's record. Included in this evidence will be the role of M. Simpson as Safety Officer, and a summary of the procedures for company safety, company safety training courses, manuals, pre-hiring tests, initiatives and improvements for company safety.

The Safety Consultant will testify to the detailed plans initiated to bring the Applicant companies into a higher standard of safety compliance. The Safety Consultant will also give an analysis of the MTO data, challenge the MTO evidence where appropriate, and possibly present a formal report.

5. Among the issues to be raised by the Respondent will be whether there is sufficient evidence to support the Registrar's March 7th, 2002 Cancellation and Seizure Order
6. Among the issues to be raised by the Applicant will be that the sanction being imposed upon it is overly harsh and inappropriate. The Applicant contends that the sanction

would mean the Applicant companies would be put out of business, and would be final. Other issues to be raised by the Applicant are the circumstances surrounding the accidents and the vehicle drivers, the accuracy of the CVOR, and the application of the Cancellation to all three of the Applicant companies.

7. It was outlined at the Prehearing Conference that:

The Registrar has issued a Cancellation and Seizure Order dated March 7th, 2002, pursuant to section 47 and 47(1) of the *Highway Traffic Act*, for R&S Transportation Inc., 590029 B.C. Ltd., and Harj-Min Express Carriers Inc.

8. The parties present at the prehearing recorded that there was no resolution of the issues between the parties.
9. The Applicant will provide a list or letter detailing its alleged inaccuracies in the CVOR record, 10 days prior to the hearing as part of its disclosure.
10. At the hearing of this matter, the Tribunal will be asked to review in detail the time period from when the Applicant had served its previous sanction in 2000 until the date of the Cancellation and Seizure Order.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

RELEASED: April 26, 2002

MENARD

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
STEPHANE MENARD

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: March 8, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

STEPHANE MENARD

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Stephane Menard, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: June 14, 2002

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
North York, ON, M2P 2E9

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON, M4V 1K6

FROM: Stephane Menard
34 Louis-Reil Street
Gatineau, ON PQ8T 1Y1

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereinafter the "Act") the parties to the proceeding, Stephane Menard (hereinafter referred to as "the Applicant"), and the Registrar, *Motor Vehicle Dealers Act* (hereinafter the "Registrar") waive the requirement of a hearing and hereby consent to an Order of the Licence Appeal Tribunal (hereinafter the "Consent Order") based on the following terms and conditions to their registrations as a motor vehicle salesperson:

1. The Applicant agrees that if he is criminally charged or convicted in the future, he will immediately notify his employer in writing of the charges or convictions against him and provide a copy of the notification signed by his employer to the Registrar, giving the particulars of the charges or convictions.
2. The Applicant agrees that if he is convicted under the Criminal Code or convicted of any industry specific offences under any Statute in the future, he will be automatically revoked.
3. The Applicant agrees to provide full and accurate disclosure on any applications, documents, statements or other form of communication or information provided to the Registrar or his authorized representatives regardless of previous disclosure.
4. The Applicant acknowledges that the Registrar is relying upon the accuracy of the disclosure provided by the Applicant in entering into these terms and conditions.
5. The Applicant agrees that his explanation of the circumstances of his criminal record, are substantially correct.
6. The Applicant agrees not to be a partner, shareholder, officer, director or sales manager of a dealership.
7. The Applicant agrees not to be the final signatory on any sales contracts on behalf of the dealer.
8. Struck and initialled
9. Struck and initialled
10. The Applicant agrees not to be involved in the process of buying or selling motor vehicles without the benefit of registration.
11. The Applicant acknowledges and understands that his registration will not be used to buy or sell motor vehicles where the Applicant knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
12. The Applicant agrees that his registration will not prevent the Registrar from taking administrative action,

including a proposal to revoke his registration, arising from matters that may have occurred or may occur in the future related to his financial circumstances and honesty and integrity.

13. The Applicant acknowledges that his registration as a motor vehicle Salesperson will not prevent the Registrar from taking legal action, including a Provincial Offences prosecution arising from matters that may have occurred or may occur in the future related to his financial circumstances and honesty and integrity.
14. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
15. The Applicant will provide a copy of this order to any future employer.
16. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
17. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
18. The Applicant acknowledges that he has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____, this _____ day of _____ 2002

(Signature) Stephane Menard

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Date:

Carl Compton
Registrar
Motor Vehicle Dealers Act

M.T.C.C. #1101
M.T.C.C. #1120

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF CLAIMS by
METROPOLITAN TORONTO CONDOMINIUM CORPORATION #1101 AND
METROPOLITAN TORONTO CONDOMINIUM CORPORATION #1120

AND IN THE MATTER OF the DECISIONS of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW CLAIMS

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decisions pursuant to section 16(2)

METROPOLITAN TORONTO CONDOMINIUM CORPORATION #1101 AND
METROPOLITAN TORONTO CONDOMINIUM CORPORATION #1120

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

CONCORD SQUARE LIMITED

Added Party

ADJOURNMENT ORDER

PURSUANT to the provisions of the *Ontario New Home Warranties Plan Act* R.S.O. 1990, Chapter O.31, as amended, Metropolitan Toronto Condominium Corporation #1101 and Metropolitan Toronto Condominium Corporation #1120 (the "Applicants") appealed Decisions of the Ontario New Home Warranty Program (the "Program") set out in Decision Letters dated March 25, 2002;

WHEREAS the Applicants filed appeals with the Tribunal, requesting a hearing;

AND WHEREAS, the Tribunal appointed a time and place for a prehearing in the above matters on July 17, 2002;

AND WHEREAS, the Tribunal also appointed a time and place for a hearing in the above matters on August 19, 2002 and to continue until August 23, 2002, if necessary;

AND WHEREAS, the Tribunal was advised that the parties on consent have agreed to adjourn the scheduled prehearing and hearing;

NOW THEREFORE upon consent of the parties, this Tribunal Orders:

6. that the prehearing in these matters is adjourned, *peremptory against all parties*, to commence at the Tribunal's Chamber's, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Friday, July 19, 2002;
7. that the hearing in these matters is adjourned, *peremptory against all parties*, to commence at the Tribunal's above Chambers, at 9:30 a.m. on Monday, October 21, 2002 and to continue until October 25, 2002, if necessary.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: June 19, 2002

DIKS and McALLISTER-DIKS

PREHEARING

DAN DIKS AND MARY McALLISTER-DIKS

APPEAL FROM DECISIONS OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW CLAIMS

TRIBUNAL: MARJORIE HILEY, VICE-CHAIR

APPEARANCES:

DAN DIKS AND MARY McALLISTER-DIKS, Applicants
SARAH KARGES, Counsel for the Ontario New Home Warranty Program
BRIAN CAMPBELL, Counsel for the Added Party 561732 Ontario Ltd. (*by
teleconference*)

DATE OF

PREHEARING: May 31, 2002

Ottawa

ORDER

Pursuant to the provisions of the *Ontario New Home Warranties Plan Act* R.S.O. 1990, Chapter O.31 as amended, Dan Diks and Mary McAllister-Diks ("the Applicants") appealed the decisions of the Ontario New Home Warranty Program (the "Program") set out in the decision letters dated January 17, 2002 and April 3, 2002;

WHEREAS the Applicants filed appeals with the Tribunal requesting a hearing.

AND WHEREAS the Tribunal scheduled the hearing to commence on May 27, 2002 and to continue to May 31, 2002 as necessary.

AND WHEREAS the Tribunal adjourned the scheduled hearing and appointed the date of May 31, 2002 at the Gillespie Reporting Services, 130 Slater Street, Suite 200, Ottawa,

Ontario for the prehearing.

AND WHEREAS in attendance at the prehearing on May 31, 2002 were Dan Diks and Mary McAllister-Diks (Applicants), Sarah Karges, Counsel for the Program, Paul Picard, warranty representative for the Program, Don Cardill, owner of 561732 Ontario Ltd., and by teleconference Brian Campbell, Counsel for the Added Party;

NOW THEREFORE upon consent of the parties this Tribunal orders that:

1. The hearing will commence on September 30, 2002 and continue to October 4, 2002 as required at the Gillespie Reporting Services above address.
2. The parties to the hearing will consist of the Applicants, the Program and the Added Party.
3. The Added Party undertakes to repair the following items that have been warranted by the Program:

(a) Decision Letter dated April 3, 2002:

- Item # 1 – light at garage storage area
- Item # 2 – two receptacles in garage
- Item # 3 – eight receptacles in basement
- Item # 4 – two lights on switches in basement
- Item # 8 – put in the missing high wall returns as required by Program
(approx. 7 in number)
- Item # 9 – changes to the basement stairs as required by Program including threshold strips
- Item #12 – fix doorstep so door handle does not strike counter
- Item #13 – reduce # of elbows in ductwork to approximately 3 if possible to increase flow of warm air to bedroom in front north west of house
- Item #14 – (a) repair voids in mortar, repoint brick, repair weeping holes
(does not cover (b) dealing with width of mortar joints)
- Item #16 – put triangular stones over arched front entry and arched window opening (work to be done instead of money for substitution claim)
- Item #17 – replace broken and cracked bricks – this is dependent on the builder finding suitable replacement bricks.
- Item #27– provide wood steps in accordance with the OBC and secure the steps to the house under the rear doors; make rear doors operable. This is to be done under the direction of the warranty representative.

- Item #28 – replace cracked pipe in basement
- Item #29 – repair power room window
- Item #30 – put drain in garage floor near the door opening in accordance with the direction of the warranty representative
- Item #31 – repair plumbing vent so it is vertical

(b) Decision Letter dated January 17, 2002: (per reinspection report of February 20, 2002 which found it to be warranted)

- Item #11 – put duct in powder room to assist with the lack of heat in the mudroom. If possible the duct will be put in through the toe kick as the powder room has limited space.

4. The repairs as stated in Paragraph #3 will be done in the following manner: On Wednesday, June 5, 2002 at approximately 4 pm the warranty representative, Mr. Picard, and the builder, Mr. Cardill, will meet at the home of the Applicants. They will be allowed access by the Applicants to assess all of the mentioned items.

Then Mr. Cardill will take one week to contact his subtrades as are necessary to schedule these repairs. A schedule will be devised by Mr. Cardill with Mr. Picard with full consultation with the Applicants. It is felt by the warranty representative, Mr. Picard, that approximately four consecutive dates are required to complete the mentioned repairs. The schedule will accommodate the Applicants as much as possible, in particular having as many trades as can be scheduled doing work on the first day, the Monday of this four day time period. If possible Mr. Diks will try to take time off to be at his house during this time period. If that is not possible Mr. Picard has undertaken to try to be at the house as much as possible during the time period. The repairs are to be completed by the end of June, 2002 at the latest. All parties are required to be flexible if due to weather issues there are some time delays in completing some of the outside work.

It is understood by the parties that if there are any differences in the method of repairs for the above mentioned items the final decision will be determined by the warranty representative, Mr. Picard.

5. There are a number of matters warranted by the Program where there is disagreement by the Applicants who wish to have the work performed rather than be compensated in money on the basis of an invalid substitution. These matters were not resolved at the prehearing and therefore will be considered at the hearing of this matter. The items are:

In Decision letter dated April 3, 2002: Items # 5 (attic insulation), #6 (wall insulation), #18 (a) (using plastic flashing), #20 (front steps of house). As well though this is not an invalid substitution matter there is a difference of opinion concerning

Item #23 (attic space access hatches – their location).

In Decision letter dated January 17, 2002: Item # 9 (drywall in garage)

As well though this is not an invalid substitution matter there is a difference of opinion concerning Item 16 dealing with the level of the grade around the front stoop

6. There are a number of items which have been resolved after discussion at the prehearing . In Decision letter dated January 17, 2002 Item # 2(c) deals with a leak in the shower. It is agreed that the builder will have the work to repair this leak done by the manufacturer's representative. This work will consist of replacement of the panel and installation of the correct skirt for the shower. Also in Decision letter dated January 17, 2002 Item # 17 concerning the grading of the driveway it is agreed that the work will be done in accordance with the recommendations of the warranty representative. The Applicants are satisfied with the width of the driveway once this grading has been completed.
7. There was a settlement schedule dated November 4, 2001. It dealt with a number of minor items. The Applicants are prepared to accept this settlement and cash the current cheque from the Program which is in their possession upon agreed that a further ninety dollars (\$90.00) will be forwarded to them by the Program to cover the additional costs of re burying the bell line at the front of their property. Despite work by the builder the bell line is not completed covered at this time. The Applicants will use that money to hire their own contractor to bury this bell line. It is agreed that the acceptance of the current cheque plus the additional ninety dollars will mean that the Applicants will do the necessary repairs on the items so listed in the settlement schedule and they release the Program from any present or future responsibilities for such repair work on these specified items.
8. A number of items were not resolved. These items will be dealt with at the hearing. They are as follows:

In Decision letter dated January 17, 2002: Items # 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 18.

In Decision letter dated April 3, 2002: Items # 5, 6, 7, 14 (b), 15, 18 (a), (b), 19, 20, 21, 23, 24, 25, 26
9. The Added Party has undertaken to provide the Applicants and the Program with the complete set of drawings that are colour coded as to amendments. These drawings will be sent to the other parties as soon as possible. The Tribunal requests that they be sent to the other parties prior to the end of June, 2002. As well the Tribunal requests that a copy of such drawings be sent to the Tribunal prior to the hearing date.
10. There has been considerable disclosure by all parties. The Tribunal has informed all

parties that they must be in compliance with the disclosure provisions of the Rules of Procedure of the Tribunal. In particular expert reports and the Curriculum Vitae of expert witnesses must be provided in accordance with these disclosure provisions. The Tribunal urges all parties to disclose their expert reports as soon as possible and certainly well in advance of the disclosure requirements of the Rules of Procedure.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley,
Vice-Chair

Released: June 4, 2002

1085-ADLS-ASTHMA

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: ROSS C. BENNETT, M.D.,
Presiding Member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF
HEARING: June 3, 2002 Sudbury

DECISION AND ORDER

A hearing was held on June 3, 2002, at Sudbury, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Ross C. Bennett, M.D.
Presiding Member

RELEASED: June 4, 2002

1085-ADLS-ASTHMA

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: ROSS BENNETT, M.D.
Presiding Member

APPEARANCES: KIM BEINTEMA
Agent for the Registrar of Motor Vehicles

Applicant, unrepresented

DATE OF
HEARING: June 3, 2002

DECISION
RELEASED: June 4, 2002 SUDBURY

REASONS FOR DECISION

A hearing was held on June 3, 2002, at Sudbury, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on June 4, 2002, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that the Tribunal by way of an oral hearing decide his appeal. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated April 22, 2002, and was received by the Tribunal on April 24, 2002, together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

The Applicant requested that his driving record not be disclosed.

The Respondent stated that the normal procedure is to introduce the driving record and in this case there is nothing in the Applicant's record of any consequence relating to this charge.

The Tribunal agreed with the Respondent and the record was introduced.

The Applicant wanted to know why it took three requests to the Ministry to try and obtain a copy of a videotape, supposedly taken while he was attempting to provide a breath sample and also a copy of the notes of another Officer, who was present, before he received an answer that neither was available.

The Respondent stated that she had informed the Applicant (Exhibit #1) that such information would have to be obtained from the police or the crown attorney. The investigating officer added that a videotape was not taken and he knew nothing about the other Officer's notes. He said that the constable would be available at the Applicant's criminal trial.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice of Appeal dated April 22, 2002
- b) Exhibit # 1(a) Notice of Appeal dated May 2, 2002

- c) Exhibit # 2 Patient's Drug Profile and two inhalers (Flovent and Ventolin)
- d) Exhibit # 3 Correspondence and Medical Reports
- e) Exhibit # 4 Copies of letters to the Respondent dated May 10, 2002

By the Respondent:

- a) Exhibit # 1 Notice to the Registrar and Arrest Report

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

- 50.1(1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
 - (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
 - (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1), (2) and (3) requires that a medical report must contain:

- 15. (1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

- (a) the name, telephone number and address, with the postal code, of the medical practitioner;
 - (b) the name, date of birth and address of the person who is the subject of the report;
 - (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

The Applicant, a 32-year-old sales manager from Sudbury was arrested in Barrie on April 21, 2002 for failing to provide a breath sample after being stopped by Officer #1, a Barrie Police Officer.

The Applicant and his girlfriend had driven down from Sudbury for a weekend of golf and fun. They checked into the Holiday Inn and then played a game of golf and had dinner at the course. After dinner they went to the Georgian Downs Slots at the racetrack to play the slot machines and then on to the Molson Centre for a concert. Following the concert they returned to downtown Barrie and picked up a couple of hot dogs. As they were driving down the street, the Applicant noticed a police car following him. He said the police car was tailgating him and he mentioned to his girlfriend that they often do this to intimidate drivers.

The Officer pulled the Applicant's car over after he observed the vehicle cross over the yellow centreline on three occasions. When the Officer requested the Applicant's driver's licence, insurance and ownership, he stated he could smell alcohol on the Applicant's breath. When asked about alcohol consumption the Applicant replied none, but his girlfriend had been drinking heavily.

The Applicant was taken back to the police cruiser for a roadside screening device breath sample. The Officer said he explained how the device worked and how the test was to be performed. When the test started the Officer observed the Applicant manipulating the mouthpiece with his tongue. The device was pulled back and the Applicant was observed pushing a piece of chewing gum with his tongue into the mouthpiece. The Applicant was cautioned regarding refusal to provide a breath sample and obstructing police and directed to spit the gum out. A second mouthpiece was affixed to the device and a second test attempted. The officer observed the Applicant pushing his tongue against the mouthpiece and spitting saliva into it. The Officer again cautioned the Applicant and directed him to try again and blow properly. The Applicant informed the Officer he has asthma and is unable to blow.

The Officer stated that at no time had he witnessed any signs of distressed or laboured breathing and there had been no previous mention of asthma. The Applicant was read his rights and arrested.

The Applicant was then taken to the South Simcoe Police detachment and a fourth request was made for a breath sample. The Applicant ignored the Officer's directions to blow continuously and blew in spits resulting in an error code. He was advised he would be charged for failure to provide a sample.

Officer #1 processed an ADLS suspension and Form 9 release and seized the Applicant's licence. He was transported back to the Holiday Inn.

There were several conflicts between the Applicant's evidence and the Officer's evidence. The Applicant said that he was not told how the test worked or how to blow properly. He complained that he was allergic to pollen, dust and smoke and he had been exposed to all three during the day, so his chest was quite tight. He said he needed his inhaler in order to blow and the Officer would not let him retrieve it from his car. The Officer said the only reason he knew about an inhaler was that he saw the yellow one (Flovent) in the glove compartment when he was retrieving the ownership and insurance papers after arresting the Applicant. The girlfriend had identified it as belonging to the Applicant. He put it in the Applicant's coat pocket when he searched him and told him it was there. The Officer said the Applicant had not requested the inhalers at any time.

APPLICATION OF THE LAW TO FACTS:

At issue is how the medical condition of the Applicant relates to Section 50.1(2)(b) of the *Highway Traffic Act* and is the medical reason the cause for him failing or not complying with the breath demand. The onus is on the Applicant to provide the Tribunal with a medical reason as to why he was unable to provide a breath sample.

Reviewing the facts the Tribunal finds that the Applicant did not relate his medical condition to Regulation 574 and Section 50.1(2)(b) of the Act

The Applicant introduced medical reports (Exhibit # 3) to verify his asthmatic condition, but they do not conform to Regulation 574. The Tribunal accepts that the Applicant has asthma, but this condition does not seem to be involved in his failure to provide a breath sample. From the evidence presented the Tribunal finds that the Applicant did not truly attempt to provide a sample.

In the first test, the investigating Office saw the Applicant forcing gum down the mouthpiece with his tongue. Gum was found in the mouthpiece when it was removed.

During the second test the Officer observed the Applicant pushing his tongue down the opening and repeatedly breaking the lip seal, without any real attempt to blow, as required.

When the Officer asked him to try a third time, the Applicant then said he had asthma and could not blow.

The third attempt at the South Simcoe Police Detachment was also a failure because the Applicant did not blow continuously and blew in spit. He had apparently used an inhaler before this last try, but it was the wrong type. Flovent is for prophylactic management of asthma, whereas Ventolin is for relief and treatment of the bronchospasm caused by asthma.

At no time did the Officer observe any signs of respiratory distress or breathing difficulties. He had detected alcohol on the Applicant's breath and he needed a sample to confirm it. The Applicant had stated he had not been drinking any alcohol that day, but for some reason he apparently did not want to provide a breath sample. The Tribunal has to assume that he had been drinking.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated April 21, 2002 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Ross Bennett, M.D.
Presiding Member

RELEASED: June 13, 2002

1086-MED-SEIZ

Appeal under section 50(1) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Minister pursuant to section 32(12)(b)(i) of that Act.

**TO CHANGE THE CLASS OR CLASSES OF
MOTOR VEHICLE IN RESPECT OF WHICH
THE LICENCE WAS ISSUED**

TRIBUNAL: JOHN A. CARMICHAEL, M.D., Presiding Member

APPEARANCES: KIM BEINTEMA, Respondent
Representative for the Minister

Applicant,
unrepresented

DATE OF
HEARING: June 6, 2002 Ottawa

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Minister (the "Respondent") pursuant to section 32(12)(b)(i) of the *Highway Traffic Act* (Ontario).

FACTS:

In 1981 the Applicant had a motor cycle accident, suffering a closed head injury as well as multiple fractures. He was admitted to the Ottawa Civic Hospital for 3 weeks and has no memory of the first two weeks of admission. (exhibit 16)

In 1982 the applicant had a 'nocturnal generalised tonic clonic seizure'. There is no information regarding the management, if any, of this episode. (exhibit 16)

In 1996 or 1997 the applicant was hit on the head with a shovel. Although the wound required stitches, there was no loss of consciousness. (exhibit 16)

On December 11th, 2000, the Applicant suffered two "nocturnal generalised tonic clonic seizures". The Applicant was seen in the emergency rooms of the Renfrew Victoria Hospital and the Ottawa Hospital. A CT scan of the head done at that time was normal. The Applicant was placed on Dilantin, 300 mgms daily. (exhibit 5)

These visits were reported to the M.O.T. (exhibits 2 & 4) as a result of which the Applicant was informed that his licence was suspended under section 47(1) of the Act. (exhibit 3)

On Mar 21, 2001 a neurological examination was reported as negative, a sleep deprived EEG and an MRI showed only minimal and non-specific changes. The Dilantin was stopped. (exhibit 5)

On May 29th, 2001 the Applicant had a sleep study which was reported as negative for seizure activity or anything that might trigger seizure activity, (exhibit 14)

On May 29th, 2001 the Applicant's licence was reinstated class 'GM'. (exhibit 6)

June the 28th, 2001 the neurological consultant reported that on April 2nd, 2001, 2 mos. after stopping the Dilantin (exhibit 13) the Applicant experienced a "nocturnal generalised tonic clonic seizure" and was restarted on Dilantin 300 mgms per day. (exhibit 7)

September 9th, 2001 the Medical Advisory Committee denied the Applicant's request for an 'AM' class licence and recommended that a change from a 'GM' to an 'AM' class licence would require 5 years seizure free of medication and 10 years seizure free on medication as per recommendation 5.4.2. "Determining Medical Fitness To Drive". 6th edition. (exhibit 8)

On February 28th, 2002 Neurological examination was reported negative, the Applicant's status stable, and the Applicant's 'GM' class licence was renewed, (exhibit 9)

On April 9th, 2002 the Applicant's family physician stated that the Applicant had been seizure free for 1 year, was on 600 mgms. Dilantin daily and the neurological exam negative. He requested the Applicant's 'AM' class licence be reinstated. (exhibit 12)

At the hearing the Applicant provided pictures identifying the type of vehicle he is currently driving, the conditions under which he is driving and the type of vehicle he would be driving should his licence be returned to class 'GM'. (exhibit 21)

ISSUES:

Should the decision of the Minister to change the class or class of motor vehicles in respect of which the licence is issued in accordance with the result of the examination be varied, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffer from any mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Regulation 340/94, Section 17 and 18 states:

- 17. (1) Qualifications required by an applicant for a holder of a Class A, B, C, D, E or F driver's licence are that the applicant or holder,
 - (a) has no history or clinical diagnosis of diabetes that requires insulin for control;
 - (b) is not taking any drug that could, in the dosage prescribed or in the dosage recommended by the manufacturer, impair his or her ability to drive a motor vehicle of the applicable class safely;
 - (c) has no established medical history of myocardial infarction, angina pectoris, coronary insufficiency or thrombosis;
 - (d) has no established medical history of heart disease including arrhythmia or of respiratory dysfunction likely to interfere with the safe driving of a motor vehicle of the applicable class;
 - (e) is not suffering from an aortic aneurysm, whether resected or not;
 - (f) is not suffering from hypertension accompanied by postural hypotension resulting in giddiness when under treatment;
 - (g) has no established medical history of loss of consciousness or awareness due to a chronic or recurring condition;
 - (h) has no established medical history of a disorder of the musculoskeletal or nervous system that may interfere with the safe driving of a motor vehicle of the applicable class;

- (i) has no established medical history of an intractable psychotic or psychoneurotic disorder, having particular regard for sustained hostile, aggressive, paranoid, suicidal or other destructive tendencies or depression unless it is medically determined that the condition from which the person has suffered is corrected or controlled;
 - (j) has a visual acuity by Snellen Rating, with or without the aid of corrective lenses, no poorer than 20/30 in the better eye and 20/50 in the weaker eye; and
 - (k) has a horizontal visual field of at least 120 degrees in each eye as measured by confrontation tests.
- (2) An applicant for or a holder of a Class A, B, C, D, E or F driver's licence who fails to meet the qualifications referred to in clauses (1)(a) to (i) may, despite the failure, qualify for the class of licence applied for or held if he or she demonstrated the ability to drive a motor vehicle in the applicable class as safely as any person who meets those qualifications.
- (3) An applicant for or a holder of a Class D driver's licence who fails to meet the qualification referred to in clause (1)(c) may, despite the failure, qualify for that class of licence if it is medically determined that he or she has made a full recovery and there is no established history of a second occurrence of myocardial infraction, thrombosis or recurring angina pectoris.
- (4) An applicant for or a holder of a Class B, C, E or F driver's licence whose hearing in one ear is better than in the other must be able to perceive in the better ear, with or without a hearing aid, a forced whisper at a distance of 1.5 metres or, if an audiometer is used to test the person's hearing, must not have a loss in the better ear of more than 40 decibels at 500, 1,000 and 2,000 hertz.
- 18. An applicant for or a holder of a G, G1, G2, L, M, M1, M2, or R driver's licence must have,
 - (a) in the case of a person whose vision in one eye is better than in the other, visual acuity in the better eye that is no poorer than 20/40 as measured by Snellen Rating; and
 - (b) a horizontal visual field of at least 120 degrees as measured by confrontation tests.

Section 32(12)(b)(i) states:

- 32 No person shall drive a motor vehicle on a highway unless the motor vehicle is within a class of motor vehicles in respect of which the person holds a driver's licence issued to him or her under this Act.
- (12) An applicant for a driver's licence or a person who holds a driver's licence shall submit to the examinations that are authorized by the regulations relating to this section and required by the Minister at the time and places that the Minister may require and the Minister may,
 - (b) in the case of a person who holds a driver's licence,

- (i) impose or remove the conditions or endorsements authorized by the regulations or change the class or classes of motor vehicles in respect of which the licence is issued in accordance with the result of the examinations, or

Section 50 states:

50(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.

(2) The Tribunal may confirm, modify or set aside the decision of the Minister or Registrar.

APPLICATION OF THE LAW TO FACTS:

The Applicant is requesting an upgrading of his driver's licence from class 'GM' to class 'AM' on the basis that he has been seizure free for one year, has never had a seizure while on medication and all three seizures were nocturnal. The Applicant states that he is currently driving large cement carriers on quarry property. These are equally as demanding and driven in more hazardous conditions than his regular trucking routes. The Applicant states that if his 'AM' licence is restored, his trips would be "short haul" with regular hours rather than "long haul" with their accompanying irregular hours and fatigue. The Applicant further states that he no longer uses alcohol or drugs and that his neurological examination and all laboratory investigation are within normal limits.

The Applicant's family physician of 20 years confirms the above and supports this request. He identifies the Applicant as a stable member of the community. On cross examination the physician stated that he was not aware of the CMA recommendations as in "Determining Medical Fitness To Drive" and could not categorically say the Applicant would be free of seizures in the future even while on medication.

The Ministry's representative stated that the Applicant's request should be denied on the basis of Regulation 340/94 (a) Section 14. To satisfy this regulation the Applicant should meet the requirements of section 5.4.2. of the Canadian Medical Publication "Determining Medical Fitness To Drive" 6th edition, i.e. to be 10 years seizure free while on medication.

The Tribunal notes an error in the Sept 10th, 2001 MAC report. The seizures were not "break through". On both occasions the Applicant was not on medication. This however should not alter the MAC's recommendation. The seizures were all nocturnal which might suggest that they were somehow sleep related. The Tribunal notes that the sleep study was essentially normal without any significant degree of apnea. The fact that all other laboratory investigation was non specific and essentially within normal limits means only that the exact aetiology of the seizures can not be determined. The seizures themselves were all witnessed and well documented.

The Tribunal agrees that the requirements for approval of the Applicant's request, 10 years seizure free on medication, (at least in this instance) appear harsh. It is also noted that the CMA publication is in its 6th edition, suggesting that the rules continue to be reviewed. With time and experience the rules may be lightened. This in turn suggests that the Applicant might consider repeating this request at a later date.

The guidelines given in the CMA publication are clear, as are the recommendations of the Ministry's Medical Advisory Committee. The Tribunal does not consider the arguments given by the Applicant compelling enough to overrule these authorities.

DECISION:

Upon the application by the Applicant to appeal the decision dated May 25, 2001 of the Minister ("Respondent") to change the class or classes of motor vehicle in respect of which the licence was issued pursuant to Section 32(12)(b)(i) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Respondent and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

John A. Carmichael, M.D.,
Presiding Member

RELEASED: June 11, 2002

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

DURANTE, T

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
TONY AND ROSE DURANTE

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

TONY AND ROSE DURANTE

Applicant

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

RUTHERFORD GENERATION INVESTMENTS INC.

Added Party

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter on September 3, 4, 5 and 6, 2002;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against all parties* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Monday, September 9, 2002 and to continue until September 12, 2002, if necessary.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: June 5, 2002

DURANTE, M

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
MARIA DURANTE

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

MARIA DURANTE

Applicant

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

RUTHERFORD GENERATION INVESTMENTS INC.

Added Party

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter on August 28, 29 and 30, 2002;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against all parties* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Monday, August 19, 2002 and to continue until August 21, 2002, if necessary.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: June 19, 2002

ALLIANCE TRAVEL AGENCY

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
AIDA REIS AND ANA REIS O/A ALLIANCE TRAVEL AGENCY
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: April 16, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

AIDA REIS AND ANA REIS O/A ALLIANCE TRAVEL AGENCY

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on August 1, 2002;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against all parties* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Tuesday, August 13, 2002.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: June 10, 2002

1105-MED-CARD

**Appeal under Section 50(1) of the Highway Traffic Act,
R.S.O. 1990, Chap. H.8 as amended, from a Decision of the
Registrar of Motor Vehicles pursuant to Section 47(1) of
that Act.**

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ROSS C. BENNETT, M.D., Presiding Member

APPEARANCES: LUBA NEUWIRTH,
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF
HEARING: June 11, 2002 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

EXHIBITS:

- #1 - Notice of Appeal and a Driving Assessment Report, received at Tribunal May 15, 2002
- #2 - Notice of Applicant's Driver's Licence Suspension from the Ministry dated March 12, 2001
- #3 - Applicant's Driving Record received from the Ministry
- #4 - File Summary prepared by the Respondent

FACTS:

The Applicant is a 56 year-old retired male who had his driver's licence suspended on March 12, 2001, after the Registrar of Motor Vehicles received a Medical Condition Report from a Physician #1, dated February 14, 2001. The doctor informed the Ministry that the Applicant had suffered a cardiovascular accident with right-sided weakness, aphasia and confusion.

The Ministry received a second report from a neurologist; Physician #2 dated November 14, 2001. She reported that the Applicant had a history of numerous atherosclerotic risk factors and had suffered a brain stem stroke in November 2000. The Applicant was admitted to the Markham Stouffville Health Centre in February 2001, because of a recurrence of symptoms. Investigation revealed a thrombosed left vertebral artery with infarction in the left medulla. He also was being treated for diabetes and hypertension.

The Applicant received treatment in the Rehab Ward and was discharged with some neurological impairment, mainly impaired temperature sensation in the left side of the face, and on the right side of his body he had a post-stroke pain syndrome. Physician #2 did not feel, however, there was any neurological contraindication to him operating a motor vehicle.

The Medical Review Committee notified the Applicant on December 10, 2001 that a satisfactory driving evaluation from a rehabilitation centre is required before reinstatement of his licence could be reconsidered.

The Applicant took a driving assessment course at Saint Elizabeth Health/DriveABLE in Toronto on February 28, 2002 (Exhibit #1). First there was a DriveABLE Competence Screen test given on a computer. The overall performance on the Driving Competence Screen resulted in a 41% predicted a probability of failing the DriveABLE Road Test, placing the Applicant in the intermediate range of scores.

The Applicant then took the road test, which is given on a standardized road course. The results of the Evaluation were:

- 1) The Applicant's driving errors are out of the normative range of healthy drivers and constitute a fail score.
- 2) Driving cessation is strongly recommended.
- 3) This recommendation is based on criteria that were empirically determined. Those criteria enable normal, healthy drivers of a similar age to achieve a passing score.

On March 12, 2002, the Ministry again informed the Applicant a satisfactory driving evaluation from a rehabilitation centre is required before his licence reinstatement can be considered.

The Applicant felt the two tests should have been given on separate days. He found the computer test very difficult because he is not familiar with computers. He provided explanations for all of the stated driving errors and claimed he did not make any mistakes.

The Applicant complained about the report from DriveABLE because of some typo errors. The date on the report was a couple of days before he even took the test. The Applicant refused to accept the findings of his driving evaluation and the Registrar's refusal to reinstate his licence.

ISSUES

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);

- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

The Registrar acted in accordance with the law by suspending the Applicant's licence when informed of the Applicant's devastating cerebrovascular accident.

The medical information provided indicates the Applicant improved physically with physiotherapy. His speech returned and the strength returned in all of his limbs. Physician #2 stated he has no residual cognitive involvement or visual impairment. In fact she says there is no neurological contraindication to him operating a motor vehicle.

The Tribunal, however does not feel the DriveABLE results can be ignored as they are very clear and concise. The road test is known to reveal driving errors of experienced drivers whose mental competence has been compromised by medical conditions and/or treatments. The results of the evaluation were that his driving errors were out of the normative range of healthy drivers and constitute a fail score and driving cessation is strongly recommended.

These results indicate the Applicant would fall under Regulation 340/94 Section 14(a) and his driver's licence should remain suspended.

DECISION:

Upon the application by the Applicant to appeal the decision dated March 22, 2001 of the Registrar of Motor Vehicles to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act*, and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

Ross C. Bennett M.D., Presiding Member

RELEASED: June 13, 2002

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

1106-ADLS-ASTHMA

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF HEARING: June 3, 2002 Owen Sound

DECISION

A hearing was held on June 3, 2002, at Owen Sound, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D., Presiding Member

RELEASED: June 4, 2002

1106-ADLS-ASTHMA

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF
HEARING: June 3, 2002

DECISION
RELEASED: June 4, 2002 Owen Sound

REASONS FOR DECISION

A hearing was held on June 3, 2002, at Owen Sound, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on June 4, 2002, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that her appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated May 10, 2002, and was received by the Tribunal on May 16, 2002, together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

The Representative of the Ministry provided the Tribunal with original certified copies of Ministry of Transportation documents on file.

The Applicant submitted new medical and internet evidence, which once reviewed by the Respondent's Representative was admitted into evidence, and on consent filed as exhibit #4.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice to Registrar – dated April 28, 2002
- b) Exhibit # 2 Notice of Appeal Form – received May 16, 2002
- c) Exhibit # 4 Additional submissions – 7 pages – received June 3, 2002

By the Respondent:

- a) Exhibit # 3 Ministry of Transportation submissions – received May 29, 2002

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

- 50.1(1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
 - (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
 - (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

- 15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
 - (a) the name, telephone number and address, with the postal code, of the medical practitioner;
 - (b) the name, date of birth and address of the person who is the subject of the report;
 - (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;

- (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
- (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

Appellant's Driver's Licence was suspended "April 28, 2002" as per Notice of Appeal (Exhibit # 2)

Appellant's Evidence

In a letter, dated May 10th, 2002 the Applicant sets out the events leading up to the demand for the breathalyser test as well as her reasons for not being able to provide an adequate sample.

The last paragraph of the Applicant's letter summarizes her position: "I believe that the medication would have helped me to provide a sample had the Officer retrieved the Bricanyl which I use whenever my breathing is becoming a problem for immediate relief. It is for this reason that I am appealing ...due to my illness Chronic Obstructive Pulmonary Disease (COPD) I could not provide a long enough breath for the required sample. I complied with the request from the Officer and it is for this reason that I am appealing..."

Page two of Notice of Appeal was prepared on May 9th 2002, by Physician #1, who has been the Applicant's physician for "...6 months...". Physician #1 explains that he is replacing Physician #2 who has been the Applicant's regular physician "...for years...". Physician #2 is currently on a one year sabbatical in New Zealand.

Physician #1 notes under "Details and Diagnosis of patient's present condition" that the Applicant has "...long history of asthma ...chronic obstructive pulmonary disease caused by years of smoking..."

Under "History of condition" Physician #1 writes, "...constantly short of breath especially with exertion, degree of shortness of breath can be variable depending on factors such as weather ...3 different kinds of inhalers..."

Physician #1 states that there are “no PFT on ...records...” but attaches the report of Physician #3 dated March 19, 1997.

At the time, Physician #3’s diagnose was “...very likely ...COPD...”. Physician #3 “...suggested ...use of ...puffers on a regular basis with an aerochamber...”. As the Applicant’s chest X-ray was “...of some concern...” Physician #3 recommended further investigation.

Under “Relevant details of last visit and when your patient was last seen” Physician #1 notes “...2002. Jan.29...”

On an handwritten prescription pad note, dated May 02, 2002, Physician #1 expands that the Applicant “...has some significant problems with her lungs with asthma (chronic obstructive lung disease) ...requires 3 different inhalers ...it is possible she may have difficulty doing the breathalyzer because of this...”

At the hearing the Applicant provided the Tribunal with what she believes to be a “prescription” from Physician #1. On a handwritten prescription pad note, dated May 20, 2002, Physician #1 wrote: “...spirometer / peak flow halter x 1...”.

Also presented at the hearing: a copy of a report from the Bruce Peninsula Health Services detailing the Applicant’s condition on “30 01 97”; a letter executed by Witness #1.

In his letter dated May 31, 2002, Witness #1 writes that the interior of Applicant’s house is under renovation; as such “...the dust from finishing the drywall boarding is very hard to contain in one area. In most cases drywall dust usually travels throughout the entire house...”

In her evidence-in-chief, the Applicant reiterated the comments in her letter of May 10th, 2002, emphasizing that it is her belief that “...the evidence speaks for itself...”

The Applicant cited several passages from her letter, regarding the amount of alcohol consumed on the day in question, and the number of opportunities allowed her by the Officer to provide a breath sample.

The Applicant asserted that she believes that had the Officer retrieved her puffer, as she requested “...several times...” she would have been able to provide an adequate sample.

The Applicant stressed that she “...didn’t refuse ever, to do a breathalyzer...”, and accentuated “...to the best of my ability, I did the best I could under the conditions as I stated in my letter under my medical reasons. I was upset over the argument, an on going argument that I had with my boyfriend. I was cold, I had six layers of clothes on the top half of my body, I had three layers of clothes on the bottom. I was very irritable and I was doing the best that I could”.

The Applicant confirmed that she does not have spirometer tests to prove that her condition has worsened over the five years that have past since she was diagnosed. This was through no fault of her own. Not being aware of the severity of her condition, she chose to go into denial after being diagnosed, rather than pursue the matter with her physicians.

The Applicant suggested that if in fact the Officer believed her to be impaired, he should have taken a blood or urine test, or asked her to perform a sobriety test.

In cross-examination the Respondent's Representative questioned the Applicant on the events prior to her being asked for a breath sample. The Applicant detailed that she had been four wheeling with her boyfriend and two other couples, for approximately six hours stopping along the way at some friend's house.

With respect to what transpired during the actual breathalyzer test session, the Applicant stated that she initially asked the Officers to retrieve her purse, so that she could prove that she used three puffers, but that subsequently she asked for her puffers because she needed them to breathe. The Applicant testified that the Officer replied, "No, you don't". Under insistent questioning from the Respondent's Representative, regarding her exact comments to the Officers, the Applicant clarified: "...No, no, no no ...no, no, no, no, I never said that I needed my puffers to breathe, I said that I needed my puffers..."

The Applicant went on to testify that she never clearly indicated to the Officer that she was having difficulty breathing, or that she needed her puffers to help her breath, she just said "...I need to take my puffers..."

The Applicant remembered telling the Officer that the gas fumes were bothering her and the car was turned off.

With respect to her symptoms at the time of the breathalyzer test, the Applicant stated that stressful situations and cold air bring about breathing difficulties. The Applicant did not complain to the Officer, because she "...is so used to it..."

The Respondent's Representative specifically asked the Applicant if she was having breathing problems at the time of the breathalyzer test, to which the Applicant replied: "...No I wasn't having breathing problems, I was having air flow problems..."

The Applicant explained that in her mind, breathing difficulties are characterized by wheezing or coughing. The condition that she has is different, in that it consists of "...attacks that just come on, whenever they feel like it...". The Applicant described the symptoms of these attacks as "...coughing fit, hard to breathe, gasping for air..."

After describing how often she used her medication, the Applicant agreed with the Respondent's comment that even though she had spent five to six hours in the cold air, in the back of a four wheeler exuding gas fumes, she had felt no need to take her medication.

The Applicant testified that she did not need to follow any of the instructions in the COPD booklet regarding shortness of breath, while sitting in the police car, and that she often exerts herself.

Once the Applicant was told that she was free to go, she opted to walk back to the farm. She took her puffers immediately, but did not visit her doctor until the following Thursday.

The Applicant was not certain as to the date that she was examined by Physician #1. She believes it was either May 2nd or May the 9th, but she remembered that Physician #1 told her he found "...a wheeze..." in her chest.

Respondent's Evidence

The Respondent provided the following Documents:

1. Certified Copy of Notice to the Registrar, sealed May 29, 2002
2. Certified Copy of Driving Record of the Applicant sealed May 22, 2002
3. Medical report of Dr. Roger Goldstein, MB., ChB, FRCP (UK), FRCP(C), FCCP

In a letter dated May 28 2002, Dr. Roger S. Goldstein, MB, ChB, FRCP(UK), FRCP(C), FCCP, Director of Program in Respiratory Rehabilitation - University of Toronto, states that he is a "...consultant respirologist in practice since 1979 with particular interest in chronic respiratory conditions such as: asthma, emphysema and chronic bronchitis ...Director of the University of Toronto, Respiratory Divisional Program in Rehabilitation, ...medical advisor to the pulmonary function laboratories for over 16 years ...familiar with the Alcotest and the Intoxilyzer 5000C having evaluated both machines in Pulmonary function laboratory ...have tested both the portable and the station monitor among a variety of individuals (men and women) age range 44-77 years, vital capacity range 1.6 to 4.5 litres, FEV1 range 0.4 to 2.9 litres, FEV1/FVC range 20% to 78% ...The vast majority of individuals, even with an FEV1 of 0.7 are able to satisfactorily provide a breath sample notwithstanding their respiratory condition...".

After reviewing the medical report prepared by Physician #1, as well as the consult report from Physician #3, Dr. Goldstein concluded "...in my view, the Applicant has a respiratory condition likely related to smoking plus a possible asthmatic (reversible) component ...unclear to me as to whether her respiratory condition was of sufficient severity to prevent a satisfactory sample..."

The Respondent called Officer #1, a member of the Ontario Provincial Police— Owen Sound Detachment as a witness. Officer #1 testified that he has been "...with the OPP for one year this past May, and four years prior to that with the Peel Regional Police..."

Officer #1 described the events that led to the Applicant being stopped and the subsequent demand for a breath sample.

The Applicant was given a total of eleven opportunities to provide a breath sample, but failed to do so.

Officer #1 testified that he "...observed ...that she put the mouthpiece of the instrument ...in her mouth ...and ...observed that she clamped her on to the piece with her front teeth and blew her breath into the machine weakly and ...specifically detected air escaping around the mouthpiece, from her mouth ...stopped her and advised her not to bite the mouthpiece, and to form a seal around the mouthpiece ...she again tried blowing weakly and stopping after a few seconds ...felt she was blowing weakly, not strong enough to provide a proper sample..."

It is Officer #1's practice to coach the individuals along by telling them to "...keep going, keep going ...harder..." until the machine registers a proper breath sample. In this case, it is Officer #1's testimony that the Applicant stopped on her own, before he asked her to do so.

According to Officer #1 the Applicant was able to activate the tone in device, but because she was not blowing hard enough and stopped prior to being told to stop, the instrument registered an error reading.

Officer #1 confirmed that after the first few attempts, the Applicant advised him that she "...had weak lungs and she smokes ...she takes puffers...". Officer #1 also confirmed that the Applicant asked him "...to go look in her purse for these puffers...", but "...at no time did she ask me to get the puffers so that she could use them or indicate that she was in medical distress and that she wanted to use them for that purpose...". Had the Applicant requested to use the medication she would have been allowed to do so, and if necessary an ambulance would have been called.

The Applicant complained, at one point, about the exhaust fumes bothering her, and Officer #2 immediately turned off the engine. Although the door of the vehicle was open, and her feet were on the roadway, the Applicant also complained about being cramped in the back seat. At this time she was allowed to provide a breath sample while standing.

Also at some point during her breathalyzer test the Applicant asked for a "break", not as in I need to stop for a while, but as in wanting to be let off.

Officer #1 noted that the last couple of attempts, made by the Applicant to provide a breath sample, were stronger and very close to being a suitable sample, but still unsuccessful.

During the time that Officer #1 spent with the Applicant he "...didn't observe any type of distress that she was in as far as breathing, or ...never heard her having a coughing fit or wheezing or any of the things that would indicate ...that a person was in respiratory distress...".

Officer #1 stated that he did not observe the Applicant using the puffer after she was released.

Under questioning by the Applicant regarding her request to use for the puffers as the medication would have opened up her lungs, Officer #1 was adamant in his reply that "...that information wasn't provided ...at the time ...there was never a request to use the puffers because you needed them period...".

The Respondent's Representative also called Officer #2 who has been a police officer "...six weeks short of twenty five years...", as a witness.

Officer #2 described his observations of the Applicant's erratic driving, and why he pulled her over and instructed Officer #1 to speak to her.

Officer #2 was sitting in the driver's seat while the tests were being administered and could hear the instrument's tone as the Applicant attempted to provide a breath sample.

Officer #2 detailed the sound heard from the device as each attempt was made: "...The first attempt the tone ended almost immediately, just come on briefly and went off, indicating that the sample being supplied was only ...for a split second; the second try, I heard the tone for approximately two seconds before it ended; the third try, I heard the tone come on and go off immediately; the fourth try, I heard the tone for approximately two seconds and then it stopped; ...on the fifth try, I heard the tone for approximately three seconds before it ended; on the sixth try, I heard the tone for approximately four seconds before it ended; on the seventh try, I heard the tone for approximately three seconds before it ended; on the eighth try, I heard the tone for approximately three seconds before it ended; on the ninth try, I heard the tone for approximately five seconds before it ended, it was still not a sufficient sample; ...number ten, number eleven were basically the same on each of those occasions, I heard the tone for approximately five seconds before it ended...".

Officer #2 noted the Applicant was cautioned that her license would be suspended and that she would be charged, if she did not provide an adequate breath sample. The Applicant stated that she had three inhalers in her purse but never requested to use the medication in her purse.

Officer #2 "...heard nothing unusual about her breathing ...", but noted that the Applicant asked to be given a break.

Officer #2 stated that he did not observe the Applicant using the puffer after she was released.

In closing the Applicant read from a prepared statement. She depicted her living status and her duties at work.

The Applicant claimed that she has "...endured undue hardship because of the suspension of ...driver's license..." the Applicant further contended that she appealed the suspension because she did not refuse to comply with the demand to provide a breath sample.

After being given eleven attempts, she was still unable to provide a suitable sample, because she "...was physically unable to ...no explanation except for ...medical condition...".

The Applicant stated that she asked the officer to get her medication, as she "...believed would have helped ...to provide a sample, but he refused..."

The Applicant questioned whether the Officer was a qualified breath technician able to determine that she "...was not blowing hard enough, as outlined in R vs Schimpf 1980 and indicated within page 316 of the Criminal Code of Canada 1990..."

The Applicant also insisted that upon being demanded a breath sample she "...was never read ...rights as required under S 10 (b) of the Canadian Charter of Rights and Freedoms..."

The Applicant challenged the "...validity of the stop..." as she does not believe the Officer "...had reasonable grounds to stop vehicle...". As an explanation as to why the Officers might have seen the rear lights go on off, the Applicant suggested that given direction her car was facing in relation to where she lives, "...it was necessary make a U turn...". The Applicant asserted that "...this was not a bona fide reason to be subjected to a random roving stop by the officers..."

The Applicant repeated her previous comments with respect to blood tests and sobriety tests not being performed. The Applicant, continued to expand on how her condition, which she has had "...for the past five years ...was further aggravated by the events of the day, emotional stresses, the anxiety of being pulled over, and further, that ...condition was already worsened due to on going renovations at ...home..."

With respect to the condition, the Applicant has now made further enquiries of her physician, as well as researched the Internet, in order to learn how the condition manifests and can be maintained.

The Applicant pointed out that she has been provided with a "...prescription for a spirometer reading testing, but ...no information on where to take it..."

In conclusion, the Applicant emphasized that she "...did not refuse a demand for the breathalyzer ...appealing ...driver's licence suspension based on ...physical incompatibility caused by chronic obstructive lung disease, diagnosed in 1997 ...further aggravated by the facts as outlined..."

At the start of his closing remarks the Respondent's Representative commented on the case law referred to by the Applicant. Mr. Biel pointed out that neither the Registrar nor the Tribunal received a copy of the case law alluded to, "...nevertheless, that in fact it is not what the factor is..."

With respect to The Applicant's reference to Charter of Rights of Freedoms, Mr. Biel noted that in order to raise an objection under the Charter, The Applicant would have had to follow the strict provisions allowing such a challenge. No notice was given as is required under statute, thus, Mr. Biel asked the Tribunal to dismiss the Applicant's challenge.

The Respondent's Representative conceded that he accepts the fact that the Applicant has been diagnosed with and suffers from "...chronic obstructive pulmonary disease...". Nonetheless, that is not the issue before the Tribunal. The issue before the Tribunal is whether the COPD prevented the Applicant from providing a suitable breath sample. It is the Registrar's position, that "...it did not...".

The Respondent's Representative continued by pointing out that according to the evidence "...contrary to the medical evidence ...supplied by The Applicant for this appeal, it appears that ...when it suits The Applicant, she is quite capable of living her life with COPD. She is able to withstand the gas fumes of these four-wheel vehicles, for five or six hours. She is able to exert herself by hanging on ...in the back of one of these vehicles, for hours at a time, while they go up and down hills and mountains and through mud ...not e asy to do and she is able to do that without a problem..."

Mr. Biel drew attention to the fact that the Applicant admitted to not following any of the precautions mentioned in the booklet, such as covering her mouth with a scarf, while she was out four wheeling with her friends. Further, The Applicant still continues "...rather normal activities, ...is able to continue to smoke, inhale and exhale cigarettes without a problem...". Mr. Biel contended that "...if you can smoke a cigarette you can exhale air ...for five or six seconds...".

The Respondent's Representative reviewed the evidence of Officer #1, and maintains that it was not the Applicant's condition that caused her "...to blow around the mouthpiece or to bite the mouthpiece in her teeth, this was a conscious attempt to deceive...". Mr. Biel suggests that the Applicant's action of asking "...to be let off...", also corroborates his theory that she did not want to provide a breath sample.

The Respondent's Representative reminded the Tribunal that the Officers observed "...no shortness of breath ...no breathing problems, no wheezing, no coughing...". Regarding the use of the puffers, Mr. Biel referred to the testimony of both Officers who declared that the Applicant never specifically requested her medication. Both officers readily accommodated the Applicant's needs when she mentioned the fumes of the vehicle, and the fact that she felt cramped. There is no reason to believe they would have denied the Applicant the use of her puffers.

Mr. Biel argues that Physician #1 "...is guessing..." when he states, "...it is possible she may have difficulty doing the breathalyzer..." because of her condition. It may be possible, but there is no specific relationship established between the condition and the breath test, as there are no pulmonary function tests to substantiate the premise.

Mr. Biel also maintained that Physician #1's statement that the Applicant is "constantly out breath" was not demonstrated during the hearing. During the hour and a half of the hearing, the Applicant did not exhibit any signs of being out of breath. She was able to read her closing statement into the record without any apparent effort.

In conclusion, Mr. Biel referred to the Applicant's evidence in chief and noted that the Applicant did not detail any medical problems occurring during the day. The Respondent's Representative asked that the Tribunal uphold the Registrar's decision.

In rebuttal the Applicant attributed her lack of more detailed reports to the fact that she lives in a rural area, where physicians are not privy to the latest resources.

APPLICATION OF THE LAW TO FACTS:

Prior to setting out the reasons for the decision, the Tribunal will address the issues raised by the Applicant.

With respect to the qualifications of the Officer and the case law mentioned, as well as with respect to the correctness of the Applicant being stopped by the officers, such matters are for a Court of Law. The Tribunal has no jurisdiction and will make no further comments.

Regarding the challenge to the Charter of Rights and Freedoms, the Tribunal must adhere to the provisions set out in Section 8 of the Tribunal's Rules of Practice, which deals with "Notice of Constitutional Question"

Section 8.1 provides as follows:

"Where a party intends, to raise a question about the constitutional validity or applicability of legislation, a regulation or by-law made under the legislation, or a rule of common law or to claim a remedy under the Canadian Charter of Rights and Freedoms,

- (1) notice shall be served on the other parties, the Tribunal, the Attorney General of Ontario, and the Attorney General of Canada as soon as the circumstances requiring notice become known and, in any event, at least 15 days before the question is to be argued before the Tribunal..."

As pointed out by the Respondent's Representative, the provisions of Section 8 of the Rules of Practice were not met, thus, the Tribunal has no alternative but to dismiss the challenge under the Charter.

Lastly, the Applicant raised the question of why she would not have been asked to provide a blood or urine sample, or a sobriety test.

There is no provision under the *Highway Traffic Act* for the provision of a urine sample. Subsection 48.3 (3) 1 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H-8 as amended, is clear in its provision, the concentration of alcohol in the blood may be obtained "...by an analysis of the person's breath sample or blood taken...". Nonetheless, the decision to request a blood sample is at the discretion of the officers, according to established policy. At the time, the Applicant was neither unconscious nor showed any visible signs of respiratory impairment, such as wheezing or choking. Thus, the issue of a blood sample is inconsequential.

As for the practice of administering sobriety tests, the Tribunal recognizes and accepts that such tests have now been superseded by the breathalyzer device, which is a much more accurate means of determining the volume of alcohol concentrated in the blood.

At issue is not whether the Applicant was impaired or had been drinking at all or whether the Applicant expressed a vocal refusal to provide a breath sample. At issue, is did the Applicant have a medical condition that could cause the Applicant to fail or not comply with the breath demand.

Section 50.1(2)(b) of the *Highway Traffic Act* allows for an appeal in circumstances where a

*“...person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood **because he or she was unable to do so for a medical reason...**”*

The Tribunal concurs with the Respondent's Representative, that whether or not the Applicant is a sufferer of chronic obstruction pulmonary disease is not in dispute. The Applicant was able to successfully establish that she is afflicted with a medical condition, i.e. chronic obstructive pulmonary disease. The question that remains to be answered is how did the Applicant's medical condition cause the Applicant to fail or not comply with the breath demand.

The Tribunal is aware of and agrees with the Applicant as to the circumstances which aggravate chronic obstructive pulmonary disease.

The Tribunal reviewed the two medical reports in evidence. Physician #1, the Applicant's physician, “...is guessing...”, according to the Respondent's Representative, when he suggests that “...it is possible she may have difficulty doing the breathalyzer...”. Physician #1 may be guessing, but Dr. Goldstein's report is just as uncertain “...unclear to me as to whether her respiratory condition was of sufficient severity to prevent a satisfactory sample...”. Finding both medical reports inconclusive, and acknowledging that neither physician was present at the scene of the breathalyzer test session, the Tribunal must rely on the eye witness testimony provided by the Applicant, herself, and that of Officer #1 and Officer #2.

The Tribunal was, somewhat confused by the Applicant's viva voce testimony that she “...wasn't having breathing problems...” she “...was having air flow problems...”. The Applicant clarified her statement by proffering an explanation as to the nature of her attacks: “...coughing fit, hard to breath, gasping for air...”. None of these symptoms were observed by either Officer #1 or Officer #2. As summarized by the Respondent's Representative, in his closing remarks, the Officers observed “...no shortness of breath ...no breathing problems, no wheezing, no coughing...”.

The Applicant implied that she was prejudiced by Officer #1's refusal to allow her the use of an inhaler. The Applicant believes that had she been allowed to use her medication she might have been able to open up her lungs and provide an adequate breath sample. The Tribunal is not the venue to access the appropriateness of Officer #1's behaviour. The Tribunal will restrict

its findings as to whether or not the Applicant was clear in her request and as to whether or not the use of the inhaler could have affected the Applicant's ability to give a suitable sample.

The Applicant claims that she told Officer #1 "several times" that she wanted her puffer, but by her own admission the Applicant may not have been explicit as to the reason she wanted her puffers: "...I never said that I needed my puffers to breathe, I said that I needed my puffers...".

Being familiar with the symptoms of chronic obstructive pulmonary disease, the Tribunal is of the opinion that had the Applicant been in severe respiratory distress, she would have been quite specific as to why the inhalers were needed. Further, the Officers would have easily detected the Applicant "gasping for air". As previously stated none of these symptoms appeared to be present at the time, thus the weight of the issue of the use the inhaler is negligible.

The Applicant seemed acquiescent with the testimony of the Officers. She did not contradict their testimony, by testifying that she was in fact coughing or wheezing at the time. Considering that at no time during the breathalyzer test session did the Applicant appear to be having respiratory difficulties, that the Applicant did not feel the condition was severe enough to request medical assistance, or seek medical assistance immediately thereafter, the Tribunal finds that the Applicant has failed to substantiate the basis for an appeal on medical grounds.

The onus being on the Applicant to establish the merit of the appeal, the Tribunal finds that the Applicant's testimony although credible, failed to substantiate the basis for an appeal on medical grounds. Thus, the Tribunal finds that the Applicant does not meet the criteria of Section 50.1(2)(b), in that she was not able to demonstrate that she suffers from a medical condition, which would prevent her from providing a breath sample.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated April 28, 2002 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal **confirms** the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: June 11, 2002

KELLY, M.M.

MICHAEL M. KELLY

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

MICHAEL M. KELLY, Applicant
unrepresented

DATE OF HEARING: June 21, 2002 ***By teleconference***

DECISION RELEASED: June 25, 2002

REASONS FOR DECISION

A hearing was held on June 21, 2002, at Toronto, Ontario, to consider the Applicant’s appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Michael M. Kelly (the "Applicant")
Motor Vehicle:	2000 Dodge Durango, plate AFHX 193 (the "vehicle")
Date of Appeal:	May 31, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on June 21, 2002 and proceeded as an electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

Prior to the commencement of the Hearing, the Tribunal established that the Applicant, Michael Kelly, entered, in the Notice of Appeal, the name of Diane Kelly as owner of the impounded vehicle, in error.

Diane Kelly being present on the line was sworn in as possible witness, but in fact was not called to testify.

There were no other preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

Vehicle required for running business and household. Vehicle is leased from Foss National Leasing, Thornhill, Ontario 905 886 2522 and is operated by Diane Sjostrom Kelly who is marketing manager at Addison Kelly Executive Search and mother to two dependant children Leah and James Kelly.

At the hearing the Applicant reiterated the grounds for the appeal. The Applicant explained he is the President of Addison Kelly Executive Search, and that his wife, Diane Kelly is the Executive Manager.

Diane Kelly is responsible for presentations and meeting with clients, she needs the vehicle to get around and carry on the business of the company.

As the company is losing business, some employees may have to be laid off.

In cross-examination, the Applicant confirmed that the family owns two other vehicles, one driven by Applicant's son, who also works for the business, and the other by the Applicant's daughter, who uses the vehicle to get to and from school.

The Applicant and his wife do not commute to work together, as the Applicant generally goes in earlier than Ms. Kelly. The Applicant has been taking the bus, walking or going in with his son.

The Applicant repudiated the Respondent's Representative suggestion that Ms. Kelly could drive their son's vehicle in order to attend her meetings. The Applicant contended that the business requires a certain image not exuded by a '96 Plymouth, or a '93 Corsica.

The Applicant stated that he had not considered renting a vehicle, as he believes the cost would be prohibitive. Although, the cost of rental could be absorbed by the business, the Applicant attested that the last quarter has not been too favourable and it would not be wise to incur additional costs.

The children have not suffered the impact of the impoundment, but the business has been severely impacted by Ms. Kelly's inability to attend the meetings required to acquire new clients and maintain existing clients.

In his closing remarks the Applicant briefly stated that he “would appreciate the vehicle back...” so that Ms. Kelly could go about her business.

Evidence for the Registrar

A summary of the Registrar’s evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as plate owner;

Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Michael M. Kelly;

Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;

Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Blood/Alcohol Content in Excess of .08 under the *Criminal Code of Canada* pursuant to which the driver’s licence of the driver was then under suspension until February 19, 2003.

The Respondent proffered no viva voce evidence at the hearing choosing to rely on the information provided for the hearing, and the legislation including the criteria set in Regulation 632/98.

In closing the Respondent’s Representative, asked the Tribunal to confirm the decision of the Registrar and uphold the impoundment, on the grounds that the Applicant does not meet the criteria of Regulation 632/98. The Applicant has alternative vehicles at his disposal but has opted not to avail himself of those alternatives.

The legislation requires that an Applicant mitigate his losses. The Applicant has not done so, as he did not consider the possibility of renting a vehicle for the duration of the impoundment.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner’s right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
- (b) financial or economic loss to any person;
- (c) loss of employment or employment opportunity to any person; or
- (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if

the owner demonstrates that,

- (a) no alternative to the impounded motor vehicle is available;
- (b) the loss will be immediate, significant and lasting;
- (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
- (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).

- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The onus is on the Applicant to establish the exceptional hardship grounds of appeal as provided in subsection 50.2(3)(d).

The criteria for considering undue hardship is found under Section 22 of Ontario Regulation 632/98.

Is there no alternative to the impounded vehicle?

Subsection 22(3)(a) Regulation 574 as amended by O. Reg. 632/98 provided that this Tribunal may not consider financial or economic loss as a ground of appeal unless no alternative to the impounded vehicle is available.

The Applicant argued that his wife Diane Kelly's ability to carry out the business of the company, owned by the Applicant, has been restricted. Ms. Kelly is unable to attend meetings due the lack of the impounded vehicle.

As the Respondent's Representative pointed out, the family owns two other vehicles. Ms. Kelly could utilize either of these vehicles to get to and from her meetings.

As the Applicant has alternate methods of transportation available, the Tribunal may not consider the provisions of 22.1 of Regulation 574.

Is the loss immediate, significant and lasting?

The Applicant does not meet the criteria of O. Reg. 632/98, Subsection 22(3)(b) which provides that the Tribunal may not regard economic loss unless the Applicant shows proof that loss will be immediate, significant and lasting.

The Applicant stated that he has suffered a loss in business, but no documented evidence was introduced to that effect.

Thus, the Tribunal may not consider O. Reg. 632/98, Subsection 22(3)(b).

The Applicant having an alternative vehicle and the loss due to the impoundment not being immediate, significant or lasting, it is not necessary to review further criteria set out in the Regulation.

The individual affected by the impoundment, has an alternative method of transportation, and has incurred no significant or permanent loss.

After assessing the evidence presented, the Tribunal finds that the Applicant has not established exceptional hardship ground for appeal, as required under section 50.2(3) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal **confirms** the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: June 25, 2002

CALLWOOD

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990, Chapter 0.31

IN THE MATTER OF a CLAIM by
DARRELL AND TRACEY CALLWOOD

AND IN THE MATTER OF the DECISION of the
Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 16(1) of the Act

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision

DARRELL AND TRACEY CALLWOOD

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, Chapter 0.31 as amended (the "Act"), Darrell and Tracey Callwood (the "Applicants") initiated an appeal under section 16(2) of the *Ontario New Home Warranties Plan Act* from a Decision Letter issued by the Program dated April 17, 2002 in terms of which the Program denied the Applicants' claims;

AND WHEREAS, the Applicants have failed to pay the filing fee for this proceeding before the Tribunal, required pursuant to section 7 of the *Licence Appeal Tribunal Act*, 1999;

AND WHEREAS, the Applicants have not responded to the Tribunal's Notice of Intent to Dismiss Proceedings sent to the Applicants pursuant to section 4.6 of the *Statutory Powers Procedures Act*, R.S.O. 1990, Chapter S. 22 as amended, and Rule 2.10 of the Rules of Practice of the Licence Appeal Tribunal, whereby a proceeding before this Tribunal may be dismissed without a hearing for failure to pay the required filing fee;

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers Procedures Act*, as amended, this proceeding initiated by the Applicants' request for a hearing before this Tribunal is dismissed;
2. Pursuant to the authority vested in it under section 16(3) of the *Ontario New Home Warranties Plan Act*, this Tribunal directs the Ontario New Home Warranty Program to deny the Applicants' claims.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek, Chair

Released: June 20, 2002

SISTERS MOVING SYSTEM INC.

IN THE MATTER OF the *Highway Traffic Act*, R.S.O. 1990 Chapter H.8 as amended;

AND IN THE MATTER OF the *Truck Transportation Act*, R.S.O. 1990 Chapter T.22 as amended;

AND IN THE MATTER OF an Application by Sisters Moving System Inc. dated January 25, 2002 for a hearing before the Licence Appeal Tribunal pursuant to Section 50(1) of the *Highway Traffic Act* appealing the Refusal to Issue a Commercial Vehicle Operator's Registration Certificate of the Deputy Registrar of Motor Vehicles dated December 10, 2001, and pursuant to Section 7(2) of the *Truck Transportation Act* appealing the Refusal to Issue an Operating Licence of the Deputy Registrar of Motor Vehicles dated December 10, 2001.

TRIBUNAL: JOHN ORT, Presiding Member
CHARLES SANDIFORD, Member
SIMON DANN, Member

APPEARANCES: No one appearing for the Applicant
PATRICK MOORE, Counsel for the Registrar of Motor Vehicles

DATE OF
HEARING: June 17, 2002 Toronto

DECISION AND REASONS

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the “Tribunal”) by Sisters Moving System Inc. (the “Applicant” and “Sisters”) respecting a Refusal to Issue a Commercial Vehicle Operator’s Registration Certificate of the Deputy Registrar of Motor Vehicles (the “Respondent” and the “Registrar”) dated December 10, 2001, and a Refusal to Issue an Operating Licence of the Deputy Registrar of Motor Vehicles dated December 10, 2001.

EXHIBITS:

Exhibit #1 - Notice of Refusal to Issue a Commercial Vehicle Operator's Registration Certificate dated November 9, 2001, issued by the Deputy Registrar of Motor

Vehicles, and Notice of Refusal to Issue an Operating Licence dated November 9, 2001, issued by the Deputy Registrar of Motor Vehicles.

Exhibit #2 - Notice of Appeal received at the Tribunal on January 29, 2002, filed by the Applicant.

Exhibit #3 - Prehearing Order released March 21, 2002, issued by the Tribunal.

Exhibit #4 - Respondent's Appeal Book.

PRELIMINARY MATTERS:

No one appeared for the Applicant at the scheduled start of the hearing at 9:30 a.m. on June 17, 2002. The hearing was adjourned for thirty minutes in case the Applicant was delayed. When the hearing resumed at 10:13 am., no one appeared for the Applicant. The Tribunal proceeded to hear the evidence of the Registrar in the absence of the Applicant.

FACTS:

The Deputy Registrar of Motor Vehicles' grounds for refusal are set out in the Notice of Refusal to Issue a Commercial Vehicle Operator's Registration Certificate and in the Notice of Refusal to Issue an Operating Licence, both dated November 9, 2001, as follows:

- a) The safety record of Cyrus Moving Systems Inc.
- b) The current Suspension and Seizure Order in effect for Cyrus Moving Systems Inc.
- c) The unpaid fines for Cyrus Moving Systems Inc.
- d) I am of the opinion that Cyrus Rezvanian directly or indirectly controls or manages or will control or manage the applicant.
- e) The safety record of Sisters Moving System Inc.
- f) The past working relationship between Fariba Rezvanian and Cyrus Rezvanian.

The Refusal to Issue a Commercial Vehicle Operator's Registration Certificate dated December 10, 2001, issued by the Deputy Registrar of Motor Vehicles states the following:

AND WHEREAS I have considered your [the Applicant's] submissions, the safety record of the applicant, the safety record of the related company, current Suspension and Seizure in effect and the unpaid fines for Cyrus Moving systems Inc. (CVOR #124-622-357);

AND WHEREAS I am still not satisfied that the applicant will operate its commercial motor vehicles safely and in accordance with this Act [the *Highway Traffic Act*], the regulations and other laws relating to highway safety...

I hereby Refuse to Issue a Commercial Vehicle Operator's Registration Certificate.

The Refusal to Issue an Operating Licence dated December 10, 2001, issued by the Deputy Registrar of Motor vehicles states the following:

AND WHEREAS I have considered your [the Applicant's] submissions, the safety record of the applicant, the safety record of the related company, current Suspension and Seizure in effect and the unpaid fines for Cyrus Moving Systems Inc. (CVOR #124-622-357);

AND WHEREAS I am not satisfied that the transportation service will be operated in accordance with the law and the public Interest, I have determined the applicant to be unfit....

I hereby Refuse to issue an operating licence to the applicant.

The Registrar's witness was Bernadette McKenna, whose evidence is as follows:

Ms. McKenna has worked for twenty-five years for the Ministry of Transportation. She is now a carrier safety rating administrator.

Fariba Rezvanian is the president and director of Sisters Moving System Inc. Fariba Rezvanian is also a former employee of Cyrus Moving System Inc., a company controlled by her brother Cyrus Rezvanian.

The Commercial Vehicle Operator Summary for Cyrus Moving System Inc. (exhibit 4, tab 12, page 2) shows an unsatisfactory violation rate of 161.3%, eight accidents, thirty convictions, and four inspections detecting out of service defects. Cyrus Moving System Inc. operated five commercial motor vehicles. On April 26, 2001, a Notice of Suspension & Seizure was issued proposing a thirty day suspension of the CVOR (Commercial Vehicle Operator's Registration) certificate issued to Cyrus Moving Systems Inc. As of May 18, 2001, the CVOR certificate and the plate portion of permits for all commercial motor vehicles and trailers issued to Cyrus Moving Systems Inc. were suspended for seven days and thereafter until all fines are paid. Fines of about \$36,000.00 are still outstanding and the suspension is still in effect.

On July 31, 2001, two commercial motor vehicles owned by Cyrus Moving System Inc. were stopped by Metro Toronto Police. Five charges were laid including a charge for operating with a suspended CVOR.

Sisters Moving System Inc. leases its four commercial motor vehicles from AAA Safe Private Storage Inc. ("AAA"). Cyrus Rezvanian, the president of Cyrus Moving System Inc., is the director of AAA. The registered office address of AAA is the same as the address for Cyrus Moving System Inc. (exhibit 4, tab 14, page 5 and exhibit 4, tab 8). AAA obtained the first of the commercial motor vehicles that it leases to Sisters on April 27, 2001. The other three

commercial motor vehicles that AAA leases to Sisters were leased to Sisters the same day that they were acquired by AAA.

Sisters Moving System Inc. provided a sales agreement dated May 11, 2001, by which it apparently purchased four trucks from Safe Private Storage Inc. (exhibit 4, tab 6, page 4). At the date of the agreement three of those trucks were not registered in the name of AAA Safe Private Storage Inc. (exhibit 4, tab 19).

Sisters Moving System Inc. was charged with operating a commercial motor vehicle without a CVOR certificate on August 17, 2001. The driver of the vehicle was Rouzbeh Asri-Aghmiouni (exhibit 4, tab 16, page 7), who had been involved in two accidents when he was a driver for Cyrus Moving System Inc. (exhibit 4, tab 12, pages 6 and 7). The Trip Inspection Report used by Rouzbeh Asri-Aghmiouni is the same as the Trip Inspection Reports used at Cyrus Moving System Inc. (exhibit 4, tab 16, page 8 and exhibit 4, tab 15, page 8). Further, the Trip Inspection Report identifies Rouzbeh Asri-Aghmiouni as Behrouz. The Safety Fitness Application for Rating of Sisters Moving System Inc. discloses that Behrooze was to be the company representative responsible for promoting safety (exhibit 4, tab 3).

An application by Sisters Moving System Inc. for a CVOR was received by the Ministry of Transportation on August 30, 2001.

The Tribunal finds the following facts to be proven on the evidence:

- 1) Cyrus Moving System Inc. directly or indirectly controls or controlled, or manages or managed the Applicant, Sisters Moving System Inc.
- 2) The CVOR certificate of Cyrus Moving System Inc. is under suspension.

ISSUE:

Should the Tribunal confirm, modify or set aside the decision of the Registrar to refuse to issue a Commercial Vehicle Operator's Registration Certificate and an Operating Licence to the Applicant Sisters Moving System Inc.?

LAW:

The *Highway Traffic Act*, R. S. O. 1990 Chapter H. 8 as amended provides as follows:

17. (1) The Registrar shall issue a CVOR certificate to every person who applies therefor in the prescribed form and meets the requirements of this Act and the regulations.
- (2) The Registrar may refuse to issue a CVOR certificate to an applicant if the Registrar has reason to believe, having regard to the applicant's safety record and any other information that the Registrar considers relevant, that the applicant will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety.

(3) The Registrar may refuse to issue a CVOR certificate to an applicant if the applicant is related to,

- (a) a person whose CVOR certificate has been cancelled, is or has been under suspension or is or has been subject to a fleet limitation;
- (b) a person whose CVOR certificate suspension, cancellation or fleet limitation is under appeal; or
- (c) a person who the Registrar has reason to believe, having regard to the person's safety record and any other information that the Registrar considers relevant, will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety.

(4) An applicant is related to a person for the purpose of subsection (3) if,

- (a) the applicant and the person are related individuals...
- (c) either the applicant or the person, directly or indirectly, controls or controlled or manages or managed the other; ...

50(2) The Tribunal may confirm, modify or set aside the decision of the Minister or Registrar.

The *Truck Transportation Act*, R.S.O. 1990 Chapter T.22 as amended states the following:

6(1) An operating licence shall not be issued or an operating authority granted unless the applicant demonstrates fitness to carry on the business of carrying goods for compensation as described in the application for the licence...

(3) Every applicant for an operating licence shall file with the Registrar, with respect to the business for which authority is sought, a description of the proposed transportation service and evidence that the applicant, ...

- (c) holds a Commercial Vehicle Operator's Registration Certificate issued under the *Highway Traffic Act* that is not under suspension or subject to a fleet limitation.

7(2) Where the Registrar finds that an applicant is not fit to hold an operating licence, the Registrar shall give the applicant written notice thereof with reasons, and the applicant may, within thirty days after receiving the notice, appeal the decision to the Licence Appeal Tribunal as defined in the *Highway Traffic Act*.

APPLICATION OF THE LAW TO THE FACTS:

Based on the evidence, the Tribunal finds that Cyrus Moving System Inc. directly or indirectly controls or controlled or manages or managed the Applicant, Sisters Moving System Inc. Pursuant to Subsection 17(4) of the *Highway Traffic Act*, the Applicant Sisters Moving System Inc. is thus related to Cyrus Moving System Inc. Since the CVOR certificate of Cyrus Moving System Inc. is under suspension, the Registrar may refuse to issue a CVOR to the Applicant in accordance with Subsection 17(3)(a) of the *Highway Traffic Act*. The Registrar's refusal is not an error.

Subsection 6(3)(c) of the *Truck Transportation Act* requires every applicant for an operating licence to file evidence with the Registrar that it holds a CVOR. The Applicant is unable to do so. Thus the Registrar is justified in refusing to issue an operating licence to the Applicant.

DECISION:

IT IS THE DECISION OF THE TRIBUNAL to confirm the Orders of the Deputy Registrar of Motor Vehicles, both his Refusal to Issue a Commercial Vehicle Operator's Registration Certificate to the Applicant and his Refusal to Issue an Operating Licence to the Applicant.

LICENCE APPEAL TRIBUNAL

John E. Ort, Member,
Presiding

Simon Dann, Member

Charles Sandiford, Member

RELEASED: June 26, 2002

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

CAMIRE

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
DONALD AUREE CAMIRE

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: April 22, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

DONALD AUREE CAMIRE

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Donald Auree Camire, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: June 28, 2002

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
North York, ON, M2P 2E9

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON, M4V 1K6

FROM: Donald Aurele Camire
143 Woodland Crescent
Timmins, ON P4N 8K3

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereinafter the "Act") the parties to the proceeding, Donald Aurele Camire (hereinafter referred to as "the Applicant"), and the Registrar, *Motor Vehicle Dealers Act* (hereinafter the "Registrar") waive the requirement of a hearing and hereby consent to an Order of the Licence Appeal Tribunal (hereinafter the "Consent Order") based on the following terms and conditions to their registrations as a motor vehicle salesperson:

1. The Applicant agrees that if he is criminally charged or convicted in the future, he will immediately notify his employer in writing of the charges or convictions against him and provide a copy of the notification signed by his employer to the Registrar, giving the particulars of the charges or convictions.
2. The Applicant agrees that if he is convicted of an offence of an economic nature under the Criminal Code or convicted of any industry specific offences under any Statute in the future, he will be automatically revoked.
3. The Applicant agrees to provide full and accurate disclosure on any applications, documents, statements or other form of communication or information provided to the Registrar or his authorized representatives regardless of previous disclosure.
4. The Applicant acknowledges that the Registrar is relying upon the accuracy of the disclosure provided by the Applicant in entering into these terms and conditions.
5. The Applicant agrees that his explanation of the circumstances of his criminal record, are substantially correct.
6. The Applicant agrees not to transfer his registration as a motor vehicle Salesperson to another dealer without having first obtained the prior written consent of the Registrar.
7. The Applicant agrees not to be involved in the process of buying or selling motor vehicles without the benefit of registration.
8. The Applicant acknowledges and understands that his registration will not be used to buy or sell motor vehicles where the Applicant knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
9. The Applicant agrees that his registration will not prevent the Registrar from taking administrative action, including a proposal to revoke his registration, arising from matters that may have occurred or may occur in the future related to his financial circumstances and honesty and integrity.
10. The Applicant acknowledges that his registration as a motor vehicle Salesperson will not prevent the

Registrar from taking legal action, including a Provincial Offences prosecution arising from matters that may have occurred or may occur in the future related to his financial circumstances and honesty and integrity.

11. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
12. The Applicant will provide a copy of this order to any future employer.
13. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
14. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
15. The Applicant acknowledges that he has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____, this _____ day of _____ 2002

(Signature) Donald Aurele Camire

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Date:

Carl Compton
Registrar
Motor Vehicle Dealers Act

1114-MED-ALCL

**Appeal under Section 50(1) of the Highway Traffic Act,
R.S.O. 1990, Chap. H.8 as amended, from a Decision of the
Registrar of Motor Vehicles pursuant to Section 47(1) of
that Act.**

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ROSS C. BENNETT, M.D., Presiding Member

APPEARANCES: LUBA NEUWIRTH
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF
HEARING: June 19, 2002 Hamilton

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

EXHIBITS:

- #1 Notice of Suspension of Driver's Licence effective February 25, 2000, issued by Registrar of Motor Vehicles
- #2 Notice of Appeal Form received at the Tribunal May 7, 2002, filed by the Applicant
- #3 File Summary prepared by the Respondent

FACTS:

The Applicant, a 59 year-old truck mechanic had his Driver's Licence suspended on February 25, 2000. The Registrar had received a Medical Condition Report from an emergency physician, Physician #1, on February 2, 2000. The prepared report states: "This individual has the following condition likely to significantly interfere with driving" and the box opposite "alcohol or drug abuse" is checked. In addition there is a check mark in the box "Patient is aware of this report."

The Applicant gave evidence that he had been attending an engagement party on January 29, 2000 and was drinking. He felt a weakness in his right arm and had his girlfriend drive him to the Joseph Brant Hospital in Burlington. The ER physician noted he had been drinking and inquired how he came to the hospital? The Applicant answered "by car" and the physician apparently assumed he had driven. Blood tests revealed an alcohol level of 35 mmol/l (above the legal limit), a GGT of 103 (normal 15-73) and a normal MCV.

The Applicant was admitted to the hospital under a neurologist, Physician #2, who diagnosed a left hemispheric small vessel stroke. He remained off work for three months and returned when he received a clearance from Physician #2 on April 13, 2000. He was very surprised to learn the suspension was because of a diagnosis of alcohol abuse, by Physician #1.

The Applicant had received a letter from the Deputy Registrar dated February 18, 2000 advising him that the Ministry had received evidence that he suffered from a medical condition that might impair his ability to operate a motor vehicle safely. The Applicant had assumed the suspension was because of his stroke.

An addiction specialist, Physician #3, at the Credit Valley Hospital saw the Applicant on August 16 and September 6, 2000 for an assessment. His blood tests were repeated and the GGT and MCV were normal. Physician #3 found the Applicant had demonstrated evidence of hazardous or problem drinking, but he did not fully meet the DSM 1V criteria for Alcohol dependency.

It was Physician #3's opinion that the Applicant would benefit from attending a Relapse Prevention Program. This program involved five days a week from 8 to 4 for three months. The Applicant stated there was no way he could afford to take the course and besides he did not feel he had an alcohol problem. He has never missed a day's work because of drinking and no one has ever mentioned any concerns about his drinking. He further stated he has never consumed alcohol at a level that would be hazardous.

The Medical Advisory Committee repeatedly demanded participation in a relapse prevention program before considering a licence reinstatement.

The Applicant is a truck mechanic and requires his licence to move trucks in his work. He states that so far he has lost \$40,000 dollars in wages as a result of the suspension.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (f) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

According to the *Highway Traffic Act* Section 47(1) the Registrar was obligated to suspend the Applicant's driver's licence when the Medical Condition Report was received from Physician #1.

It was unfortunate there was a communication breakdown and the Applicant believed for several months that the suspension was a result of his suffering a stroke.

The Applicant admits he was drinking at a party when the stroke occurred and had his girlfriend drive him to the hospital. His problems began when the emergency physician thought he had driven himself to the hospital, while under the influence of alcohol and reported him to the Ministry. The records indicate the Applicant did not appear to be impaired while he was in the emergency, but his blood alcohol and GGT were elevated.

The Tribunal found the Applicant's Alcohol Assessment Form was very complete and appeared to be honest. It indicated the Applicant liked his beer and drank often, but not too much at a time. He stated in evidence that he never drinks at home and now does not drink during the week. He meets a group of friends at noon every Saturday and Sunday and they have a couple of beers and that is all. He will not accept the label that he is an alcoholic or that he has to take a relapse prevention program.

The Tribunal finds that the evidence presented does not support the Respondent's position under Section 47(1) that the Applicant's licence should remain under suspension until he attends a relapse program. There is little evidence to indicate that the Applicant has an alcohol problem or would be a danger to society while driving a motor vehicle.

DECISION:

Upon the application by the Applicant to appeal the decision dated February 15, 2002 of the Registrar of Motor Vehicles to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be set aside.

LICENCE APPEAL TRIBUNAL

Ross C. Bennett M.D., Presiding Member

RELEASED: June 25, 2002

PREHEARING

IN THE MATTER OF THE HIGHWAY TRAFFIC ACT Revised Statutes of
Ontario, 1990, Chapter H.8;

AND IN THE MATTER OF the Order of Suspension and Seizure by the Registrar of Motor Vehicles dated May 22nd, 2002, issued to the Applicants;

AND IN THE MATTER OF unpaid fines.

APPEARANCES:

DATE OF

PRE-HEARING: June 24, 2002

Toronto

REASONS FOR DECISION AND ORDER

The Respondent issued a Suspension and Seizure Order dated May 22, 2002, (the "Suspension Order") whereby it ordered the Commercial Vehicle Operator's Registration ("CVOR") issued to each of the Applicants and plate portion of permits for all commercial motor vehicles and trailers in the name of each of the Applicants be suspended for a period of

14 days and thereafter until all fines are paid. The Respondent, in the Suspension Order, also notified the Applicants that the plate portion of permits, or if issued by a jurisdiction other than Ontario, the permits and the number plates, will be seized. The Suspension Order was to be in effect at 9:00 a.m. Eastern Standard Time on the 29th day of May, 2002 to 8:59 a.m. Eastern Standard Time on the 12 day of June, 2002, and thereafter until all fines are paid.

The Applicants appealed the Suspension Order by a Notice of Appeal dated May 28, 2002, (the "Appeal") which was received by the License Appeal Tribunal (the "Tribunal") on May 28, 2002. The Appeal requested a Prehearing Conference to be convened by the Tribunal and participation in the Prehearing Conference was set down for a conference on June 24, 2002, in accordance with the Rules of Practice of the Tribunal. At the Prehearing Conference, both the Registrar and the Applicants were represented by counsel.

It became apparent at the Prehearing Conference that the issues involved in the Suspension and the Appeal were simple and straight forward and the usual discovery procedure and cooperation between counsel might identify facts or evidence that could be agreed upon in order to expedite the time spent at the hearing. It was generally agreed that the hearing would occupy two to three days in mid-September 2002, and would involve one witness for each party subject only to the decision of counsel for the Applicants to call expert evidence in accordance with the Tribunal's Rules of Practice. The Prehearing Conference also disclosed some doubt at this time respecting the status of one of the Applicants and clarification was sought and discussed so as to simplify prior to the date of the hearing one of the issues raised by the Appeal with respect to the Parties participating.

DECISION:

It was agreed between counsel and decided by the Tribunal that on or before the close of business on Tuesday, July 2nd, 2002, Counsel for the Applicants would obtain instructions from his clients whether or not P. S. Sandhus & Associates Ltd. would continue as a Party to these proceedings in view of the apparent fact that it was no longer in an active business undertaking at this time. If Counsel could obtain such instructions, the withdrawal of the Appeal by P. S. Sandhus & Associates Ltd. would expedite the hearing without prejudice to the Respondent to introduce evidence respecting P. S. Sandhus & Associates Ltd. as a predecessor registrant of the CVORs'.

ORDER:

The Tribunal therefore makes the following Order respecting the hearing to be heard before the Tribunal:

1. The Parties to the hearing are the Applicants and the Registrar subject only to the withdrawal of P. S. Sandhus & Associates Ltd.;

2. The hearing shall take place at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, on Wednesday, September 18, 2002, and shall be continued on Thursday, September 19, 2002, and Friday, September 20, 2002, if necessary;
3. The Parties shall fully comply with Rules 6.3 and 6.4 of the Tribunal's Rules of Practice;

LICENCE APPEAL TRIBUNAL

Terence A. Wardrop,
Vice-Chair

Released: June 28, 2002

1129-MVIA-EXHP

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: NIVES MONTANO
Presiding member

APPEARANCES: LUBA NEUWIRTH
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF HEARING: June 21, 2002 St. Catharines

DECISION RELEASED: June 24, 2002

REASONS FOR DECISION

A hearing was held on June 21, 2002, at St. Catharines, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	the Applicant
Motor Vehicle:	the vehicle
Date of Appeal:	June 2, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on June 21, 2002 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

THE LOSS OF THIS VEHICLE WILL CAUSE EXCEPTIONAL HARDSHIP. I HAVE RECENTLY BEEN SUFFERING FROM SEVERE DEPERSSION DUE TO MARITAL/ FINANCIAL BREAKDWON WHICH CREATES ERRATIC BEHAVIOR. I MADE A SERIOUS MISTAKE WHICH AT THE TIME I DID NOT EVEN REALIZE THE IMPLICATIONS. I AM A SINGLE MOM OF TWO BABIES (2 & 3) IF I LOSE MY CAR I WILL HAVE NO TRANSPORTATION & WILL NOT HAVE ANY MEANS TO BECOME SELF-SUFFICIENT. I AM ALSO IN GRAVE FINANCIAL TROUBLE AS IT IS. THIS VEHICLE IS LEASED TO ME & I RISK LOSING IT ALTOGETHER. I COMPLETELY UNDERSTAND & FELL SERIOUS REMORSE FOR THIS INCIDENT. I CANNOT EXPRESS TO YOU ENOUGH HOW THIS SITUATION HAD CREATED MORE TURMOIL IN MY LIFE. I AM BEGGING THIS TRIBUNAL TO RELEASE MY VEHICLE. I AM A GOOD UPSTANDING CITIZEN WHO MADE A BIG MISTAKE I THANK-YOU FOR YOUR CONSIDERATION.

May 29, 2002

To Whom It May Concern:

Re: the Applicant

The above mentioned is presently under my care and she was hospitalized back in May 2002 for treatment of depression. She is the mother of two children and she is recently separated. She apparently was becoming increasingly depressed, dysphoric, anxious, agitated and had suicidal thoughts.

I understand that she was involved in a car accident but she was not the driver. Apparently the driver was disqualified at the time of the incident and her care was impounded. This is the only transportation she has and deprivation of this motor vehicle is going to cause significant hardship on her. She is emotionally very devastated and this is intensifying a major depressive disorder for which she is being treated with medications.

Her behavior of allowing a disqualified driver to drive her was probably a manifestation of her underlying depression and anxiety and she now realizes that it was an irrational act.

I also gather from her that every day of the impound costs her fifteen dollars which could accumulate to a figure of several hundred dollars. She is in deep financial trouble.

I would hope that you would consider releasing the impounded vehicle to her. I will continue to see her in my office in ongoing psychotherapy and monitoring medications.

I will be more than pleased to provide details if you require so.

Thanking you.

Yours sincerely,
"Physician #1"

The following is a summary of the Applicant's affirmed testimony.

The Applicant is a mother of 2 young daughters aged 2 and 3 years of age. She is currently separated and will be in a position to file for divorce in August, 2002.

There is no separation agreement in place with the Applicant and her estranged husband. He only provides her with child support, but no additional financial support. He is employed full-time and resides with his parents in Ajax. Because of this, the Applicant moved to her current hometown to be with family and has been on welfare for the past 2 months.

With respect to the circumstances surrounding the impoundment, The disqualified driver, the Applicant's friend since October, 2001 and herself decided to frequent a few clubs that evening. At a certain point, the Applicant refused to drive since she had been drinking. The disqualified driver volunteered to drive her vehicle with her permission. The Applicant was aware that the disqualified driver was a suspended driver.

As the disqualified driver was travelling along St. Paul Street in St. Catharines, The disqualified driver failed to check his blind spot when changing lanes and got into an accident with a taxi (Exhibit 5). The Applicant testified she tried to assume responsibility for the accident, but there were too many witnesses. The disqualified driver was charged criminally and the vehicle was impounded.

Due to all of the foregoing, the socio-economic changes in her life, the lack of support at the time, the bad decisions and the mistakes which were made, the Applicant suffered severe depression and was hospitalized in May, 2002. She is currently under the care of a psychiatrist (Exhibit 3) as well as case workers to assist her emotionally and with her parenting skills.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows (Exhibits 6 & 7):

Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as plate owner;

Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by the disqualified driver;

Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;

Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Blood/Alcohol content in Excess of .08 under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until January 9, 2003.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in

determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Tribunal must determine whether it should set aside the Registrar's order to impound the vehicle on the basis that the owner of the impounded vehicle will suffer exceptional hardship.

The Applicant has appealed on the grounds of "exceptional hardship" under section 55.2(3)(d).

Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the criteria the Applicant must meet to determine if in fact "exceptional hardship" will result from the impoundment. The Applicant in this case has argued that the impoundment will result in hardship as described in section 22(2). In order for her appeal to be considered under section 22(2), she must have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulations provides the criteria for demonstrating that every reasonable option has been considered respecting an alternative vehicle.

The Applicant has testified that she is currently using her grandmother's leased vehicle. There is no public transit in her current hometown. She also testified that she has made some friends in the area who would provide her with transportation if the need arose.

With regard to possible threat to the health or safety of any person ordinarily transported by the motor vehicle, the Applicant testified that her daughters have no health issues. The community in which the Applicant resides is "911" accessible and the hospital is about 3 kilometres from her home. Since the impoundment, she has not missed any doctor's appointments.

She would like to honour her commitment to the leasing company as well as repairing the damage caused to the vehicle, but she doesn't feel she can manage the cost of the towing charges, impoundment fees as well as the cost to repair the vehicle. Unfortunately, the insurance company has disallowed the damage claim since the Applicant was not the driver of the vehicle at the time of the accident.

Although the Applicant is a person in crisis, her plight with regard to her significant financial losses regarding this impoundment cannot be addressed by this Tribunal since there are alternatives to the impounded vehicle.

Evidence was heard that the Applicant has incurred severe financial hardship as a result of the loss of the vehicle. The Applicant testified that the disqualified driver indicated he would help her pay half of the expenses, but to date she has not received any money. "He has a good job with John Deere". The Applicant may pursue compensation from the suspended driver as is stated in section 55.1(21) of the *Highway Traffic Act*:

"The owner of a motor vehicle that is subject to an order to impound under this section may bring an action against the driver of the motor vehicle at the time the order was made to recover any costs or other losses incurred by the owner in connection with the order".

After considering the above requirements, the Tribunal finds that the Applicant has alternatives to the impounded vehicle and the impact of the loss will only be financially significant, but not immediate and lasting.

Accordingly, after considering the criteria set out in section 22(3) and (4) of Regulation 340 as amended by Ontario Regulation 632/98, the Tribunal finds the Applicant has not established exceptional hardship as set out in section 50.2(3)(d) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Nives Montano, Presiding Member

RELEASED: June 25, 2002

CLAVERO

HIGHWAY TRAFFIC ACT
R.S.O. 1990, Chap. H.8 as amended

IN THE MATTER of the ORDER to IMPOUND a MOTOR VEHICLE Order # 2501058 OWNED BY: Veronica L. Clavero of: 1323 Red Bank Crescent, Oakville, Ontario, L6H 1Y4 made pursuant to section 55.1 of the *Highway Traffic Act*, effective on: June 17, 2002.

AND IN THE MATTER of a requirement for a hearing respecting an appeal of the said Order to Impound, pursuant to section 50.2 of the *Highway Traffic Act*.

VERONICA L. CLAVERO

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

CONSENT ORDER

Upon the application to the Tribunal by the Veronica L. Clavero, Applicant, and by the representative for the Registrar of Motor Vehicles, for the issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22, and having reviewed the written settlement signed by the Applicant and the Registrar of Motor Vehicles as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the facts and on the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: June 27, 2002

Schedule "A"

LICENCE APPEAL TRIBUNAL

Between:

VERONICA CLAVERO

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

1. On June 17th, 2002, the motor vehicle described in Order to Impound #2501058 was impounded in accordance with subsection 55.1(3) of the *Highway Traffic Act*, R.S.O. 1990, c. H. 8 as amended.
2. The Applicant, Veronica Clavero, whose name is shown on the vehicle and plate portion of the permit for the impounded motor vehicle, is the owner of the said vehicle.
3. The Applicant filed an appeal of the Order to Impound, in accordance with the grounds permitted under clause 50.2(3)(a) of the *Highway Traffic Act*, stating that the motor vehicle that is subject to the Order was stolen at the time in respect of which the Order was made.
4. Having investigated this matter and receiving the appropriate information from the police service, the Registrar is satisfied that the motor vehicle that is subject to the Order was stolen at the time in respect of which the Order was made.
5. The Applicant has had the opportunity to obtain independent legal advice with

respect to consent to this Order.

6. The parties agree that this agreement does not bind the Ministry of Transportation or the Registrar of Motor Vehicles in any way, with respect to future hearings or Consent Orders.

JOINT SUBMISSION

Accordingly, the parties consent to an Order of the Licence Appeal Tribunal under subsection 50.2(5) of the *Highway Traffic Act* that the Tribunal set aside the Order to Impound.

Veronica Clavero

**Authorized Delegate for
Registrar of Motor Vehicles**

(signature of Applicant)

(signature of Respondent)

(date)

(date)

DONNA M. HUNT

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: MARJORIE L.HILEY, Vice Chair

APPEARANCES: GARY HUNT, Agent for the Applicant
AVIVA HARARI, Counsel for the Registrar, *Motor Vehicle Dealers Act*

DATE OF
HEARING: April 23, 2002 Sudbury

REASONS FOR DECISION AND ORDER

BACKGROUND:

This matter was commenced by the Registrar issuing a Notice of Proposal dated July 30, 2001. In that Notice of Proposal the Registrar stated his refusal to register the Applicant as a motor vehicle salesperson based on the non disclosure of outstanding judgments against her. The Applicant submitted a Notice of Appeal dated September 24, 2001. The Registrar issued Notice of Further and Other Particulars on April 9, 2002. In that Notice of Further Particulars the Registrar stated that the refusal was based on the previous reasons and as well the facts that:

1. the Applicant received a transfer of funds in contravention of section 91 of the *Bankruptcy and Insolvency Act*;
2. The Applicant declared personal bankruptcy on October 29, 2001.

There was a dispute over the admissibility of some of the documents presented by the Applicant. The Tribunal allowed in as evidence the original application, the lawsuit between the Bank of Nova Scotia and Donna Hunt, letter of James Houston, copy of Jeannette Assinewai deal, copy of Anna Wilkins deal and the report dated April 15, 2002 from Catherine Beebe. R.N. The affidavit of Gary Hunt, the copy of the LAT decision re Gary Hunt, the copy of the Canadian Charter of Rights and Freedoms, the copy of the Canadian Bill of Rights and the copy of the lawsuit between Donna Hunt and Mary Jane South were not entered as exhibits.

It was determined that the Tribunal would not hear any Charter arguments as the proper procedure had not been followed by the Applicant. Mr. Gary Hunt was to act as agent for the Applicant and would not be called as a witness.

ISSUE:

Was the Registrar acting reasonably in refusing the registration of Donna M. Hunt to be a motor vehicle salesperson?

EVIDENCE:

The Registrar called Pamela Florence, an estate administrator for Price Waterhouse Coopers and Mary Jane South, deputy register, as his witnesses.

Pamela Florence testified that she has been a certified estate administrator since 1995 and was familiar with the bankruptcy of Grandview Ford Lincoln Sales Ltd. as her company had been appointed the receiver on this matter. She stated that the Trustee in Bankruptcy was to review certain transactions of which one was the payment to Donna Hunt of forty thousand dollars (\$40,000.00) via a bank draft on November 17, 1999. Ms Florence found this to be an unusual transaction as the bank draft was drawn on the MasterCard account of the dealership. Normally the monies in the MasterCard account would be transferred to the dealership's general account. As well this bank draft had been labeled as a bonus but if that were the case there should have been a T4 issued and taxes should have been deducted. Ms Florence stated that repayment of a personal loan would normally be posted to the general account and if it were a bonus it would be a payroll item. She stated that there is a court order stating that this transaction is a settlement payment and not allowed under section 91 of the *Bankruptcy and Insolvency Act*. The money was to be returned by Ms Hunt to the trustee. Ms Florence stated that to the best of her knowledge the funds had not been returned. There had been a recovery of \$2,000.00 when a motor home owned jointly by Donna and Gary Hunt was seized and sold. The funds were distributed on a percentage basis to the various creditors.

Mary Jane South testified that she has been the deputy registrar of OMVIC since January, 1997. OMVIC is a non profit corporation which has the responsibility to administer the *Motor Vehicle Dealers Act*, which is a public protection act. She had issued the Notice of Proposal. She based her refusal on the outstanding judgments with the CIBC and the Bank of Nova Scotia as well as the transfer of funds by bank draft to Ms Hunt and the fact that Ms Hunt was an undischarged bankrupt. Ms South felt that Ms Hunt had misled the Registrar concerning her financial position. Her application for registration as a motor vehicle salesperson was dated July 17, 2001. In it Ms Hunt had stated that there were no outstanding judgments but the Bank of Nova Scotia judgment predated that application.

Ms South stated that she asked Ms Hunt about that judgment and the CIBC judgment during a telephone conversation on September 24, 2001. Ms Hunt stated that the Bank of Nova Scotia judgment had been settled and she was unaware of any judgment

against her by CIBC. Ms South stated that Ms Hunt could not work as a business manager without being registered but she could work as an accountant without such registration. Such a distinction is stated in Section f of the application form.

Ms South stated that Ms Hunt had said she was not signing any documents. The Vehicle Purchase agreement for the Doreena Trudeau deal dated August 15, 2001 has the signature of Ms Hunt plus her old registration number of 4671880. As well there is the Jeannette Assinewai document dated June 30, 2001 which was signed by Ms Hunt. Ms Hunt also signed the vehicle purchase agreement dated July 24, 2001 for Anna and Gary Wilkins.

Ms South stated that the CIBC judgment against Gary and Donna Hunt is dated February 8th, 2001 in the amount of \$277,350.35 for principal and accrued interest plus \$3500.00 for costs. As of May 8th, 2001 the amount owing on that judgment was \$290,519.03. The Bank of Nova Scotia judgment against Donna and Gary Hunt is dated February 23, 2001. It is in the amount of \$758,754.00 plus \$36,170.74 for prejudgment interest. The full and final release by the Bank of Nova Scotia on this judgment is dated August 8, 2001 which is after the application for registration had been submitted to OMVIC. Ms Hunt then declared personal bankruptcy and the insolvency search conducted on October 29, 2001 showed no discharge date.

It was the position of Ms South that declaring bankruptcy itself is not the factor for financial irresponsibility in this case. It is the conduct of Ms Hunt leading to the bankruptcy which concerns the Registrar. Ms Hunt had failed to disclose her proper financial position and had not conducted herself in a financially responsible manner. She signed documents on behalf of the dealership when she knew that she should not be doing that as she was not yet registered under the Act.

Ms Hunt testified on her own behalf. She has extensive business experience with the motor vehicle industry since 1980. She relocated to Gore Bay and submitted a renewal application in March, 2001. That renewal application could not be found at OMVIC so it was resubmitted. Then the matter was delayed in the legal department at OMVIC. She was told to do a reinstatement application. This was done in July, 2001. She put down that there were no outstanding judgments as she thought the Bank of Nova Scotia judgment had already been settled and she did not know about the judgment against her by CIBC. She does not remember being in court on this matter.

Ms Hunt stated that she had a difficult time in the fall of 2000 as she was depressed and went to hospital suffering from a nervous breakdown. She had been upset at the lawsuit over the closure of Grandview. Money was tight in the family as her husband was not working steadily. She was on Prozac for some time and recently has gone off it. She stated that she had liquidated a RESP fund to allow her husband to have the funds for the business. Her husband had agreed to repay her. It was not a bonus situation. She did take the \$40,000.00 bank draft from her husband. She thought that the funds had been repaid and she had heard nothing from Price Waterhouse Coopers on this issue. She felt when the full and final release was signed with the Bank of Nova Scotia that

meant the \$40,000.00 had been repaid, that no fault was found and there was no lawsuits between the parties.

Ms Hunt testified that she and her husband had been fighting with CIBC as the bank had erred on a bank loan so they stopped payments. The bank did not protect their motor home from creditors. All their other credit obligations are paid in full.

Regarding Island Ford, Ms Hunt stated that she did not work for them but helped with the paperwork. She did not sell cars. She was not knowingly trying to deceive anyone. She felt that her situation was delayed due to the problems being experienced by her husband. Their current financial problems are due to her husband. She had no paperwork to prove it was a loan to her husband. It was monies from her first divorce.

Ms Hunt wants to work at Island Ford where her husband is now the general manager. She would report to him as well as to Ken Bell. She does not understand why you have to be registered if you work as a business manager. Regarding the documents with her signature she had signed them at home and then the customer signed them.

LEGISLATION:

The relevant legislation is the *Motor Vehicle Dealers Act*:

5(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

(a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law, and with integrity and honesty;

...

(2) A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant, imposed by the Tribunal or prescribed by the regulations.

...

7.(4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

(5) The Tribunal may attach such terms and conditions to its order or to the registration as it considers proper to give effect to the purposes of this Act.

ANALYSIS:

This is an application by Ms Hunt to be allowed to be registered as a motor vehicle salesperson. She had been registered in the past but that registration had lapsed and she had applied for reinstatement. She has been working in the motor vehicle industry in a variety of positions since 1980. This depth of experience is significant in the decision of this Tribunal.

It is the opinion of the Tribunal that the Registrar acted reasonably in refusing to register Ms Hunt as a motor vehicle salesperson. It is trite law that the Tribunal should not interfere with the decision of the Registrar unless the Tribunal is of the opinion that the Registrar acted unreasonably and did not have sufficient grounds for the Proposal.

The Tribunal bases its decision on a number of factors. Ms Hunt has stated and she provided medical information that she suffered emotionally after the collapse of the Grandview dealership. Accordingly the Tribunal can accept her explanation that she has some confusion over exactly what occurred from the fall of 1991 until recently. But Ms Hunt was quite clear that she had faxed in her application form in March, 2001, it was lost and she did another one later that spring and then finally did a reinstatement application in July, 2001. The evidence before the Tribunal is that Ms Hunt did appear in court regarding the CIBC statement of claim so she either misled the Registrar regarding this matter or she failed to make inquiries as to what happened with that court case. Regarding the Bank of Nova Scotia judgment there was a release signed August 8th, 2001. The Tribunal finds it difficult to believe Ms Hunt's explanation that she thought it was settled earlier. She was capable enough to sign documents on behalf of Island Ford in June, July and August, 2001. Why was she not capable of ascertaining the progress on the settlement negotiations with the Bank of Nova Scotia? Failure to make proper disclosure on the application form is considered by this Tribunal as a serious error of judgment and requires reasonable explanations as to why the application was not completed properly. In this case the Tribunal did not receive such reasonable explanations. The Registrar must rely on these applications to be accurate and honest due to the tremendous volume of applications received each year. To deceive the Registrar, particularly on a reinstatement application, show a lack of honesty and integrity on the part of the Applicant. This Applicant had worked for many years in the motor vehicle industry and had been registered previously. She should have ensured her answers were accurate to the best of her ability.

The Tribunal is also concerned about the conduct of the Applicant signing documents on behalf of Island Ford when she had not received her registration. Indeed on one document, the Trudeau deal, Ms Hunt not only signed her name on behalf of the dealership but she put her old registration number. She knew in August, 2001 that her registration application had not been accepted by the Registrar and yet she knowingly put down an expired registration number on the vehicle purchase agreement. There were three examples of Ms Hunt having signed official documents on behalf of Island

Ford either shortly before or shortly after having submitted her reinstatement application. Yet she should have known due to her previous experience as a registrant that you cannot work as a business manager without being registered. Indeed that statement is stated quite clearly on the application form that she submitted in July, 2001. Again Ms Hunt was either misleading the Registrar or was negligent in not reading the application form.

The Tribunal agrees with the statement of Ms South that the fact that one has filed for personal bankruptcy does not in itself mean you cannot be registered under the Act. You have to look at the conduct of the individual prior to and after the filing of the bankruptcy.

It is unfortunate that Ms Hunt and her family are suffering financially due to the business losses of her husband. The Tribunal can sympathize with how this affected her emotionally. But the Tribunal, as does the Registrar, must balance the interests of the applicant with that of the general public. In this case the Tribunal found the conduct of the Applicant in not completing the reinstatement application properly and in acting as a business manager without being registered shows that she would not act with honesty and with integrity if permitted to be registered as a motor vehicle salesperson.

ORDER:

Accordingly, pursuant to the authority vested in it by section 7(4) of the *Motor Vehicle Dealers Act*, the Tribunal directs the Registrar to carry out his Proposal to refuse the registration of Donna M. Hunt as a motor vehicle salesperson.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley, Vice-Chair

RELEASED: July 30, 2002

EUGENE BORG

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: VICTOR DREVNIG, Vice-Chair

APPEARANCES:

FREDERICK FEDORSEN, Counsel, representing the Applicant
AVIVA HARARI, Counsel, representing the Registrar under the
Motor Vehicle Dealers Act

DATES OF

HEARING: June 5, 2002

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

The Applicant appeals a Notice of Proposal dated November 6, 2001, issued by the Registrar of the *Motor Vehicle Dealers Act* ("the Act") to refuse to grant the registration of Eugene Borg as a motor vehicle salesperson under the provisions of the Act.

The Registrar's Proposal is based on the provisions of section 6(2) of the Act as read with section 5(1)(b) and 5(1)(a) thereof on the grounds that the past conduct of the Applicant affords reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty. In addition, the Registrar relies on a Decision of this Tribunal between the same parties, released on August 25, 2000 and which is attached to the Decision of the Registrar as Exhibit #1, an appeal from the Registrar's previous refusal to register the Applicant dated January 1, 2000.

FACTS:

The Tribunal heard evidence from Mr. John McCormack. He alleged that he bought a car from Mr. Eugene Borg for \$12,800 from a driveway near Eglinton and Renfrew, said car being a 1996 Ford Windstar, on March 26, 2001 with an odometer reading of approximately 38,000 km. but that he never received any paperwork until April 6, 2001. he further stated that he gave Mr. Borg some \$2000.00 in cash for a deposit and in payment of taxes and improvements on the vehicle.

When he received the Sales Receipt (Exhibit 3 Tab 10 4th page) the amount of the sale price was \$10,332.00 and the seller was G.W. Motors and the Salesperson was indicated to be Sally Baughem. He was later advised by a Ford dealer that the true mileage was in fact 83,000 km. as of 1999. He had a great deal of trouble with the van and sold it within 6 months.

Mr. Mark Harris was the second witness for the Registrar. He advised the Tribunal that he represents G.W. Motors and that they are registered under the Act. He testified that he had been trying to help Mr. Borg, who used to own his own car business. Mr. Harris testified that when old customers call Mr. Borg, Mr. Borg refers them to Mr. Harris, who gives him a commission.

Mr. Borg also goes to car auctions with Mr. Harris as an advisor. Mr. Harris further stated that he pays a referral and commission cheque to Mr. Borg monthly, together with some cash each month. The motor vehicle in question, the Ford Windstar sold to Mr. McCormack, was a theft recovery sale by Ford Credit Canada at auction with the notation "TKU" True Kilometers Unknown. It had in fact been a stolen vehicle.

In cross examination Mr. Harris advised the Tribunal he knew about Mr. Borg's Criminal Record, and his some 7 convictions and that he would still trust him and, if licenced, would have hired him on his car lot.

Amanda Lee Dempsey was the third witness for the Respondent. She is an employee of the office of the Registrar and enforces the *Motor Vehicle Dealers Act*. She testified that their criteria for registration are honesty and integrity and financial responsibility.

She testified she was aware of the reasons for the Registrar's decision to refuse registration and that in Mr. Borg's case the refusal concerns his complete criminal record and his deception in not advising the Registrar about it when filing out applications on two previous occasions (See Exhibit #1 with Schedule "A" attached). There also were concerns to do with his financial irresponsibility in non payment under a support order, and also in his acting as a salesperson when not licenced.

The Registrar was particularly concerned by the conviction for possession of stolen property and fraud and by the arrears of the Family Court Award.

Mr. Eugene Borg was the sole witness for the Applicant. He testified that he is 38 years of age and was convicted at the ages of 16 and 18 for possession of stolen auto parts, and in 1987 for possession and fraud. He testified that he had no knowledge of the 1998 or 1999 convictions, but knew they dealt with his marriage troubles. He is paying his ex-wife \$300-400/month in cash over the last 9 months and is \$63,000.00 in arrears.

His work consists of finding cars for dealers and fixing up cars. If he is allowed to attend auctions he can earn a living. He admitted during the last week of March 2001 he met Mr. McCormack at a friend's driveway and told him that the friend had a vehicle for sale.

He drove Mr. McCormack to Speedy Muffler, where the vehicle was located, and was paid \$2000.00 cash, by Mr. McCormack, to do repairs to the vehicle. He did the repairs himself through a company he owns. No invoices were produced. Mr. Borg testified he never saw Mr. McCormack again.

He further stated that certain payments have been made to his wife by friends on his behalf. The payment records of the Family Responsibility Office (Exhibit 5) do show certain payments were made, payments which he indicated were to be credited to him.

In cross examination Mr. Borg acknowledged that Exhibit #7 was a Judgement of the Ontario Court of Appeal in a case recorded as Caroline Gerstner (Respondent) and Eugene Borg (appellant) being file no. G 29403, which was decided on February 10, 1999 and dealt with a contempt order made against him, concerning his failure to pay \$100,000.00 into his solicitor's trust account.

The contempt order dealt with the removal of \$171,000.000 from a business account and an affidavit was sworn by Mr. Borg concerning the whereabouts of the funds. It later became known that the affidavit was false and that his mother was holding the funds for him. The Court of Appeal stated that due to a technical error, Mr. Borg could not be held in contempt. However, the affidavit he had sworn was indeed false.

THE LAW:

The relevant portions of the Act that are applicable to these proceedings are subsections 5(1) and 6(1), which set out the circumstances under which the Registrar may refuse to register an applicant. The powers of the Tribunal are set out in section 7(4).

5.(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

(a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or

(c) the applicant is a corporation and,

(i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, or

(ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or

(d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

6.(1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 5.

7.(4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

The Divisional Court has clearly outlined the proper test to be applied by the Tribunal in *Re Brenner*, 19 C.R.A.T.58 as follows:

"The effect of section 7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner has genuinely reformed and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself."

APPLICATION OF LAW TO FACTS:

Ms. Harari argues that the Tribunal cannot find in favour of the Applicant unless the Tribunal finds that the Registrar erred in its Decision. She is quite right. She further argues that any reasonable Decision should go in favour of the Registrar and that the case for the Registrar is stronger now than it was two years ago due to Mr. Borg's acting as a salesperson without a licence.

Mr. Fedorsen, Counsel for the Applicant, submitted that the Registrar erred in failing to investigate the Applicant's age at the time that the "honesty" convictions were dealt with and his wife's willingness to remove the order filed with the Family Responsibility Office before refusing his registration. He further argued that the Applicant is forthright and admitted everything to the Tribunal and that he has been in the motor vehicle business all of his adult life.

The Tribunal finds as fact that:

1. The Applicant was carrying on the business of a car salesperson while unlicensed.
2. The Applicant's dealings with Mr. McCormack did not exhibit the integrity and honesty expected of a licensed motor vehicle salesperson.
3. The Applicant was financially irresponsible with regard to his support payments.

4. In 1999, the Applicant was found by Ontario Court of Appeal to have sworn a false affidavit with regard to his financial circumstances.

The Tribunal finds that based on these facts the Registrar was correct in his findings that the past conduct of the Applicant:

- (a) afforded reasonable grounds for believing that he would not carry on business in accordance with law, and with integrity and honesty; and,
- (b) having regard to the facts found in the evidence, indicated the Applicant could not reasonably be found to be financially responsible in his business dealings.

Having regard to the aforesaid the Tribunal finds no grounds to disagree with the Registrar's Decision.

ORDER:

Accordingly the Tribunal, pursuant to the authority vested in it by Section 7(4) of the *Motor Vehicle Dealers Act*, directs the Registrar to carry out its proposal dated November 6, 2001 to refuse the registration of Eugene Borg as a motor vehicle salesperson under the Act.

LICENCE APPEAL TRIBUNAL

Victor Drevnig, Vice-Chair

Released: July 5, 2002

CYNTHIA AND JOSIP BAN

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MARJORIE L. HILEY, Vice-Chair

APPEARANCES: CYNTHIA AND JOSIP BAN, Applicants
KAREN JONES, Counsel representing the Ontario New Home
Warranty Program

DATE OF
HEARING: April 8 and 9, 2002 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

The Registrar issued a decision letter on November 21, 2001 in which he denied the claim of the Applicants based on water penetration issues and the spalling of the foundation concrete. The Registrar found that the claim did not fall within the definition in the Act for major structural failure.

The Applicants by their Notice of December 5, 2001 requested a hearing before the Tribunal. They stated in their Notice of Appeal that they had an engineer's report stating there was structural damage, joist ends needed to be supported, and the foundation wall did not meet Code and was defective.

The hearing was held on April 8, 2002 and continued on April 9, 2002.

ISSUE:

Do the claims of the Applicants fall within the meaning of the definition of major structural defect under the *Ontario New Home Warranties Act*?

If so, did the Applicants suffer any damages from this defect?

TESTIMONY:

Testimony of Cynthia Ban:

Mrs. Ban is one of the homeowners of the property at 5259 Forestwalk Circle, Mississauga, Ontario. She and her husband took possession of the property on January 29, 1998.

Mrs. Ban testified that she first noticed the water penetration problem in July, 2001. They have a two story detached home. The water penetration was occurring at the north end of the basement adjacent to the garage. They had insulation only on the top one half of the walls in their basement. They noticed a puddle of water on the floor by the north wall. They removed the insulation in that particular area. They did not notice any cracks in that area. They then noticed that the foundation was crumbling on the outside of the house. They contacted the Program and on the recommendation of the Program staff they had concrete testing done by Construction Testing Laboratory on September 19, 2001. After receiving the results of that testing they filed a claim with the Program on September 21, 2001.

Mrs. Ban testified that it was recommended by the Laboratory that they have the foundation repoured and have the joist ends supported by metal posts. Mrs. Ban was informed that the city inspector does not look at testing the concrete when it is poured into foundations. She was not aware of how this concrete issue could have come to their awareness without doing the concrete testing. Mrs. Ban stated that the concrete in their foundation does not meet the requirements of the Ontario Building Code.

Mrs. Ban testified that on October 30, 2001 there was a site inspection of the claim by a warranty representative.

Mrs. Ban presented a number of photographs to illustrate the nature of the problem. Photograph 8C shows the top of the foundation on the north wall of the house just before the garage. Mrs. Ban took this photograph on March 13, 2002. Photograph 8A shows a close up view of the north wall of the house going down some 4 to 5 inches below the soil surface. There is no evidence of plastic covering or tar covering on the wall. This photograph was taken by Mr. Ban on April 6, 2002. Photograph 8B is taken inside the basement on the east wall of the house. It shows efflorescence half way down on the wall. Mrs. Ban took this photograph on March 13, 2002. Photograph 8D is of the north wall of the house on the outside. It was taken by Mrs. Ban on March 13, 2002. Photograph 8E is of the outside north wall of the house closer to the garage. It was taken by Mrs. Ban on March 13, 2002.

Mrs. Ban explained that the Ontario Building Code states that concrete in the foundation should be 12.7 mpa but the results of the testing show the concrete at her home to be 5.5 mpa.

Exhibit 9 to this hearing is some pieces of the foundation of the house which had been seen in the photographs contained in Exhibit 8.

The Construction Testing Laboratories Limited did a further report dated December 4, 2001 which dealt with the matters raised by the warranty representative after his site visit.

Mrs. Ban stated that on March 6, 2002 Mr. Genge and the warranty representative came to their home for a site visit. A report was written on March 15, 2002. The Construction Testing Laboratories Limited then did a further report dated March 29, 2002.

Mrs. Ban testified that they are concerned about their ability to sell their home with these problems. She had no estimate of the costs involved to remove the concrete foundation and repour it in sections.

Under cross examination Mrs. Ban confirmed that they had no concerns about the basement until July of 2001. It had not been raining when they discovered the puddle of water on the floor. They found about a litre of water on the floor in the north west corner of the basement. They use their basement for storage and continue to do so now.

Mrs. Ban stated that the foundation was crumbling on the north wall by the garage. As well there was a bit by the front door. There was nothing on the south wall and with the deck on the east wall they could not see the foundation.

Mrs. Ban with the assistance of her husband completed a chart which showed the extent of the problem. Efflorescence was found by the south wall near east side by the insulation. In the cold room the efflorescence starts at the top of the wall and goes to the middle of the wall. There is a crack at the west end of the north wall near the electrical box. It is about 4 feet in length and perhaps a couple of millimeters in width being wider at the top. There was no water from that crack. There was another crack on the north wall under the insulation in the top part of the wall. It is about 3 ½ feet long and approximately 4 millimeters in width, being wider at the top. There was no water on the wall. In the northeast area of the basement the cardboard boxes were damp underneath.

Mrs. Ban stated that she had not taken any humidity readings. There was no dehumidifier, just the air conditioner.

In conclusion the north wall had efflorescence under the insulation; northeast wall had efflorescence by the insulation and at the bottom; south wall had efflorescence by the insulation; and the west wall by the cold room.

Mrs. Ban stated that they have not shorn up the joists as they did not want to do anything to prevent their ability to file for warranty protection.

Mrs. Ban stated that there was no crumbling of the foundation inside the basement but that had started to happen in the garage in the summer of 2000. There is a fine powder

crumbling along all the exterior walls of the garage. This problem was not mentioned to their engineer, Mr. Wong or to the warranty representative.

Testimony of William Wong:

Mr. Wong is a professional engineer. He has tested approximately 25 to 30 house foundations since 1987. His area of expertise is in the testing of concrete. He normally does industrial or commercial testing. He tests approximately three or four houses per year.

His initial report (Exhibit 5) was done on September 20, 2001. Using a diamond core drill he took three cores from the north wall. Two of those cores were from the exterior above the ground level and the third core was taken from the interior of the north wall about 800 millimeters from the floor and about one meter east of the electrical box.

Mr. Wong explained the calculation of pressure is done in megapascals. He uses a specific type of machine that results in the piston rising and the concrete material is crushed. His machine dates from 1995 and is calibrated yearly. He had an average result of 5.5 mpa while the Ontario Building Code speaks of 15 mpa. His results were roughly one third of the minimum requirements under the Ontario Building Code.

Mr. Wong stated that the results of his carbonation tests showed 20 mm and 25mm for the exterior walls and 35mm for the interior wall. He concluded that the concrete was so porous that carbon dioxide could enter. He stated that normally concrete will carbonate at about 1 mm per year. If it is a poor quality of concrete then you get a larger amount of carbon in it. He found the concrete to be extremely porous on both interior and exterior of the wall.

The two cores were taken from the exterior of the wall. The surface was very scaled which is caused by freeze and thaw damage. Water gets into the pores of the concrete. When it freezes that causes expansion and the concrete will flake off. Such flaking is an indication that the concrete is porous and absorbs water readily. If this process is allowed to continue you could have a collapse of the wall as the foundation would not be thick enough to support the house.

Mr. Wong stated that as the compressive strength was lower than the Code it was necessary to have metal shoring posts along the foundation walls at the end of every joist. He stated that there was no way to determine the strength of the concrete at the base point where the wall meets the floor.

The third core was taken in the interior of the wall closer to the basement floor. Mr. Wong observed that it could be weaker at the top of the wall where the base plate is under the joists.

His second report of December 4, 2001 deals with the observations of the warranty representative.

He stated that the minerals from the concrete, in particular calcium hydroxide, are brought to the surface by water. There is a reaction and a white residue is formed which is insoluble in water. This is efflorescence. It happens to concrete that is very porous. Mr. Wong felt that good quality concrete of this age should not be showing any measurable carbonation. The shrinkage cracks mean a high water to cement ratio. The normal water to cement ratio is 0.55. When you increase the water to cement ratio the concrete becomes porous for when it dries the water dissipates leaving pores behind. Its compression strength decreases. He felt that a symptom of high water to cement ratio are shrinkage cracks. He observed densities of 2174.5 to 2212.4 kg/m³. Normal densities are 2300 kg/m³. He felt this was due to more water in the mix.

Mr. Wong stated that the Ontario Building Code at 9.3.1.6 mentions the compressive strength as being 15 mpa as the minimum standard. This is necessary so there will be the ability to resist environmental exposure, resist abrasion and damage by impact. If you fail to meet this standard then it might not be able to anchor what you mount on the inside of your house.

Mr. Wong stated that the table 9.15.4.1 of the Ontario Building Code states that the thickness of foundation walls is related to the 15 mpa. There has been no changes in the Code on this issue.

Mr. Wong stated that the strength of concrete will increase over time. Within 28 days of pouring you get about 90 to 95% of its strength. You have about 75% of its strength after seven days from being poured. He found that the original thickness of the foundation walls in this house was 8 inches. If the foundation erodes then something drastic could happen within ten years. As well the lateral earth pressure can bend the wall and horizontal cracks will appear. It is necessary to have the 15 mpa strength to resist that kind of pressure.

Mr. Wong responded to the criticism of his report by Mr. Genge. He stated that the size of his samples meets the standard set up the CSA. He stated that 100 mm requirement is not part of that standard and is not necessary but is a notation to the standard. The core samples were taken to his laboratory and allowed to sit for twenty four hours before testing. CSA standards allow for one day of rest before testing. Mr. Wong disagreed with Mr. Genge's statement that the Schmidt method meets the CSA standard. According to Mr. Wong Schmidt test method is not intended to determine strength. You use the Schmidt impact hammer to determine the areas of weaker concrete and stronger concrete. Mr. Genge did not determine the correlation between rebound numbers and the compressed strength. Accordingly Mr. Wong felt the compressive strength results by Mr. Genge were totally misleading.

Mr. Wong disagreed with Mr. Genge's analysis of the carbonation tests. He did not feel that the walls were exposed to the environmental hazards mentioned by Mr. Genge.

Indeed the third core test was done on an interior wall and it was the highest in results. Mr. Wong felt that there was no indication that the foundation was built in winter using heaters for to do that it would require plywood frames.

Regarding the issue of moisture Mr. Wong disagreed with the comments of Mr. Genge that the moisture was caused by air in the basement. There is very heavy sheeting on the insulation in the basement. The water vapour is due to emissions from the concrete. Mr. Wong also stated that he did not see any damp proofing. If it is required you cannot apply it to a flaking surface but one that is clean and dry. Mr. Wong stated that you need to replace the concrete with that which meets the Code standard. He felt that the photograph 8B showed that the damp proofing had been compromised.

Mr. Wong stated that the efflorescence at the top and bottom of the wall showed that either the damp proofing was not there or it was not working. Two factors can cause efflorescence: weak concrete or non functional damp proofing.

Mr. Wong explained that he used the CSA test method to take cores from the house as explained at 17.6.7.2 dealing with compressive strength requirements. As well he used the CSA test method of 4.1.1 for taking test specimens. He had to trim his samples. The 100 mm diameter is in a footnote to the standard. He also used the dry conditioning mentioned in 4.1.3.2 of the CSA standards. He also applied the correction factors mentioned in Table 1 of this standard.

Mr. Wong stated that the rebound test standard used by Mr. Genge was not intended to be an alternative to strength determination of concrete. As well the rebound numbers were not correlated with the core testing information.

Mr. Wong stated that under the Code foundation walls below ground level should be damp proofed. The photograph 8A shows that damp proofing was not present. In order to do damp proofing properly the holes and recesses in the concrete walls have to be sealed with cement mortar.

In cross examination Mr. Wong explained that three of his staff went out to the Ban home to do the core samples. Then on March 21, 2002 Mr. Wong went to the house.

Mr. Wong explained that he went to University at Memorial University, University of Toronto and in the Philippines which was recognized here in Canada. He has two years of engineering experience plus he passed the three hour written examination in law/ethics. When he wrote the report of Sept. 20/01 it was based on the observations of his three employees. He felt that spalling and scaling were words to be used interchangeably. They meant the flaking off of concrete.

Mr. Wong stated that his report dealt with random scaling on the foundation, not measured scaling. He did not see the surface spalling on the basement walls. The prime objective of his employees was to take the core samples. There was no testing for porosity or entrained air. He felt that there were a number of trucks who supplied

concrete to the foundation, probably three loads of cement. A cold joint is a separation between two loads of cement.

Mr. Wong felt there was no real change in the standards between CSA 2000 and CSA 1994. He did not feel you had to use the 100 mm diameter core sample. He had to trim his samples so they were shorter than 100 mm. He felt that the testing was done until noon or 1 pm. That would have given the 24 hours for the samples to be dry cured. If the cores are wet there would be a slight decrease in the test results. He felt that length does make a difference.

Mr. Wong did not feel that the fact that his samples were crushed invalidates his test results. As well he did not think you could do a 100 mm diameter penetration in an eight inch wall as it would penetrate the wall. You could possibly do that in a twelve inch wall.

Regarding calcium carbonate, which is formed when water leaches out carbon hydroxide, Mr. Wong did not feel that walls with calcium carbonate have a stronger matrix. You then have a lining of a cell structure. Unlike air pores you can see water pores with your naked eye. A porous concrete is linked to permeability.

Mr. Wong disagreed with the hypothesis that warm moist air behind a vapour barrier will pond below the insulation. Instead he felt that the moisture is from the concrete and as the wall was drier inside than outside the water was wicked into the inside wall. This water is then trapped by the vapour barrier and goes down to below the insulation and causes the efflorescence. He felt the damp proofing was not working well. He did not feel that the cold joint was causing the efflorescence.

Regarding the repair issue Mr. Wong did not feel that it was possible to fix the problem by repairing the outside wall. The bonding agent would not adhere due to the scaling of the wall. There is little aggregate to paste bond. He disagreed with the analysis of Mr. Genge that the foundation was safe. Mr. Wong felt the concrete was soft and its load bearing capacity was one third of what it should be. Though it is currently supporting the load there could be a structural failure in the future. Currently the structural failure is that the concrete does not meet Code.

Testimony of Mr. Camilleri:

Mr. Camilleri was at the house when Mr. Wong's staff came to do the core testing. He recalls that these people were at the house from approximately 9 am to 11:30 am.

Testimony of Mark Roccatagliata:

Mr. Roccatagliata has an architectural diploma from Mohawk College. He has extensive experience in the building industry and has been a warranty representative with the Program since 1988. He has taken a number of courses on the Ontario Building Code, and on brick, masonry and concrete repairs. In the course of his career with the

Program he estimates that he has inspected over three thousand homes of which approximately twenty per cent deal with foundation problems.

Mr. Roccatagliata recalls doing a home inspection in the presence of Mrs. Ban and her father, Mr. Camilleri. He viewed the core sample area, the area of water penetration and tested the floor joists on base where he observed that one and one half inch sat on the foundation. He saw the area of the cold joint which was near a band of efflorescence. There was a crack at the northwest corner but no evidence of water penetration. He saw efflorescence below the hydro panel and on the north wall at the band of insulation. On the north wall he observed that concrete had spalled away from the top face of the foundation wall about 2 to 3 feet west of the electrical panel and that carried on for 15 or 20 feet along the north wall.

Mr. Roccatagliata had seen the report dated September 20, 2001 from Mr. Wong. He disagreed with its findings. He felt there was no failure of the load bearing foundation. He based that finding on there being no displacement of the wall, no sheering of the wall as the foundation was flush and there was no lateral movement, no collapse of the floor joists and no horizontal cracks to indicate displacement.

Mr. Roccatagliata went again for an inspection of the home on March 6, 2002 with Mr. Genge. Mr. and Mrs. Ban were there at that time. He cut into the insulation and did find a crack there. There was no spalling on the south wall and the homeowners had not directed his attention to any problems with the west wall by the front entrance.

Mr. Roccatagliata disagreed with the statement that no damp proofing would mean moisture penetrating the foundation. That situation was dependent on the soil conditions near the foundation. In his opinion the efflorescence was the result of condensation. The cold foundation draws heat. Condensation forms a band on the insulation. The header space (space below the floor joint) was not insulated and condensation forms on the vapour barrier. If the water was being wicked through the concrete foundation there would have been evidence of efflorescence on all of the foundation walls.

Mr. Roccatagliata felt the repair can be effected by cleaning the exposed surface, applying the bonding agent and then applying a concrete solution to help it bond.

Under cross examination Mr. Roccatagliata did not deny that there was a violation of the Code but he disagreed with the statement that this led to a major structural defect.

Testimony of Gerald Genge:

Mr. Genge stated that he is a professional engineer with a degree from the University of Toronto. He is accredited by the Toronto Building Envelope Council. He is a consulting engineer. As such he has been retained by CMHC to examine a number of condominium properties and by private corporations and cooperatives to examine their structures. He has done research on concrete repairs and is currently working on a

research report on the methods of concrete repair. The Tribunal found him to be an expert on building envelopes, structural concrete and the repair of defects of concrete.

Mr. Genge had done an inspection of the Ban property on March 6, 2002. He had noticed deterioration of the north wall for approximately forty feet but did not notice any such deterioration on the south or west wall. Inside the home he noticed staining and efflorescence on the concrete immediately below the insulation and one crack of a diagonal nature on the north wall.

He had read the reports of September/01 and December/01 from CTL. Though he wanted to analyze the core samples to tell what was the break or failure of the core he was unable to make that determination from the sample of core provided to him.

Mr. Genge testified that he conducted tests using the Schmidt Hammer, which is an instrument that through impact testing indirectly measures the strength of the concrete. By putting weight against the plunger the instrument calibrates strength. This test is done at least ten times at each location. It is a non destructive test, unlike the core sampling method. It does not give absolute values of compressive strength but is a reasonably accurate methodology. For instance, if the test result is 10 mpa the result could be 8 ½ to 11 mpa. Basically the readings are not in mpa but in rebound numbers that are averaged and then compared to a calibration chart.

Mr. Genge stated that he obtained values considerably higher than the core samples obtained by Mr. Wong. He found no real significant problem with the actual strength of the foundation and felt his findings showed it was not inconsistent with acceptable values for concrete in basements. Mpa relates to strength of the concrete. The standards are 15 mpa for foundations, 20 mpa for floor slabs and 20 to 30 mpa for exposed sidewalks.

Part 9 of the Ontario Building Code is a prescriptive standard. A house designer can opt out of Part 9 and use engineering principles. There is not a major structural defect simply because the mpa in the concrete does not meet the Code. You have to determine the relevance of meeting this standard and as well look at the scope of the repair required.

If there is a higher water to cement ration than the concrete is less durable. This higher water ratio can happen if there is excessive water added at the end of a pour of cement. The strength of the foundation is less at the top than at the bottom.

Mr. Genge stated that while a trained observer could do a naked eye assessment of concrete and state if there is a high degree of air content you still need to have microscopic observations to determine the degree of entrained air in the concrete.

He stated that there has never been a failure of a basement wall due to inadequate comprehensive strength for the loads (live and dead) applied are less than required for such a failure.

In his opinion the scaling of the exterior wall on the north side was due to freeze/thaw problem and it needed to be stopped by restoring the profile of the concrete (removing the deteriorated concrete) and putting in a repair concrete under the veneer. This is an atypical repair of a low strength concrete so you must be careful of the patch materials used and ensure that they match the qualities of the substrata. The aggregate paste bond failure was another sign of low strength concrete.

Mr. Genge did not see water leaking through the crack. He assumed that the damp proofing was intact as there was not significant staining nor was there efflorescence on the whole face of the wall. He felt that the problem was due to condensation.

Mr. Genge did not see any horizontal cracks which could mean displacement of the foundation. The lateral crack was likely the result of improper backfilling but by this time it would not result in that wall falling.

Mr. Genge described the core drilling method and stated that all core drills have some wobble in them and that wobble impacts on the cores when inside the barrel and there is vibration damage to the concrete. The larger the diameter of the core samples the less impact of this vibration damage to the samples. Once you know that you have a soft concrete then you should be suspicious of the test results using the core drilling method as the cores can be damaged during the testing. It is essential that the cores be dried in accordance with the standards. Mr. Genge felt that the fact that the core samples in Mr. Wong's tests crumbled or were crushed means that the testing would not give an accurate value of the strength of the concrete. He found it difficult to believe that the core testing results were at 5.5 mpa. This is an usually low figure.

Mr. Genge found the carbonation results of Mr. Wong to be surprising considering the age of the house but he did not feel that these results should be given any significance. These type of tests are normally done for the ph factor to determine if there is any corrosion on the steel in the concrete. This was not the situation here.

Under cross examination Mr. Genge stated that he has done a number of reports for the Program in the past and several have been in support of the homeowners. He disagreed with the statement that you should not use the Schmidt test in this type of situation. He stated that both types of testing, Schmidt and core, showed greater strength of the concrete at the bottom then at the top and that there was a higher water to cement ratio than was usual. Mr. Genge felt the strength of the walls was adequate to support the house. He would effect the repair by taking away the deteriorated concrete and then bonding it to the proper material.

CLOSING STATEMENTS:

Applicant:

Mr. Ban stated that the Ontario Building Code states that concrete in foundations need to be at 15.5 mpa. The results from CTL shows that the concrete is below that standard and the foundation is affected by the substandard concrete. He feels he will have difficulty selling his house .

Program:

Counsel stated that the Applicants took possession of their house on January 29, 1998. There is efflorescence on the northeast corner and south wall of the house with scaling on the north wall above the grade and on the west wall. This is a case of experts and Counsel submitted that the Tribunal should prefer the evidence of Mr. Genge who is an acknowledged authority on concrete. It is submitted that Mr. Wong is wrong in his theory on what has caused the efflorescence. As well he is wrong as regards his sampling procedures as there was no sample taken from the middle of the wall. There are concerns as regards his lab testing techniques particularly in regards to the evidence of Mr. Genge. The samples by Mr. Wong were crushed and that reflects damage done to the core during the testing. You should set out the type of failure in the test results.

Counsel submitted that the case of *Chewerda (Re)* (1997) O.C.R.A.T.D. No.49 speaks to the time limitations and what is the definition of major structural defect. In this case the applicants could use the basement for storage and could continue to use the basement throughout their complaint.

Counsel submitted that the case of *Pengelly (Re)* (1995) O.C.R.A.T.D. No.60 stands for what is meant by the definition of major structural defect. There must be an imminent danger and current problem. Here we have the case of Mr. Wong saying there could be a danger in the future.

In the *Lowry (re)* (1999) O.C.R.A.T.D. No. 256 there were statements as to what could be considered as major structural defects. There must be some visible sign of failure of the load bearing function. Both the *Brabant (re)* and *Pengelly (re)* cases offer definitions of what is a major structural defect.

Here the Applicants need to stop the flaking of the concrete wall. The damaged concrete needs to be cleared away and fresh concrete applied. Then there will be no problems in the future.

In the case of *Richards (re)* (1994) O.C.R.A.T.D. 105 major structural repair was defined as being a threat to the structural integrity of the home and not a failure to repair something which could lead to further deterioration.

LEGISLATION:

The Ontario New Home Warranties Plan Act states in section 14

(1) Where,

...

(c) the owner suffers damage because of a major structural defect as defined in the regulations for the purposes of section 13, and the claim is made within four years after the warranty expires or such longer time under such conditions as are prescribed,

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

Regulation 892

"Major structural defect" means for the purpose of clause 13 (1) (b) of the Act any defect in work or materials

- (a) that results in failure of the load bearing portion of any building or materially and adversely affects its load bearing function, or
- (b) that materially and adversely affects the use of such building for the purpose for which it was intended,

including significant damage due to soil movement, major cracks in basement walls, collapse or serious distortion of joints or roof structure and chemical failure of materials, but excluding flood damage, dampness not arising from failure of a load bearing portion of the building, damage to drains or services, damage to finishers and damage arising from acts of God, acts of the owners and their tenants, licensees and invitees, acts of civil and military authorities, acts of war, riot, insurrection or civil commotion and malicious damage.

ANALYSIS:

This case is based upon major structural defect. The Applicants did not notice a problem with their foundation until after the one year and two year warranty periods had expired. Though it can be said that the foundation problem was not an obvious one the *Ontario New Home Warranties Plan Act* does not provide for extensions of warranty periods for latent defects.

The caselaw is quite clear as regards a major structural defect. As stated in the *Richards* case it needs to be a threat to the structural integrity of the home and not a failure to repair a defect which could lead to further deterioration or a more serious defect in the future. Other items might be characterized as minor structural defects but they do not meet the definition as found in Regulation 892. The *Pengelly* case at paragraph 16 cites from two earlier CRAT cases that being *Angelos Proestos* (1992) CRAT 758 and *DanVera* (1988) 17 CRAT 185 which establish that a fear for future potential problems cannot therefore constitute a major structural defect.

In the present case the Applicants are concerned that at some point in the future if the foundation is not corrected it will not hold the dead load and live loads of the house. They are concerned because the concrete in the foundation is not up to the standard as established by the Ontario Building Code. They have efflorescence on many of their interior walls in the basement and at one time there was a pool of water in the north west corner of the basement. Despite these concerns and problems the Applicants continued to use their basement for storage and did not follow the suggestion of their expert, Mr. Wong, and shored up the joists. Their actions suggest that they do not believe that their foundation is in imminent danger of failure. They are concerned that the crumbling of the concrete outside of the home and the efflorescence as found below the insulation on the interior walls of the foundation will worsen over time. They had a number of photographs which showed this crumbling and the efflorescence problem.

But Mr. Roccatagliata of the Program had also seen a number of these problems. He has inspected the home on two occasions. He has reviewed the numerous reports of their expert, Mr. Wong. He has called in his own expert, Mr. Genge, to inspect the foundation. Mr. Roccatagliata does not disagree with the Applicants that their foundation is crumbling nor that they have an efflorescence problem in the interior walls of the basement but he does disagree that these problems constitute a major structural defect. Indeed Mr. Roccatagliata is of the opinion that there is no problem with the joists and no lateral movement, no sheering of the walls and no horizontal cracks to suggest displacement which would be symptomatic of a major structural defect. He feels that the problem does require some cleaning of the outside concrete and the applying of a bonding agent to help the new concrete bond to the old concrete.

Primarily this is case of divergent opinions of experts. Mr. Wong, the expert for the Applicants, did core testing which showed that the concrete strength was significantly less than that required by the building code. His carbonation tests showed that the concrete was very porous and therefore lacking in the necessary strength to resist environmental exposure. He was concerned that if the process of scaling were permitted unchecked there could be a collapse of the foundation wall in the future. He did not detect any damp proofing for the foundation. He did not feel that the type of repair work espoused by the Program was appropriate as the porous nature of the concrete would not permit a proper bond with new concrete. His solution was to replace the foundation, to provide proper damp proofing and to shore up the joists. The Building code violation was of considerable significance to Mr. Wong as the low strength of the concrete constituted a major structural defect.

But Mr. Genge, expert for the Program, disagreed with every fundamental point in the analysis of Mr. Wong. He did not like the method of testing used by Mr. Wong as he did not get sufficient core samples and the testing led to the destruction of the samples which in the opinion of Mr. Genge voided the results. Mr. Genge preferred using the Schmidt Hammer tests which by impact testing indirectly measures the strength of the concrete. His test results were higher than those obtained by Mr. Wong. He felt that the foundation concrete was consistent with acceptable values for the strength of concrete for basements. He did not put any significance on the carbonation results of Mr. Wong

due to lack of relevance. Such testing is mainly to check for corrosion on steel in the concrete which is not the case for this foundation. Mr. Genge felt that the repair suggested by Mr. Roccatagliata was appropriate for the crumbling of the concrete on the outside of the foundation. He felt the efflorescence was due to evaporation problems in the inside of the basement. The condensation formed a band on the insulation. It was not due to water wicking through the porous concrete.

The Tribunal finds the testimony of Mr. Genge to be superior to that of Mr. Wong. It is significant that Mr. Genge is an accredited expert in the repair of concrete. He has a long history of work with residential concrete problems. He also has a superior understanding of the *Ontario New Home Warranties Plan Act* and its regulations. He stated quite clearly that a breach of the Ontario Building Code does not of itself mean there is a major structural defect. One must determine what is the relevance of the standard in this type of situation and what is the scope of the repair. The Tribunal accepts his statement that there have been no failures due to the comprehensive strength being less than that required under the Ontario Building Code. The Tribunal accepts his explanation that the efflorescence is due to condensation for the efflorescence is not on the entire face of all the interior walls of the basement but mainly close to the band of insulation. The Tribunal accepts his statements as to the inadequacies of the type of core drilling tests conducted by Mr. Wong and how it is significant that the core samples did not survive the tests. The Tribunal accepts his explanation that though there are significant problems with scaling that can be corrected by a proper repair of restoring the profile of the concrete and using a suitable bonding agent. This repair will require some skill to ensure that the patch materials used match the qualities of the concrete substrata. But it is not necessary to replace the foundation in order to correct the scaling.

The Tribunal does not find that this problem meets the test of a major structural defect. There is no failure to the load bearing portion of the building. The strength of the concrete does not adversely affect the load bearing function of the foundation. There is no material or adverse affect to using the basement for storage. That has been its use throughout the time that the Applicants have had possession of the house. There are no major cracks in the basement walls. Any cracks are minor in nature and lateral, not horizontal, in direction so as not to signify any significant damage due to soil movement. The comments by Mr. Wong and the Applicants are speculative in nature and are directed to a situation which could develop at some point in the future if the repairs are not effected. The Tribunal cannot take such speculation into account when making a determination on whether or not there is a major structural defect in a home.

It is unfortunate for these homeowners that the scaling and efflorescence did not come to their attention during the time period of the one or two year warranties. Reasonable homeowners would conclude that repairs are required to prevent further scaling on the outside of the foundation and to stop the condensation on the inside walls of the basement. But such repairs do not come within the scope of the definition of major structural defect and accordingly cannot be warranted by the Program.

DECISION:

Accordingly under the authority vested in it under section 16(3) of the *Ontario New Home Warranties Plan Act* the Tribunal directs the Program to disallow the claim of the Applicants.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley, Vice-Chair

RELEASED: July 17, 2002

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice or Divisional Court is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

ANASTASIA NOEL PARE

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE *ONTARIO NEW
HOME WARRANTIES PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL: JOHN ORT, Member

APPEARANCES: ANASTHASIE NÖEL-PARÉ, Applicant, representing herself
SEAN W. KELLY, Counsel, representing the Ontario New Home
Warranty Program
DENIS CANPEAU, Agent, representing the Added Party, Denis
Campeau Construction Inc.

DATES OF
HEARING: July 8 and 9, 2002 Ottawa

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") by Anasthasie Noël-Paré (the "Applicant") under section 14(1) (b) and (c) of the *Ontario New Home Warranties Plan Act* (the "Act") respecting a decision by the Ontario New Home Warranty Program (the "Respondent" and the "Program") dated May 18, 2001, (the "Decision") denying the Applicant's claim for compensation.

The Decision described the Applicant's complaint as: "Mold throughout the house. Water penetration and cracks in grout."

EXHIBITS:

- Exhibit #1 Decision Letter dated May 18, 2001;
- Exhibit #2 Notice of Appeal dated June 6, 2001;
- Exhibit #3 Prehearing Order released October 23, 2001;
- Exhibit #4 Book of Documents of the Respondent;
- Exhibit #5 Letter from Jacques Whitford Environmental Limited to Ms. Netanus Rutherford, Ontario New Home Warranty Program, dated June 17, 2002;

- Exhibit #6 Letter from Dr. John Molot to Dr. S. Moulavi dated June 7, 2000;
- Exhibit #7 Letter from Dr. C. Leger-Nolet to Dr. L. Scully dated August 9, 2000;
- Exhibit #8 Letter from Dr. John Molot dated October 25, 2000;
- Exhibit #9 Letter from Heather L. Knudsen, Buchan, Lawton, Parent Ltd., to Ms. Anastasia Noel Pare dated October 11, 2001;
- Exhibit #10 Two photographs of water damage in basement closet; and
- Exhibit #11 C.V.s of Bruce C, Fraser and David Jolliffe.

FACTS:

The reason given by the Decision, exhibit 1, for denying the Applicant's claim is:

With respect to the mold issue, even though the report of Buchan, Lawton, Parent Ltd. is fairly explicit, it does not state that the house is not fit for habitation but rather clean up is required. It also state (sic) that, there is a high concentration of condensation and humidity in the house. Under section 13(2)(e) 'damage caused by dampness or condensation due to failure by the owner to maintained (sic) adequate ventilation', (f) 'damage resulting rom improper maintenance' are excluded from warranty.

Furthermore, there has been no failure in the load bearing portion or function of the structural components of the house, nor has it been materially or adversely affected. The use of the building for the purpose for which it was intended, namely a residence, has not been materially or adversely affected as indicated in the Buchan, Lawton, Parent Ltd. report. Therefore this is no major structural defect.

With respect to water penetration, under Reg. 892 of the Act, water penetration through the envelop of the unit is warranted for a period of two years from the original date of possession. It is also the owner's responsibility to inform the ONHWP in writing during this time period. This complaint was not documented in writing to the Warranty Program, as stipulated under Section 13(4) of the Act, within the appropriate time frame and therefore cannot be considered under the warranty. The ONHWP recommends to the owner to have this issue repaired in the near future so to minimize damages and the growth of mold.

With respect to the cracking of the grout between the ceramic tiles in the main washroom, this item of complaint is defect in material or workmanship and is covered under the builder's one-year warranty. However, this time period has elapse. It is also the owner's responsibility to inform the ONHWP in writing during this period. This complaint was not documented in writing to the Warranty Program, as stipulated under Section 13(4) of the Act, within the appropriate time frame and therefore cannot be considered under the warranty. The ONHWP recommends to the owner to have this issue repaired in the near future so as to minimize damage.

The Applicant's witnesses were Mrs. Anasthasie. Nöel-Paré and Ms. Marie Belanger. The evidence of Mrs. Nöel-Paré is as follows:

Mrs. Noël-Paré is a retired nurse. She purchased a new semi-detached, one-story house, 66 Sandfield Street, Alexandria, from the Third Party, Denis Campeau Construction Inc., on April 25, 1997. She moved in about three days later.

In March 1998, water leakage formed a bubble on the ceiling of the kitchen. The bubble burst. Mrs. Noël-Paré's insurance company repaired the damage. There has been no additional water leakage in the area.

Later in March 1998, water leaked under the front window of the master bedroom. The Third Party fixed the problem. Mrs. Noël-Paré also told the Third Party about water leakage beside the electrical switch in the foyer onto the tiles and down into the crawlspace. The Third Party inspected the foyer and the crawlspace, but both were dry then.

On February 26, 2000, when the snow was melting, Mrs. Noël-Paré contacted the Third Party because of another water leak in the foyer beside the electrical switch. Mr. Campeau later told her said that he changed the joint on the eaves trough above the main entrance. Mrs. Noël-Paré also informed Mr. Campeau that she found ice and moldy baseboards in the master bedroom closet. This was the first time that the Applicant noted mould in the house. Mr. Campeau repaired a crack in the closet with silicone. There has not been water leakage into the closet since.

In March 2000, after Mrs. Noël-Paré's son moved a buffet in the dining room, she found a dark stain on the hardwood floor as well as black deposits in cracks opening between boards. Mrs. Noël-Paré telephoned the Third Party that she had found mould.

On April 7, 2000, Mr. Poitras of D&D construction found that the exhaust duct of the heat recovery ventilator (the "HRV") was squeezed by a plumbing pipe so that only about fifty per cent of the usual cross-section allowed air flow.

On May 26, 2000, Mrs. Noël-Paré permanently moved out of the house.

The first notification to the Program was by letter dated February 15, 2001, exhibit 4, tab 7. In a Request for Claim Inspection dated March 29, 2001, the homeowner's complaint is described as mould throughout house, as set out at tab 11 of exhibit 4.

Since about July 1999, Mrs. Noël-Paré experienced a variety of physical problems that she believes were caused by living in the house. Her condition improved when she was away on vacation. Problems included temporary hypothyroiditis and jaundice. She was also diagnosed as hypersensitive to mould. She continues to experience some problems even after moving out of the house. When visiting the house, she can stay for about twenty minutes before experiencing problems.

Mr. John Molot, M.D., practicing in Environmental Medicine, states the following in a letter dated November 29, 2001, being part of exhibit 8:

You have asked me for my opinion as to whether Ms. Pare could return to live in the home located at 66 Sandfield Avenue following the cleanup recommended in the report dated October 11, 2001. It must be emphasized that the level of exposure required to provoke symptoms in sensitized individuals is unknown. Therefore, I cannot determine whether Ms. Pare or any other individual with mould sensitivity could live in the home located at 66 Sandfield after the cleanup. However, any individual without mould sensitivity should be able to live in this home once the IAQ and, in particular, the mould levels are within the limits seen in normal homes.

The Program's witnesses were: Paul Rochon, David Jolliffe, and Bruce Fraser.

The evidence of Paul Rochon was as follows:

Mr. Rochon has been a warranty representative with the ONHWP for thirteen years. He inspected the Applicant's home and prepared the Decision.

Mr. Rochon found the intake and exhaust of the HRV to be partially blocked. In the basement he saw no water leak stains and no mould where Mrs. Noël-Paré indicated a leak in the closet. In the master bedroom, he found evidence of a previous leak, but did not find mould. Under the master bedroom window, he also did not see evidence of a water leak or mould.

Mr. Rochon did see hardwood floor boards with black and green edges. He saw nothing on the surface of the boards. He did not think there was mould.

The evidence of David Jolliffe was as follows:

Mr. Jolliffe is a Certified Engineering Technologist and is a project manager at Jacques Whitford Environmental Limited. He inspected the house on behalf of the Program for water infiltration and major structural faults. Mr. Jolliffe was accepted by the Tribunal as an expert in building envelope investigation.

Mr. Jolliffe detected a number of Ontario Building Code violations and other deficiencies. The sewer vent pipes end inside the attic. The attic hatch is not insulated. No attic roof vents were present. Soffit ventilation was obstructed at the rear of the house. The insulation in the attic was not staggered. The vapour barrier above the gypsum board ceiling was not sealed at the overlaps. Eave protection against ice damming was not present. The HRV inlet and exhaust were partially blocked.

The firm's report, exhibit 5, states the following in its conclusion:

Several defects in work and materials were noted in this investigation. However, none of the defects, in and of themselves appear to be structural defects....

Evidence of water/moisture impacts was noted in several locations in the subject dwelling. These impacts appear to be of a historical nature or occur only infrequently. These areas included:

- 5.1 The basement bedroom closet
- 5.2 The master bedroom closet
- 5.3 The front hall foyer
- 5.4 The basement crawlspace

Several building envelope deficiencies related to the roof system/cantilever portion of the exterior were noted which appear to have contributed to the water entry into the master bedroom closet and front hall foyer. It appears that this water entry was either historical in nature or occurs only infrequently. Furthermore, these deficiencies do not appear to have resulted in visible mold growth in the areas investigated in the master bedroom closet and front hall foyer. Limited amounts of suspect visible mold were observed in the following locations:

- 6.1 Basement bedroom closet baseboard ($\ll 1 \text{ m}^2$ or approximately 0.04 m^2)
- 6.2 Basement crawl space joists ($\ll 1 \text{ m}^2$).

The firm's report also states that asphalt-impregnated felt paper was present immediately adjacent to the basement bedroom exterior wall. A damp concrete odour was noted from the space behind the felt paper and the foundation door. This was suspected to be a moisture source and a possible cause of mould growth.

There did not appear to be bulk water entering the basement through the foundation wall.

The evidence of Bruce Fraser was as follows:

Mr. Fraser is Manager, Indoor Environment, at Jacques Whitford Environmental Limited. He was accepted by the Tribunal as an expert in indoor air quality and mould investigation.

Mr. Fraser examined the house twice. He came a second time to investigate the house after a heavy rain.

Upon entering, he detected no mould odour. Based on a prior report from Buchan, Lawton, Parent Ltd., tab 6 of exhibit 4, Mr. Fraser expected to find mould amplification (present or past growth) in the basement. Water is required for mould growth. Mr. Fraser took moisture measurements from the interior of the basement of all basement exterior walls. The results were fairly uniform and were not unusual. Based on the moisture measurements and absence of visible signs of water entry in the basement, he concluded that there does not appear to be bulk water entering the basement through the foundation wall.

Mr. Fraser examined the bathroom exhaust grill. He could find no penetration of the outside wall or roof. The grill seemed to vent into the heating or HRV ducts. This was a defect. However, it was not related to mould amplification in the basement. Levels in the whole house would be the same if mould spread through the heating or HRV ducts.

In the living room, Mr. Fraser examined the hardwood floor. The dark areas seemed to be stains not mould.

The squeezed HRV duct was not a concern. It should not increase concentration. It should only have a minor, local effect. Mould spores would mostly move with the air.

Mr. Fraser collected four air samples for total airborne spores, four air samples for viable mould only, carpet-settled dust samples of f the basement bedroom floor and the master bedroom floor, and one bulk material sample from a wood floor joist in the crawl space. The samples were sent to Sporometrics, Inc., an independent laboratory, for analysis. The bulk sample showed no growth and no fungal elements. The basement floor surface dust sample showed low growth only and the master bedroom floor dust sample showed moderate growth. Results of mould air samples vary widely even when taken during a single day. Mould amplification was noted in the basement air samples. Potential mould amplification was noted in the master bedroom air samples. Penicillin mould was clearly dominant in the basement air samples and, to a lesser extent, it was dominant in the master bedroom air samples. The Penicillin subgenus contains both toxigenic and non-toxigenic moulds that are difficult to tell apart.

The conclusion of the firm's report ends with the following:

The mold present in the house appears to have had a measurable, but not dramatic, effect on the quality of the air within the home. It is possible that many persons would not even be aware of this degradation in air quality, although it is just as possible that a particularly sensitive individual would find it intolerable. Since the effects of mold exposure vary amongst individuals ..., it is not possible to define a level of mold exposure at which all persons would find their use of the building as a home materially and adversely affected. The level of mold exposure that would have such an affect would have to be made on an individual basis, and only then by a licensed medical practitioner.

ISSUE:

Should the Tribunal set aside, confirm, or modify the decision of the Program to disallow the Applicant's claim for compensation under section 14(1) (b) and (c) of the *Ontario New Home Warranties Plan Act*?

LAW:

Section 14(1) of the *Ontario New Home Warranties Plan Act* (the "Act") stated in part:

Where...

- (b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty; or
- (c) the owner suffers damage because of a major structural defect as defined in the regulations for purposes of section 13, and the claim is made within four years after the warranty expires or such longer time under such conditions as are prescribed.

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

Section 13(1) of the Act adds:

Every vendor of a home warrants to the owner,

- (a) that the home,
 - (i) is constructed in a workmanlike manner and is free from defects in material,
 - (ii) is fit for habitation, and
 - (iii) is constructed in accordance with the Ontario Building Code;
- (b) that the home is free of major structural defects as defined by the regulations; and
- c) such other warranties as are prescribed by the regulations.

Section 13(4) states in part:

“A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect...”

Section 15 of Regulation 892 under the Act states:

- (2) Every vendor of a new home warrants to the owner,
 - (a) that the home is constructed in a workmanlike manner and is free from defects in materials including windows, doors and caulking such that the building envelope of the home prevents water penetration;
 - (b) that the electrical, plumbing and heating delivery and distribution systems are free from defects in material and work;
 - (c) that all exterior cladding of the home is free from defects in material and work resulting in detachment, displacement or physical deterioration;
 - (d) that the home is free from violations of the Ontario Building Code regulations under which the Building Permit was issued, affecting health and safety, including but not limited to fire safety, insulation, air and Vapour barriers, ventilation, heating and structural adequacy;
- (3) The warranties described in subsection (2) apply only in respect of claims made within two years after the home was completed for possession...

Section 1 of Regulation 892 under the Act defines “major structural defect” for the purposes of clause 13 (1) (b) of the Act as:

...any defect in work or materials,

- (a) that results in failure of the load—bearing portion of any building or materially and adversely affects its load—bearing function, or
- (b) that materially and adversely affects the use of such building for the purpose for which it was intended,

including significant damage due to soil movements, major cracks in basement walls, collapse or serious distortion of joints or roof structure and chemical failure of materials, but excluding floor damage, dampness not arising from failure of a load-bearing portion of

the building, damage to drains or services, damage to finishes and damage arising from acts of God, acts of the owners and their tenants, licensees and invitees, acts of civil and military authorities, acts of war, riot, insurrection or civil commotion and malicious damage.

APPLICATION OF LAW TO FACTS:

The burden was on the Applicant to prove a major structural defect. The Applicant purchased her home on April 25, 1997, and moved in a short time later. The first notification of a problem was provided by the Applicant to the ONHWP by a letter dated February 15, 2001. Since notice was given more than one year after the warranties of section 13(1) of the Act took effect, section 13(4) precludes any claim based solely on defects in material, compliance with the Ontario Building Code, and fitness for habitation. Similarly, section 15(3) of Regulation 892 under the Act disallows any claim submitted two years after the home was completed for possession for water penetration, defects in plumbing, and violations of the Ontario Building Code affecting health and safety under section 15(2) of that regulation. The notice given by the Applicant was timely only with respect to a major structural defect.

The definition of *major structural defect* in section 1 of Regulation 892 under the Act includes two alternatives.

The Tribunal finds that the first alternative within the definition of *major structural defect* is not satisfied. No evidence was provided of any defect in materials that results in failure of the load-bearing portion of any building or materially and adversely affects its load-bearing function. Although Mr. Fraser observed limited amounts of suspect visible mould on the basement crawl space joists, there is no suggestion that the load-bearing function of the joist is affected. Further, if mould is present on the hardwood floor, or on the basement bedroom closet baseboard, such infestation was not claimed to materially and adversely affect a load-bearing element of the house.

The Tribunal must still decide whether there is any defect in work or materials that materially and adversely affects the use of such building for the purpose for which it was intended, whether the second alternative of the *major structural defect* definition is satisfied. Mould requires water. There is evidence of some water penetration in the past, but there is no evidence of current water penetration. There is evidence of mould in the air and dust inside the house; there is no evidence of significant mould on house materials. The Applicant argued that such mould presence on materials might be found if the space within walls was examined. That was not done. The burden to present such evidence was on the Applicant, not on the ONHWP. The Tribunal is satisfied that Mrs. Noël-Paré is unable to stay in the house for extended periods. After she moved into the house, she was diagnosed as being hypersensitive to mould. She is unable to use the house as a residence, which was the purpose for which she intended to use it. However, the Tribunal finds that the test in the definition of *major structural defect* is objective, not subjective. Frailties of the homeowner that were unknown at possession are irrelevant. No credible evidence was presented that a reasonable person of normal

health would have been unable to reside in the house. The Tribunal, therefore, finds that there is no major structural defect and the Applicant's claim under section 14 of the Act fails.

DECISION:

Accordingly, by virtue of the authority vested in it under section 16(3) of the *Ontario New Home Warranties Plan Act*, the Tribunal directs the Ontario New Home Warranty Program to disallow the Applicants' claim.

LICENCE APPEAL TRIBUNAL

John Ort, Member

RELEASED: July 31, 2002

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice or Divisional Court is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

MARY AGOSTINO

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MARJORIE L. HILEY, Vice-Chair

APPEARANCES: MARY AGOSTINO, the Applicant
MARCUS KNAPP, Counsel, representing the Ontario New Home
Warranty Program
J. BUTSON, Counsel, representing the Added Party, Villa Royale
Homes Inc.

DATE OF
HEARING: April 18, 2002 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

The Program by its decision letter of December 4, 2001 denied the claim of the Applicant for financial loss under section 14(1)(b) of the *Ontario New Home Warranties Plan Act*. The Program held that the Applicant had a contract with a vendor to purchase a home and had paid a deposit to the vendor which had not been refunded . But the Program also held that the vendor had not failed to transfer title due to bankruptcy or a fundamental breach of contract. The Applicant filed a Notice of Appeal dated December 20, 2001. In it the Applicant alleged that the conduct of the vendor and misrepresentations by the vendor led to the failure to transfer title and that the circumstances surrounding the deal were such that the Tribunal should permit the return of her deposit.

ISSUE:

Was there a fundamental breach of contract by the vendor which would allow for a claim of financial loss under section 14 (1) (b) of the Act?

EVIDENCE:

For the Applicant:

Ms Agostino testified that she had been financial arrangements to purchase the house at 104 Villa Royal Avenue in Vaughan. She paid \$5000.00 on July 21, 2000 at the time of signing of the Agreement of Purchase and Sale. She paid another \$5000.00 in August, 2000 and a further \$10,000.00 in October, 2000. Her total deposit on the home was \$20,000.00. The house was scheduled to be ready for possession in January, 2001. But there were delays with the construction. Ms Agostino agreed to the delay as she was herself having some delays in obtaining the remainder of her financing for the house. She signed an agreement to consent to the delay of completion of the house. She thought that the builder would take a second mortgage for her on the house.

Ms Agostino testified that by mid July 2001 she was beginning to have serious concerns about the quality of construction of her house. She realized that the house would have some steps at the front and this was not something that she had contracted for when she signed the Agreement for Purchase and Sale. The drawing that she had seen did not show such steps. She would not have agreed to purchase this house if she knew there were going to be steps as she has health problems and sometimes uses a cane, and her husband had just recently completed a course of chemotherapy for cancer.

Ms Agostino felt that she had been deceived by the builder as she learnt later that the site plans submitted to the Town of Vaughan dated May 25, 2000 showed her house with these steps yet she had known nothing of this when she signed the Agreement of Purchase and Sale in July, 2000. Ms Agostino also learned from the architect she hired after the sale had not been completed that the drawings submitted to the Town of Vaughan for the building permit in December, 1999 had only one step at the front of the house.

There were other problems with the construction of the house, in particular the fact that it could not be an A frame. She had thought that was the style of her house but the builder told her that the A frame style could not hold the weight of the brick and either she could lower the ceiling or have siding rather than brick if she wanted the A frame design.

She had thought that 120 days had expired and that she could get out of her contract. Accordingly she had not bothered to proceed with the financing of the sale. But her lawyer told her she was wrong and then she began to look at the financing for the sale. She had discussions with a mortgage broker after that time.

She instructed her lawyer to write to the builder on August 1, 2001 demanding a substantial abatement in the purchase price of the home.

Ms Agostino also stated that in August, 2001 the construction on her house was changed in that the door from the garage into her house was boarded up and she now

would have to exit the garage and go up the front steps to enter her house. She had wanted this particular house because of everything being accessible on one floor.

Ms Agostino testified that the pre delivery inspection of her home was scheduled for August 30, 2001 which is the date of completion of the purchase and sale. About midnight of August 29th/30th she went to the house and saw that there were workmen in it laying tile in the foyer, the upstairs bathroom and the master bathroom. This was disturbing to her. She and her husband then attended at the house at 9 am on August 30, 2001. There were workmen in the house and a bulldozer in her front yard. She took a number of photographs of the state of the house at that time which were admitted into evidence. The photographs did show that workmen were at work on both the outside and inside of the house at that time and that there were a number of matters such as floors and cupboards which had to be completed.

Ms Agostino testified that no toilets were in operation at 9:45 am of August 30th, 2001. The hardwood floors had not been laid. There was dirt on the floors.

She had started to do the pre delivery inspection and had been in the house for about an hour. The pre delivery inspection was not complete as she wanted to go over her list with what had been written down by Anthony. The builder came into the house and was rude to her. Then she and Mr. DeFlippis got into a screaming match. He told her to leave the property and he was calling the police. She and her husband left the property and sat in their car until 11:30 am but the police did not come. She did not want to go back on the property so the pre delivery inspection was not completed. She contacted her lawyer. The house sale was not completed. There were discussions between her lawyer and the builder for a period of time into September, 2001. She did not want to pay another thousand dollars to extend the time for the closing. Then she was told that the builder wanted another fourteen thousand to close the house. Ms Agostino had an appraisal which put the value of the house at \$300,000.00. The sales price had been \$295,000.00. She was not prepared to pay more for the house than what it had been appraised for financing purposes.

Ms Agostino stated that the house was not habitable when she was doing the pre delivery inspection. The municipal inspector did issue an occupancy permit for the house which her lawyer received at 3:55 pm on August 30, 2001.

Ms Agostino stated that the house was not the one she had contracted with the builder as the builder made modifications to it which he failed to disclose to her. The builder knew prior to her signing the Agreement of Purchase and Sale that there were modifications and yet he did not tell her. Ms Agostino felt that the conduct of the builder showed that the contract was breached for fundamental misrepresentation, failure to disclose and mis-description. Besides the photographs taken at the time of the pre delivery inspection on August 30, 2001 there were a series of six photographs introduced into evidence which were taken in the spring of 2002 and which showed the exterior of the house and the stairs at the front of it.

Under cross examination Ms Agostino stated that she had not verbalized her health problems and the need not to have stairs. She would have done so if she had known of the modifications to the design of the house. She agreed that though she took the Agreement of Purchase and Sale to a lawyer there was nothing put in writing in the Agreement as to the requirement that there be no stairs. She agreed that the letter of August 1, 2001 only asked for an abatement of the purchase price not to cancel the contract. She agreed that there was no reference in her Notice of Appeal regarding the issue of stairs.

Ms Agostino stated that the first mortgage was in place but she was finalizing the second mortgage at the end of August, 2001 and the paperwork on it was not completed by August 30, 2001. She agreed that her lawyer was not in a position to close the deal as of August 30, 2001. She agreed that she had signed the Agreement of Purchase and Sale which allowed the builder to increase or decrease the steps and to change the house elevation. She agreed that her Proof of Claim document sent to the Program did not mention the issue of the stairs. She agreed that she had signed a number of documents extending the closing date for the house.

Mr. Agostino testified that in July 2001 he had attended at the house site and saw that the front porch was higher than expected and there was a door opening into the house from the garage. That was then closed and you could not go from the garage into the house. He thought he was at the wrong house at first as it looked so different from the drawings. He did not approach the builder with his concerns.

For the Program:

Mr. Basso DiCesare testified that he was the sales representative for Villa Royale from July, 2000 to July, 2001. He now works for Royal LePage Real Estate. He recalls meeting with Mr. and Mrs. Agostino. He does not recall any discussions with them concerning the house elevation or problems with stairs due to health issues. The Agreement of Purchase and Sale of July 21, 2000 was initially conditional on financing and legal review. The Agostinos told him they had reviewed it with a lawyer. He assisted them with financing arrangements. The TD bank was contacted for the first mortgage but they would need a second mortgage. The builder was unable to give them a second mortgage so he contacted Eagle Group Mortgage company who could do the second mortgage. Mr. DiCesare had thought the financial arrangements were complete but Mrs. Agostino thought the rate on the second mortgage was too high. Mr. DiCesare met the Agostinos by accident in September, 2001 and was told there were problems with the house deal. He went to the house with Mr. Agostino and everything looked fine there. He told Mr. Agostino to get their lawyer to contact Villa Royale to work out the problem. He agreed under cross examination that though he had contacted Mrs. Agostino regarding the modification dealing with the brick he did not mention the other changes to her.

Anthony DeFilippis testified that he was the assistant site supervisor and did the pre delivery inspection with the Agostinos. He met with them at the house at 9 am on August 30, 2001. He found Mrs. Agostino to be upset. He went through the house with her and was recording what was unfinished or missing. Mrs. Agostino was outraged with the condition of the home. He explained that the backhoe was there to dig out the water box and complete the installation for the city inspector. There was about 20 to 25% of the house to be completed on that day, which he did not find to be unusual. Cupboards needed to be installed, floors needed to be finished and the carpet was not laid. The pre delivery inspection report was never signed by the Agostinos. Mrs. Agostino yelled at the owner. He tried to calm them down by speaking to them after the yelling match. The senior site supervisor also tried to calm them down. The City Inspector looked at the house in the afternoon and found it to be habitable. Two days later a second city inspector came and Mr. DeFilippis let him into the house. That city inspector also found the house to be habitable. Under cross examination Mr. DeFilippis did not recall there being a request to delay the pre delivery inspection. It had to be done on August 30th as that was the closing day.

Sherri Budgell, a customer service representative, testified on behalf of the Program. She has held that position for thirteen years. She is responsible for complaints, delayed closings and deposit refunds. She examined the request by Mrs. Agostino for a refund of the deposit. She wanted to determine if there was a fundamental breach of contract and if so from which party. She wanted to determine why the house sale had not closed. Mrs. Agostino in her documentation to the Program had stated that she was not happy with the house nor with the pre delivery inspection. The house had not been complete so she did not sign the pre delivery inspection form. Mrs. Agostino also told her that she did not have the financing in place on the date of closing. There was no mention by Mrs. Agostino about problems with the steps at the front of the house nor was it mentioned in the claims documentation. Ms Budgell denied the claim for a refund of the deposit. She felt that the items complained of were items of warranty deficiency and there were not sufficient grounds to find a fundamental breach of contract. The vendor was ready and willing to close the house deal but Mrs. Agostino did not have the funds to close it. In cross examination Ms Budgell stated that the Agreement of Purchase and Sale permitted the builder to make changes to the design.

In their closing statements both parties referred to a number of cases for the Tribunal to consider.

Mrs. Agostino cited Freeear v Gilders 64 D.L.R. 274 (Ont. App. Div.) regarding the proposition that even in the absence of fraud there can be rescission of a contract if there is a difference in substance between the thing bargained for and that obtained. Here she had relied upon the drawings and the sales representative as to what would be the style of her house. She was given no warning that it would be so different. She was induced into the contract. In Keen v Alterra Developments Ltd. (1993) O.J. No. 2623 it was found that the changes made to the house constituted a fundamental breach of contract. In Lau v 1755 Holdings Ltd. 6 R.P.R. (3d) 152 (B.C. Ct. of Appeal) the judge found that the changes made by the builder were not minor modifications and

amounted to a fundamental breach of contract. The Applicant stated that having steps to the front door and omitting the door from the garage to the house were not minor changes. In Hyrsky v Smith 5 D.L.R. (3d) 385 the court found that if the mistake was so fundamental that it went to the very root of the contract then it was fundamental breach of contract. Here the mistake was fundamental as there was a significant transformation from the brochure to the actual house.

The Applicant submitted that she had signed the agreement in good faith and the vendor knew she would not get what she had contracted to get and the vendor did not bother to tell her.

Counsel for the Added Party submitted that the Applicant was making a new issue of the stairs which had not been mentioned in any significant fashion prior to the failure to close the transaction, nor were they mentioned in the claim by the Applicant for the return of her deposit. The Agreement of Purchase and Sale permits the vendor to make modifications. The Applicant took the Agreement to her lawyer and nothing was put in writing in it as to the importance of the design or the lack of stairs. As well the Applicant did not have her financing in place in order to close on August 30th, 2001. There might have been defects but the city inspector did issue the occupancy permit. The Keen v Alterra Developments Ltd., supra, case can be distinguished on its facts. There the buyers had made known their requirements and tried to cancel the deal when they realized the changes that had been made. Here the Applicants never told anyone about their concerns about the stairs. The vendor was ready and willing to close on August 30th, 2001. In such a case the vendor can keep the deposit as the fault lies with the purchasers.

Counsel for the Program stated that the builder had not committed a breach of contract. The municipality approved the home for occupancy. Mrs. Agostino did not have her financing in place to close the deal. The stairs were never raised as an issue to cancel the deal. Indeed the lawyers for Mrs. Agostino tried to keep the deal alive. In the Morris Keter LAT August 29, 2001 case the doctrine of fundamental breach is discussed. There the buyer got extra windows which were not found to be a fundamental breach. In Town Wood Homes Ltd. v Khanna (1994) O.J.No.940 the Divisional Court found no fundamental breach though the buyer got a single garage door rather than a double garage door. In Fisher (re) (1995) O.C.R.A.T.D. No. 56 it was found to be a fundamental breach when the purchasers received a house considerably smaller than what they had contracted to buy. In the case of Re Greenidge (re) (1995) O.C.R.A.T.D. No.72 there was no fundamental breach of contract in factual situations whereby the purchaser failed to have her financing in place and the vendor was ready and willing to close. In the case of Dryden (re) (1998) O.C.R.A.T.D. no. 254 there was a fundamental breach due to a smaller garage. This can be distinguished from the Town Wood Homes Limited v Krishna Khanna, supra, whereby the purchaser did not wish to close due to the lack of funds and decline in the real estate market. In the case of Mageau (re) (2000) O.L.A.T.D. no. 160 it was held that though there was a breach of warranty in that the basement had a moisture problem which led to mold or mildew that was not a

fundamental breach of contract. In this case the real reason the Applicant failed to close the deal was due to her lack of financing on the date of closing.

LEGISLATION:

The Ontario New Home Warranties Plan Act:

Section 1:

“vendor” means a person who sells on his, her or its own behalf a home not previously occupied to an owner and includes a builder who constructs a home under a contract with the owner

Section 14(1):

(2) Where,

...

(c) the owner suffers damage because of a major structural defect as defined in the regulations for the purposes of section 13, and the claim is made within four years after the warranty expires or such longer time under such conditions as are prescribed,

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

Regulation 892

1. In this Regulation,

“deposits” means, in respect of a home, all money received before the date of possession by or on behalf of the vendor from a purchaser on account of the purchase price payable under a purchase agreement, and, in the case of a condominium dwelling unit, includes money received by or on behalf of the vendor after the date of possession and prior to the date of transfer but does not include money,

- (a) paid under the purchase agreement as rent or as an occupancy charge and not part of the purchase price, or
- (b) specified in the purchase agreement as money paid under subsection 51(6) of the *Condominium Act*.

6.(1) A purchaser who has a claim under clause 14 (1) (a) of the Act in respect of a purchase agreement entered into after the 30th day of June, 1988 is entitled to be paid out of the guarantee fund an amount for damages arising from the breach of the agreement by the vendor that does not exceed \$20,000.00

ANALYSIS:

This is a claim under section 14 (1) (a) of the *Ontario New Home Warranties Plan Act* for the return of deposit monies of twenty thousand dollars. The decision letter of December 4, 2001 accurately states the requirements for making such a claim. Mrs. Agostino does have a contract to purchase a home from a vendor. She has shown that she paid twenty thousand dollars (\$20,000.00) to the vendor and that money has not been returned to her. The issue in this case has been whether the vendor failed to transfer title due to a fundamental breach of contract by the vendor. There is no question that this is not a case of a vendor going into bankruptcy.

The decision of this Tribunal is that the purchaser has not shown that the vendor committed a fundamental breach of contract. Therefore the purchaser is not entitled to have the deposit returned to her.

There is a significant point in this case; that being that the purchaser acknowledges that she did not have the financing in place to close the deal on August 30, 2001. There is no question that Mrs. Agostino was upset by the state of her home on the morning of her pre delivery inspection. The photographs show that the home was not complete in many of its finishing aspects, that being the laying of tiles, of hardwood floor and of the installation of kitchen cabinets. But it is significant that the municipal inspector for the Town of Vaughan did find that by the afternoon of August 30, 2001 the house was fit for occupancy. Indeed a second inspector some days later also found that the house was fit for occupancy.

Mrs. Agostino did have cause for being concerned about the state of affairs on the morning of August 30, 2001. But her concern was not sufficient to lead to a fundamental breach of contract. All of her concerns could have been dealt with under the warranties for the first year. But the occupancy certificate was proof that the home could be occupied even if some of the finishing items were not completed. It is significant that she had similar concerns a month prior to the closing but she never requested the cancellation of the deal. It is significant that she never told the vendor of the importance of not having stairs because of health issues. It is significant that though she went to a lawyer over the Agreement of Purchase and Sale there were no written provisions in the deal as to the necessity of not having stairs. It is significant that she did not state the importance of not having stairs when she asked for the return of her deposit from the Program. In essence Mrs. Agostino did not find the issue of the stairs to be of importance until her request for the return of her deposit was denied by the Program.

It is of importance to note that her Agreement of Purchase of Sale, as is the case with most Agreements, permits the builder to make modifications to the contract as is necessary to construct the dwelling. There is no evidence that anyone at the builder had any knowledge of the state of her health and the importance of not having stairs in the dwelling. Indeed Mrs. Agostino in her own evidence makes it clear that she did not impart that information to the builder as it was personal and she did not feel it necessary

to tell them about her health issues. How can the builder be found to have made a misrepresentation when the fundamental issues are not before them?

This is not a case such as found in the cases whereby the house has been made substantially smaller or that the builder knew of an issue but ignored it. Indeed there were modifications to the plans but even when Mrs. Agostino knew of those modifications she did not demand that the contract be cancelled. The mistake was not so fundamental that it goes to the root of the contract.

The Tribunal has great sympathy for Mrs. Agostino who did not appear to understand the risks that she undertook when she refused to close the deal either on August 30th or at some later date. Either she did not receive proper advice from her counsel or she failed to appreciate the importance of the advice that she did receive. Failure to close a real estate deal on the date of closing can lead to substantial risks unless one is quite clear on the justification for that action. Here Mrs. Agostino, either through her lawyer or by herself never stated in a clear and forthright fashion that it was her health issues with the stairs that led to the failure to close the deal. Indeed the evidence at the hearing can only lead to the Tribunal finding that she had not completed the financing on the deal and therefore was vulnerable and had to find reasons for why she could not close on the date of closing. The evidence of the vendor is quite clear and uncontradicted that it was ready and willing to close on August 30, 2001. Though the conduct of the vendor in not completing many finishing aspects of the house until the last moment is not to be commended, it is a fact that the occupancy permit was granted by the municipal inspector in the afternoon of August 30th. The purchaser had a case for deficiencies under the warranty but not for failure to close the deal.

ORDER:

Pursuant to the authority vested in it by section 16 (3) of *The Ontario New Home Warranties Plan Act* the Tribunal directs the Program to disallow the claim of the Applicant.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley, Vice-Chair

RELEASED: July 24, 2002

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
OLYMPIC HOLIDAYS CANADA LTD.
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: December 10, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

OLYMPIC HOLIDAYS CANADA LTD.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by Olympic Holidays Canada Ltd., the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: July 4, 2002

BETWEEN:

OLYMPIC HOLIDAYS CANADA LTD.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

BACKGROUND

1. Olympic Holidays Canada Ltd. (hereinafter referred to as the "Registrant") has been registered as a travel wholesaler (registration number 4218640/W) under the *Travel Industry Act*, R.S.O., c. T-19, as amended (hereinafter referred to as "the Act") since October 21, 1993. Prior to Registration, the Registrant, on October 18, 1993 consented to terms and conditions on its registration including the maintenance of proper trust accounting and minimum working capital.

WORKING CAPITAL

2. The Registrant has failed to maintain the minimum required working capital as required by section 25 of Regulation 806/93, made under the Act ("the Regulation") and the terms and conditions of registration as consented to by the Registrant, as summarized by paragraphs 2 through 22.
3. The Registrant's financial statements for its fiscal year ended October 31, 1994 revealed a working capital shortfall of \$40,112.00 based on the Registrant's reported gross sales of \$3,826,532.00.
4. By letter dated February 28, 1995, the Ontario Travel Industry Inspections Office advised the Registrant that it must correct the shortfall reflected on its October 31, 1994 financial statements.
5. By letter dated March 23, 1995, the Registrant advised the Ontario Travel Industry Inspections Office that it had received a shareholder loan of \$36,000.00 and had collected \$3,786.31 to correct its October 31, 1994 shortfall.
6. The Registrant's financial statements for its fiscal year ended October 31, 1995 revealed a working capital shortfall of \$27,432.00 based on the Registrant's reported gross sales of \$4,014,680.00.
7. By letter dated March 21, 1996, the Ontario Travel Industry Inspections Office advised the Registrant that it must correct the shortfall reflected on its October 31, 1994 financial statements.
8. By letter dated March 23, 1995, the Registrant's accountant advised the Ontario Travel Industry Inspections Office that it had received a shareholder injection of \$30,000.00 to correct the Registrant's October 31, 1995 shortfall.
9. The Registrant's financial statements for its fiscal year ended October 31, 1997 revealed a working capital shortfall of \$1,111.00 based on the Registrant's reported gross sales of \$4,384,025.00.

10. The Registrant's financial statements for its fiscal year ended October 31, 1999 revealed a working capital shortfall of \$90,848.00 based on the Registrant's reported gross sales of \$2,461,722.00.
11. By letter dated April 12, 2000 the Travel Industry Council of Ontario ("TICO") advised the Registrant that it must correct the shortfall reflected on its October 31, 1999 financial statements.
12. By letter dated March 15, 2000, the Registrant advised TICO that it had received a shareholder loan of \$85,000.00 to partially correct its October 31, 1999 shortfall.
13. By letter dated June 7, 2000, TICO advised the Registrant that a further injection of \$5,848.00 was required to correct the shortfall reflected on its October 31, 1999 financial statements.
14. By letter dated June 29, 2000, the Registrant advised TICO that it had received a shareholder advance of \$6,000.00 to correct its October 31, 1999 shortfall.
15. The Registrant's financial statements for its fiscal year ended October 31, 2000 revealed a working capital shortfall of \$50,929.00 based on the Registrant's reported gross sales of \$2,461,722.00.
16. By letter dated February 23, 2001, the Registrar, *Travel Industry Act* advised the Registrant to correct the working capital shortfall reflected on the Registrant's October 31, 2000 financial statements.
17. By undated letter received by TICO on March 13, 2001, the Registrant advised that it had a \$30,000.00 term deposit to partially address the working capital shortfall. The promised to provide evidence that it had corrected the outstanding balance by the end of March or early April 2001.
18. By letter dated March 21, 2001, the Registrar, *Travel Industry Act* gave the Registrant until April 5, 2001 to correct the remaining shortfall.
19. On April 12, 2001, the Registrant provided evidence of shareholder deposits in the amount of \$20,000.00 to address its October 31, 2000 shortfall.
20. The Registrant's financial statements for its fiscal year ended October 31, 2001 revealed a working capital shortfall of \$47,598.00 based on the Registrant's reported gross sales of \$2,545,770.00.
21. By letter dated February 11, 2002, TICO advised the Registrant of the shortfall reflected on its October 31, 2001 financial statements and gave the Registrant until February 26, 2002 to correct that deficiency.
22. To date, the Registrant has failed to provide evidence that it is maintaining the minimum required working capital.

Trust Accounting

23. The Registrant has failed to comply with the trust accounting requirements of section 36 of the Regulation and the terms and conditions of registration as consented to by the Registrant and has failed to provide banking records when requested to do so by TICO, as summarized by paragraphs 24 through 33.
24. TICO conducted an inspection of the Registrant on June 12, 2000 to ensure that the company was operating in accordance with the Regulation. The inspection revealed that the Registrant's trust account was not properly designated. The inspection also revealed that the trust account was utilized for non-travel related transactions and that the trust account bank statement dated April 30, 2000 showed that the account was in an overdraft position several times throughout the month of April 2000.

25. By letter dated August 29, 2000 the Registrant was directed to provide TICO with trust reconciliations for the months of July, August, and September 2000 to be submitted by August 31, September 30, and October 31, 2000 respectively.
26. By letter dated October 3, 2000, the Registrant advised TICO that effective November 2000 the Registrant would have two separate bank accounts, one general and one *Travel Industry Act Trust Account*. The letter indicated that the trust account would not be overdrawn. The letter requested that TICO "be patient" in allowing the Registrant to submit a reconciliation commencing with November 2000.
27. On February 20, 2001 financial statements were received for the fiscal year ended October 31, 2000. The statements did not disclose the customer deposit position.
28. By fax dated March 12, 2001, TICO was advised in writing by the National Bank of Greece that the Registrant "operates a business trust account". The fax did not disclose the trust account number.
29. By letter dated April 12, 2001, TICO received a letter from the Registrant's solicitor, which included a letter from the National Bank of Greece confirming separate bank accounts for the general account and the *Travel Industry Act Trust Account*, and a copy of the trust account bank statement for the month of March 2001. The letter stated that the trust account reconciliation would be submitted in early May 2001.
30. By letter dated October 22, 2001 TICO requested that the Registrant provide bank statements for the months of August and September 2001, an interim bank statement for each account for the period of October 1 to October 26, 2001, and a list of all customer deposits as of October 31, 2001. Of the items requested, the Registrant only provided the August and September bank statements. Both the general and trust accounts were overdrawn in September 2001.
31. TICO conducted another inspection of the Registrant on October 29, 2001. This inspection revealed that the Registrant was not adhering to trust accounting, and that the trust account was consistently overdrawn during the month of October 2001, due to extensions of credit.
32. By letter dated November 5, 2001 the Registrant was requested to provide TICO with a trust reconciliation for the month of October 2001 and submit a copy of the general bank account for the month of October 2001.
33. On November 19, 2001 the Registrant faxed the trust reconciliation for the month of October 2001, and also provided a copy of the general account bank statement. The reconciliation showed that as at October 31, 2001, there was a trust deficit of \$11,433.92.
34. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsections 6 (4) and (5) of the *Travel Industry Act* directing that:

1. the Registrar refrain from carrying out the Proposal to Revoke Registration dated December 10, 2001;
2. the Registrant's registration is to be subject to the following terms and conditions:
 - (a) The Registrant shall at all times maintain sufficient funds to cover its customer obligations. Such funds shall be maintained in a properly designated "Travel Industry Act Trust Account"

and in accordance with the trust accounting requirements as stipulated in section 36 of the Regulation or such subsequent provision as may be in force from time to time;

- (b) The Registrant shall submit a monthly trust account reconciliation with corresponding bank statements to the Registrar beginning with the month of April, 2002, no later than 30 days after the end of each calendar month, for so long as the Registrar shall so require;
 - (c) The Registrant shall correct any and all working capital deficiencies by June 30, 2002 and provide a Notice to Reader from a licensed public accountant confirming that the Registrant is maintaining the minimum required working capital by September 30, 2002. At all times thereafter, the Registrant shall maintain the minimum working capital as required by section 25 of the Regulation or such subsequent provision as may be in force from time to time;
 - (d) If, at any time, the Registrar has reason to believe that the Registrant is in financial difficulty, the Registrar, in his sole discretion, may require that the Registrant provide a written statement of the Registrant's current net working capital and the Registrant shall do so within the time specified by the Registrar.
 - (e) The Registrant shall file complete financial statements, including a reconciliation of customer funds and customer obligations, as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for its fiscal year ending October 31, 2002, no later than January 31, 2003;
 - (f) The Registrant shall file complete financial statements, including a reconciliation of customer funds and customer obligations, as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time for its fiscal year ending October 31, 2003, no later than January 31, 2004; and
 - (g) If the above-noted financial statements as filed are incomplete, the Registrant will have 14 days from the date of notice of the deficiency to fully and completely address the deficiency and produce proof of such correction to the Registrar. Notice of the deficiency, if any, shall be sent by registered mail to the Registrant.
3. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) to (g) inclusive during the two (2) year period immediately following this order of the Tribunal, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.
4. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by its signature below that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED at Mississauga this ____ day of March, 2002

Mr. Tasso Demopoulos
Olympic Holidays Canada Ltd.
I have authority to bind the corporation

Mr. Michael Pepper
Registrar, *Travel Industry Act*

AMZAD A. KHAN d/b/a KHAN AUTO REPAIRS AND AMZAD KHAN

**APPEAL FROM A NOTICE OF THE DIRECTOR OF
VEHICLE INSPECTION STANDARDS ISSUED
PURSUANT TO CLAUSES 91(8)(a) and (c) AND
CLAUSES 93(a) and (c) OF THE *HIGHWAY TRAFFIC ACT*
R.S.O. 1990, CHAPTER H.8 AS AMENDED**

**TO REVOKE AMZAD A. KHAN D/B/A/ KHAN AUTO
REPAIR'S LICENCE AS A MOTOR VEHICLE
INSPECTION STATION AND AMZAD A. KHAN'S
REGISTRATION AS A MOTOR VEHICLE INSPECTION
MECHANIC**

TRIBUNAL: JOHN E. ORT, Presiding Member

APPEARANCES:

AHMAD A. KHAN, Agent, representing the Applicants
PATRICK MOORE, Counsel, representing the Director of Vehicle
Inspection Standards

DATES OF

HEARING: May 6-10, May 27, 2002

Toronto

ORDER

WHEREAS the Director of Vehicle Inspection Standards (the "Director") issued a Proposal dated November 24, 2001 to revoke the Motor Vehicle Inspection Station Licence Number 22-40772 issued to Amzad A. Khan d/b/a Khan Auto Repairs and to revoke the registration of Motor Vehicle Inspection Mechanic, Amzad A. Khan holding Trade Certificate Number 310S-078453 and 310T-078453 (the "Applicants");

AND WHEREAS the Applicants requested a hearing before the Licence Appeal Tribunal to appeal the above noted proposal;

AND WHEREAS the Tribunal heard evidence and testimony regarding this matter May 6 through May 10, 2002 and on May 27, 2002 at the Tribunal's Chambers;

AND WHEREAS, said evidence and testimony not being completed, the Tribunal arranged to continue hearing the matter on July 29, 30 and 31, 2002 at the Tribunal's Chambers;

AND WHEREAS, by fax dated July 25, 2002, the Agent representing the Applicants notified the Tribunal that he had been instructed to withdraw the Applicants' appeals before this Tribunal;

NOW THEREFORE this Tribunal orders that these proceedings are concluded before this Tribunal.

LICENCE APPEAL TRIBUNAL

John E. Ort, Member

Released: July 26, 2002

RTS TRANSPORT LTD.

Appeal under section 50.(1) of the *Highway Traffic Act* R.S.O. 1990, Chapter H.8 as amended (the “Act”) from the Amended Suspension and Seizure Order of the Deputy Registrar pursuant to section 47(1) of the Act.

TO APPEAL AN AMENDED SUSPENSION AND SEIZURE ORDER ISSUED BY THE DEPUTY REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: VICTOR DREVNIG, Vice-Chair, presiding
SIMON DANN, Member
MALCOLM FEALING, Member

APPEARANCES: PATRICK DI MONTE, Counsel for the Applicant
PATRICK MOORE, Counsel for the Respondent

DATES OF HEARING: May 30 & 31, June 3, 2002 Toronto

REASONS FOR DECISIONS

An oral hearing was held on May 30, 31 and June 3, 2002, at Toronto, Ontario, to consider the Applicant’s appeal pursuant to section 50.(1) of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Amended Suspension and Seizure Order imposed by the Deputy Registrar pursuant to section 47(1) of the HTA

GLOSSARY OF TERMS

CVIR: Commercial Vehicle Inspection Report

CVOR: Commercial Vehicle Operator’s Registration

CVSA: Commercial Vehicle Safety Alliance (road inspection standards for commercial motor vehicles in Mexico, U.S. and Canada)

DOT:	Department of Transport
HTA:	Highway Traffic Act, R.S.O. 1990, Chapter. H.8 (as amended)
MTO:	Ministry of Transportation, Ontario
OOS:	Out of Service
SPPA:	Statutory Powers and Procedures Act, R.S.O. 1990, Chap. S.22 (as amended)
Registrar:	Registrar of Motor Vehicles
Tribunal:	Licence Appeal Tribunal

BACKGROUND:

This is an appeal under section 50.(1) of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Deputy Registrar of Motor Vehicles (the “Registrar”) made a decision to issue a CVOR suspension and seizure order against RTS Transport Ltd. under section 47(1) of the Act on January 28, 2002.

RTS Transport Ltd. is located in Surrey, British Columbia and transports perishable and other goods into and out of Ontario, between Ontario and Quebec and the U.S. and Canadian west coast markets. Subsequent to the June 30, 2000 date issue of its Ontario CVOR certificate, RTS Transport received a Warning Letter in June 2001 advising RTS that its safety record was at an unacceptable level of performance and that “Further events on your record may result in a change to your safety rating, a facility audit being conducted on your premises, and/or yourself being required to attend an interview with an official of the Ministry to show cause why your privileges of operating commercial motor vehicles in Ontario should not be suspended or cancelled”.

On December 14, 2001, the Registrar notified RTS that its safety rating had been revised to ‘Unsatisfactory’ and that a Notice of Suspension and Seizure had been issued based on the company’s safety record and unpaid fines.

A Show Cause Meeting between RTS Transport and Ministry of Transport representatives was then held on January 16, 2002 during which RTS had the opportunity “...to present information that may impact the decision relative to the suspension and seizure of the CVOR certificate.”

Based on the Registrar's consideration of the submissions made by RTS at the Show Cause meeting, as well as the company's safety record, the Registrar issued an Amended Suspension and Seizure Order on January 28, 2002 to the Applicant by courier and fax and enclosed the following:

1. Notice of Suspension and Seizure;
2. Commercial Vehicle Operator Record;
3. Rating and CVOR Registration System Public Guideline;
4. MTO's Facility Audit Guideline;
5. Accident Reports;
6. Analysis
7. National Safety Code Manual;

On January 31, 2002, RTS Transport Ltd. (the "Applicant") filed an appeal of this suspension and seizure order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 filing fee.

A Pre-Hearing was held on March 6, 2002 and it was agreed to proceed to a full hearing at which time the Respondent would present evidence to show why the suspension and seizure are in the interest of highway safety and the Applicant would provide evidence to show the suspension "is harsh and unwarranted, and will result in the Applicant being put out of business".

At the commencement of the Hearing, the Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing and none were forthcoming.

Witnesses identified as appearing for the respective Parties:

- Respondent	Ms. Bernadette (Bunny) McKenna Carrier Safety Rating Analyst
- Applicant	Mr. Mr. Daman Grewal Operations/Safety Manager

ISSUES:

Was the Registrar justified in issuing a thirty day Suspension & Seizure order and should the Tribunal confirm, modify or set aside the Registrar's order?

Would the Suspension & Seizure order result in exceptional hardship to the Applicant which would justify modification or setting aside the Registrar's order?

EVIDENCE:

The Respondent presented evidence pertaining to the Ministry's records of the Applicant's number of accidents, its unacceptable safety record and operating procedures in the June 2000 to December 2001 review period.

The Respondent's witness was then introduced as being Ms. Bernadette (Bunny) McKenna, who is employed as a Carrier Safety Rating Analyst as the Ministry of Transportation's Carrier Safety Enforcement Branch (CSEB). Ms McKenna carries out analyses of commercial carrier safety records and performance of CVOR holders whose safety record comes to the attention of the CSEB.

The Ontario Safety Enforcement Branch compiles statistics to monitor CVOR-holder compliance with the MOT's Carrier Safety Rating Program and Commercial Vehicle Operator's Registration System and associated legislation and regulations (the full public guideline document is contained in Exhibit 4, Tab 17).

A description of violation rates and threshold values leading to intervention and sanctions, which could be a fleet limitation, plate seizure or suspension or cancellation of a carrier's operating privileges, is described in Exhibit 4, Tab 17, page 220-240.

Ms. McKenna reviewed the CVOR abstract of the Applicant showing that RTS had been involved in five (5) accidents in the June 30, 2000 through November 13, 2001 period and that charges had been laid in three (3) of the five incidents.

The CVOR abstract for RTS further showed there had been 24 convictions with the two most frequent violation types being for speeding and log book or document records maintenance improprieties. The analysis showed there had been a number of log book violations and poor or inadequate record keeping. The resulting overall violation rate was 3.6569 (365.7%) versus a threshold rate of 1.0 (100%).

While the Suspension and Seizure Order would under normal circumstances have been issued when the Applicant's safety record or performance reached 100%, McKenna stated the record had been worse in the last 6 months of 2001 than in the prior 13 months.

The Ministry's standard practice with under-performing carriers is to send out a warning letter when a CVOR holder reaches 35% of the threshold. At 65% of the threshold level, a facility audit is triggered and at 80% of the threshold either an interview stage or audit may occur. At 100% of threshold a review of a non-compliant carrier is triggered.

Ms. McKenna advised the Tribunal that despite these various stages and prescribed actions at these stages, the Registrar's actions are discretionary and can be taken at any time when the safety of the public is of concern.

Evidence presented by Mr. Grewal, the Applicant's Representative at the Show Cause meeting, revealed:

- there were no safety programs in place when he joined RTS in April 2001
- plans to implement new hiring practices are not yet in place; RTS consists mainly of Owner/Operators
- the company relies on driver experience in place of driver tests
- no log training is provided – the company relies on a driver's past experience and only checks after first trip
- Mr. Grewal was aware drivers were falsifying logs but did not know how to control practice
- Sukhwinder Pandher reportedly completes accident reviews with drivers
- vehicles are checked on return to yard; drivers are required to submit monthly maintenance reports – copies of monthly reports were provided but no repair receipts were available for verification
- RTS was not aware of all speeding charges against drivers as drivers do not submit tickets received
- dangerous goods charges had been laid against RTS but date of event and against which driver was not known
- as RTS was growing very fast, Mr. Grewal had become more involved with dispatch duties and recommended the company hire a safety manager
- RTS hired Mr. Sandy Power as Safety Manager; training sessions for all drivers were being developed for presentation on Saturdays, starting February – drivers not attending could face suspension
- Mr. Grewal spoke of his belief that "RTS was getting better"; that the discipline policy was getting stricter and he was attempting to get RTS into compliance; and since he had joined the company there had been a 60-70% improvement overall in their safety record

Ms. McKenna advised the Tribunal that even if the amendments to the CVOR licence requested by the Applicant had been granted to increase the company's CVOR fleet size, the threshold rate would still have been at 170%.

The Applicant's Counsel, Mr. Patrick DiMonte presented through his opening statement, the following points:

- the cited threshold was reached on an incorrect fleet size
- of the five (5) accidents alleged to have happened in a short time, two (2) were minor and should not have been mentioned; one (1) was questionable; and the two (2) serious events "allege driver error"
- that the 30 day suspension is "Draconian" and could put RTS out of business
- that the company has done everything possible and there has been a dramatic performance improvement

On cross-examination by Mr. DiMonte, Ms. McKenna acknowledged that RTS equipment showed no significant problems but restated that accidents and convictions, the majority being for speeding and log book improprieties, triggered the warning letter.

Ms McKenna emphasized that almost six (6) months went by between the time the Warning Letter was sent and when the Suspension and Seizure Order was issued. During this time there had been expectation of improvement but this did not occur. Evidence showed that the RTS performance record for the June 17, 2001 through December 16, 2001 period would have been approximately 224% versus a maximum allowable of 100%.

Ms McKenna clarified (1) that even at the adjusted fleet size and with an adjusted threshold of 170% versus 365%, the Order would still have been issued, and (2) while U.S. road events have no impact on a carrier's rating, if there are no Ontario events, they do become part of the overall consideration if the carrier's Ontario record triggers the Notice process.

When Mr. DiMonte asked Ms. McKenna about the RTS safety performance during the January 2002 through to the end of May 2002 period, Ms McKenna said she had no knowledge about performance in this time as it was after the Order date.

The witness appearing for the Applicant was Daman Dede Singh Grewal. While Mr. Surpinder Pandher, a co-owner and director of the Applicant, was present throughout the hearing he did not testify.

The evidence presented by Mr. Grewal included the following:

- his background included working at Aman Enterprises Ltd., also a trucking company, for 18 months where he was involved with safety operations and where he met Surpinder and Sukhwinder Pandher, the owners of RTS
- he started at RTS in March 2001
- RTS operates in 48 states and from British Columbia to Ontario in Canada; RTS has 45 trucks on the road and owns 6 trucks and numerous trailers; 39 power units are owner operated; the company began operating in Ontario on June 30, 2000 and approximately 21 to 23 units enter Ontario
- as operations manager his duties include hiring drivers, input of drivers' log records into computer and dealing with safety matters
- there are close to 70 drivers; he started the log book program in June 2001 and Gurbit Gill, an employee whom Grewal oversees, inputs data and is the record keeper
- the business largely moves B.C. lumber to U.S. destinations with offloads in California and then transports produce to food terminals in Ontario; RTS trucks then take consolidated freight out West; a standard trip can take eight (8) days to complete
- on the matter of fuel tax reports, which are necessitated by law and indicate the mileage travelled in each province, Mr. Grewal confirmed that RTS has them done by Coping With Trucking, a corporation in Langley, British Columbia

- certain material for some drivers' applications were lost and not available
- the discipline procedure calls for a file note re the accident or conviction; if required, a written warning; if another breach occurs the driver is supposed to be suspended; a further breach calls for termination
- Mr. Grewal testified he had never before seen the Registrar's letter of warning (June 27, 2001) to the company

In cross-examination Mr. Grewal's list of drivers, dated March 2002, and was different from the records contained in the Applicant's Book of Documents, dated October 23, 2001. Mr. Grewal was unable to answer how that had occurred.

He could not explain why one driver (Gill) was recorded as on active driver in December 2001 but had been purportedly terminated in May 2001 as a result of an accident.

In regards to the accident referred to in the police report of July 7, 2001, where Nav Dayg Gun Drak and Jasvir Dahliwal were allegedly fired for falling asleep and causing a serious accident, they appeared to still be active drivers months after their supposed termination date.

When dealing with speeding infractions, log book entry violations and hours of work violation matters Mr. Grewal agreed that RTS does not have the proper paper work in the records.

With repeat offenders it is company policy to first provide an oral warning and then a written warning. There are supposed to be two written warnings before suspension but mostly it is three. The third warning stage results in a suspension for 5 days.

RTS has written a four page driver's handbook, which is supposed to be read by and must be signed by all drivers to confirm they have read it. Mr. Grewal stated that while not all drivers are fluent in English, the company rules are in English and are reviewed with each driver by translation through him and Sukhwinder Pandher.

In addition, numerous training materials are available in his office for any drivers who wish to avail themselves of additional training materials; there is also a British Columbia Trucking Association (BCTA) course however, RTS is not a BCTA member as it is too expensive.

Additionally, Mr. Grewal confirmed videos are available in Punjabi and English; Safety Bulletins were started on October 31, 2001 and are contained in the drivers' pay packets; since RTS received the Notice of Suspension and Seizure, drivers are monitored much more closely.

Mr. Grewal stated that the hours of work and the days during which the hours were worked are given to him verbally before he enters it into the computer

He was cross-examined extensively as to his record keeping especially relating to:

- log book entries
- speeding infractions
- the driving records of Mr. Gill, Mr. Drak and Mr. Dahliwal who incurred infractions after they had allegedly been terminated

In addition he was questioned as to his knowledge of the *Highway Traffic Act* of Ontario and especially Ontario Regulation 4/93 which deals with hours of work and the use to be made of the automatic timer installations which are installed in all of the Applicant's vehicles, and which calculate:

- distance travelled
- time of engine use (start up - shut down)
- speed
- times when the timer device box is opened and shut

Mr. Grewal admitted he was not familiar with any of the above items.

LAW:

- 47(1) Subject to section 47.1, the Registrar may suspend or cancel,
- (a) the plate portion of a permit as defined in Part II;
 - (b) a driver's licence; or
 - (c) CVOR certificate, on the grounds of,
 - (d) misconduct for which the holder is responsible directly or indirectly, related to the operation or driving of a motor vehicle;
 - (e) conviction of the holder for an offence referred to in subsection 210(1) or (2); or
 - (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
 - (g) any other sufficient reason not referred to in clause (d), (e) or (f).
- (10) The Registrar may, at any time for misconduct or contravention of this Act, the Truck Transportation Act, the Public Vehicles Act or of any regulation thereunder by an owner or lessee of one or more motor vehicles or trailers for which permits have been issued by a jurisdiction or jurisdictions other than the Province of Ontario, order that the permit and number plates issued for the vehicle or vehicles be seized and any police officer or any officer appointed for carrying out this Act or the enforcement of the Public Vehicles Act or the Truck Transportation Act may seize the permit and number plates and deliver them to the Ministry which shall return them to the authority that issued them.

According to Section 22(e) HTA:

22(e) the Lieutenant Governor in Council may make regulations, governing the suspension or cancellation of CVOR certificates under subsection 47(1) or the imposition of a limitation on the fleet size operated under a CVOR certificate under subsection 47(2).

The maintenance requirements under the HTA are found, inter alia, at Regulation 575 (commercial motor vehicle inspections); Regulation 577 (covering of loads); Regulation 587 (re brake push rod travel); Regulation 597 (gross vehicle weights); Regulation 625 (tire standards and specifications); Regulation 762/91 (safety inspections); Regulation 614 (security of loads).

The appeal comes to this Tribunal by virtue of s. 50(1) of the HTA which provides:

- 50(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.
- (2) The [Tribunal] may confirm, modify or set aside the decision of the Minister or Registrar.

Regulation 574, also addresses appeals to this Tribunal;

- 3(3) Upon receipt of a notice of appeal under subsection (1) the [Tribunal] shall forthwith notify the Minister or Registrar, as the case may be, and the person notified shall forthwith provide the [Tribunal] with all the relevant documents and other material in his or her possession.
- 3(6) At any hearing under this section, the person making the appeal has the right to attend and make representations and, subject to subsection (7), to adduce evidence respecting the appeal either personally or through counsel.
- 3(7) At any hearing under this section, the [Tribunal] shall hear only such evidence as was submitted to the Minister or the Registrar, as the case may be, respecting the matter in dispute."

APPLICATION OF LAW TO FACTS:

Section 47 of the *Highway Traffic Act* provides that the Registrar may suspend a CVOR certificate on the grounds set out in that section.

The Tribunal has reviewed the considerable volume of evidence brought before it both as exhibits and through oral testimony. The Tribunal has some concerns that the only witness produced on behalf of the Applicant was Mr. Grewal, a person who had only been employed by the company for about 18 months and who did not have full knowledge of the business practices of the Applicant and was not an officer or Director of the Applicant although an officer, owner and Director was present but did not give evidence.

Although Mr. Grewal was operations manager he also stated that he acted as the safety manager of the Applicant. He had very little experience having only taken 4 or 5 one or two day courses in the National Safety Code, log book useage and management, the handling of dangerous goods, loading and unloading, as well as drug and alcohol issues.

Mr. Grewal attended the show cause hearing on behalf of the Applicant and stated that he attempted to change the methods of operation after receiving the Order of

Suspension and Seizure. These actions were said to include drafting a Drivers' Hand Book to be read by all drivers.

Mr. Grewal gave general evidence as to what the number of contracts were in Ontario (about 100) but gave no evidence concerning the dollar amount of the contracts or the value of business done in Ontario and he testified that all contracts were oral in nature. There was no evidence provided regarding the possible financial impacts that a 30 day suspension could have on the RTS business.

Mr. Grewal's testimony revealed a lack of knowledge of the *Highway Traffic Act*. In addition, the inability to discipline drivers properly suggested that it would be difficult for him to keep complete log book records and address the RTS driver performance in Ontario. No evidence was provided about changes being made at any time up to the date of the hearing.

The evidence of Ms. McKenna is found to be credible, clear and consistent in the reliance on information from computer print-outs, other reports and a CVOR safety rating system which is applicable to all commercial trucking companies using Ontario roads.

Ms. McKenna's evidence was that the record of the Applicant was 365% and even if the amendment to the CVOR licence had been properly requested and allowed by the Ministry of Transportation the number would still be 242%, approximately 2 ½ times over the Suspension of Licence level.

The Applicant did not dispute the accuracy of the information in the show cause hearing and attempted to show that the carrier had improved its driving record since the original Suspension and Seizure Order had been issued.

CASELAW:

Brenner v Ontario (Registrar of Motor Vehicle Dealers and Salesman) 1983 O. J. No. 1017 Ontario Supreme Court-High Court of Justice Divisional Court

This was an appeal by the Registrar of Motor Vehicle Dealers and Salesmen from a decision of the Commercial Registration Appeal Tribunal in which the Tribunal directed the Registrar to grant a conditional registration to the Respondent. The Applicant had a very serious criminal record which he had disclosed in his application but he had not disclosed three further convictions which were considered by the Registrar to be minor offences. The Tribunal heard evidence from a potential employer and a criminal lawyer who testified that the Applicant was rehabilitating himself. The Tribunal found that "possibly the applicant will in the future, be a person of honesty and integrity", and the Tribunal expressed a willingness to "encourage that objective". The Court found that the Tribunal had not applied the proper test, and set out this test in paragraph nine of the judgment as follows:

"the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty."

DECISION:

In considering the evidence presented regarding the record of driver performance, the log book violations, the absence of clear and consistent safety practices and training programs, the Tribunal finds that the Registrar was justified in his concern for the safety of the public on Ontario roads and did not err when issuing the Amended Suspension and Seizure Order.

Therefore, and in the absence of any evidence to indicate the Applicant's claim that the suspension would put the company out of business, and pursuant to the authority vested in the Tribunal under section 50.(2) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the decision of Registrar of Motor Vehicles to issue a suspension and seizure order for 30 days.

LICENCE APPEAL TRIBUNAL

Victor L. Drevnig, Vice-Chair,
Presiding

Simon Dann, Member

Malcolm Fealing, Member

RELEASED: July 5, 2002

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice or Divisional Court is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

MOHEBALI MOJARRAB O/A UPTOWN USED CARS

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF THE
MOTOR VEHICLE DEALERS ACT

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: FREDERICK YACK, Counsel, representing Mohebalí Mojarrab
AVIVA HARARI, Counsel, representing the Registrar, *Motor
Vehicle Dealers Act*

DATE OF
HEARING: July 2, 2002 Toronto

ORDER

WHEREAS the above matter came before the Tribunal for hearing on July 2, 2002;

AND WHEREAS the parties, their witnesses and the parties' respective Counsel, appeared before the Tribunal on July 2, 2002;

AND WHEREAS upon the completion of the testimony of the parties and their witnesses, Counsel for the parties agreed that closing submissions would be presented to the Tribunal by way of written submissions.

NOW THEREFORE the Tribunal ORDERS:

1. By no later than July 16, 2002 the Registrar shall serve upon the Applicant's Counsel and file with the Tribunal, the Registrar's written closing submissions;
2. By no later than August 6, 2002 the Applicant's Counsel shall respond to the Registrar's written closing submissions by providing the Registrar's Counsel and the Tribunal with the Applicant's written submissions;
3. If the Registrar wishes to reply to the Applicant's written closing submissions, the Registrar shall by not later than August 9, 2002 serve upon the Applicant's

Counsel and file with the Tribunal the Registrar's written reply to the Applicant's written closing submissions;

4. The Parties are to provide, with their written submissions, a list of the exhibits that each is relying on in support of their submissions.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: July 3, 2002

HARRY NICOLAU

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE *ONTARIO NEW
HOME WARRANTIES PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL: MICHAEL H. TURK, Vice Chair

APPEARANCES:

DORIS NICOLAU representing Harry Nicolau
ANDREW LEWIS representing the Ontario New Home Warranty
Program

DATE OF

HEARING: June 12, 13, 14, 17 and 18, 2002 Toronto

REASONS FOR DECISION AND ORDER

The Applicant, Harry Nicolau, appeals to the Licence Appeal Tribunal from a decision of the Ontario New Home Warranty Program (the Program) set out in a decision letter dated 25 January 2002 and a supplementary decision letter dated May 24, 2002. These decision letters had the cumulative effect of denying the warranty claims made by the Applicant.

BACKGROUND:

On November 21, 2000, the Applicant submitted an offer to purchase the property located at 1 Lister Drive, Toronto from Michael & Yekaterina Zaleznik (hereinafter the "vendors"). This home was custom built for the vendors by Hunter Building & Development Inc. and completed for occupancy in July 2000. The Certificate of Completion and Possession was signed by the vendors on July 24, 2000 and does not identify any deficiencies. The vendors never moved into the home.

The Applicant's offer was prepared and submitted by his spouse, Doris Nicolau in her professional capacity as a licensed real state agent. The offer was conditional upon inter-alia satisfactory written approval of a qualified home inspector. In this regard, the Applicant retained the services of Steve Balshin of Majestic Home Inspection Service who compiled a list of 233 deficiencies.

Following the inspection the Applicant negotiated a \$10,000.00 abatement in the purchase price, waived the inspection condition and completed the transaction with a purchase price of \$508,000.00.

The real estate commission payable by the vendors was 5% of the selling price plus GST. The Applicant's spouse as purchaser's agent split the commission due on the completion of this transaction.

Following the formal transfer of the home, the Applicant submitted a claim to the Program for the 233 deficiencies.

At the conciliation the Applicant withdrew 33 items from his deficiency claim.

In its first decision letter the Program found 35 items to be warranted at a value \$8,305.00 and denied the balance of the Applicant's claims on the basis that the Applicant was the second owner, that the home was fit for habitation save & except that final cosmetic finishes were incomplete and that the Applicant had reached a settlement with the first owner for \$10,000.00 thereby receiving a benefit under Section 14 (6) of the Act.

In its supplementary decision letter the Program obtained a quotation for 87 specific items of warranted work in the sum of \$8,395.00 and a second non-specific quotation for warranted work in the sum of \$4,580.00 for a total quotation for warranted work of \$12,975.00. The Program further denied the Applicant's claim on the basis that the Applicant had refused a repair to the garage floor (deficiency item No. 5) as offered by the builder thereby entitling the Program to a further set-off of \$4,000.00.

As the Program's set-offs of \$14,000.00 exceeded its quotation for warranted work of \$12,975.00 the Applicant's claim was denied.

THE FACTS

The Applicant did not appear in person and was represented by his spouse, Doris Nicolau. In addition to Doris Nicolau, Steven Balshin of Majestic Home Inspection Service gave evidence for the Applicant.

The Program called two witnesses, Richard Johnston, a warranty representative, and Ozzie Felkir, the owner of a general contracting company.

The deficiency list of Majestic Home Inspection Service contained 233 items at a cost of \$66,425.00 and formed the basis of the Applicant's claim. At the hearing Steve Balshin of Majestic Home Inspection Service acknowledged that errors took place in transposing his quotations which result in a reduction of his quotation by \$1,100.00 for revised claim of \$65,325.00.

The Applicant withdrew the following 33 items: 6, 9, 23, 45, 58, 61, 64, 67, 70, 72, 77, 82, 86, 89, 90, 98, 116, 119, 121, 122, 125, 132, 133, 142, 143, 54, 155, 156, 165, 187, 230, 232 and 233 thereby reducing the claim by \$5,200.00.

The Applicant acknowledged and accepted the Program's quotations for the following 24 items: 4, 19, 20, 31, 37, 40, 50, 68, 73, 76, 79, 85, 88, 91, 92, 94, 99, 100, 126, 133, 206, 207, 228 and 231 having a value of \$2,470.00

With 57 items having been either withdrawn by the Applicant or accepted by the Applicant 176 items remained to be determined. These items can be categorized in the following manner:

1) Paint and Drywall

108 or approximately 60% of the items relate to alleged defects in material and workmanship in paint and drywall. The Applicant asks that the entire home be repainted and drywall repaired where necessary. The Program acknowledges defects in paint and drywall but states that the defects and warranty are limited to the white areas of the home.

The Applicant quotes the cost of remedial paint and drywall at \$36,950.00. The Program says that the cost of drywall repairs and re-painting the white areas of the home is \$5,250.00 and the cost of paint and drywall repairs for the entire home is \$8,000.00.

2) Ceramic Tiles

The Applicant claims 9 defects in material and workmanship of the ceramic tiles and grout in the main floor kitchen, lower level kitchen, master ensuite, second floor middle bathroom, bathroom in basement, upper floor laundry room floor, a cracked tile in the upper laundry room and a slope in the basement and basement laundry room floors.

The Applicant quotes the cost of ceramic repairs at \$5,800.00. The Program has allowed \$240.00 for repairs to ceramic tiles & grout and denies all other claims as within allowable specifications.

3) Garage Floor

The garage floor slopes improperly and requires repair. The Applicant says the entire concrete garage floor must be removed and repoured at a cost of \$4,000.00. The Program agrees that the floor requires work but states that a lesser repair is appropriate at a cost of \$2,000.00.

4) Missing Quarter Round

The Applicant advances 7 claims that quarter round is missing in halls, foyer, main floor kitchen, master ensuite and basement and quotes the remedial costs of these items at

\$1,600.00. The Program has allowed the sum of \$200.00 for the installation of warranted missing quarter round and baseboards.

5) Doors

The Applicant advances 9 claims for door adjustments and the installation of a replacement solid door in the basement cold cellar and quotes the remedial costs at \$950.00. The Program has allowed the sum of \$240.00 for warranted door items.

6) Gaps

The Applicant advances 8 claims for items described as gaps between cabinets and walls, the tub area and between cabinets and the floor and quotes the cost of remedial work at \$600.00. The Program allows the sum of \$200.00 for warranted items.

7) Concrete Cracks

The Applicant advances 1 claim for parging the exterior portion of the foundation wall, 2 claims for cracks to the foundation wall and 1 claim for a mortar joint crack at the header area of the patio door and quotes the cost of remedial work at \$1,500.00. The Program allows \$40.00 for warranted work.

8) Caulking and Weatherstripping

The Applicant advances 3 claims for improper caulking and weatherstripping and quotes the cost of remedial work at \$375.00. The Program has allowed \$140.00 for warranted work.

9) Eavestrough

The Applicant advances 3 claims for improper & deficient installation of eavestroughs and splash pads and quotes the costs of remedial work at \$350.00. The Program denies any defect or deficiency.

10) Deck

The Applicant advances 3 claims for deficiencies to the deck pertaining to steps and treatment of lumber and quotes the cost of remedial work at \$350.00. The Program has allowed \$125.00 for warranted work.

11) Dents to Doors

The Applicant advances 2 claims for dents to the front door and garage door and quotes remedial costs at \$450.00. The Program denies these claims as not being in the vendor's Certificate of Completion & Possession.

12) Rooms over Garage

The Applicant advances 2 claims for heating/air conditioning of rooms over the garage and quotes remedial costs of \$1,150.00. The Program denies any defect in materials or workmanship.

13) Electrical

The Applicant advances 4 claims for electrical deficiencies for a missing outlet, doubled up circuit, loose electric operator in the central vacuum system and poor finish of an electrical panel cover and quotes the cost of remedial work at \$525.00. The Program denies any defects in materials or workmanship.

14) Rust

The Applicant advances a claim for rust on the front porch and quotes remedial costs at \$350.00. The Program denies any defects in material or workmanship.

15) Vents

The Applicant advances 3 claims for an exterior vent for the central vacuum, blocked vent opening in the cold cellar and a vent in the furnace room door and quotes remedial costs at \$325.00. The Program allows \$40.00 to open the blocked vent and denies the other claims as being defects in material or workmanship.

16) Insulation

The Applicant advances 2 claims for missing insulation and uncovered insulation and quotes remedial cost at \$275.00. The Program denies any defects in material or workmanship.

17) Lintels

The Applicant advances a claim for the cost of painting exterior lintels which have only been primed and quotes remedial costs of \$350.00. The Program denies any defect in materials or workmanship.

18) Humidifier

The Applicant advances a claim that all of the components for the humidifier had not been supplied and quotes remedial costs of \$75.00. The Program denies any defect in material or workmanship.

19) Shower

The Applicant advances a claim that the shower plate in the master ensuite is not installed properly and quotes remedial costs of \$100.00. The Program agrees that this item is warranted at a cost of \$40.00.

20) Chimney

The Applicant advances a claim that the chimney is overly close to the second floor bedroom window and quotes remedial costs of \$150.00. The Program denies that this is a violation of the Building Code and denies coverage.

21) Cover Black Waterproofing

The Applicant advances a claim that the black waterproofing on the foundation wall is above the grade of the property, should be covered and quotes remedial costs at \$200.00. The Program denies any defect in materials or workmanship.

22) Exterior Nails

The Applicant advances a claim that there are nails protruding from the exterior of the property and claims remedial costs of \$200.00. The Program denies the existence of this issue.

23) The Hardwood Floor

The Applicant advances a claim that the flooring in the dining room has a small chip, is scratched and quotes remedial costs of \$200.00. The Program states that these complaints are normal wear and tear and denied coverage.

THE EVIDENCE

The Applicant's entire claim is based upon the deficiencies and quotations contained in the report of Majestic Home Inspection Service and the Applicant's first witness was Steve Balshin of Majestic Home Inspection Service.

Steve Balshin is a former home builder and is a registered home inspector with the Ontario Association of Home Inspectors and is also certified by the Housing Inspection Foundation as a certified home inspector.

Home inspections are Steve Balshin's full time occupation and in the past year he performed approximately 900 home inspections and estimated that to date he had conducted approximately 23,000 inspections. The Tribunal accepted Mr. Balshin's qualifications.

Steve Balshin testified that his only inspection of the home took place in December, 2000 and that he had no independent recollection of the home. He viewed the workmanship of this home as not typical and that many deficiencies could result in consequential damage. Overall, Steve Balshin testified that he would classify the workmanship as one of the poorest he had seen with paint and drywall issues being the major areas of deficiency.

On cross examination, Steve Balshin testified that he considers himself to be a critical home inspector, that his standards are close to perfection and that anything short of perfection is a defect in his mind.

As it relates to quotations for repairs, Steve Balshin testified that he would not undertake remedial work, his quotations were calculated on an individual item by item basis and if a contractor was retained to complete the repairs his quotations should be reduced by a factor of 20%.

In response to questions from the Tribunal Steve Balshin testified that the cost to repaint the entire home would be \$9,000.00. As it relates to the issue of the garage floor, Steve Balshin testified that the only repair method that he was aware of was to repour the entire garage. He dismissed the Program's suggestion that a solution would be to repour a small area of the garage floor.

The Applicant's second and final witness was the Applicant's spouse, Doris Nicolau.

Mrs. Nicolau testified that she is a licensed real estate agent and in the top 10 of her office, Sutton Group. Mrs. Nicolau testified that following Steve Balshin's home inspection she negotiated a token \$10,000.00 abatement in purchase price, that the agreement specifically provided for an assignment of the New Home Warranty to the purchaser and that it was her intention to submit a claim to the Program based upon Steve Balshin's deficiency list.

At the hearing, Mrs. Nicolau conceded that the \$10,000.00 abatement in purchase price should be treated as a benefit and that this sum less 20% from the quotations of Steve Balshin should be deducted from the amount of the Applicant's claim.

Mrs. Nicolau relied upon the report of Steve Balshin and submitted 27 miscellaneous photographs as an illustration of various deficiencies.

Mrs. Nicolau attempted to introduce 3 pages of a 15-page report from The Home Buyers Guide Inc. The Program objected to the filing on the grounds that the report was not served prior to the hearing in accordance with the Rules of the Tribunal and that in any event, the report was incomplete and that the Tribunal should not accept what appeared to be an edited version of the report.

The Tribunal was prepared to consider allowing the report to be admitted if the sole issue was with respect to service and timing. The Tribunal was not prepared to accept a partial or edited report and therefore did not permit the Applicant to file this report.

Mrs. Nicolau testified that she did not purchase the home on an as is basis and was highly critical of the Program's treatment of the claim. Mrs. Nicolau was very candid in her view that the Program was acting in bad faith and that following its initial determination not to accept the Applicant's deficiency claims any further investigation would be used as a further excuse by the Program not to pay.

On cross examination Mrs. Nicolau reluctantly testified that as the purchaser's real estate agent she received a real estate commission of \$12,700.00 on the transaction and paid her broker \$1,000.00 from this amount. Mrs. Nicolau testified that as an agent she was entitled to this amount and that this was not a factor in determining the purchase price for the home.

As it relates to the issue of the sloping of the garage, Mrs. Nicolau stated that in accordance with Steve Balshin's report the correct remedy is to repour the entire garage. She testified that she rejected the proposed repair of Gene Privis and further testified that Mr. Privis failed to appear on two occasions and was unreliable.

In response to questions from the Tribunal, Mrs. Nicolau testified that she expected the remedial costs to be between \$35,000.00 and \$40,000.00, that she did not obtain specific quotations from individual trades and that her main areas of concern were with paint, drywall ridges and the slope of the garage floor.

The Program's first witness was Richard Johnston, an experienced warranty representative of 14 years.

Richard Johnston testified that his involvement commenced at the conciliation of August 20, 2001 and that following the conciliation he commenced an investigation into whether the home was purchased on an as is basis and whether the owner had received a benefit within the meaning of the Act.

Richard Johnston formed the view that the owner had received a benefit and this view is apparent throughout his correspondence to the Applicant and in the two decision letters.

Mr. Johnston further testified that he did not obtain quotations from Ozzie Felkir for the entire items claimed by the Applicant until he had been so instructed by the Program's legal counsel.

Mr. Johnston proceeded to give credible evidence on an item by item basis as to whether an item was warranted, if not why, and the estimated costs for repair.

On cross examination, Mr. Johnston acknowledged a friendship with Mr. Felkir but steadfastly denied that he instructed Mr. Felkir to provide quotations within a specified range or that there was anything improper with retaining Mr. Felkir.

As it related to the issue of accepted standards for workmanship, Mr. Johnston testified that the industry standards that he spoke of were not in writing but were an accepted practice. As the Applicant did not present any credible evidence to dispute Mr. Johnston's standards, the Tribunal accepts the testimony of Richard Johnston with respect to the issue of industry standards.

The Program's final witness was Ozzie Felkir, the principal of IOW, a general contractor.

Ozzie Felkir testified that his company has been doing work for the Program for 10 years and in this matter was requested by Richard Johnston to attend at the Applicant's home and prepare a quotation for the items claimed by the Applicant.

Mr. Felkir's quotations are to be found in the Supplementary decision letter and his specific quotations were tendered in evidence and marked as Exhibits 9 and 10 respectively. Exhibit 9 provides an itemized quotation for 233 items for a total estimate of \$32,635.00 and has a separate category for paint and drywall issues. The paint and drywall repairs total \$16,650.00.

Exhibit 10 does not break down paint and drywall repairs and provides a revised estimate of \$32,415.00.

Mr. Felkir noted that like Mr. Balshin, his quotations were provided on an item by item basis and that the estimates can be discounted by 25%-30% on a contract basis.

Mr. Felkir testified that he made no determination whether an item was or should be warranted and estimated that the cost of warranted paint and drywall repairs was \$5,250.00 and that the cost of paint and drywall repairs for the entire home is \$8,000.00.

As it related to the repair of the garage floor, Mr. Felkir testified that it is possible to perform a lesser repair by cutting back 4 - 6 feet at a cost of \$2,000.00.

In response to questions from the Tribunal Mr. Felkir testified that it was just not the white areas of the home that required repainting and drywall repairs and that as a practical matter the entire home should be repainted. As it relates to the issue of the garage floor, Mr. Felkir testified that in order to avoid the possibility of any further settling, the most effective repair would be to replace the entire concrete floor.

On cross examination, Mr. Felkir vehemently denied that he was instructed or pressured by Mr. Johnston in any manner and stated candidly that that was not the way he operates.

ISSUES:

There are two issues.

- 1) Did the Applicant obtained a benefit under Section 14 (6) of the Act and if so, to what extent.
- 2) Are the other items warranted and if so, what are the costs of repair.

THE LAW:

The relevant sections of the Act are as follows:

13. (1) Every vendor of a home warrants to the owner,;
 - (a) that the home,
 - (i) is constructed in a workmanlike manner and is free from defects in material
 - (ii) is fit for habitation, and
 - (iii) is constructed in accordance with the Ontario Building Code
 - (c) such other warranties as are prescribed by the regulations.
- (2) A warranty under subsection (1) does not apply in respect of;
 - (c) normal wear and tear;
 - (f) damage caused by improper maintenance;
- 14 (6) In assessing the amount for which a person is entitled to receive payment out of the guarantee fund under this section, the Corporation shall take into consideration any benefit, compensation, indemnity payable, or the value of work and materials furnished to the person from any source;

THE APPLICATION OF THE LAW TO THE FACTS:

With respect to the first issue the following applies:

At the hearing Mrs. Nicolau admitted that the Applicant received an abatement of purchase price in the sum of \$10,000.00 and that this sum should be deducted from any award. It is therefore conceded that the Applicant received a benefit of \$10,000.00 pursuant to Section 14 (6) of the Act.

Mrs. Nicolau testified that as a real estate agent and the purchaser's agent in this transaction she shared in the real estate commission payable by the vendors and that

her share of the commission was \$12,700.00 and that of this sum she paid \$1,000.00 to her broker.

The Program asks the Tribunal to treat the real estate commission as a benefit under Section 14 (6) of the Act.

The Program was unable to provide the Tribunal with any precedent whereby a benefit under Section 14 (6) of the Act included the receipt of a real estate commission.

The real estate commission was earned by the Applicant's spouse, Doris Nicolau in her professional capacity and was taxable income to her. Mrs. Nicolau testified that she is in the top 10 of her office and is taxed at 50 percent.

In the event that the Tribunal considers the real estate commission to be a benefit, the commission would be discounted by 50% to reflect the after tax value.

Unlike the Applicant's negotiation of the \$10,000.00 abatement in purchase price which was directly related to the issue of deficiencies, there was no evidence tendered that the real estate commission was a factor in determining the purchase price for the home.

The Tribunal is not satisfied based upon the evidence that the real estate commission earned by the Applicant's spouse, Mrs. Nicolau is a benefit under Section 14 (6) of the Act.

With respect to the second issue, the onus is on the Applicant to demonstrate that the defects complained of are warranted as a result of defects in material and/or workmanship and in this regard the following applies:

(1) Paint and Drywall

Based upon the admission of the Program that the white areas of the home should be repainted and drywall repaired where necessary, the issue is whether the entire home should be repainted and drywall repaired and at what cost.

Steve Balshin testified that the quality of workmanship for paint and drywall was consistent with the worst that he had seen. Approximately 60% of Steve Balshin's report deals with paint and drywall repairs at an estimated cost of \$36,950.00. Allowing for Mr. Balshin's reduction of 20% reduces his quotation to \$29,560.00

Steve Balshin's quotation of \$29,560.00 contained in his deficiency list is inconsistent with his testimony that the cost of repainting the entire home is \$9,000.00. Although he did not give testimony for the costs of drywall repairs, it is inconceivable that the costs for drywall repairs should be in the \$20,000.00 range.

Ozzie Felkir testified that there were paint and drywall deficiencies in all areas of the home and that a practical solution would be to repaint the entire home and repair the

drywall where necessary. He testified that the costs of paint and drywall repairs were \$8,000.00, however the total of individual items for paint and drywall in his Exhibit 9 are \$16,650.00. As this would be reduced by 25% on a contract basis, Mr. Felikir's estimate is \$12,487.50.

Based upon the evidence, it is the Tribunal's finding that there are sufficient paint and drywall deficiencies throughout the home that the entire home should be repainted and the drywall repaired where necessary.

The Tribunal finds that the sum of \$12,487.50 is a fair and reasonable cost to repaint and repair drywall throughout the home and allows the Applicant this amount.

(2) Ceramic Tiles

The Applicant advances 9 claims for defects in material and workmanship for ceramic tiles.

The Applicant did not produce any evidence from a tile expert and Steve Balshin was not of assistance to the Tribunal in this area.

The only evidence before the Tribunal was that of Richard Johnston who testified that save & except the sum of \$240.00, all issues complained of were within allowable specifications and standards.

The Tribunal allows the Applicant the sum of \$240.00.

(3) Garage Floor

During the hearing the Program withdrew the allegation that the Applicant refused a form of repair and as such the issue to be determined is the nature and cost of the repair.

The Tribunal is satisfied that the entire garage floor should be removed and repoured and allows the sum of \$4,000.00 for the costs of the same.

(4) Missing Quarter Round

The Applicant says that quarter round is missing in various areas throughout the home. The Program acknowledges that quarter round is missing in certain areas and states that the agreement of purchase and sale does not specifically refer to quarter round.

The Tribunal finds that the construction contract for the home was vague in many areas and that in this custom built home the missing quarter round is a deficiency. The Tribunal allows the sum of \$350.00 for the cost of the same.

(5) Doors

The Applicant advances 9 claims for door adjustments and the installation of a solid door in the basement cold cellar. The Program allows the sum of \$240.00 for door adjustments and the Tribunal allows the Applicant this amount for door adjustments.

The Applicant has not provided evidence that a solid door is a Building Code requirement and therefore the Tribunal dismisses the claim for a solid door.

(6) Gaps

The Applicant advances 8 claims for items that are best described as gaps between cabinets and walls, the bathtub and cabinets and the floor.

The Program acknowledges defects and allows the sum of \$200.00 for the costs of repairs. The Tribunal accepts the Program's quotation and allows the Applicant the sum of \$200.00 for gap repairs.

(7) Concrete Cracks

The Applicant advances claims for 2 foundation cracks, a motor joint crack at the header of the patio door and parging the exterior portion of the foundation wall.

The Applicant has not submitted any evidence that there is leakage or that these claims are warrantable.

The Program allows the sum of \$40.00 for warranted work and the Tribunal accepts this sum for the cost of repair. The Tribunal dismisses the applicant's other claims in this category.

(8) Caulking and Weatherstripping

The Applicant and the Program agree that there are deficiencies in caulking and weatherstripping but disagree on the cost of the remedial work.

The Tribunal accepts the Program's estimate of the sum of \$140.00 as the cost of repairs.

(9) Eavestrough

The Applicant advances 3 claims for improper and/or deficient installation of eavestrough and splash pads. In her evidence, Mrs. Nicolau testified that she had taken the necessary steps to remedy these deficiencies.

On that basis, the Tribunal finds that no deficiencies exist and dismisses these claims.

(10) Deck

The Applicant advances 3 claims for deficiencies to the deck. The Program acknowledges deficiencies but disagrees on the cost of repairs.

The Tribunal accepts the Program's cost estimate of \$125.00 as the cost of the repairs.

(11) Dents to Doors

The Applicant advances claims for dents to the front door and garage door. The Program acknowledges the dents but denies coverage on the basis that these items were not noted in the original Certificate of Completion and Possession and therefore may have been damaged in the period from this Certificate and the Applicant's offer to purchase.

The Tribunal notes that the Certificate of Completion and Possession referred to by the Program does not contain one deficiency, notwithstanding the fact that numerous deficiencies exist.

The Tribunal therefore finds that the damage to the front and garage doors represent defects in material and workmanship and allows the Applicant the sum of \$225.00 for the same.

(12) Rooms Over Garage

The Applicant advances claims that 2 rooms above the garage are overly cold compared to the rest of the home. The only evidence in this regard was the testimony of Mrs. Nicolau.

The Applicant did not conduct any inspection to determine the cause of the temperature variance nor did the Applicant provide evidence from a heating/ air conditioning contractor or otherwise in order to assist the Tribunal in determining whether the issues complained of are in defects in material or workmanship.

The Tribunal therefore dismisses the Applicant's claims in this category.

(13) Electrical

The Applicant advances 4 claims for electrical deficiencies but did not tender any evidence from an electrician to support these claims nor was Steve Balshin's evidence helpful to the Tribunal.

The Tribunal dismisses the Applicant's claims in this category.

(14) Rust

The Applicant advances a claim for rust on the front porch and tendered a photograph of the same as evidence.

The Tribunal is satisfied on the evidence that the rust complained of is a defect and allows the Applicant the sum of \$60.00 for the same.

(15) Vents

The Applicant advances 3 claims for an exterior vent, blocked vent and a missing vent in the furnace room door. The Program acknowledges that the blocked exterior vent must be cleared.

The Applicant did not tender evidence in support of the claim that the missing vents were a deficiency or a violation of the Building Code and therefore the Tribunal dismisses these claims.

The Tribunal allows the Applicant the sum of \$40.00 to open the blocked vent.

(16) Insulation

The Applicant advances 1 claim for missing insulation and 1 claim for uncovered insulation.

The Applicant did not provide any evidence that these items are deficiencies or Building Code requirements and therefore the Tribunal dismisses these claims.

(17) Lintels

The Applicant advances a claim that the exterior lintels have only been primed and tenders 1 photograph of the same as evidence.

The Tribunal is satisfied that the failure to paint the lintels are a deficiency and allows the Applicant the sum of \$100.00 for the same.

(18) Humidifier

The Applicant did not provide the Tribunal with any evidence that components of the humidifier are missing and therefore the Tribunal dismisses this claim.

(19) Shower

The Program agrees that this is a warranted item at \$40.00 and the Tribunal accepts the Program's cost estimate of \$40.00.

(20) Chimney

The Tribunal finds that Steve Balshin was not well versed in Building Code issues and did not satisfy the Tribunal that the placement of the chimney was a Building Code violation and therefore the Tribunal dismisses this claim.

(21) Cover Black Waterproofing

The Applicant did not provide any evidence to the Tribunal that the exposed area of the foundation wall was as a result of a defect in workmanship or material and therefore dismisses this claim.

(22) Exterior Nails

The Applicant had no knowledge of whether there are nails protruding from the exterior of the property and therefore did not satisfy the Tribunal that there was a deficiency. The Tribunal therefore dismisses this claim.

(23) The Hardwood Floor

The Applicant did not provide any photographs or evidence that the scratches were anything other than normal wear and tear. The Tribunal therefore dismisses this claim.

DECISION:

The onus is on the Applicant to demonstrate that his complaints are valid and prove with credible evidence that the complaints are warranted under the Ontario New Home Warranty Plan Act.

The Tribunal was constrained by the Applicant's failure to provide current expert evidence and cost estimates from individual trades and contractors.

Although the Applicant alleges lack of bona fides on behalf of the Program, it is principally the admissions and evidence tendered by the Program that results in the Applicant's award as hereinafter provided.

Whereas the Tribunal accepts the qualifications of Steve Balshin as a home inspector, the Tribunal finds that remedial costs and providing cost estimates for remedial work are not Steve Balshin's forte.

The Tribunal finds as a general principle that Steve Balshin's costs estimates are excessive and therefore for the purpose of awarding compensation to the Applicant has primarily relied upon the evidence and cost estimates as provided by the Program through its witness, Ozzie Felikir.

Therefore, by virtue of the authority vested in it by section 16(3) of the *Ontario New Home Warranties Plan Act*, the Tribunal directs the Program to pay the Applicant the following:

- 1) The sum of \$2,470.00 for the 24 items acknowledged and agreed upon between the Applicant and the Program;
- 2) The sum of \$12,487.50 for paint and drywall repairs;
- 3) The sum of \$240.00 for ceramic tiles and grout repairs;
- 4) The sum of \$4,000.00 for repairs to the garage floor;
- 5) The sum of \$350.00 for replacement of quarter round and baseboards;
- 6) The sum of \$225.00 for door adjustments;
- 7) The sum of \$200.00 for gap repairs;
- 8) The sum of \$40.00 for concrete repairs;
- 9) The sum of \$140.00 for caulking and weatherstripping;
- 10) The sum of \$125.00 for repairs to the deck;
- 11) The sum of \$225.00 for repairs to doors;
- 12) The sum of \$60.00 for removal of rust;
- 13) The sum of \$100.00 to paint lintels; and
- 14) The sum of \$40.00 for installation of a shower plate;

The total cost of the warranted items listed above is \$20,702.50 which sum is to be reduced by \$10,000.00 on account of the benefit that the Applicant received.

The Tribunal therefore finds that the Applicant be paid the sum of \$10,702.50 by the Program by way of recompense.

The Tribunal upholds the remaining decisions of the Program to disallow the Applicant's other claims.

LICENCE APPEAL TRIBUNAL

Michael H. Turk, Vice-Chair

Released: July 17, 2002

IBL TRANSPORT CO. LTD.

IN THE MATTER OF AN APPLICATION BY IBL TRANSPORT CO. LTD. DATED FEBRUARY 11, 2002, FOR A HEARING BEFORE THE LICENCE APPEAL TRIBUNAL PURSUANT TO SECTION 50(1) OF THE HIGHWAY TRAFFIC ACT, TO CONSIDER THE APPEAL OF THE SUSPENSION AND SEIZURE ORDER OF THE DEPUTY REGISTRAR DATED JANUARY 28, 2002;

AND IN THE MATTER OF THE HIGHWAY TRAFFIC ACT, R.S.O. 1990, CHAPTER H.8, AS AMENDED;

AND IN THE MATTER OF THE COMMERCIAL VEHICLE OPERATOR'S REGISTRATION (CVOR) CERTIFICATE 106-998-851 ISSUED TO IBL TRANSPORT CO. LTD.;

AND IN THE MATTER OF THE NOTICE OF SUSPENSION AND SEIZURE DATED DECEMBER 12, 2001, ISSUED TO IBL TRANSPORT CO. LTD.;

AND IN THE MATTER OF THE SAFETY RECORD OF IBL TRANSPORT CO. LTD.

TRIBUNAL: BRIAN K. MAROTTA, Vice-Chair, Presiding
SIMON DANN, Member
CHARLES J. SANDIFORD, Member

APPEARANCES: JAMES F. LEE, Agent, representing the Applicant
PATRICK MOORE, Counsel for the Respondent

DATES OF
HEARING: June 25 and 26, 2002 Toronto

REASONS FOR DECISIONS

An oral hearing was held on June 25 and 26, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.(1) of the *Highway Traffic Act*, R.S.O., 1990, Chap, H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Suspension and Seizure Order imposed by the Deputy Registrar pursuant to section 47(1) of the HTA.

BACKGROUND:

This is an appeal under section 50.(1) of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

On January 24th, 2002, the applicant met with the Deputy Registrar to show cause why the suspension and seizure order should not be issued. At that meeting, the parties discussed the Deputy Registrar's dissatisfaction with the high out of service rate of the applicant's vehicles, its record of accidents and poor safety record.

As a result of that meeting, the Deputy Registrar issued the following suspension and seizure order:

SUSPENSION AND SEIZURE ORDER

WHEREAS a Notice of Suspension & Seizure dated the December 12, 2001 was issued proposing a 30 day suspension of the CVOR certificate issued to IBL TRANSPORT CO. LTD. and suspension and seizure of plate portion of permits and number plates;

AND WHEREAS provided in the notice, you had the opportunity to make submissions at a meeting with the Deputy Registrar on January 24th 2002, to show cause why the suspension and seizure order should not be issued;

AND WHEREAS I have considered your submissions and your safety record including your record of convictions, accidents, vehicle detentions and vehicle out of service rates, history of past dealings with the ministry and I remain concerned for highway safety;

NOW THEREFORE IT IS ORDERED that pursuant to Section 47 & 47.1 of the Highway Traffic Act that as of February 18th, 2002, CVOR certificate 106-998-851 and plate portion of permits for all commercial motor vehicles and trailers issued to IBL TRANSPORT CO. LTD. be suspended for 7 days and the plate portion of permits, or if issued, by a jurisdiction other than Ontario, the permits, and the number plates be seized.

The Applicant filed an appeal of this suspension and seizure order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 filing fee. Therefore the suspension did not go into effect.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUES:

Should the Tribunal confirm, modify or set aside the decision of the Registrar to issue a suspension and seizure order for 30 days?

FACTS:

The Tribunal heard from Mr. Donald H. Gillett, Carrier Safety Rating Administrator, with the Ministry of Transportation. It was his duty to monitor CVOR operators for safety and performance. Prior to that he was a National Safety Code Auditor and Provincial Offences Officer. He stated that the objective of the Ministry of Transportation is to monitor carriers to ensure that they comply with the provisions of the Act and Regulations. He explained how the CVOR rating system operated and the point system attributed to each infraction. He explained how this was all set out in the Ontario's Carrier Safety Rating and Commercial Vehicle Operators Registration System Public Guideline.

He produced the CVOR Abstract of the applicant which set out all accidents, convictions and inspections. The applicant became a CVOR holder on August 22, 1991.

With the CVOR system, a threshold limit is established by comparing the record of the CVOR holder with operators of comparable fleet size. The threshold limit of the applicant was therefore adjusted to compare with operations of a fleet size of one vehicle. When the CVOR holder reaches 35% of the threshold a warning letter is sent out. At 65% of the threshold, the holder is put in an audit stage, at 80% of threshold, the operator reaches an interview stage and at 100% of threshold the sanction stage is triggered.

The goals of the CVOR system are to promote safe operation of commercial motor vehicles as defined by the Act. The CVOR system monitors a two year time frame based upon certain computer data which is updated regularly and entered into the CVOR system. The updating of the system is a continual process.

The system works upon a point rating system. An example is that convictions are rated from 0 to 30 points for violations with the more serious violations having the higher points assigned to them. The accidents are rated on a range from 0 to 12 points depending upon the seriousness and the driver impropriety involved. The out of service (OOS) has a 2 point maximum if two OOS items are reported on a vehicle inspection.

In the two year period from October 16, 1999 to October 15, 2001, the following numbers of events appeared on the company's CVOR record:

Accidents – 6

Conviction – 28

Inspections – 56

Point values were assigned to some of these events in accordance with the tables in the Ministry's CVOR Guideline. Not all events on the record were pointable. Three of the 16 accidents had points assigned. Twenty-four of the inspections resulted in points being assigned. Accidents count as double points, but not all accidents are pointable.

The Appellant's violation rate was determined by calculating the number of points in each category by the number of vehicles and the number of months. There was no dispute in this case about the company's adjusted fleet size of 22 vehicles.

The appellant's violation rates were as follows:

Accident	– 77.7%
Conviction	– 88.3%
Inspections	– 50.4%
Overall	– 73.5%

Mr. Gillett testified that this was a high overall violation rate. The Ministry is concerned whenever a carrier's violation rate exceeds 35%.

Mr. Gillett testified that the Ministry will consider sanctions at a point before 100% percentage of threshold in various circumstances. Among these circumstances, a sanction will be considered when there is a poor score on an audit or there is a history of interventions. It was his opinion that both existed in this case. After hearing the evidence in this matter, the Tribunal agrees.

The April, 2001 Audit resulted in the Appellant receiving the following compliance rate scores:

Driver Profile:	33.3%
Vehicle Profile:	47.8%
Safety Programs and Training:	30%
Overall:	40.6

The history of previous interventions with the appellant was lengthy. The Ministry makes use of three interventions short of a sanction – warning letters, interviews and audits. All three of these interventions were attempted at least twice with the Appellant. The first intervention was a warning letter on March 3, 1992 – seven months after the company was issued a CVOR. The last intervention was the April 2001 Audit, for which it was agreed that the findings of the ministry were correct.

According to Mr. Gillett, the forms of intervention used by the Ministry normally have very high rates of success in bringing about improvement in a carrier's compliance rate. The improvement sought by the Ministry is that the CVOR holder brings its violation rate below the 35% of threshold. The violation rate of IBL was 73.5% overall.

There are three threshold values which are all considered together to arrive at the violation rate. These three thresholds are: safety (accidents), convictions and inspections.

On cross-examination, the Applicant attempted to establish, through Mr. Gillett, that the Ministry's pointing system was unfair. One complaint was that the number of points assigned to the offence of "Fail to Inspect/Repair/Maintain According to Standards" was excessive. Mr. Gillett's evidence was that this was one of the most serious charges laid by Ministry officers. It seems logical to the Tribunal that this is a very serious charge.

If the driver fails to inspect a vehicle defects cannot be found, repaired, nor can vehicles be properly maintained thus endangering public safety.

It was also suggested in cross-examination that there may be a flaw in the system as it pertains to points being assigned to accidents because if there was a charge laid, and the case is later dismissed, the points remain. The Tribunal has noted that there was no evidence from the Appellant to suggest that points were assigned to its record for charges that were later dismissed.

Mr. Gillett indicated that the Ministry's pointing system only took into account a limited class of accidents. No points were assigned to any accidents reported at Collision Reporting Centres. No points were assigned where the investigating police officer did not specifically note impropriety. Thus, an incident like the accident of March 31, 2000, for which the Applicant asserted that no fault was found on the part of the driver, was a "zero pointer". This was even though it involved a tractor trailer backing up along the shoulder of a road and striking a vehicle which was exiting a parking lot.

The Tribunal heard evidence with respect to the three accidents for which points were assigned. The descriptions of the pointable accidents indicate three very serious incidents. Two of the three accidents involved rollovers of tractor trailers and the other accident involved a tractor trailer jack-knifing into a guardrail. Two of the incidents were on the 401 and the other on a ramp to the 427. Each of the three accident reports reference ambulance or hospital care.

It was suggested to Mr. Gillett that the Ministry should not have taken note of accidents where neither the company nor the driver was at fault. Mr. Gillett's evidence was that these accidents did not effect the company's CVOR standing. He indicated that accident violation points trigger interventions, not accidents. It was noted by the Tribunal that the Respondent had not in any way relied on these occurrences in its examination in chief. For example, the last wheel separation incident may not have gone unnoticed by the Ministry, but if there was no point assigned, it would not affect the CVOR of the Applicant.

It was suggested in cross-examination of Mr. Gillett that the Appellant's accident record appeared much differently when the non-pointable accidents were removed. However,

the fact is that the company's three pointable accidents still exceeded the provincial average of two accidents for its fleet size.

In cross-examination of Mr. Gillett, it was suggested that the company's out of service rate in the second analysis year had improved over the previous year. While this was not disputed, it was shown by Mr. Gillett that the rate remained above the provincial average. His evidence, which was not challenged by the Appellant, was that the time frame in question also saw a more general reduction in the provincial average. The company's out-of-service rate had been highlighted as a problem in the past with the first reference to it in the Interview of July 13, 1994.

The only witness for the Applicant was David Tso. Mr. Tso has been president or vice-president of the company since its inception. The other two key people in the company were Danny Lo, who has been Operations Supervisor/Dispatcher for 10 years and Jim Lee, who has been the Safety Consultant since 1990 or 1991.

IBL transports ocean containers. There are no power units owned by the company as one hundred percent are owner operated. Eighty to ninety percent of the trailers are leased. IBL operates hauling containers between Toronto and Montreal and it also has local delivery.

Mr. Tso stated that he has set up an Accident Review Committee which is composed of himself and Danny Lo. He stated that the Committee reviews all accidents and he gave evidence with respect to his assessment of each of three pointable accidents on the Company's record. He was also noted as being the person responsible for accident reviews in the 1996 interview. In respect of the rollover of the tractor trailer, he stated he reviewed this with the driver who stated that he was not speeding and thought the load may have shifted. He terminated that driver. In regard to the jackknife on 401, he also talked to that driver who stated that he had been cut off by another vehicle. He terminated the employment of that driver.

With respect to the rollover on highway 401, the driver had told Mr. Tso that the load had shifted. Mr. Tso did not believe the driver as he was on a straight road and it should not have shifted and, therefore, he terminated the driver.

Although Mr. Tso said the Company was trying to improve its record by terminating any driver who has an accident, he also stated that the purpose of terminating drivers is for insurance purposes.

In the National Safety Code Audit of March 17, 1992, there was a large concern noted about overweight loads. Mr. Tso answer was that he had discussed the problem with his customers, but IBL had no control over the weight of the containers. That was still his position as of this hearing.

In the second Audit on July 2, 1993, it was noted that drivers logs were not completed properly, there were missing logs and the drivers were using US style logs. It was also

noted that the logs were not being checked for hours of service. To correct this, Mr. Tso had made an action plan which included that the operator would ensure a process was in place to regulate monitor driver daily logs and trip inspection reports to ensure compliance with the regulations. He also stated that Mr. Lee had done driver's training on log books five or six times over the past six or seven years. If there was a new driver hired, Danny Lo would give him an orientation.

It is interesting to note that it was remarked in that Audit that:

"Drivers logs had missing information, this was after the drivers received training on log books and hours of service by Jim Lee as reported by the Operators. No documentation on file re training. No system being implemented to check or verify the logs submitted."

In January 1996, the Applicant was called in for an interview as a result of continuing to accumulate convictions at an unacceptable rate. At that time, total convictions on record for a three year period was seventy-five. Of those, twenty-four were for weight, thirteen as a result of facility audit and twenty-three related to defects and inspections with two violations relating to drivers licences. The out of service defects were predominately for break adjustment, brakes and tires, as well as lights, suspension and steering.

As a result of that interview, IBL filed an action plan in which it promised to do a number of things to correct the problems and Mr. Tso stated that all things on that plan had been done. In addition, Mr. Tso stated that all drivers must have an AZ licence to drive a tractor trailer with air brakes and three years experience. He stated that all drivers are given road tests however, he did not have any results of the road test in his files and did not produce any. He thought that most of the drivers had road tests results, but they might have been misfiled.

On cross examination, Mr. Tso said that Mr. J. Lee had been the same safety consultant that had been with the Company since 1991, although he is not full time.

He also stated that the Accident Review Committee had never formally been established but it had always been there.

Commenting on the July 31, 2000 rollover incident, he stated that besides talking to the driver he had reported it to his insurance company and left it to the insurance adjuster to do the inspection. The driver had stated that the load had shifted, however, Mr. Tso did not follow up on that and did not know how it was loaded. Contrary to his prior evidence, he stated that he fired the driver because the driver no longer had a power unit.

In the December 1, 1999 accident, the tractor trailer had rolled over in a single vehicle accident on highway 401. The police report had noted a log book problem and although Mr. Tso had reviewed the accident with the driver he could not remember if he had reviewed the log books. He admitted that it was possible that the driver fell asleep, but he did not have any answers.

In his 1996 action plan, Mr. Tso had stated that Kellers Maintenance Manager Program had been purchased and would be implemented. Mr. Tso confirmed that this had been purchased in 1995 and he thought that there was a page somewhere in the program about logs but he wasn't sure. He said that the program consists of forms only as he had never purchased the computerized part of the program.

In regard to driver training, he stated that his Company has a handbook for drivers in the office but he didn't bring it with him. He did bring five pages of it with him to the show cause hearing, which pages were created about one month before the Deputy Registrar issued the suspension and seizure order.

When questioned on discipline policies or drivers who performed poorly, Mr. Tso stated that any driver in a motor vehicle accident is fired. He had already indicated that this was not necessarily for safety purposes but was for insurance purposes and, if the accident was serious enough, because the driver would no longer have a power unit. He also stated that there were charge backs or fines by the Company for drivers who did not comply with the regulations. He was questioned about the charges against one of his drivers who had convictions for items such as failing to wear a seatbelt, using a radar device and speeding.

Mr. Tso was asked if that driver had been fined by the Company for his offences and Mr. Tso stated that he had not, but maybe Mr. Lo had warned him, he was not sure.

Mr. Tso was asked about another driver whose vehicle was found to be out of service in three out of five inspections. He stated that he knew about this high rate of out of service in this case but usually he doesn't track particular drivers. Danny Lo was his Dispatcher and probably Mr. Lo would have warned him, but he was not sure.

In a letter in December 2001, Mr. Tso had advised the Deputy Registrar that IBL would require all drivers to attend a defensive driving course within six months. He stated that there was such a course at Guelph that was run by an insurance company. The day of this hearing was the first day anyone had been sent to the course and one employee was there.

In that same letter, Mr. Tso stated that "IBL will assign an administrative person to monitor hours of service and log books". The Tribunal notes that in 1994 Mr. Tso had made a similar promise in the proposed action plan. He indicated that he would ensure that "a process is in place to regularly monitor driver daily logs and trip inspection reports to ensure compliance with regulations". On redirect examination, Mr. Tso said that at one time he did assign a person to monitor the log book but he had to terminate his employment.

In regard to hours of work that appeared to continue to be a problem. In the first company audit in 1992, one of the items noted was "no hours being maintained for local drivers". The same problem was referred to in the 1997 audit where the company committed to keeping a record of times for local drivers. Mr. Tso acknowledged that one

of the difficulties the company had in its 2001 audit was with local drivers who did not know they needed to submit hours.

In the Montreal to Toronto run, Mr. Tso stated that the drive would take six hours each way. The regulations provided for thirteen hours of driving time, plus two hours on duty but not driving. This would mean that it would be very tight for a driver to travel from Toronto to Montreal and back within his allowable driving time.

Mr. Tso did not seem to be concerned with that and stated that in "most cases" the drivers would not exceed their allowable time and that it was possible that they "could be" not complying. Mr. Tso did not express concern that his drivers could be exceeding the maximum driving time allowable.

LAW:

Highway Traffic Act

S. 16(1) "operator" means the person directly or indirectly responsible for the operation of a commercial motor vehicle including the conduct of the driver of, and the carriage of goods or passengers, if any, in the vehicle or combination of vehicles

s. 16(2) No person shall drive or operate a commercial motor vehicle on a highway unless the operator is the holder of a CVOR certificate that is not under suspension

...

47(1) Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) CVOR certificate, on the grounds of,
- (d) misconduct for which the holder is responsible directly or indirectly, related to the operation or driving of a motor vehicle;
- (e) conviction of the holder for an offence referred to in subsection 210(1) or (2); or
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

- (10) The Registrar may, at any time for misconduct or contravention of this Act, the Truck Transportation Act, the Public Vehicles Act or of any regulation thereunder by an owner or lessee of one or more motor vehicles or trailers for which permits have been issued by a jurisdiction or jurisdictions other than the Province of Ontario, order that the permit and number plates issued for the vehicle or vehicles be seized and any police officer or any officer appointed for carrying out this Act or the enforcement of the Public Vehicles Act or the Truck Transportation Act may seize the permit and number plates and deliver them to the Ministry which shall return them to the authority that issued them.

107(3) Every operator shall inspect, repair and maintain or cause to be inspected, repaired and maintained all commercial motor vehicles and trailers under the operator's control in accordance with the prescribed vehicle component performance standards and the operator's system for periodic inspections.

According to Section 22(e) HTA:

22(e) the Lieutenant Governor in Council may make regulations, governing the suspension or cancellation of CVOR certificates under subsection 47(1) or the imposition of a limitation on the fleet size operated under a CVOR certificate under subsection 47(2).

Regulation 424/97

Section 5(1) The safety record of an operator shall contain a record of the following:

...

6. Any warning letters sent by, or interview held with, Ministry officials relating to the operator's safety performance and practices.
7. Any conviction relating to the operation of a commercial motor vehicle or a vehicle drawn by it, for an offence committed by the operator, its agents or employees
8. The particulars of any accident involving a commercial motor vehicle operated by the operator or a vehicle drawn by it.
9. The results of any inspection under section 82 or 82.1 of the Act or any similar inspection of a commercial motor vehicle operated by the operator, or a vehicle drawn by it.
11. The results of any audits of the operator
14. The operator's fleet size
17. Any compilations or analyses of any of the information in paragraphs 1 to 16.

The maintenance requirements under the HTA are found, inter alia, at Regulation 575 (commercial motor vehicle inspections); Regulation 577 (covering of loads); Regulation 587 (re brake push rod travel); Regulation 597 (gross vehicle weights); Regulation 625 (tire standards and specifications); Regulation 762/91 (safety inspections); Regulation 614 (security of loads).

The appeal comes to this Tribunal by virtue of s. 50(1) of the HTA which provides:

- 50(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or Registrar.

Regulation 574, also addresses appeals to this Tribunal;

- 3(3) Upon receipt of a notice of appeal under subsection (1) the [Tribunal] shall forthwith notify the Minister or Registrar, as the case may be, and the person notified shall forthwith provide the [Tribunal] with all the relevant documents and other material in his or her possession.
- 3(6) At any hearing under this section, the person making the appeal has the right to attend and make representations and, subject to subsection (7), to adduce evidence respecting the appeal either personally or through counsel.

- 3(7) At any hearing under this section, the [Tribunal] shall hear only such evidence as was submitted to the Minister or the Registrar, as the case may be, respecting the matter in dispute."

APPLICATION OF FACTS TO THE LAW:

The Applicant had suggested that the company may have been assigned more points than other carriers because it operates on the 401 corridor where it has greater exposure to enforcement activity. A similar argument was rejected by Madam Justice MacFarland in *Muscillo Transport Limited v. Deputy Registrar of Motor Vehicles* (Ont. Gen. Div., unreported, June 3, 1997):

"The appellant suggest also that because it carries on its business primarily in an area of the province where there are more inspection stations it is subject to a greater number of inspections than are other carriers elsewhere in the province and that in and of itself is inherently unfair. The short answer to the question is that if the appellant maintains its fleet and trailers properly as it is required to do, it has nothing to fear from such inspections." (pp. 8-9)

The issue of inclusion in the CVOR Record of zero point accidents was also dealt with by Madam Justice MacFarland in *Muscillo Transport Limited v. The Deputy Registrar of Motor Vehicles*:

"In relation to the accidents as recorded in police accident reports, the objection is made that all accidents are recorded including those in which the carrier is not at fault. It is submitted that it is inappropriate to include such accidents in its process. Again, the system which is challenged is one merely which brings the particular carrier to the attention of the Ministry; before its rights are affected in any way, the carrier is afforded full opportunity for a hearing". (p. 9)

The purpose of a sanction under section 47 was described in the majority and minority decisions of the Court of Appeal in *Muscillo Transport Limited v. Deputy Registrar* (Ont. C.A.) unreported (April 1, 1998):

"The issue is not simply one of sanction, but rather one of the safety of the public and the appellant's dedication in that regard" (page 2) per Brooke, Moldaver JJ.

...

The purpose of a sanction under s. 47(2) of the *Highway Traffic Act* is to improve, assist and encourage the licence holder to adhere to appropriate safety standards in order to ensure the safety of highway users and others." (page 3) Per Borins JA

Muscillo Transport Limited et al. v. Deputy Registrar of Motor Vehicles

In *Muscillo*, Madam Justice Chapnik adopted the Board's expression of the standard to be expected of truck and bus operators:

"[T]he appellants have had a full 2 years to demonstrate whether their operations can achieve compliance with the HTA. The CVOR's, SafetyNet reports, and audits show overwhelming evidence to the contrary.

The standard to be met by commercial vehicle operators is not incremental improvements over many years towards defect free vehicles but are you compliant now."

According to the record of IBL, it is difficult to find any substantial improvement. While there was some improvement in the company's out-of service rate, the record deteriorated in other areas such as audit compliance.

The evidence was that the key people at the Appellant being, David Tso, who held the positions of Vice-President and President; Danny Lo who has been Operations Supervisor/Dispatcher for 10 years; and Jim Lee who has been Safety Consultant since 1990 or 1991, were all familiar with the Deputy Registrar's concerns, yet it was noted that there was non-compliance in log books and hours even after training by Jim Lee.

In the area of hours of work, the evidence was that the company has had problems from its earliest days and has not resolved its problems.

IBL had purchased a program to assist in improving its record, but Mr. Tso was not sure what was included in the program even though it was purchased in 1995.

There were promises that were made in action plans that were either not put into effect or were abandoned and then again proposed in subsequent years.

In the area of the performance of the company's drivers and on the monitoring of their performance by the company, it was apparent that Mr. Tso was generally not familiar with the performance of individual drivers. He indicated that he checks the company's CVOR record but does not keep track of driver performance.

The Appellant provided virtually no documentation to explain, illustrate or corroborate its policies and processes in the areas of hiring, training, testing, monitoring or discipline.

From the evidence of Mr. Gillett, it is accepted that the methods used by the Ministry and the Deputy Registrar to assess the applicant, were applied clearly and uniformly. There is no evidence that the Deputy Registrar took into account information about the applicant which would not be considered in assessing the safety of every other carrier in the Province.

The Tribunal finds that the suspension proposed by the Deputy Registrar is necessary to sanction the Appellant. A number of measures short of an actual suspension have been attempted over the years with the Appellant. Each of warning letters, interview and audits have been tried more than once. While Mr. Gillett testified that these interventions are usually successful in bringing about compliance, they clearly have not worked with the Appellant. Considering the continuing non-compliance of the Applicant there is no basis to conclude that the company's record in the future will be different than it has been in the past.

Sanctions of a CVOR holder indicate to the industry as a whole that serious consequences ensue when a company fails repeatedly to come into compliance.

Public safety is the most important consideration. The evidence of Mr. Tso gives the Tribunal concern over whether the company is willing and competent to deal with its accidents. Similarly, there is room for concern over its continued logbook/hours of service violations. Both areas affect the company's ability to adequately provide for public safety. A suspension will force the company to seriously deal with these issues.

In the case of *Brenner vs. The Registrar of Motor Vehicle Dealers and Salesmen*, 19 CRAT 59, a Decision issued by the Divisional Court on April 7, 1983, Southy, J. stated:

"...the effect of Section 7 (4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty".

The authority of the Tribunal on this appeal is subject to the decision in *Brenner*. Accordingly, it is only if the Tribunal finds that the Registrar was in error in his conclusion that an order can be made directing the Registrar to refrain from carrying out his proposal. In the circumstances of this case, the Tribunal finds that the Deputy Registrar had sufficient and reasonable grounds to believe that the past conduct of the applicant supported the belief that it would not operate a commercial vehicle safely or in accordance with the law. The Tribunal also finds no reason to interfere with the extent of the sanction imposed by the Deputy Registrar.

The 7-day suspension imposed by the Deputy Registrar is the shortest period of suspension that is employed by the Ministry. It was also noted by the Tribunal that the time of suspension had already been reduced from a former proposal for a 30 day suspension. There was no evidence from the Appellant on the effect that the suspension would have on its business or that it would be unduly harsh. It was not argued that the Appellant's business has a special characteristic that would make the ordered suspension unduly harsh in the specific circumstances of the company.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.(2) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the decision of Registrar of Motor Vehicles to issue a suspension and seizure order for 7 days to be imposed on a date to be fixed by the Deputy Registrar.

LICENCE APPEAL TRIBUNAL

Brian K. Marotta, Vice-Chair,
Presiding

Simon Dann, Member

Charles J. Sandiford, Member

RELEASED: July 26, 2002

FILE NAME: 1001.cvor.IBL

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice or Divisional Court is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

1012265 ONTARIO INC. o/a TRI STAR SALES AND LEASING
AND VASILIOS AND PARTHENIA MITROPOULOS

MOTION TO CONSIDER A STAY OF AN ORDER OF THE
LICENCE APPEAL TRIBUNAL, TO REVOKE
REGISTRATION

TRIBUNAL: MARJORIE HILEY, Member

APPEARANCES: KEVIN MACDONALD, Counsel, for the Applicants
AVIVA HARARI, Counsel, representing the
Registrar, the *Motor Vehicle Dealers Act*

DATE OF
HEARING: JULY 4, 2002 Toronto

REASONS FOR RULING

BACKGROUND:

This is a motion by the Applicants requesting an order to stay the revocations of the registration of 1012265 Ontario Inc. o/a Tri Star Sales and the revocations of the salesperson registrations of Vasilios Mitropoulos and Parthenia Mitropoulos. The hearing in the matter was held before the Tribunal on May 23 and 24, 2002. By order of the Tribunal released June 12, 2002 the registration of 1012265 Ontario Inc. o/a Tri Star Sales and Leasing as a dealer and the registrations of Vasilios Mitropoulos and Parthenia Mitropoulos as salespersons were revoked.

Facts:

The Applicants by their Notice of Appeal dated June 18, 2002 have appealed to the Ontario Superior Court of Justice, Divisional Court. There is no date scheduled for the hearing of this appeal.

1. Affidavit Evidence:

In support of the Applicants' motion there has been filed the Affidavit of Vasilios Mitropoulos.

Mr. Mitropoulos states that he is the President of 1012265 Ontario Inc. o/a Tri Star Sales and Leasing. He is 54 years of age with a grade 6 education. He has been employed as a motor vehicle dealer for 23 years. He and his wife have no other source of income except their dealership and the sales registrations. He states that without the ability to conduct business in his dealership he and his wife cannot service their debts and likely will be forced into bankruptcy. If that happens he doubts that the registrations

could be reinstated due to the ground of lack of financial responsibility. There will be irreparable harm to the good will of the business. He and his wife are willing to consent to any reasonable conditions on their registrations while they await the decision of the higher court.

The Respondent filed an affidavit from Mary Jane South, deputy registrar, *Motor Vehicle Dealers Act*.

In her affidavit Ms South states that she was present during the two days of the hearing and that the dealer and salespersons were represented by counsel. She feels that the decision of the Tribunal accurately states the evidence of Amanda Dempsey. She states that it was only during the evidence of Mr. Mitropoulos that it became apparent that he had been aware that the seller was not the registered owner of the vehicles. She states that the Registrar disclosed all documents it relied upon and that opportunity was given to the counsel for the Applicants to review the documents of those witnesses who were called by the Registrar to testify at the hearing. She states that there was no evidence as to a standard of practice within the motor vehicle industry for transactions requiring lien release letters. As well the Registrar had insisted that the Applicants comply with all terms and conditions of their registration.

2. Decision of the Tribunal which is appealed:

The Tribunal found, inter alia, the following:

- a) that Mr. Mitropoulos had actual knowledge that the vehicles were not registered to the seller as required and this was not a case of negligence or carelessness
- b) that Mrs. Mitropoulos, though playing a minor role in the day to day business of the dealership, would have known that Chariots was not the owner of the cars and that the dealership was buying cars from someone other than the registered owner and she took no steps to ensure compliance with the terms and conditions
- c) that the decision of the Registrar to revoke the dealer registration and the salesperson registrations was not in error

3. Grounds of Appeal:

The Notice of Appeal of the Applicants lists the following grounds upon which their appeal is based:

- a) decision of Tribunal was grossly unreasonable and contrary to the weight of evidence;
- b) Tribunal erred in its findings of fact;
- c) Tribunal erred in not considering the formal admissions of the Registrar made prior to the hearing and in permitting the Registrar to make arguments contrary to such admissions;

- d) Tribunal failed to take notice of the evidence of Amanda Dempsey;
- e) There should have been an adverse inference for failure to call Elizabeth Browning as a witness;
- f) There was failure to disclose relevant and material documents;
- g) Tribunal failed to consider the standard of practice within the industry as to the use of release letters in the purchase and sale of used motor vehicles;
- h) Tribunal should not have considered the issue of the posting of the sign;
- i) Tribunal failed to consider the evidence as to the Registrar condoning breaches of the consent order;
- j) Tribunal used an improper standard of proof as to the revocation of registrations;
- k) Tribunal erred in its application of section 5(1)(b) of the *Motor Vehicle Dealers Act*;
- l) Tribunal erred in concluding Parthenia Mitropoulos acted without honesty or integrity;
- m) The penalty is grossly disproportionate to the offences;
- n) Section 5(1)(b) of the *Motor Vehicle Dealers Act* is void for uncertainty;
- o) Charter challenges to sections of the *Motor Vehicle Dealers Act*, and the *Licence Appeal Tribunal Act*.

4. Grounds for Stay of Proceedings:

The Applicants rely on the following grounds for a stay of the Tribunal's decision:

- a) that the Applicants have a strong prima facie case on appeal;
- b) that there will be irreparable harm if the order is not stayed;
- c) continued revocation of the registrations is inequitable;
- d) section 7(9) of the *Motor Vehicle Dealers Act*.

Argument by Counsel:

Applicants Counsel:

Counsel stated there is a three-part test:

1. Serious issue: Counsel stated that the *RJR-MacDonald v Canada (Attorney General)* (1994) 111 D.L.R. (4th) 385 (S.C.C.) is the authority for the low threshold required to determine there is a serious issue. Once the Tribunal has determined this is not frivolous or vexatious the preliminary examination should not be prolonged. Here the transcripts have been ordered as there is disagreement over the evidence as cited in the decision.

Counsel held that the Registrar by his formal admission had stated he was not relying on the state of mind of the Applicants. The *Coates* decision (65 O.R. (2d) 526 (1988) O.J. No. 1351) stated that there had to be clear and convincing proof for there to be a revocation of existing licences. Counsel stated that there had been a request for Particulars. On the basis of the response to that request the Applicants felt the issue was failure to ensure compliance with the Consent order and that state of mind was not

an issue. It is agreed that Chariots had permitted fraud by issuing fraudulent letters of release. The Applicants had relied on those letters of release in the conduct of their business. Then in the cross examination of Mary Jane South it was alleged that the transfers by the Applicants were done knowingly. Though it was objected to by Counsel for the Applicants the Tribunal permitted this evidence and relied upon it in the reasons for the decision. The reasons for the decision focus on knowingly and willingly and not on a failure to comply or negligence or carelessness. Counsel relied upon the case of *Shine Car Sales Inc.* (2001) O.L.A.T.D. NO. 286 for showing the distinction between acting with carelessness and acting without integrity and honesty. Sopinka in his book *The Law of Evidence in Canada* states that a formal admission can be made by a letter written by the party's solicitor prior to the trial. Disclosure had been requested pursuant to the Rules of Procedure of the Tribunal. Counsel submits that this ground is sufficient to raise a serious question.

Other grounds relied upon include the reliance of the Applicants on the comprehensive inspection conducted by Ms Dempsey in September 2000. Despite examining one of the transactions dealing with Chariots of Hire Ms Dempsey did not state the Applicants had failed to comply with that part of the terms and conditions. The Applicant did correct the issue of the sign. As well there was no convincing evidence to warrant the revocation of the registration of Mrs. Mitropoulos. There was a standard industry practice regarding release letters at the time of these transactions. Now the OMVIC has provided a standard for the industry. There were issues of the Registrar failing to disclose relevant documents and numerous adjournments were required during the course of the hearing in order for Counsel for the Applicants to review the documents of witnesses. As well revocation is an extreme penalty and not suited to a case dealing with carelessness.

2. Irreparable harm issue: Counsel stated that there will be at least a four-month delay or longer before this case can be argued at the Divisional Court. The Applicants have stated in their affidavit that they will have to declare bankruptcy. If that happens they cannot be reinstated as they cannot meet the financial responsibility test. It is not just a question of money but of the loss of the right to appeal. This issue was not mentioned in the affidavit of Mary Jane South.

3. Balance of convenience issue: Counsel characterized this as who will sustain the greater harm. If the stay is not granted Counsel stated that the appeal will not be heard. The Applicants are willing to agree to terms. Such terms could include regular inspections; having only a wholesale business; no purchases of leased vehicles. Chariots of Hire are now out of business so there will be no repeat offences. The Applicants have changed their business practices to comply with OMVIC standard.

Counsel referred to the case of *RE Off Lease Motor Car Sales Inc.* (1999) O.C.R.A.T.D. no. 292 which dealt with two Divisional Court decisions *Jacobs Sales and Service Inc.* court file NO. 558/98 and *Aghtaie Mashmoul Hasem* heard by the Divisional Court on October 18, 1999. Both those decisions considered the effect of not granting a stay in circumstances where the applicant would be out of business and thereby rendering the

appeal moot. In both cases the court granted the stay. Counsel referred to the case of *RE 1159275 Ontario Ltd. (c.o.b. Thrifty Auto Sales)* (2000) O.L.A.T.D. No. 405 where the Tribunal found it significant that the Applicants would abide by terms and conditions. As well the Tribunal found that the Tribunal could not rely on material that was not part of the evidence.

Accordingly here the Applicants would suffer the greater harm. Counsel stated that many of the cases relied upon by the Respondent predated the Supreme Court of Canada case of *RJR MacDonald* which is the governing case for these stay applications.

Counsel for the Respondent:

Counsel stated that it is important to realize that this is a unique situation. This case is distinguishable from the *Off Lease* supra as this case deals with a registration that was already under terms and conditions.

As regards the three-part test Counsel stated:

1. Serious issue: One needs to take a common sense approach. There was a breach of clause 12 of the Terms and Conditions which led to a significant loss of property as thirty-eight cars were involved in this situation. There is no evidence of standards in the industry at the time of these transactions. The Applicants were bound by the terms and conditions and a general industry standard is irrelevant to the situation. The Registrar was not aware of who had affected the transfer of vehicles from Chariots of Hire until Mr. Mitropoulos stated in his evidence that he did the transfers. The VINs show that ownerships were never in Chariots name so Mr. Mitropoulos had physical evidence of the ownerships prior to using the release letters. From this evidence the Registrar then found there was a knowing element to the breach. Counsel relied on the *Clairmont* decision by the Divisional Court in which Madam Justice Van Camp stated that past conduct can just be one incident of a mistake. Counsel stated that the decision accurately summarizes the evidence of Ms Dempsey. The fact that Ms Dempsey was not aware of the breaches by the Applicants does not mean she condoned them. If the Applicants wanted to hear the evidence of Ms Browning she could have been summoned as a witness by them. It is not the position of the Registrar to call witnesses to help the case of the Applicants. All documents were disclosed that were being relied upon by the Registrar. Some dealer witnesses came to the Tribunal hearing with documents. These documents were not under the control of the Registrar. The Applicants were not disadvantaged as the Tribunal gave them the opportunity to view these documents prior to their examination of these witnesses. The evidence presented at the hearing would be cogent whether this was a refusal case or a revocation case. The *Coates* case can be distinguished as Mr. Coates was an officer of the company but not involved in the daily activities of the dealership. The Applicants, through the wording of the terms and conditions were aware of the consequences of non-compliance.

2. Irreparable harm: Counsel relied upon the *RJR MacDonald* supra case whereby the Supreme Court stated that it was the magnitude of the harm not the nature of the harm that had to be examined. The Applicants are operating within a regulatory framework. The nature of the harm is the result of the proper application of the *Motor Vehicle Dealers Act*, which is a public protection statute.

3. Balance of convenience: The legislation is a public interest Act. In looking at the balance the Tribunal must consider the individual economic interest versus the public interest. The onus is on the Applicants to show private economic interest is paramount to public interest. It is important here that the Applicants have been under terms and conditions due to a prior revocation of their registration. It was mainly a wholesale operation and other dealers as well as consumers are at risk. It is not a situation where you can have any certainty that they will comply in the future. Counsel referred to the case of *Ontario Federation of Anglers and Hunters v. Ontario (Ministry of Natural Resources)* (1990) 43 O.R. (3rd) 760 whereby the public interest was considered. In the case of *Foster v Registrar, Motor Vehicle Dealers Act* CRAT (1993) it was held that only in extreme circumstances should the Tribunal grant a stay. In the case of *RE Dudzic and Law Society of Upper Canada* (1990) 71 O.R. (2d) 272 (Div. Ct.) the court also considered a statute which had no automatic stay. Due to the nature of the legislation it was inappropriate to grant the stay.

Counsel stated that the Registrar did not feel this was an appropriate case for terms and conditions. If terms and conditions were imposed Counsel stated that it was not necessary to have inspections as they are mandated under the legislation. Suggestions for terms and conditions include: only wholesale transactions; being in a registered premises; pay the costs for inspections which are more frequent than the industry average (that being one inspection every two years); not dealing with leased vehicles; allow the salesperson registrations to continue but not the dealer registration; post a bond.

The Law:

Section 25 (1) of the *Statutory Powers Procedures Act* states:

Unless it is expressly provided to the contrary in the Act under which the proceeding arises, an appeal from a decision of a Tribunal to a Court or other appellate tribunal operates as a stay in the matter except where the Tribunal or the Court or other body to which the appeal is taken otherwise orders.

Section 7(9) of the *Motor Vehicle Dealers Act* states:

Although a registrant appeals from an order of the Tribunal under section 11 of the Ministry of Consumer and Commercial Relations Act, the order takes effect immediately, but the Tribunal may grant a stay until disposition of the appeal.

Metropolitan Stores (MTS) Ltd. v Manitoba Food and Commercial Workers, Local 832 (1987) 38 D.L.R. (4th) 321 sets out the three stage test. This test was adopted by the Supreme Court of Canada in *RJR MacDonald Inc. v. Canada (Attorney General)* (1994) 1 S.C.R. 311.

The three-stage test is as follows:

1. First test: A preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried.
2. Second test: It must be determined whether the Applicant would suffer irreparable harm if the application was refused.
3. An assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision.

ANALYSIS:

The issue before this Tribunal at this motion is whether or not to exercise its discretion under section 7(9) of the *Motor Vehicle Dealers Act* and grant a stay as against the decision of this Tribunal which revoked the dealer registration and the salesperson registrations of the Applicants. But the Applicants are only entitled to the relief of a stay if they can satisfy all three of the tests as enunciated by the Supreme Court of Canada in *RJR MacDonald* supra. The Tribunal will consider each of the three stages of the tests having completed a thorough review of the affidavit evidence, the law and the legal analysis referred to by Counsel in their argument during the motion.

1. Serious issue test:

In the consideration of whether or not there is a serious issue to be appealed the Tribunal is not put in the position of judging on the merits of the appeal itself. Indeed the Supreme Court of Canada in *RJR MacDonald* supra cites at paragraph 44 the dictum of Lord Diplock from the *American Cyanamid Co. Ethicon Ltd.* (1975) A.C.396 case in which states that “the applicant need no longer demonstrate a strong prima facie case. Rather it would suffice if he or she could satisfy the court that the case is not frivolous or vexatious; in other words, that there is a serious question to be tried”. It is the role of this Tribunal to make a preliminary assessment of this point to determine if there is an arguable case. Indeed, even if the Tribunal should feel, based upon its own assessment, that it is unlikely that the appeal will be successful, the Tribunal would still find this stage of the test has been satisfied if the issue before the appeal court is not frivolous or vexatious. This stage of the test requires a low threshold for success.

Based on the arguments presented by Counsel for the Applicants the Tribunal finds that there is a serious issue to be argued before the appeal court. Though the Notice of Appeal itself contains many grounds, some of which could be charitably considered as boilerplate arguments, there are some serious points for consideration by the appeal court. In particular, the issue of formal admissions and whether or not evidence as to state of mind should have been presented by the Registrar during the course of the hearing raises some interesting evidentiary issues. The *Statutory Power Procedures Act* permits tribunals to consider all evidence that the tribunal feels is relevant to the issues at hand whether or not such evidence is technically hearsay. But the issue of whether or not a Registrar is bound by its formal admissions made during the request by the Applicants for particulars on the issue of past conduct raises novel

considerations which are neither frivolous nor vexatious and which could have an impact on evidentiary procedure for the Tribunal in the future. On that ground alone the Applicants have shown a serious issue. Accordingly the Tribunal will not review other grounds as stated in the Notice of Appeal as it is only necessary for the Applicants to demonstrate that they have one serious issue for argument before the appeal court in order to succeed with this first stage of the test.

2. Irreparable harm

The Supreme Court of Canada in *RJR MacDonald* supra provided a definition of irreparable harm at paragraph 59; “Irreparable refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other”. The Supreme Court then at paragraph 58 characterizes the nature of this stage of the test as follows: “ At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants’ own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application”.

The Tribunal finds it significant that the Registrar in its affidavit evidence of Mary Jane South does not address this stage of the test. The only evidence before the Tribunal is that of the affidavit evidence of the Applicants. The Applicants state that they have worked for 23 years at the dealership, they both are salespersons for the dealership and they have no other source of income to satisfy their debts. It would have been helpful if the Applicants had provided more particulars as to the quantum of their financial distress but they do state that it is likely they will need to seek the protection of bankruptcy proceedings if the stay is not granted. Significantly they state that being a bankrupt, and the Tribunal is assuming they mean an undischarged bankrupt as they make no mention of even attempting a Proposal prior to bankruptcy, would be a severe impediment to them being allowed to revive the dealership due to the requirement in the *Motor Vehicle Dealers Act* that one show financial responsibility.

The Registrar correctly states that the legislation does not provide for an automatic stay on the filing of the appeal and therefore the Applicants need to prove such a stay should be granted. Counsel for the Registrar has argued that revocation of registration is the natural consequence of the application of the *Motor Vehicle Dealers Act*. But the legislation also provides for other remedies including suspension and terms and conditions.

This Tribunal holds that the Applicants have met the second stage of the test. Being put out of business and the risk that even if successful at the appeal they then could not meet the requirement of financial responsibility meets the definition of irreparable harm as found in *RJR MacDonald*.

3. Balance of convenience:

There must be a determination of which of the parties would suffer the greater harm from the granting or refusal of the application for the stay. In the course of this consideration the Tribunal needs to balance the public interest versus the individual economic interest. The *Motor Vehicle Dealers Act* is a public interest legislation. The Registrar needs to be vigilant to protect the public from those in the motor vehicle industry who act without integrity and in a dishonest manner.

Again the only affidavit evidence before this Tribunal is that of the Applicants who state that they are willing to consent to terms and conditions for the time frame until their appeal has been decided. There is no affidavit evidence from the Registrar regarding any special matters to be considered when balancing the public interest with that of the Applicants. Though some charter issues have been raised by the Applicants in their Notice of Appeal this does not make the case such that the public interest becomes a special factor as was stated in the case of *Metropolitan Stores (MTS) Ltd. v Manitoba Food and Commercial Workers, Local 832*, supra.

The Registrar has relied upon the statements as set out in *Foster v Registrar, Motor Vehicle Dealers and Salesmen Act* April 23, 1993 (C.R.A.T.) and *Re Dudzic and Law Society of Upper Canada* (1990) 71 O.R. (2d) 272 (Div. Ct.). In both those cases the courts put great reliance on the fact that the relevant legislation did not provide an automatic stay for an appeal and that there must be good and cogent reasons for then disturbing the status quo. But both cases were decided prior to the benefit of the Supreme Court of Canada in the *RJR MacDonald* supra case. The Supreme Court of Canada did not put such restrictions on stay applications.

The Registrar also relied upon the statements of the court in *Ontario Federation of Anglers and Hunters vs. Ontario (Ministry of Natural Resources)* (1999) 43 O.R. (3rd) 760. But there is a distinction between seeking to suspend the application of a regulation made under the authority of a statute and seeking to exempt yourself from the provisions of a statute. In the *Ontario Federation of Anglers and Hunters* supra case the parties were seeking to suspend the operation of law, in particular a regulation forbidding the cancellation of the spring bear hunt. Here the Applicants seek an exemption from the revocation of their registrations pending the outcome of their appeal. This Tribunal agrees with the analysis found in the *RE Off Lease Motor Car Sales Inc.* (1999) O.C.R.A.T.D. no. 292 that the Applicants do not need to show there is an affirmative public interest flowing from the granting of a stay but only that the balance of convenience favours the granting of the stay.

The Tribunal does not find that the public will be endangered by granting of this stay on the basis of the imposition of terms and conditions upon the Applicants. OMVIC has properly considered the situation of release letters on leased vehicles and has advised the industry of an acceptable procedure for dealing with such situations. The Applicants are aware of OMVIC's position as it formed part of the exhibits attached to the affidavit of Mr. Mitropoulos. Counsel for the Applicants has stated in his argument that the Applicants would agree to doing only wholesale deals and not to deal with the transfers of leased vehicles while awaiting the outcome of the appeal. Counsel for the Registrar

has stated there is a past history with these Applicants and indeed the issue before the Tribunal which led to its decision dealt with whether or not these Applicants had transgressed previous terms and conditions. But the Registrar has not provided any affidavit evidence indicating their concerns for the public interest at this time. There is no evidence before the Tribunal to indicate there is a serious risk that the Applicants will continue with such behaviour while the appeal is being determined.

In these circumstances the Applicants would suffer the greater harm from a refusal to grant the stay.

DECISION:

For the reasons stated above, pursuant to the authority vested in it by section 7(9) of the *Motor Vehicle Dealers Act*, the Tribunal directs that there shall be a stay of its order issued herein on June 12, 2002 respecting the revocation of the dealership registration of 1012265 Ontario Inc. o/a Tri Star Sales and Leasing and the salesperson registrations of Vasilios Mitropoulos and Parthenia Mitropoulos, until the disposition of the Applicants' appeal to the Divisional Court. The stay of the order contains the following terms and conditions:

1. 1012265 Ontario Inc will operate under a wholesale registration. The retail registration is suspended.
2. 1012265 Ontario Inc. and Vasilios Mitropoulos and Parthenia Mitropoulos will not deal with the transfers of leased vehicles.
3. The Applicants will cooperate with representatives of the Registrar during any inspections of its premises or books and records and will provide copies of any documents promptly when requested by the agents of the Registrar.
4. The Applicants will comply with all of the legislative requirements as found in the *Motor Vehicle Dealers Act* or its regulations.
5. Any failure to abide by terms #1 through #4 will result in the Registrar having the ability to bring this matter back to the Tribunal for further consideration.
6. These terms shall be in force until such time as the Divisional Court has issued its decision on the appeal of the Applicants.

LICENCE APPEAL TRIBUNAL

Marjorie Hiley, Vice-Chair, Presiding

RELEASED: July 16, 2002

SERGIO ALEXANDER MONZON

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE MOTOR VEHICLE DEALERS ACT

TO REFUSE REGISTRATION

TRIBUNAL: DAVID J. HUNT, Vice Chair

APPEARANCES: YOVANKA McBEAN, Agent representing the Registrar
under the *Motor Vehicle Dealers Act*
MARK WAINBERG, Counsel representing the Applicant

DATE OF HEARING: July 9, 2002 Toronto

REASONS FOR DECISION AND ORDER

This is a hearing before the Licence Appeal Tribunal (the "Tribunal") arising out of a Notice of Proposal issued by the Registrar under the Motor Vehicle Dealers Act ("the Registrar", and "the Act" respectively). The Notice of Proposal dated February 7, 2002 proposed to refuse the registration of Sergio Alexander Monzon under the Act as a motor vehicle salesperson.

REASONS

The reasons for this proposal are:

The intention and objective of the Act is to protect the public interest. The requirements of the Act include that Registrants be financially responsible in the conduct of business and that Registrants carry on business in accordance with the law and with integrity and honesty. The Applicant's past conduct is inconsistent with the intention and objective of the Act, and therefore warrants disentitlement to registration under the Act. Therefore, the Registrar is unwilling to register Sergio Alexander Monzon under the *Motor Vehicle Dealers Act*;

PARTICULARS

December 12, 1991:	Possession of Property Obtained By Crime Over \$1000 Fail to Comply With Recognizance
June 09, 1993:	Possession of Narcotic
September 26, 1996:	Fail to Comply with Recognizance Fail to Appear
April 03, 1997	Attempt Theft Under \$5000
July 15, 1998	Carry Concealed Weapon Obstruct Peace Officer

The Youth Court record was included in the particulars in the Notice of Proposal but has not been reproduced in this Decision

THE LAW

Section 3 of the *Motor Vehicle Dealers Act* (the "Act"), states as follows,

(1) No person shall,

- (a) carry on business as a motor vehicle dealer unless the person is registered under this Act; or
- (b) act as a salesperson of or on behalf of a motor vehicle dealer unless the person is registered as a salesperson of such dealer and such dealer is registered as a motor vehicle dealer under this Act

Section 5 of the Act, states as follows;

5(1) An applicant is entitled to registration by the Registrar except where,

- (a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
- (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law, and with integrity and honesty; or
- (c) the applicant is a corporation and
 - (i) having regard to its financial position, it cannot reasonable be expected to be financially responsible in the conduct of business, or
 - (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or
- (d) the applicant is carrying on activities that are or will be, if the applicant is registered, in contravention of this Act or the regulations.

(2) A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant, imposed by the Tribunal or prescribed by the regulations.

Section 6 of the Act states as follows;

(1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion , the applicant is disentitled to registration under section 5.

(2) Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5, if the registrant were an applicant, or where the registrant is in breach of a term or condition of the registration.

CASELAW

Brenner v Ontario (Registrar of Motor Vehicle Dealers and Salesman) 1983 O. J. No. 1017 Ontario Supreme Court-High Court of Justice Divisional Court

This was an appeal by the Registrar of Motor Vehicle Dealers and Salesmen from a decision of the Commercial Registration Appeal Tribunal in which the Tribunal directed the Registrar to grant a conditional registration to the Respondent. The Applicant had a very serious criminal record which he had disclosed in his application but he had not disclosed three further convictions which were considered by the Registrar to be minor offences. The Tribunal heard evidence from a potential employer and a criminal lawyer who testified that the Applicant had rehabilitated himself. The Court found that the Tribunal had not applied the proper test, and set out this test in paragraph nine of the judgment as follows:

"the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was the possibility that he, indeed, might have reformed himself."

Lloyd Ripani v Registrar of Real Estate and Business Brokers December 8, 1988, Commercial Registration Appeal Tribunal

In this matter the applicant had been registered as a real estate salesperson and had been convicted of conspiracy to traffic in cocaine. He was sentenced to 12 months in custody and 18 months probation. He had failed to make disclosure of the Criminal Record in his application as he was afraid of the consequences for his registration. Significant evidence of good conduct was presented to the Tribunal. The Tribunal recognized that when a person has been sentenced for an offence and the sentence has been served, they should be entitled to return to the responsible position in the community where there is sufficient evidence of true reformation. At p. 359 of the decision, the Tribunal found that there would not be an automatic registration after a specified time, but the principles should be applied to each case on its individual merits. They would look at the nature of the offence, the sentence imposed, and the acceptance of responsibility for the offence by the applicant as well as the conduct of the applicant and evidence of moral reform. In the circumstances, the Tribunal found that they were able to conclude that the Applicant's past conduct up to the date of the hearing, did not afford reasonable grounds to believe that he would not carry on business in accordance with law and with integrity and honesty.

**Re: (Moodie) v Registrar under the Motor Vehicle Dealers Act, June 19, 1998
Ontario Commercial Registration Appeal Tribunal**

In this case the Applicant had failed to disclose some criminal charges, and stated that he thought that the question on the Application form only related to recent charges involving the sale of motor vehicles. He later admitted he had been charged twice with drug offences. The criminal record search revealed six charges, including three charges of trafficking in narcotic. The Applicant claimed that he had turned his life around, and provided evidence that he had completed a drug rehabilitation program. The Tribunal found that the failure to answer the question correctly may have been due to a lack of thoroughness on his part and not an attempt to mislead. However, the Tribunal found that the record combined with the nondisclosure gave reasonable grounds for the decision by the Registrar not to grant registration.

**Diamond v Registrar under the Motor Vehicle Dealers Act Feb. 17, 2000 Ontario
Commercial Registration Appeal Tribunal**

In this case the Tribunal found that the Registrar was allowed to obtain a Youth Court record under the *Young Offenders Act* as the consent given by the Applicant in the Application Form was sufficient. The Applicant may have turned a corner in his life but the decision by the Registrar was not in error, and the application for registration should be refused.

ISSUES

The legal issue in this case is whether the Registrar was wrong in his decision to refuse to grant the Applicant registration as a motor vehicle sales person under the Act on the basis of the Applicant's past conduct including his criminal record, his failure to disclose his record, and particulars of the offences in answer to question 9 on the Application Registration form which he filed with O.M.V.I.C.

WITNESSES FOR THE REGISTRAR

Laura Gordon testified on behalf of the Registrar that she has been the Director of Compliance for O.M.V.I.C. since 1997. Prior to that she was an investigator with the Ministry of Consumer and Commercial Relations. She explained that O.M.V.I.C. was established in 1997 as a non-profit corporation to administer the Act which is a public protection statute. The primary functions are to carry out complaint mediation, registration under the Act; inspections, and investigations of non-compliance. As a public protection statute, the goal of the Act is to ensure that the public is able to have confidence in the individuals and companies working within the automotive sector. A person or company is entitled to registration under the Act unless their past conduct shows that they will not carry on business with honesty, integrity, financial responsibility, or in accordance with law.

In this case the Registrar had concerns as the Applicant was not forthcoming concerning his criminal record. The Applicant had a Youth Court and adult record involving numerous offences with conviction dates beginning in 1988 and finishing in 1998, involving a variety of offences. This record itself gave the Registrar concerns as it involved property related offences, failures to comply with Court orders, and an obstruction of a Peace Officer. She also noted that in the Notice of Appeal (exhibit 2) filed by the Applicant he complained that he was not given an opportunity to respond to the results of the Criminal Record search and give an explanation for his answer to question 9 on the Application form in which he marked the 'no' area when asked if he had ever been found guilty or convicted of an offence under any law or had any charges pending. The witness explained that he in fact had three opportunities to give an explanation. First, on the Application form itself, he failed to give any explanation in the area provided below question 9 which asks for a list of all charges, the circumstances surrounding them, and invites the Applicant to attach additional sheets if necessary. In her estimation, he was provided with three opportunities to give an adequate explanation and failed to do so at any time.

The witness pointed out that at the end of question 9, there was an explanatory note that advised Applicants that background and Criminal Record searches would be done. The answers provided to this question are considered by O.M.V.I.C to be extremely important, as it is the first test of honesty in the Applicant's dealings with them, and it would therefore be taken into account in the consideration of their honesty and integrity. Next, she explained that in Section 'D' on the third page of the Application form, the Applicant is advised to read the section prior to signing the Application, as it includes a consent for the collection and exchange of information from government and non-government sources. Section 'E' of the Application form is the certification signed by the dealer in which they state that they have personally and fully discussed the response to each question with the Applicant and are satisfied with the responses prior to signing the document. This certification is not to be signed by the representative of the dealer until it has been completed and signed by the Applicant.

Ms Gordon noted that when the Criminal Record search was requested from the Ontario Provincial Police, the reply received (Exhibit 3, Tab 4) showed a pattern of criminal activity commencing in 1988 and finishing in 1998. She explained that when there is no disclosure by the Applicant of a record but one is returned by the police, a form letter is sent to the dealer advising them that a record has been found, and that even though it might not be correct, they are asked to discuss the matter with the Applicant. At this time the Applicant is requested to again provide an explanation, in writing, as to why the convictions were not disclosed, and the circumstances surrounding each charge or conviction if this has not been done in the original Application form. The dealer is also advised that if it is a new or a reinstatement Application they should not be allowing the Applicant to act as a sales person until the Application is approved.

The witness testified that when the Applicant responded by letter, (Exhibit 3, Tab 6) he first explained that he misunderstood, then admitted the charge of Carry Concealed Weapon and provided the explanation that it was just a small pocket knife. Mr. Monzon explained that the police made a big deal of it which caused him to be angry and uncooperative, resulting in the charge of "obstructing justice". The Applicant then stated in his letter, that this charge was quickly dismissed by the judge as "foolish" however he confirmed that he was given three years probation for it. In addition he received a Community Service Order which he says he did voluntarily. At the beginning of the letter he explained that he had misread the question due to his haste to get his license and understood it to be asking whether there were any charges pending. At the end of the letter he repeated that he had made a mistake by not fully reading the question properly.

Ms. Gordon explained that a second letter was written by the Applicant and submitted to O.M.V.I.C in which he elaborated on his earlier version and claimed that the police arrived due to an argument between two other parties, and he was questioned and patted down. He elaborated on his last explanation by saying that he did not give his name to the police and that is what led to the Obstruct Justice charge. He provided an explanation concerning his narcotics conviction and stated that he and some friends found a marijuana plant growing in the backyard and took it to his house for safe keeping. The next day a friend came over when he was not there, got angry at him and called the police. He denies that he was a dealer or a grower and states that he simply just found the plant. For the three charges of failure to appear in Court, he stated that he just forgot and for the theft charge, commented that it was probably just something stupid.

The witness testified that she still had serious concerns over the fact that, despite these letters, he was not forthcoming about the offences and there was no explanation of the two Fail to Comply with Recognizance charges or the Possession of Property charge. She also stated that the letters were not in compliance with the requirements of the letter to the dealer (Exhibit 3 Tab 5) as they were supposed to be co-signed and sent within ten days, and the letters as sent, (exhibit 3, Tabs 6 & 7) were not co-signed by the dealer.

On the basis of all of this information the Registrar believed that the Applicant's past conduct gave grounds to believe that he would not carry on business with honesty, integrity and in accordance with the law.

In cross examination Ms. Gordon explained that the document from Georgian College (Exhibit 3, Tab 3) does refer to the conditional registration certificate and a request for a permanent certificate however January 28, 2002 which was the date of the document was not the date that the certificate would have been issued as it would take an extra few days. She had concerns that the business card showing him in a sales capacity was attached to the application which was dated December 27, 2001.

The witness explained that once per week there is a committee meeting to review applications in which there are issues. She was not present at the meeting but did have input. Based on her experience and knowledge she stated that there would have been concern over the record and the lack of disclosure. Although there are no formal minutes of the meetings taken, the lawyer or someone else would make notes of the results of the discussions. She explained that the letter to the dealer (Exhibit 3 Tab 5) was sent by O.M.V.I.C. by fax and they knew that it was received as the Applicant responded to it. However, they did not contact the dealership to ensure that they had discussed the issues with the Applicant, as it was the responsibility of the dealer to do so and they assumed that the dealer would carry out that function.

When the witness was asked what the policy of O.M.V.I.C. was as to a person's rehabilitation she answered that they look at each case individually on the merits, and give the person the opportunity to explain. She explained that they generally asked for a copy of the Information document on the charges but in this case two came back and the others did not. Therefore she did not contest what the Applicant had said about the offence dates. On that basis, there was a gap of five years since the commission of the last offence. However, she stated that the lack of disclosure in this circumstance was serious and would not give the Registrar confidence in this Applicant. Even without the problem of disclosure, she stated that this particular record would have given concerns and it is likely that he would have been refused in any event. In this case the failure of the Applicant to disclose the record was a very serious matter and lead to questions about his honesty and integrity

In redirect examination Ms. Gordon stated that the issue of the conditional certificate was based on his answers that there was no Criminal record and he had not been bankrupt. A conditional certificate is given to avoid undue delays in registration and she stated that it is the Applicant's responsibility to advise the dealer of the record.

WITNESS FOR THE APPLICANT

The Applicant, Mr. Sergio Alexander Monzon testified that he was 29 years of age, had been married for 1 1/2 years and had known his wife since 1997. He and his wife have a baby girl at the present time his wife is on maternity leave from her employment at Sorenson-Page Chrysler, Dodge, Jeep as a salesperson. He explained that he now works at the dealership on a part time basis at \$ 8.00 per hour, moving vehicles from place to place as often as he is needed. This employment is usually for less than 20 hours per week. In addition to this work he owns a business building decks and fences, and also works cleaning restaurants at night. The Applicant testified that when he is licensed as a motor vehicle salesperson he would have a job waiting for him at Sorenson-Page. He produced a letter (Exhibit 4) from the dealer signed by Rick Major, the general sales manager at the dealership, vouching for him, and indicating that he would have a job with that dealership.

When the Applicant was asked why he failed to disclose his criminal record in question

9 of the Application Form he explained that he was afraid that if he disclosed it, his application for the license would be turned down by O.M.V.I.C. He elaborated and stated that he spoke to a couple of people and was told that O.M.V.I.C. didn't really do criminal record checks very often anyway.

When he was asked about the charge of Attempt Theft in 1997 he stated that when he wrote the document to O.M.V.I.C. at (Exhibit 3, Tab 7) he did not remember, and simply had said that it was probably something stupid. Since then, he has had the ability to remember and stated that one day at 2:00 am. in the morning he was with some friends who went over a fence into a fruit market. He explained that one of them took a mango and everyone was charged. He could not remember if he pleaded guilty or not.

With regard to the charge of Carry Concealed Weapon in 1996 he stated that he has had no criminal charges since that time. He remembered that it occurred on Labour Day of 1996 or 1995 but is not sure which year it was. Mr. Monzon explained that the weapon involved was a small pocket knife with a locking blade and was certainly not a "Rambo knife". Since that time he has moved away from the neighbourhood, has changed his friends and associates, and has married and moved to Richmond Hill. The witness stated that he did more than the required number of hours of community work at a community organization for tenants at which he worked with children, organized functions and helped some elderly persons move. He explained that his Probation Officer was apparently very satisfied with his work. Since he has been employed at the dealership, he stated that he was doing well when he was selling cars, it was the first time he enjoyed the work he was doing as he was well-suited for it and was working with his wife as a team.

In cross-examination, he agreed that the Registrar would rely on honest answers to the questions in the Application as would an employer. The witness also acknowledged that as a motor vehicle sales person, honest and complete disclosure is an important part of the job which is very crucial to the consumer.

The Applicant stated that the two Fail to Comply Reconnaissance charges were based on his failure to keep the peace and be of good behaviour due to further offences which occurred while the recognizances were in effect. These offences are shown on the record.

The final witness for the Applicant was Carolina Monzon who testified that she had been married to the Applicant for approximately two years and that their daughter was born April 25, 2002. At the present time, she is on maternity leave until April 2003. She and the Applicant intend to have more children in the future. The witness testified that the Applicant supports his family; is a good father, and is very kind. While she is on maternity leave she is getting some financial benefits. She stated that the car business has been very good for her and that he is now working at Sorenson-Page and she is one of the top sales persons in North York.

Admissibility of the Youth Court Record

In this matter, the Applicant was warned on the Application form that O,M,V,I,C. would be conducting a criminal records search. In the last paragraph of the box containing question 9 on the Application form, the Applicant is advised that he would be subject to a background and criminal record search. In section D of the Application form, the Applicant is directed to read this section fully before signing the Application, and there is a consent to the collection and sharing of information to be used for the purposes of the Application which would obviously include a Criminal record search. It is clear from the evidence of the Applicant that he knew that he was subject to a Criminal records search. He hoped that O.M.V.I.C. would fail to do it, but he proceeded to sign the form in any event. The Youth Court record was found to be admissible but the list of offences has been deleted from the "PARTICULARS" in this Decision due to the public availability of this Decision.

FACTS FOUND PROVEN

The facts found by the Tribunal are that the Applicant has completed the required course at community college and was working in a motor vehicle dealership pending the approval on his license. When he was required to fill in the Application form for registration, he did not disclose his criminal record. When he signed the form he was aware that a criminal record check was the proper procedure and gave his consent for that to be done. After the criminal record check was done, he was given two opportunities to explain to O.M.V.I.C. why he did not give correct disclosure and explain the offences. In his first effort at an explanation on Feb. 6, 2002 in a typewritten explanation to O.M.V.I.C. (Exhibit 3, Tab 6), he explained that he did not tick off "yes" due to his haste and because he misread the question as he focussed on the part asking whether there were any charges pending or ongoing. In dealing with the issue of the Concealed Weapon charge, he said that it was a little knife, but the police made a big deal of it, causing him to be angry and un-cooperative which lead to an Obstruct Justice charge. In his typed letter of February 6, 2000 to O.M.V.I.C. (Exhibit 3. Tab 6), he stated that this charge was "quickly dismissed" by the judge as foolish, but when he was questioned by his counsel during this hearing, he repeated his explanation from his letter to O.M.V.I.C. at (exhibit 3, Tab 7) and said that he was patted down by the police due to a dispute between other parties. Concerning the narcotics charge he stated in his letter to O.M.I.C. at (Exhibit 3, Tab 7) that he found the marijuana plant and took to his house for safe keeping and was turned in by a friend who was angry at him. In his handwritten reply submitted to O.M.V.I.C. (Exhibit 3, Tab 7), he claimed that he did not remember anything about the theft charge, but it was simply stupid. Despite this, in his Notice of Appeal to the Tribunal he claimed that he was denied natural justice because he was not given an opportunity to respond to the results of the Criminal record search and to explain the inconsistency between his answer to question No. 9 and results of the Criminal record search. He also repeated that he had misread the question and mistakenly responded. However, this ground was abandoned at the hearing. When he

was under examination in chief, he testified that he knowingly chose to answer the question falsely as he was afraid that if he answered it correctly his application would be refused.

The Tribunal finds that the final answer by the Applicant that he gave a false answer to question 9 in the Application form as he was afraid that he would be refused registration, if he advised them of his record was the truthful answer, and was in fact the motivation for this deception. Further, the Tribunal accepts his evidence that he had received the advice of friends that O,M,V.I.C. does not always carry out the criminal records check. The Tribunal finds that he gave this answer believing that he might thereby be able to avoid detection through a false answer.

APPLICATION OF LAW TO FACTS

The Act provides that the Registrar may revoke or refuse the registration of the Applicant where the Applicant's past conduct affords reasonable grounds for belief that the Applicant will not carry on business in accordance with the law, and with integrity and honesty. The Tribunal finds the following facts to be relevant past conduct

The Applicant has a significant criminal record showing a pattern of dishonesty. However, to his credit, the string of convictions commencing in the 1988 ends in 1998. Since that time the Applicant appears to have made many important and positive changes in his life. However, there is a very serious issue of recent past conduct based on his failure to honestly answer the question in the Application form regarding his criminal record. Of equal concern to this Tribunal is his trying to evade responsibility by a continuing assertion in his letters to O.M.V.I.C., as well as his Notice of Appeal filed with this Tribunal, claiming that he misunderstood the question and gave the answer in error. When he finally admitted during examination in chief that he gave the false answer as he was afraid of what would happen if he answered truthfully, he also explained that he had been told that O.M.V.I.C. might not actually do the search, and he saw the possibility of avoiding detection.

When the Applicant was put a position of choosing between honest disclosure and the risk of being refused because of the record, he chose to try to conceal the truth when he thought that the criminal record check might not be done. When he tried to explain this away throughout the entire process, up until the time he filed the Notice of Appeal for his application to this Tribunal he compounded his problem and continued the deception when he again said that he misread the Application and had incorrectly mistakenly responded.

In his written material sent to O.M.V.I.C., as well as his evidence before the Tribunal, when he described the circumstances surrounding each of the offences he minimized the facts and trivialized the events. However, on closer examination this does not hold true. On the charge of Carry a Concealed Weapon and Obstruct Justice, he had explained that the judge dismissed the charge of Carry Concealed Weapon or Obstruct Justice and had referred to it as foolish. He was however he was convicted on each

charge, and given concurrent suspended sentences with a two-year probation and a further 10 year firearms prohibition. This most certainly did not show that the judge treated the matter as trivial as the penalty imposed was much greater than the minimum available. The judge may very well have commented that the situation or the act was foolish. The Applicant's explanation for the narcotics charge also stretches the imagination, as it is hard to believe that he took a marijuana plant home simply for safekeeping. It certainly seems more realistic that the most favourable scenario for him was that he was presented with the opportunity to get a small amount of free drugs and took advantage of it. All of his explanations concerning his extensive record diminish his responsibility and show that he is willing to hold other persons responsible when it meets his ends.

Whether or not the Applicant provided correct information in the Application document is a crucial matter in assessing the honesty of an Applicant, as this information is clearly intended to be relied upon by the Registrar. If any information is intentionally concealed, or if false information is given, the Registrar has good reason to have serious concerns that the Applicant will withhold information or provide false information in the future in his dealings with the public or with the Registrar.

A motor vehicle dealer or salesperson deals with members of the public who are purchasing or selling products of substantial value, and are depended upon not to misrepresent the value or quality of the vehicles, handle large sums of money, and have access to credit card information. By withholding or falsifying information, they are in a position to take advantage of a vulnerable consumer, and the public must have confidence that the dealer or salesperson will not put their own personal interests ahead of their responsibility to conduct business with honesty and integrity.

The Tribunal finds that in this case relevant information was concealed and false information intentionally provided. A reasonable person would draw an inference that this very recent pattern of dishonesty demonstrates a continuation of the dishonest behaviour, which in addition to the past conduct that was concealed, provides reasonable grounds to believe that there will be future behaviour which does not meet the statutory standard of acting with honesty, and integrity, and in accordance with the law.

This Applicant has made great progress in his life as he has avoided contact with the criminal justice system for five years, has married and is now raising a family. Hopefully he will continue to distance himself from his past ways. But, when he was given the opportunity in this case to choose between honesty and immediate advantage, he showed that his rehabilitation was not yet adequately complete.

The legal test to be used by the Tribunal is whether the Registrar was in error in deciding that the past conduct of the Applicant provided reasonable grounds to believe that the Applicant would not carry on business with integrity, honesty and in accordance with the law. On the basis of the facts as found, and the application of the law to those facts, the Tribunal finds that the decision by the Registrar was not in error.

DECISION

Therefore, by virtue of the authority vested in it under section 7(4) of the *Motor Vehicle Dealers Act* the Licence Appeal Tribunal directs the Registrar to carry out his proposal to refuse the registration of the Applicant.

LICENCE APPEAL TRIBUNAL

David J. Hunt,
Vice Chair, Presiding.

Released: July 19, 2002

R.C. JERRY DALDIN

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: PATRICE A. J. CÔTE, Counsel representing R.C. Jerry Daldin

A. MICHAEL ROTHE, Counsel, representing the Registrar under
the *Motor Vehicle Dealers Act*

DATES OF
HEARING: July 17, 2002 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") from a Notice of Proposal by the Registrar of the *Motor Vehicle Dealers Act* (the "Registrar") pursuant to Section 7 of the *Motor Vehicle Dealers Act* (the "Act"). The proposal dated February 8, 2002 seeks to refuse the registration of R.C. Jerry Daldin ("Daldin") as a motor vehicle salesperson.

The proposal sets out the reasons for the Registrar seeking an order for the refusal of Daldin's registration. The reasons are stated as follows:

The intention and objective of the Act is to protect the public interest. The requirements of the Act include that Registrants be financially responsible in the conduct of business and that Registrants carry on business in accordance with the law and with integrity and honesty. The Applicant's past conduct is inconsistent with the intention and objective of the Act, and therefore warrants disentitlement to registration under the Act.

The particulars that the Registrar relies on are stated in the Proposal, as follows:

The reasons for this proposal are:

- 1) The Applicant applied for registration as a motor vehicle salesperson on or about January 11, 2002. He proposes to work for Romolo Chiaravalle o/a Clearvalley Auto Sales.
- 2) On the application to become a registered salesperson question 1 asks:

"Have you previously applied for or been granted any registration, exemption or certificate of any kind by the Registrar, *Motor Vehicle Dealers Act*? If yes, of what kind?

The Applicant said "yes" and indicated:

"Applied April or May 1994 (not granted)".

- 3) The Applicant was originally registered as a salesperson on or about December 19, 1990 and subsequently had his application for registration refused in or around February 1995.

- 4) On the application to become a registered salesperson question 6 asks:

"Are you engaged now or have been involved in personal bankruptcy proceedings? If yes, attach a copy of the Assignment in Bankruptcy or proof of discharge."

The Applicant said "yes" and indicated:

"1984? – discharged"

- 5) On the application to become a registered salesperson question 8 asks:

"Are there any unpaid judgements or outstanding court orders pending against you? If yes, submit a copy of each judgement and/or court order. State amount outstanding and repayment arrangements."

The Applicant said "yes" and indicated:

"outstanding court orders – copies attached"

- 6) The Applicant has 6 restitution orders with respect to criminal convictions totalling \$13,350.00.

- 7) On the application to become a registered salesperson question 9 asks:

"Have you ever been found guilty or convicted of an offence under any law or are any charges pending? (This includes those instances where a conditional or absolute discharge has been ordered)."

The Applicant said "yes", indicating:

"No charges pending – copies attached"

"Number of convictions for Fraud & Theft. But all have been dealt with"

The Applicant also provided the number for his probation officer.

- 8) A criminal record check found the Applicant has the following convictions:

Jan. 3, 1989: False Pretences
Jun. 12, 1989: Fraud (x2)
 Fraud (x4)
 Theft By Conversion (x4)
 Fraud
Jun. 20, 1989: Theft By Conversion (x3)

Fraud
Theft By Conversion (x2)

Oct.13, 1989: PAROLED

Nov. 18, 1991: Theft
Fraud Under \$1000
Theft Under \$1000

Mar. 18, 1992: PAROLED

Nov. 10, 1992: Fraud Over \$1000
Fraud Under \$1000 (x3)

Jan. 19, 2001: False Pretences over \$5000
False Pretences Under \$5000 (x3)
Fraud Under \$5000 (x2)

9) The Applicant will be on probation until October 2003.

10) The Applicant has failed to comply with the *Motor Vehicle Dealers Act*, in particular with section 5.

Subsequent to the Proposal the Registrar filed a Notice of Further and other Particulars dated June 10, 2002 stating as follows:

FUTHER PARTICULARS

It is further alleged as follows:

1. R.C. Gerry Daldin (hereinafter "Daldin") failed to disclose his criminal record on previous applications submitted to the Registrar.
2. Daldin is an undischarged bankrupt.

Daldin, by written notice in terms of section 7.(2) of the Act, informed the Tribunal that he required a hearing regarding his appeal to the Registrar's Proposal.

At the commencement of the hearing, Counsel for the Applicant conceded that C.P.I.C. report (Exh.4, Tab2) of January 16, 2002 is true and correct as to its contents and is admitted by the Applicant;

THE EVIDENCE:

The evidence presented to the Tribunal by the Registrar consisted of documentary evidence as well as the oral testimony of Laura Gordon and Yovanka McBean. The evidence presented to the Tribunal by Daldin consisted of his oral testimony as well as the testimony of Roman Chairavalle.

Laura Gordon

Ms. Gordon testifies that she is the Director of Compliance of the Ontario Motor Vehicle Industry Council ("OMVIC") a non profit organization empowered with the duty to oversee compliance with the Act and its regulations. The Act itself is a public protection statute.

Gordon stated that she is familiar with Daldin's file as, in her capacity as Director of Compliance, she had the duty to generally oversee and monitor applications for registration under the Act. She explained the import of Section 5 of the Act and the basis for the Registrar's refusal to grant Daldin's registration as a salesperson.

Gordon stated that Daldin was, pursuant to a written application, originally registered as a salesperson in December 1990 and was reinstated on October 1992 pursuant to his written applications for reinstatement.

(Exh. 4, Tabs 7, 8)

Again in March 1994 Daldin applied for reinstatement of his registration.

(Exh. 4, Tab 9)

Pursuant to receipt of the March 1994 application, the Registrar issued a Proposal to Refuse Daldin's continued registration.

The basis of the Registrar's proposal was the failure of Daldin to disclose in his 1990, 1992 and 1994 applications that:

- he had an outstanding judgement against him for \$5,480.00
- he had made an assignment in bankruptcy
- he had some 17 criminal convictions for fraud & theft during the period March 1988 and November 1992
- had had some 31 convictions for driving offences under the *Highway Traffic Act* as well as having his driver's licence suspended on 12 occasions.

(Exh.4, Tab5)

Daldin did not oppose the Registrar's proposal and the Registrar carried out that proposal and refused Daldin's registration. The Registrar, in his proposal contended that the past conduct of Daldin afforded the Registrar reasonable grounds for belief that Daldin would not carry on business in accordance with law and with integrity and honesty.

On January 10, 2002 the Registrar received an application from Daldin for registration as a motor vehicle salesperson.

(Exh.4 Tab10)

On this application, according to Gordon, Daldin made fuller disclosure than in the previous applications although still not sufficiently precise so as to satisfy the Registrar.

Since the convictions extending to November 1992, Daldin had been again convicted on January 19, 2001 on 6 further charges of fraud and false pretences. Daldin is still on probation for these latter offences and convictions.

(Exh.4 Tab11)

Gordon stated that from investigations made certain of the criminal convictions were industry specific in that the offences occurred when Daldin worked for car dealerships and took deposits without handing such deposits to this employer.

The January 2001 convictions all related to offences of taking deposits from the dealer's customers and failure to hand such deposits to the dealer for whom Daldin worked. When convicting Daldin in respect of these offences, the Court ordered restitution. None of those restitution orders have been complied with by Daldin.

In addition to the six restitution orders that are outstanding, there are two other prior restitution orders that Daldin has failed to comply with.

Yovanka McBean

McBean testified that she is a legal assistant employed by OMVIC and that in her employment with OMVIC she personally made enquiries of and concerning the restitution orders made by Court against Daldin in January 2001. Pursuant to her enquiries she was informed by the Clerk of the Court concerned that Daldin has failed to comply with these restitution orders which remain outstanding.

Gerry Daldin

Daldin testified that he is 55 years of age.

He stated that he has a degenerative physical condition that limits his physical abilities. He further stated that he admits to his criminal convictions as alleged by the Registrar in his proposal and admits that in his 1990, 1992 and 1994 applications for registration he did not disclose his convictions as well as not disclosing his bankruptcy. He also admitted that he has some eight restitution orders made against him arising out of certain criminal convictions and that he has not, to date, made restitution as ordered.

Daldin went on to state that since 1980 he has suffered from a gambling addiction which has been the cause of his various criminal misdemeanours. His addiction, which he referred to as sickness, lead him to obtain monies by theft, fraud and false pretences which in turn lead to his losing his employment and being convicted on charges of theft and fraud. His loss of employment and inability to obtain fresh employment due to his criminal record has resulted in his not being able to comply with the various restitution orders.

Presently, Daldin is receiving \$3,400.00 per annum from "Ontario Works" and he lives with his elderly father who suffers from Alzheimer's disease. Since July 2000 he no

longer gambles and regularly, on a weekly basis, attends a Chapter of Gambler's Anonymous. These ongoing attendances help him to cope with his gambling addiction. Additionally, since April 2000 he has been in regular telephone communication with an Addiction Therapist at the Centre for Addiction and Mental Health, Toronto who has been counselling Daldin regarding his gambling problem. He has also recently taken and passed OMVIC's certification course with the Canadian Automotive Institute at Georgian College.

Daldin testified in conclusion that he is a "terrific salesperson" who had an income of over \$80,000.00 or more in the early 1980's. If given the opportunity to obtain work as a motor vehicle salesperson coupled with his belief that he has overcome his gambling problem, Daldin maintains he would be in a position to meet his obligations under the various restitution orders.

Roman Chiaravelle

Chairavelle testified that he is in the used car business and is a registered dealer under the Act.

He has known Daldin for the past 27 years and is fully aware of his criminal convictions and his gambling problem. He is however prepared to employ Daldin as a motor vehicle salesperson in his dealership if the Registrar grants Daldin registration. He is prepared to take whatever steps are reasonably necessary to both protect consumers by ensuring Daldin would not handle monies or deposits and would ensure that any terms and conditions to Daldin's registration will be complied with.

FACTS FOUND PROVEN:

The following are the facts found proven.

1. Daldin was originally registered as a motor vehicle salesperson under the Act in December 1990.
2. Daldin was reinstated as a motor vehicle salesperson when he applied for renewal of his registration in October 1992.
3. Pursuant to Daldin's application for reinstatement of his registration in March 1994, the Registrar caused inquiries to be made as a result of which the Registrar, in December 1994, issued a Proposal to Refuse Daldin's registration.
4. Daldin did not contest the Registrar's proposal as a result of which the Registrar carried out that Proposal in terms of Section 7.(3) of the Act.
5. Daldin made an assignment in bankruptcy in June 1986 which assignment was not disclosed by Daldin in his applications to the Registrar for registration in

1990, 1992 and 1994, despite the Registrar asking Daldin in those applications if he had ever been involved in bankruptcy proceedings.

6. Daldin, between March 1988 and November 1992, was convicted of some 21 criminal convictions for fraud, false pretences and theft all of which convictions Daldin denied and none of which did he disclose in his applications to the Registrar for registration in 1990, 1992 and 1994 despite Daldin being asked in such applications whether he had ever been found guilty of or convicted of an offence under any law.
7. In or about January 2001, Daldin was found guilty of and convicted on three charges of fraud under \$5,000.00 and false pretences.
8. Daldin has six court imposed restitution orders registered against him pursuant to his criminal convictions and has made no restitution under any of those orders.

THE LAW:

Sections 5. (1)(a) and (b) of the *Motor Vehicle Dealers Act* state:

5.(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

(a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty;

Section 6. (2) of the Act states:

(2) Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5 if the registrant were an applicant, or where the registrant is in breach of a term or condition of the registration.

Sections 7. (1) and (2) of the Act state:

(1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the Registrar shall serve notice of the proposal, together with written reasons therefor, on the applicant or registrant.

(2) A notice under subsection (1) shall state that the applicant or registrant is entitled to a hearing by the Tribunal if the applicant or registrant mails or delivers, within fifteen days after service of the notice under subsection (1), notice in writing requiring a hearing to the Registrar and the Tribunal, and the applicant or registrant may so require a hearing.

APPLICATION OF LAW TO FACTS:

The onus of proof rests upon the Registrar in this matter.

There are the following issues for consideration by the Tribunal, namely:

1. Did Daldin fail to disclose his assignment in bankruptcy to the Registrar when asked in his 1990, 1992 and 1994 applications?
2. Did Daldin fail to disclose his various criminal convictions to the Registrar when asked in his 1990, 1992 and 1994 applications?
3. Having regard to the financial position of Daldin, can he be reasonably expected to be financially responsible in the conduct of business?
4. Does the past conduct of Daldin afford the Registrar reasonable grounds for belief that he will not carry on business in accordance with law and integrity and honesty?

An analysis of these issues follows.

Failure To Disclose

Daldin had conceded in his testimony and the Registrar has proven on a balance of probabilities that Daldin in his 1990, 1992 and 1994 written applications for registration failed to disclose any of his many admitted criminal convictions registered against him between 1989 and 1992. Additionally Daldin admits that he made an assignment in bankruptcy in 1986 and failed to disclose this to the Registrar in his 1990, 1992 and 1994 applications.

The Registrar is entitled to rely on the truth, accuracy and completeness of answers by applicants to questions posed to such applicants in their applications for registration. The various convictions and the assignment in bankruptcy were all recent in time when the 1990, 1992 and 1994 applications were made by Daldin. The convictions and assignment in bankruptcy were undoubtedly within the knowledge and memory of Daldin and his denial of such recent convictions and assignment speak volumes as to his dishonesty and lack of integrity in not disclosing such events. The failure to disclose was not an isolated single event but was repeated. The non disclosures are material and important non disclosures that denied the Registrar both the opportunity and the ability to make an informed and reasoned decision.

Daldin's Financial Position

The bankruptcy of Daldin in 1986 and the 6 unsatisfied restitution orders in the sum of over \$13,000.00 are indicative of the inability of Daldin to meet his financial obligations

and to be financially responsible. Daldin in his evidence before this Tribunal admitted that he earned over \$80,000.00 in the early 1980's and, in subsequent years, greatly exceeded that sum.

Despite such earnings, he failed to meet his financial obligations, and show financial responsibility, which led to his assignment in bankruptcy and in more recent times to his failure to meet his obligations under six restitution orders. Daldin's financial position, according to his own evidence, is in disarray. He has no employment due to his being unable to obtain employment as a result of his many criminal convictions. Based upon Daldin's past conduct in relation to his finances as well as his recent conduct in not meeting his financial obligations under the various restitution orders, the Tribunal is of the opinion that Daldin cannot reasonably be expected to be financially responsible in the future in the conduct of business.

Criminal Convictions

The criminal convictions that Daldin has accumulated are impressive in number and the time span over which the convictions were registered. The convictions started in 1988 through to 1992 when there was a hiatus until 2001 when further convictions were recorded. The convictions related to fraud, theft and false pretences. All the offences relate to financial dishonesty that reflect an ongoing absence of integrity on the part of Daldin and a continued display of behaviour that is outside societal norms and is at odds with an acceptable lawful ordered society.

Daldin has a problem in not being able to control his gambling impulses which he contends have led to his criminal activity and consequent convictions. While the Tribunal is sympathetic to Daldin's position and is impressed with his having sought counselling, it cannot become preoccupied with sympathetic concerns as to whether or not he will manage to overcome his gambling addiction. What is of prime concern to the Tribunal is whether the past conduct of Daldin, particularly as reflected in his convictions, affords the Registrar reasonable grounds for belief that Daldin will not in the future carry on business in accordance with law and with integrity and honesty. The Tribunal finds there are reasonable grounds for this belief and that the Registrar was not in error in concluding that Daldin's past conduct affords him reasonable grounds for his belief.

DECISION:

Therefore by virtue of the authority vested in it under section 7(4) of the *Motor Vehicle Dealers Act*, the Licence Appeal Tribunal directs the Registrar to carry out his proposal of February 8, 2002.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: July 25, 2002

MICHAEL HOBBS

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE MOTOR VEHICLE DEALERS ACT

TO REFUSE REGISTRATION

TRIBUNAL: DOUGLAS MACKINTOSH, Vice-Chair

APPEARANCES:

MICHAEL HOBBS, on his own behalf
A. MICHAEL ROTHE, Counsel representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: July 10, 2002
Ottawa

REASON FOR DECISION AND ORDER

This is an appeal by the applicant, Michael Hobbs, to the Licence Appeal Tribunal from a proposal dated 11th February by the Registrar under the *Motor Vehicles Dealers Act* (the Act) to refuse him registration as a motor vehicle salesperson under the Act.

The Registrar relies solely on the Applicant's failure to meet the criteria set out in section 5 of the Act.

THE EVIDENCE:

There were two witnesses.

Laura Gordon (Gordon) gave evidence for the Registrar. For the past five years she has been Director of Compliance for the Ontario Motor Vehicle Industry Council ("OMVIC") which was created in 1997 to enforce compliance with the Act and its regulations.

She is familiar with the problems in the application made by Mr. Hobbs to be registered as a salesperson.

The first contact was receipt by OMVIC of this application on January 24, 2002. It was dated November 1, 2001. The Applicant sent some further information explaining the

circumstances of a fraud conviction and a letter from his present employer, a motor vehicle dealer who, knowing the background, wants him to move up from parts and service to sales.

The fraud was significant and it was committed at the time the Applicant was vice-president of finance. Over a three year period he absconded with over \$880,000 from his corporate employer, Kromacorp Printing Ink ("Kroma").

Documentary evidence was introduced proving the conviction and the subsequent 2½ years sentence.

Ms. Gordon confirmed there was also a civil judgement against Mr. Hobbs. She had done so by phoning Kroma's lawyer.

Ms. Gordon expressed great concern arising from the seriousness and economic nature of the offence combined with the length of the time over which the fraud continued. Also, the offence was recent.

She pointed out vehicles are the second biggest item ordinary people buy and that temptations arise for vehicle salespersons over trade-ins, large deposits, incorrect odometer readings and so on. She noted that the Applicant had been under police and parole supervision until the end of last year, 2001, and that the subsequent period is too short from which draw conclusions.

She stated that the Applicant is not a good candidate for terms and conditions and that anyway, supervision that can be given is different from police and parole supervision.

The Applicant gave evidence on his own behalf. He does not deny what he did.

He is now 51 years of age. His career started after passing through grade 12 when he took night courses to be an accountant. For a while he worked for Hershey, a chocolate factory in Smith Falls. Then he moved to a pharmaceutical company in Perth and finally to Kromacorp Printing Ink ("Kroma") situated in Prescott. That is the company he has defrauded. It had 70 employees and annual sales of \$20 to \$25 million.

He testified that in 1994 he became controller and then vice-president of finance. But he had matrimonial troubles and during the next three years absconded with the \$887,000 already mentioned.

On 3rd June 1999 he pleaded guilty to one count of fraud over and two other counts were withdrawn.

With respect to Kroma's civil suit against him, he instructed his lawyer not to contest it and that is all he knows. Between the police and Kroma \$131,000 was retrieved from his bank accounts and life insurance policy. The balance owing is approximately \$170,000.

Other problems emerged in his cross-examination. It became clear that Applicant had made a fraudulent conveyance of property to his ex-wife.

There is concern about the explanation that Mr. Hobbs gave in one of the sections in the Application form. Section 8 asks the following question:

"Are there any unpaid judgements outstanding against you? If yes, submit a copy of each judgement. State the amount outstanding and repayment arrangements".

The Applicant answered "No".

In cross examination he said that he gave that answer because he has heard nothing about the judgement and only knows he instructed his counsel not to defend. The Tribunal finds in this respect the Applicant has been wilfully blind. He must have suspected the judgement existed, realized its probability and refrained from obtaining the final confirmation.

Besides the judgement, his finances are also weighed down by two credit card debts totalling \$8,596.

As to the cause of his crime, the Applicant testified that fraud was related to matrimonial problems and a family disaster and that he was trying to make things perfect for his family. It was not, he said, because of drugs or alcohol.

After spending some months in jail, he was placed in a half way house and was then on parole until 2nd December 2001. His parole Officer whom he saw once a month wrote a letter of support saying that the Applicant had reintegrated successfully and is leading a pro-social life in the community. He wrote "I would have no hesitation to support the issuance of a salesperson licence for Mr Hobbs".

THE LAW:

The relevant sections of the Act provides as follows:

5. (1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

(a) having regard to the financial of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business, or:

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with the law and with integrity and honesty...

6.(1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 5.

DECISION AND REASONS:

The Tribunal finds that the Applicant is obviously capable and intelligent. He also obviously gets on well with people. However, the only question the Tribunal has to answer is whether the Registrar was in error in concluding that the Applicant is not in compliance with the requirements of section 5 of the Act.

The leading case on the proper test to be applied is set out in *Brenner v Registrar of Motor Vehicles and Salesmen 1983 19 CRAT Divisional Court* which confirms how the act. should apply:

"The effect of s. 7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the Applicant afforded reasonable grounds for the belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question. Instead the Board seems to have been pre-occupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself."

It is therefore the Applicant's past conduct, not his prospects which govern the outcome.

Accordingly, by virtue of the authority vested in it under section 7.(4) of the *Motor Vehicles Dealers Act*, the Tribunal directs the Registrar to carry out his proposal dated February 11, 2002.

LICENCE APPEAL TRIBUNAL

Douglas Mackintosh,
Vice-Chair

RELEASED: July 24, 2002

SUBRAMANIAN SOMANATHAN

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE *ONTARIO NEW
HOME WARRANTIES PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, Vice Chair

APPEARANCES:

SUBRAMANIAN SOMANATHAN, representing himself
MARCUS KNAPP, Counsel, representing the Ontario New Home
Warranty Program
MORRIS KANSUN, Agent, representing the Added Party, KANSUN
HOMES LIMITED

DATE OF
HEARING:

July 9, 2002

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") from a written decision of the Ontario New Home Warranty Program (the "Program") dated February 17, 2002 wherein the Program denied the Applicant's claim

The Applicant in this appeal is Subramanian Somanathan (the "Applicant"). The Applicant's claim relates to a dwelling situate at 15 Hacienda Drive, Richmond Hill, Ontario (the "home") which was constructed by Kansun Homes Limited in terms of a written agreement of Purchase and Sale dated October 20, 1999. Kansun Homes Limited (the "Builder") subsequently changed its name to Sierra Homes Inc. The transaction was completed on March 21, 2000.

Subsequent to the transaction being completed, the Applicant brought a claim for damages for delayed closing in terms of Section 14(3) of the *Ontario New Home Warranties Plan Act* (the "Act") as read with Section 17 of Regulation 892 to the Act. The Applicant's claim for damages for delayed closing was investigated by the Program and on February 27, 2002 the Program issued a written decision regarding that claim in which decision the Program denied the Applicant's claim. The Applicant now appeals

the Program's decision to deny his claim. The Builder has been specified by the Tribunal as an added party to this appeal in terms of Section 16(4) of the Act.

THE EVIDENCE:

The only person to testify for the Applicant was the Applicant himself. The only person to testify for the Program was Susan Scheunemann while Morris Kansun was the only person to testify for the Builder. A summary of the above persons' testimonies follows.

Subramanian Somanathan (the "Applicant")

The Applicant testified that he and the Builder entered into a written agreement of purchase and sale on October 20, 1999 in respect of a residential home (the "home") in Richmond Hill, Ontario. The Builder was to construct the home on certain lands purchased by the Applicant in terms of the agreement and the transaction of purchase and sale was to be completed on March 1, 2000.

(Exhibit 3, Tab 1)

The agreement was amended on November 25, 1999 when the Applicant and the Builder executed a written amendment whereby the transaction's closing date of March 1, 2000 was altered to February 23, 2000.

(Exhibit 3, Tab 1, last page)

At the time the Applicant and the Builder signed the agreement the home was partially constructed. The Applicant visited the home then being constructed on an approximately weekly basis. On some of such visits the Applicant would attend at the Builder's sales office and speak with Charlie Barnett, a sales representative of the Builder. During his visits the Applicant also met and spoke with the site superintendent. After December 1999, when Charlie Barnett demanded that the Applicant leave the sales office, the Applicant did not again go to that office although he continued to visit the home under construction.

The Applicant further testified that he did receive the Builder's letter of January 18, 2000 in which letter the Builder advised him that due to unforeseen delays, the closing was being moved from February 23, 2000 to March 8, 2000.

(Exhibit 3, Tab 2)

The Applicant stated that he received this letter through the mail, delivery being by both regular mail and registered mail. The date that he received the letters delivered by regular and registered mail was January 21, 2000.

The Applicant denied that the letter of January 18, 2000 was handed to him by Morris Kansun either on January 18, 2000 or at all. He further denied having met with Morris

Kansun on January 18, 2000 or at any other time prior to his seeing Kansun at the hearing of this appeal. He had only spoken to Kansun once by telephone.

Upon receiving the Builder's letter of January 18, 2000 by way of both regular and registered mail, the Applicant telephoned Susan Scheunemann at the Program. He explained to Scheunemann that there was a delay in the closing of the transaction and he sought her assistance in speeding up the closing of the transaction. Scheunemann called the Applicant back and informed him that she had spoken with Kansun, who she stated, undertook to look into the matter.

The Applicant further stated that the only time he spoke with Kansun was by telephone during January 2000 and that discussion related to the delay in closing from February 23, 2000 to March 8, 2000. He also stated that he did not request his lawyer to write the letter of January 31, 2001 to the Builder's lawyer.

(Exhibit 3, Tab 4)

The Applicant also testified that when he learned that the closing was to be delayed until March 8, 2000 he did not ask his lawyer to request a further delay in the closing until March 21, 2000.

The Applicant also stated that due to the delay in closing he was obliged to rent an apartment. The minimum period that he could rent was for two months and he therefore was obliged to rent for March and April 2000 at \$1,000 per month. He paid the rental of \$2,000 by way of a bank draft.

(Exhibit 16B and Exhibit 16A)

The Applicant claimed he had the following expenses due to the delay in the transaction's closing.

eligible moving costs - movers, truck	\$750	
rental, gas, meals	\$350	1100.00
tel. activation, mail redirect \$55+tax,+32 to temp accommation		95.00
long distance tel., transport, gas, parking to look for temp accommadation		200.00
had a hard time finding a place to live so I decided & sent my family to live with relatives & I planned to move to hotel.		
Fare \$255.20, for meals & cab \$750.00 & \$100.00		1005.00
After sending my family I found temp. accommadation		
time off from work to move to temp. place		500.00
time off to move to new place - ok		
incidental expenses parking, tickets, gas, meals etc		<u>725.00</u>
		\$5625.00

(Exhibit 3, Tab 8, last page)

Morris Kansun

Morris Kansun ("Kansun") testified that he is the President of Sierra Homes Inc. and that Kansun Homes Limited (the "Builder"), subsequent to the transaction with the Applicant, changed its name to Sierra Homes Inc. He stated that he is familiar with the transaction.

Kansun stated that the relationship with the Applicant "was rocky" from the beginning. The Applicant, when visiting the home during its construction, continually argued and interfered with the Builder's employees. The site superintendent complained to Charlie Barnett regarding the behaviour of the Applicant and Barnett in turn complained to Kansun concerning the Applicant's disruptive behaviour.

When it became apparent to Kansun that the transaction could not close on February 23, 2000 he "commissioned" the letter of January 18, 2000. Due to the strained relations between the Builder's employees, including Barnett, and in an attempt not to exacerbate the strained relations, Kansun decided to meet personally with the Applicant, to then deliver the letter of January 18, 2000 to the Applicant and to deal with any concerns the Applicant may have. Accordingly, Kansun instructed Barnett to arrange a meeting between the Applicant and Kansun at the Builder's sales office. Barnett was also to be present at the meeting. The purpose of the meeting was to try to obtain the Applicant's consent to changing the closing date from February 23, 2000 to March 8, 2000. Only in the event of it not proving possible to obtain the Applicant's consent would Kansun then hand the Applicant the Builder's letter of January 18, 2000.

On January 18, 2000 Kansun attended at the Builder's sales office when he met with the Applicant for the first time. Barnett was also present. The meeting was brief. Kansun requested the Applicant's consent to the extension of the closing to March 8, 2000 and before he could get an answer to this request, the Applicant raised his voice and started shouting. Realizing that the Applicant's consent was not going to be obtained and wishing to avoid a confrontation, particularly as a prospective purchaser was present in the sales office, Kansun left the sales office after handing the Applicant an envelope that contained the Builder's letter of January 18, 2000.

Within ten minutes of leaving the sales office Kansun received a call on his cell phone from Barnett who told Kansun the Applicant wished to speak with him. Kansun then spoke with the Applicant who accused Kansun of delaying the closing for his own gain. Kansun did not wish to continue speaking with the Applicant and then told the Applicant to leave the sales office. Kansun then hung up. The following morning copies of the January 18, 2000 letter, that Kansun had hand delivered to the Applicant the previous day, were sent to the Applicant by registered and regular mail.

Kansun continued to testify that on March 2, 2000 he instructed the Builder's lawyers of exercise the five day grace period so that the closing would then take place on March 13, 2000. The Builder's lawyers accordingly sent the Applicant's lawyers a letter dated March 7, 2000, reading as follows:

"Further to our telephone conversation of March 2nd and today, we confirm our advice to you that the Vendor is exercising its five (5) day grace period in accordance with the Ontario New Home Warranty Program. Accordingly, the closing is now schedule to be completed on the 13th day of March, 2000 with all other terms and conditions to remain the same and time to continue to be of the essence."

(Exhibit 3, Tab 5)

Kansun further stated that pursuant to the letter of March 7, 2000, the Builder's lawyer advised Kansun that the Applicant's lawyer had left a voice mail message that the Applicant was not comfortable with closing on March 13, 2000 due to religious reasons and the Applicant therefore requested a closing on March 21, 2000. Kansun agreed to the extension until March 21, 2000 without penalty to the Applicant. Accordingly, the Builder's lawyers wrote on March 9, 2000 as follows to the Applicant's lawyer.

"Further to your voice mail message yesterday, we confirm your clients' advice that the would not be closing the subject transaction before the 21st day of March, 2000. We further confirm our client's consent to their request for the extended closing date, with all other terms and conditions to remain the same and time to continue to be of the essence.

Finally, the Vendor would also confirm that there will be no penalties, charges or compensation for the delayed closing."

Susan Scheunemann

Susan Scheunemann ("Scheunemann") testified that she was a customer service representative with the Program for some fifteen years and that since 1998 has the duty of assessing delayed closing claims. Since 1998 she has assessed approximately 400 claims for delayed closing. She confirmed that she is familiar with and has carriage of the Applicant's file relating to his claim for compensation for delayed closing.

Scheunemann investigated the Applicant's claim and pursuant to her investigation the Program issues its Desk Assessment Report of June 27, 2001.

(Exhibit 3, Tab 15)

The Program, in its Desk Assessment Report, denied the Applicant's claim. Scheunemann referred in her testimony to the report and explained the reasons for her denying the Applicant's claim. She stated that she stood by the report and the reasons for denying the Applicant's claim.

In the report she stated that:

"The builder's hand delivered notice of January 18, complied with Regulation 892, Section 17 (3) (b), therefore delayed closing compensation does not apply for the period from February 23 until March 8.

Delayed closing compensation also does not apply for the period from March 8 until March 13 because closing was not further extended more than five days beyond the extended date as outlined in Regulation 892 Section 17 (1) (b).

The purchaser requested an extension from March 13 until March 21, which the builder agreed to and confirmed in writing that there would be no penalties, interest or compensation for the delayed closing."

After this report was sent by the Program to the Applicant and the Builder, the Applicant wrote to the Program and stated in that letter that he had not received "any hand delivered letter from the Builder", referring to the Builder's letter of January 18, 2000.

Scheunemann stated that she requested and had been furnished with two conflicting Statutory Declarations, one by the Applicant and the other by Kansun.

(Exhibit 3, Tab 18(A) and Exhibit 3, Tab 12(A) respectively)

The Applicant contended in his Statutory Declaration that the January 18, 2000 letter was not hand delivered to him by Kansun, while Kansun in his Statutory Declaration had countered that he personally delivered the January 18, 2000 letter to the Applicant. Faced with the conflicting declarations, Scheunemann communicated with the Barnett before issuing a decision letter. Barnett was then no longer in the Builder's employ. Barnett told Scheunemann that although he no longer remembered the exact date, he did recall the meeting in the Sales Office of the Builder when the Applicant, Kansun and he met. He confirmed that he saw Kansun hand the envelope to the Applicant and that an argument had erupted. Faced with the conflicting Statutory Declarations, Scheunemann was not able to decide as to who was to be believed and as the onus of proof was on the Applicant she felt that he had not discharged such onus and accordingly denied the Applicant's claim.

Scheunemann's superior, Manager Dennis Faubert, reviewed the Applicant's file and concluded that the decision made by her was correct. Accordingly, the Program issued its decision letter of February 27, 2002 setting out the facts as found by the Program as well as reasons for the denial of the Applicant's claim for compensation for delayed closing.

FACTS FOUND PROVEN:

The following are the facts found by the Tribunal to have been proven.

1. The Applicant and the Builder entered into an Agreement of Purchase and Sale on October 20, 1999 in terms of which the Applicant purchased certain lands in Richmond Hill, Ontario on which the Builder undertook to construct the home.
2. In terms of the Agreement of Purchase and Sale, the transaction was to be completed by March 1, 2000.
3. By written Agreement of Amendment dated November 30, 1999 the Applicant and the Builder agreed to the date of completion being changed from March 1, 2000 to February 23, 2000.

4. By letter dated January 18, 2000, addressed by the Builder to the Applicant, the Builder advised the Applicant that the date of completion of the transaction was to be changed from February 23, 2000 to March 8, 2000.
5. The Builder's letter addressed to the Applicant and dated January 18, 2000 was delivered personally by Morris Kansun on behalf of the Builder to the Applicant on January 18, 2000 on which date the Applicant received that letter.
6. On January 19, 2000 the Builder mailed to the Applicant two copies of the Builder's letter of January 18, 2000. One of the two copies was mailed by regular mail and the other copy of the letter of January 18, 2000 was mailed by registered mail.
7. The two mailed copies of the Builder's letter of January 18, 2000 were received by the Applicant on January 21, 2000.
8. By letter dated March 7, 2000 addressed to the Applicant's solicitor by the Builder's solicitors, the Builder extended the amended closing date of March 8, 2000 to March 13, 2000.
9. By way of voice mail message from the Applicant's solicitor to the Builder's solicitor, the former, on behalf of the Applicant, requested of the latter, that the closing be extended to March 21, 2000 to which request the Applicant's solicitor agreed.
10. The transaction closed on March 21, 2000.

THE LAW:

The following sections of the Act and Regulation 892 are applicable to this appeal.

14(3) Subject to the regulations, an owner of a home is entitled to receive payment out of the guarantee fund for damages resulting from a breach of warranty if,

...

(b) the person has a cause of action against the vendor or the builder, as the case may be, for damages resulting from the breach of warranty.

Section 17.(1) of Regulation 892 to the Act states:

17. (1) Every vendor of a new home of a type referred to in clause (a) or (b) of the definition of "home" in section 1 of the Act warrants to the owner that in the event of a delay in closing that is more than five days beyond,

(a) the date originally fixed for closing the purchase agreement; or

(b) an extension referred to in clause 3 (a) or (b),

the vendor shall compensate the owner for all direct costs caused by the delay in an amount that does not exceed \$100 a day for living expenses and \$5,000 in total.

Section 17.(3)

(3) Subject to paragraph 5 of the Addendum referred to in paragraph 12 of section 1 of Regulation 894 of the Revised Regulations of Ontario, 1990, subsection (1) does not apply where,

(a) the vendor extends the closing beyond the original closing date after giving written notice to the purchaser at least sixty-five days before the original closing date; or

(b) the vendor extends the closing for not more than fifteen days beyond the original closing date or beyond the extended closing date referred to in clause (a), after giving written notice to the purchaser at least thirty-five days before the original closing date or the extended closing date referred to in clause (a).

(4) Where a claim is made under subsection (1), compensation shall be calculated from the original closing date or the closing date as extended under clause (3) (a) or (b).

APPLICATION OF LAW TO FACTS:

The onus of proof in this matter rests upon the Applicant to prove his version of events on a balance of probabilities.

It is common cause that the Applicant and the Builder entered into a written agreement on October 20, 1999 whereby the Builder undertook to construct a home for the Applicant on certain lands in Richmond Hill, Ontario. Further, that the transaction was initially to close on March 1, 2000 but that date was by the written consent of the Applicant and the Builder, dated November 20, 1999 changed to February 23, 2000. However, the Applicant and the Builder disagree regarding the facts surrounding a further extension of the closing of the transaction to March 8, 2000 from February 23, 2000.

A finding by the Tribunal as to the validity, or otherwise, of the Notice of Extension of January 18, 2000 is critical in determining whether or not there has been a delayed closing which entitles the Applicant to compensation. In order to determine whether the Builder's letter of January 18, 2000 complies with section 17 of the Regulation 892, the Tribunal has to look at the testimony of the Applicant, Kansun and Scheunemann as well as the documentary evidence introduced at the hearing. Essentially, it is a matter for the Tribunal to decide as to the credibility of the Applicant, Kansun and Scheunemann.

Having considered the testimony of the above three persons as well as the documents tendered as exhibits at the hearing, the Tribunal has no difficulty in finding the testimony of Kansun and Scheunemann, where such testimony differed from the Applicant's testimony, to be more compelling and convincing. The documents and letters support the Builder's version of events.

The testimony of Kansun as to what transpired on January 18, 2000 is supported by Barnett's evidence who confirmed to Scheunemann that he was present when he observed Kansun hand a letter in an envelope to the Applicant. While it would have been preferable to have heard Barnett's testimony firsthand, the Tribunal is nevertheless entitled to receive hearsay evidence and, having received it, to weigh that evidence. This entitlement to receive Barnett's evidence is in terms of Section 15 of the *Statutory Powers Procedure Act*. The Tribunal finds therefore, that the Applicant did receive notice of extension of the closing on January 18, 2000 when Kansun handed the Applicant the envelope containing the January 18, 2000 letter. The Builder's letter of January 18, 2000, which the Tribunal finds was handed to the applicant on that date by Kansun, did therefore comply with section 17.(3)(b) of Regulation 892 and the closing date was thereby extended to March 8, 2000 from February 23, 2000, a period of less than 15 days. The January 18, 2000 letter also complies with Section 17.(3)(b) of Regulation 892 as such notice was more than thirty-five days before the original March 1, 2000 closing date.

The Builder was entitled to a further extension of five days beyond the already extended closing of March 8, 2000. This five day period extended the closing to March 13, 2000. This five day extension claimed by the Builder was in compliance with section 17.(1)(b) of Regulation 892.

Insofar as the closing not having taken place on March 13, 2000 but having taken place on March 21, 2000 the Tribunal finds that the requested extension to March 21, 2000 was specifically made at the request of the Applicant through his solicitor. The Builder's solicitor's letter of March 9, 2000 addressed to the Applicant's solicitor supports and confirms the testimony of Kansun that the Builder was agreeable to accommodating the Applicant's solicitor's request. The Tribunal rejects the Applicant's testimony that he did not require such extension and that he did not instruct his solicitor to request the extension. The contents of the March 9, 2000 letter was at no time contested or disputed by the Applicant's solicitor and the Tribunal finds it unlikely in the extreme that this letter did not accurately reflect that it was the Applicant himself who wished to delay the closing until March 21, 2000 and it was the Builder who agreed to the Applicant's request.

The Applicant has failed to discharge the onus that rested upon him and has not satisfied the Tribunal that his version of events, where in conflict with that of the Builder, are either credible or acceptable. The Tribunal finds that the builder is not in breach of warranty for the delayed closing and is not obliged to compensate the Applicant for any amount whatsoever.

DECISION:

Accordingly, pursuant to the authority vested in it under section 16.(3) of the *Ontario New Home Warranties Plan Act*, the Tribunal directs the Ontario New Home Warranty Program to disallow the Applicant's claim.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: July 19 , 2002

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
RASHID HALBOUNI

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: March 8, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

RASHID HALBOUNI

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Rashid Halbouni, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: July 11, 2002

TO: The Registrar
Motor Vehicle Applicants Act
Ontario Motor Vehicle Industry Council
36 York Mills Road, Suite 110
Toronto, Ontario M2P 2E9

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Rashid Halbouni
493 Old Wonderland Road
London, ON N6K 3T5

In accordance with Section 4.1 of the *Statutory Powers Procedure Act*, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereinafter the "Act") the parties to the proceeding, Rashid Halbouni (hereinafter referred to as "the Applicant"), and the Registrar, *Motor Vehicle Dealers Act* (hereinafter the "Registrar") waive the requirement of a hearing and hereby consent to an Order of the Licence Appeal Tribunal based on the following terms and conditions:

1. The Applicant agrees that if he is criminally charged or convicted in the future, he will immediately notify his employer in writing of the charges or convictions against him and provide a copy of the notification signed by his employer to the Registrar, giving the particulars of the charges or convictions.
2. The Applicant agrees that if he is convicted under the Criminal Code or convicted of any industry specific offences under any Statute in the future, he will be automatically revoked.
3. The Applicant agrees to provide full and accurate disclosure on any applications, documents, statements or other form of communication or information provided to the Registrar or his authorized representatives regardless of previous disclosure.
4. The Applicant acknowledges that the Registrar is relying upon the accuracy of the disclosure provided by the Applicant in entering into these terms and conditions.
5. The Applicant agrees that his explanation of the circumstances of his criminal record, are substantially correct.
6. The Applicant agrees not to be a partner, shareholder, officer, director or sales manager of a dealership.
7. The Applicant agrees not to be the final signatory on any sales contracts on behalf of the dealer.
8. The Applicant agrees not to transfer his registration as a motor vehicle Salesperson to another dealer without having first obtained the prior written consent of the Registrar.
9. The Applicant agrees not to be involved in the process of buying or selling motor vehicles without the benefit of registration.
10. The Applicant will comply with the Ontario Motor Vehicle Industry Council's Code of Ethics and Standards of Business Practice as may be amended from time to time.
11. The Applicant acknowledges and understands that his registration will not be used to buy or sell motor vehicles where the Applicant knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.

12. The Applicant acknowledges that he is required to conduct business in a financially responsible manner and will make arrangements to meet any and all outstanding financial obligations.
13. The Applicant agrees that his registration will not prevent the Registrar from taking administrative action, including a proposal to revoke his registration, arising from matters that may have occurred or may occur in the future related to his financial circumstances and honesty and integrity.
14. The Applicant acknowledges that his registration as a motor vehicle Salesperson will not prevent the Registrar from taking legal action, including a Provincial Offences prosecution arising from matters that may have occurred or may occur in the future related to his financial circumstances and honesty and integrity.
15. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
16. The Applicant will provide a copy of this order to any future employer.
17. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
18. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
19. The Applicant acknowledges that he has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of London this day of , 2002.

Rashid Halbouni (signature)

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Date:

Carl Compton
Registrar

1054-MED-TUM

**Appeal under Section 50(1) of the Highway Traffic Act,
R.S.O. 1990, Chap. H.8 as amended, from a Decision of
the Registrar of Motor Vehicles pursuant to Section
47(1) of that Act.**

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ROY MELVIN, M.D., Presiding Member

APPEARANCES: LUBA NEUWIRTH
Representative for the Registrar of Motor Vehicles

Solicitor for Applicant

DATE OF
HEARING: July 8, 2002 Kitchener

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

FACTS:

The Applicant is a 43 year old automobile mechanic who began to have unusual symptoms within his head about two years ago. Then he had spells where he felt a constriction in his throat, sour taste in the mouth, tingling feelings in his left arm and leg, sometimes a numbness at which times he would drop things from his hand. His family doctor referred him to a Neurologist, Physician #1 at McMaster Health Centre in Hamilton, who suspected a right frontal brain tumour. An EEG, September 26, 2001, reported abnormal activity of the right frontal region.

The Applicant was referred to Physician #2, a neurological surgeon at St. Michael's hospital in Toronto. An M.R.I., October 17, 2001, shows a large right-sided brain lesion and the Applicant was booked for a biopsy, November 13, 2001.

In the meantime he had been for a visit to Hungary where he was seen by various doctors and prescribed Tegratol, which relieved his spells somewhat. The biopsy, reported December 27, 2001 diagnosed this tumour as oligodendroglioma. He was reviewed by the Multidisciplinary Oncology team at the Hamilton Regional Cancer Centre on January 17, 2002. The consensus of opinion was that he should undergo surgical removal of this tumour, followed by radiation therapy. The risks were discussed with the Applicant and he was asked to make a decision. In the meantime he was advised to continue with the anti-epileptic medication because he could be a risk of having more aggressive seizures given the extent of his tumour.

It was at this point that Physician #3, of this team, sent a medical report to the Ministry of Transportation pursuant to Section 177 of the *Highway Traffic Act*, who suspended his licence as per Section 47(1) effective February 24, 2002.

The Applicant was assessed again by Physician #2, Neurosurgeon, on February 26, 2002, who agreed with the recommendation of the Hamilton Regional Cancer Centre. He showed very little clinical change and attributes this to taking a variety of herbal medications which he gets from a clinic in California. He states that he gets very few so-called seizures while he is taking Tegratol.

To date the Applicant has made no definitive decision regarding the treatment of his tumour as recommended by the appropriate specialists.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffer from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

The Applicant has a slow growing right sided brain tumour diagnosed by biopsy as an oligodendroglioma with focal symptoms of a vague nature sometimes involving sensation and movement of the left arm and/or leg. These are relieved, for the most part, by taking Tegretol regularly. However, without definitive treatment by surgery and/or radiation, he will be at risk to experience unexpected and unpredictable disorders of motor sensory or cognitive nature due to pressure of the tumour on so vital an organ as the brain.

Should such an event occur while he is driving a motor vehicle he would be placing himself and/or others at serious risk. This is in direct contravention of Regulation 340/94 section 14(a), which states:

An applicant for or a holder of a driver's licence must not,

- (a) suffer from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely;

DECISION:

Upon the application by the Applicant to appeal the decision dated February 15, 2002 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

Roy Melvin, M.D., Presiding Member

RELEASED: July 16, 2002

JAMES AND PATRICIA FRASER

MOTION TO CONSIDER AN APPLICATION
FOR AN ADJOURNMENT

TRIBUNAL: CARL F. DOMBEK, Chair, presiding

APPEARANCES:

JAMES AND PATRICIA FRASER, Applicants
SARA KARGES, Counsel, representing the Ontario
New Home Warranty Program
SCOTT McEWAN, Agent, representing the Added Party, 729135
Ontario Ltd.

DATE OF
HEARING: July 17, 2002

By Teleconference

ORDER

Upon reading the decision letter, the Notice of Appeal, the request for an adjournment, and upon hearing the submissions of the Parties the Licence Appeal Tribunal orders that:

1. The hearing is adjourned, with conditions, to commence Monday, October 28, 2002 at 9:30 a.m. at the Gillespie Reporting Services, 130 Slater Street, Suite 200, Ottawa, Ontario, to continue on October 29, 2002 at Gillespie Reporting Services, if necessary.
2. The conditions of the adjournment are:
 - (a) On August 20, 2002 access to the Applicants' home will be granted by them to David Walker, P.Eng, ("Walker") and representatives of the Ontario New Home Warranty Program ("ONHWP") and the Added Party. The expert of the Added Party shall also attend at this time.
 - (b) The Applicants shall ensure that the actual photos provided by their expert, Trow Engineering ("Trow"), shall be available at this meeting. The Added Party shall ensure that the Roof Truss Drawings shall also be available at this meeting.
 - (c) The expert (Trow) retained by the Applicants shall also attend the August 20, 2002 meeting.

- (d) The parties' experts shall have one or more meeting and, where appropriate, communicate directly with each other outside of meetings to:
 - (i) exchange all relevant information and documentation related to facts or opinions in dispute;
 - (ii) discuss all facts or opinions in dispute with a view to reducing or eliminating areas of controversy;
 - (iii) reach consensus on facts, issues and opinions which do not require a determination by the Tribunal;
 - (iv) where applicable, develop conditions of approval acceptable to all parties; and
 - (v) explore any other means of resolving areas of dispute between the parties.
- (e) The Parties and their representatives may attend experts' meetings, where practical, as long as their attendance will not interfere with the scheduling, progress or outcome of these meetings.
- (f) Statements made during the process outlined above shall not be used or referred to during the Hearing or communicated to anyone else unless all of the parties consent.
- (g) The parties' consultants shall report back to the parties or their representatives with information that will assist them in reaching agreements, and identifying, understanding and focusing on the most important considerations with respect to each issue which remains in dispute.
- (h) A report on the progress, but not the content of these meetings may be required by the Tribunal to ensure that this process is occurring in an appropriate manner.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair, Presiding

Released: July 18, 2002

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
RICHARD REEVES

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATION
- Proposal dated: February 26, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

RICHARD REEVES

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Richard Reeves, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: July 3, 2002

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
789 Don Mills Road, Suite 800
Toronto, ON M3C 1T5

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON, M4V 1K6

FROM: Richard Reeves
1207 Cline Crescent
Ottawa, ON K2C 2P3

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereinafter the "Act") the parties to the proceeding, Richard Reeves (hereinafter referred to as the "Applicant"), and the Registrar, *Motor Vehicle Dealers Act* (hereinafter the "Registrar") waive the requirement of a hearing and hereby consent to an Order of the Licence Appeal Tribunal (hereinafter the "Consent Order") based on the following terms and conditions to their registrations as a motor vehicle salesperson:

1. The Applicant agrees not to be involved in the process of buying or selling motor vehicles without the benefit of registration.
2. The Applicant agrees not to invite the public to deal at a place other than his employer's registered premises.
3. The Applicant acknowledges and understands that his registration will not be used to buy or sell motor vehicles where the Applicant knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
4. The Applicant will not be involved in arranging for the delivery or delivering any vehicles sold by his sponsoring dealer to anyone other than the consumer indicated in the dealer's books and records. If the Applicant has reason to believe that any vehicle sold by the dealership is being delivered to anyone other than the customer indicated on the dealer's books and records, the Applicant will forthwith notify his sponsoring dealer.
5. The Applicant agrees that he is under a positive obligation to disclose all material facts about the vehicles he sells to his customers. Material facts include but are not limited to salvage, previous salvage, frame and unibody damage, rebuilt, accident repair, theft recovery, prior use as a police cruiser, taxicab or daily rental and branded vehicles. The Applicant agrees to make reasonable efforts to research the history of all vehicles he sells prior to sale to ensure all material facts are disclosed in writing to the purchaser.
6. The Applicant agrees to immediately enrol in the Ontario Motor Vehicle Industry Council Certification Course and to be responsible for all fees in relation to enrolment. The Applicant further acknowledges that enrolment in the course entitles him to a sixty (60) day conditional registration period that allows for his successful completion of the course (including passing the exam).
7. The Applicant agrees that his registration will not prevent the Registrar from taking administrative action, including a proposal to revoke his registration, arising from matters that may have occurred or may occur in the future related to his financial circumstances and honesty and integrity.

8. The Applicant acknowledges that his registration as a motor vehicle Salesperson will not prevent the Registrar from taking legal action, including a Provincial Offences prosecution, arising from matters that may have occurred or that may occur in the future.
9. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
10. The Applicant will provide a copy of this order to his employer forthwith.
11. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
12. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
13. The Applicant acknowledges that he has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____, this _____ day of _____ 2002.

Richard Reeves (Signature)

These Terms and Conditions are accepted by the Registrar, *Motor Vehicle Dealers Act*.

Date:

Carl Compton
Registrar
Motor Vehicle Dealers Act

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
GREGORY SKINNER AND CATHERINE SKINNER

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

GREGORY SKINNER AND CATHERINE SKINNER

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

CHRIS JOHNSON & ASSOCIATES LTD.

Added Party

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter
on July 3 and 4, 2002;

AND WHEREAS, upon consent of the parties, the hearing was adjourned to July 23-24,
2002;

TAKE NOTICE, upon consent of the parties, the Tribunal further adjourns the hearing
peremptory against all parties to commence at the Tribunal's Chambers, 1 St. Clair
Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Monday, September 16,
2002 and to continue September 17, 2002, if necessary.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: July 16, 2002

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
LUCIANO PACIONE, 1290100 ONTARIO INC. O/A CARRERA MOTOR
CAR COMPANY AND HEIMRATH PERFORMANCE CARS

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATIONS
- Proposal dated: March 11, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

LUCIANO PACIONE, 1290100 ONTARIO INC.
O/A CARRERA MOTOR CAR COMPANY AND
HEIMRATH PERFORMANCE CARS

Applicants

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Luciano Pacione, 1290100 Ontario Inc. o/a Carrera Motor Car Company and Heimrath Performance Cars, Applicants, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicants and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: July 11, 2002

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
789 Don Mills Road, Suite 800
Toronto, Ontario M3C 1T5

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Luciano Pacione
23 Orchard Park
West Hill, ON M1E 3T6

AND FROM: 1290100 Ontario Inc.
O/A Carrera Motorcar Company & Heimrath Performance Cars
1251 Kennedy Road
Scarborough, ON M1P 2L4

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the Motor Vehicle Dealers Act, (hereinafter the "Act") the parties to the proceeding, Luciano Pacione (hereinafter referred to as "the Salesperson") and 1290100 Ontario Inc. O/A Carrera Motorcar Company & Heimrath Performance Cars (hereinafter referred to as "the Dealers"), and the Registrar, Motor Vehicle Dealers Act (hereinafter the "Registrar") waive the requirement of a hearing and hereby consent to an Order of the Licence Appeal Tribunal based on the following terms and conditions:

1. The Dealers and Salesperson acknowledge and understand that they will not retain the services of a salesperson unless the salesperson is registered as a salesperson to the Dealers.
2. The Dealers and Salesperson further acknowledge that the restrictions concerning the activities of a salesperson referred to in these terms and conditions apply to buying, selling and leasing on behalf of a dealer. "Buying, selling and leasing" refers to showing a vehicle to a prospective purchaser or any form of negotiation concerning the purchase, sale or lease of a motor vehicle and is not limited to the signing of contracts. This further includes attendance at auctions on behalf of the Dealers.
3. The Dealers and Salesperson agree to operate exclusively from the location approved by the Registrar. The Dealers and Salesperson agree to apply for the Registrar's approval, by way of prior written notice, of any change in business location in the form required by the Registrar.
4. The Dealers agree not to invite the public to deal at a place other than their approved location.
5. The Dealers will not conduct any purchases with anyone who is in the business of buying and selling motor vehicles without confirming that they are registered as a Dealer under the Motor Vehicle Dealers Act.
6. The Dealers will ensure that all advertisements placed by or on behalf of the Dealers will identify their registered name and the address of the location approved by the Registrar.
7. The Dealers will ensure that any vehicles sold are registered in the name of the purchaser before releasing the vehicle to the purchaser.
8. The Dealers will not purchase vehicles without ensuring that the vehicle is registered to the seller, unless otherwise permitted by law.

9. The Dealers agree to register all vehicles purchased within 6 days in accordance with the Highway Traffic Act.
10. The Dealers acknowledge and understand that their registrations will not be used to buy or sell motor vehicles where the Dealers or Salesperson know or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
11. The Dealers and Salesperson agree to provide full and accurate disclosure on any applications, documents, statements or other form of communication/information provided to the Registrar or his authorized representatives regardless of previous disclosure.
12. The Dealers and Salesperson agree that they are under a positive obligation to disclose all material facts in writing about the vehicles they sell to purchasers. Material facts include but are not limited to salvage, previous salvage, frame and unibody damage, rebuilt, accident repair, theft recovery, prior use as a police cruiser or taxicab and branded vehicles. The Dealers agree to make reasonable efforts to research the history of all their vehicles prior to sale to ensure all material facts are disclosed. The Dealers and Salesperson agree that should any information come to light, which the Registrar deems to be a material fact concerning a vehicle the Dealers have sold, the Dealers and Salesperson will comply with all reasonable requests made by the Registrar to provide compensation to the purchaser.
13. The Dealers will comply with the Ontario Motor Vehicle Industry Council's Code of Ethics and Standards of Business Practice.
14. The Dealers agree to maintain a garage register in accordance with the Highway Traffic Act and will maintain all books and records as required by the Motor Vehicle Dealers Act. The Dealers agree that all books and records relating to motor vehicles sold or leased by or on behalf of the Dealers before and after registration shall be kept at the Dealers' registered premises and be readily available for inspection. The Dealers further agree to provide free access to their books and records to any authorized representative of the Registrar without any prior notice being given.
15. Unless registered under the Motor Vehicle Dealers Act, the Dealers and Salesperson agree that they will not be involved in the process of buying, selling or leasing motor vehicles.
16. The Dealers and Salesperson agree that they will act with financial responsibility.
17. The Dealers and Salesperson will comply with all aspects of the Retail Sales Tax Act with regards to filing, and ensuring all tax collections are accurately reported and remitted to the Minister of Finance when due.
18. The Dealers and Salesperson acknowledge that the Registrar may take administrative action, including a proposal to revoke their registration arising from any matters that have occurred in the past, save for those matters giving rise to this proceeding, or that may occur in the future related to their financial circumstances and their honesty and integrity.
19. The Dealers and Salesperson acknowledge that the Registrar may take legal action, including a Provincial Offences prosecution, arising from their actions related to the sale of motor vehicles that may have occurred in the past, save for their actions giving rise to this proceeding, or that may occur in the future.
20. The Dealers and Salesperson agree and acknowledge that should they breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
21. The Dealers and Salesperson hereby consents to an Order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.

22. The Dealers and Salesperson hereby withdraw their appeals to the Licence Appeal Tribunal.

23. The Dealers and Salesperson hereby acknowledge that they have obtained or have had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____ this _____ day of _____, 2002.

Luciano Pacione (signature)

Officer/Director of 1290100 Ontario Inc.
I have the authority to bind the corporation.

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Date:

Carl Compton
Registrar
Motor Vehicle Dealers Act

CYRUS LINDSAY WOODS

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF THE
MOTOR VEHICLE DEALERS ACT

TO REFUSE REGISTRATION

TRIBUNAL: DAVID HUNT, Vice-Chair

APPEARANCES: EDWARD SULLIVAN, Agent, representing the Applicant
AVIVA HARARI, Counsel, representing the Registrar, *Motor
Vehicle Dealers Act*

DATE OF HEARING: July 29, 2002 Toronto

ORDER

The Applicant in this matter was not personally in attendance on the date of the hearing, having been sentenced, on June 28, 2002, to nine months in custody. He had arranged for Mr. Sullivan to attend as his agent and a request for adjournment was made without prior, formal notice. The basis of the request was that Mr. Woods could obtain a temporary absence pass for the day to leave the institution where he is serving his sentence and therefore could appear at the Tribunal on a future date. The institution (Mimico Correctional Centre) was contacted by Counsel for the Registrar and it was confirmed that Mr. Woods could qualify for a temporary absence pass for a future date.

The position of the Registrar was that the application for adjournment should be refused by this Tribunal as there was not adequate notice and Mr. Woods did not take the appropriate steps to obtain a pass for the scheduled date of the hearing.

The Tribunal finds that although the Applicant failed to obtain a pass for the scheduled date of the hearing he did instruct an agent, and demonstrated a real interest in being part of the proceedings. He was not really absent by choice. In all of the circumstances the matter was adjourned, to recommence on August 21, 2002 at 9:30 a.m. in the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto, Ontario.

Counsel for the Registrar requested an order for costs in the event that the adjournment was given. Mr. Sullivan, on behalf of the Applicant, consented to costs in the amount of \$650.00, payable to the Respondent within 14 business days of the date of this order. The order for costs is so made.

LICENCE APPEAL TRIBUNAL

David Hunt, Vice-Chair

Released: July 30, 2002

NASR AHMED SAEED

APPEAL FROM A DECISION OF THE BOARD OF
TRUSTEES OF THE ONTARIO MOTOR VEHICLE
DEALERS COMPENSATION FUND

TO DISALLOW A CLAIM

TRIBUNAL: DAVID HUNT, Vice-Chair

APPEARANCES: NASR AHMED SAEED appearing on his own behalf
AVIVA HARARI, Counsel representing the Ontario Motor Vehicle
Dealers Compensation Fund

DATE OF
HEARING: July 3, 2002 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") from a written decision of the Ontario Motor Vehicle Dealers Compensation Fund (the "Fund"), dated March 15, 2002, wherein the claim for compensation of Nasr Ahmed Saeed (the "Applicant") was denied.

The claim of the Applicant is for the sum of \$5,150.00 being the amount of a default judgment obtained by the Applicant in the Toronto Small Claims Court against Auto Sahel. The default judgment has not been satisfied by Auto Sahel and was set aside by the Court on May 30, 2002.

MOTION BY THE FUND:

At the commencement of the hearing, Counsel for the Fund brought a motion that the Tribunal was without jurisdiction to hear this appeal for the following reasons:

1. The Applicant's claim against the Fund identifies the basis of his claim as being a default judgment, dated October 18, 2001, for \$5,150.00 granted in favour of the Applicant against Auto Sahel.
2. Subsequent to the default judgment being granted by Court, Auto Sahel brought a motion to that court to set aside the default judgement.

3. Pursuant to the Applicant's motion to set aside the default judgement, the court heard evidence and rendered a decision. The decision of the court, issued on May 30, 2002, was:

The Judgement for the Plaintiff against the Defendant in the sum of \$5,150.00; was set aside subject to the filing of a Statement on Defense and payment of \$100.00 – costs.

4. The Statement on Defense was filed June 14, 2002 and the \$100.00 costs were paid on June 5, 2002.
5. On the basis that the judgement was set aside and the conditions met, the Board of Trustees for the Motor Vehicle Dealers Compensation Fund revoked its decision of May 15, 2002:
 - i) On October 18, 2001, the Applicant was granted a default judgement against Auto Sahel in the amount of \$5,150 which judgement has not been satisfied by Auto Sahel.
 - ii) On May 30, 2002 the default judgement for \$5,150.00 against Auto Sahel was set aside and by June 14, 2002 all the conditions were met.
 - iii) On July 3, 2002 the Board of Trustees for the Motor Vehicle Dealers Compensation Fund revoked its decision of March 15, 2002 as the judgement was no longer in place.

THE ISSUE:

The legal issue raised by the motion brought by the fund is:

Has this Tribunal the jurisdiction to hear the Applicant's appeal under section 12(3)1. of Regulation 801 to the Act?

THE LAW:

MOTOR VEHICLE DEALERS ACT

Section 1. "Motor vehicle dealer" means a person who carries on business of buying a or selling motor vehicles, whether for the person's own account or the account of any other person, or who holds himself, herself or itself out as carrying on the business of buying or selling motor vehicles

Section 24. The Lieutenant Governor in Council may make regulations,

.....

- (o) providing for the establishment, maintenance and administration of the Motor Vehicle Dealers Compensation Fund including prescribing provisions relating to investing and paying out of money from the Fund;

.....

- (p) providing for payment out of the Fund of claims and procedures to be followed in respect thereto;

.....

REGULATION 801 TO THE MOTOR VEHICLE DEALERS ACT

.....

Section 12(3) A customer may make a claim against the Fund where the customer gives written notice of the claim to the Registrar within two years of the participant's refusal or failure to pay, even if the motor vehicle dealer with respect to whom the claim is being made ceased to be a participant after the refusal or failure to pay, and where the claim meets one of the following requirements:

1. The customer has recovered in any court in Ontario a judgement in respect of the claim and the judgement has become final by reason of the expiration of the time for appeal or of having been confirmed by the highest court to which an appeal may be taken and the customer makes an application, supported by the judgement and statement of claim, for payment of the unsatisfied portion of the judgement and costs as assessed.

.....

APPLICATION OF LAW TO FACTS:

The Applicant when filing his notice of claim against the Fund, dated April 3, 2002, stated that his claim was based upon an unsatisfied default judgement for \$5,150.00 against a motor vehicle dealer, namely Auto Sahel.

The Applicant, accordingly, filed his claim in terms of section 12(3)1 of regulation 801. Auto Sahel successfully challenged the default judgement in a motion brought before the

Court and upon the Court setting aside the default judgement for \$5,150.00 there was no longer a judgement upon which the Applicant could found his claim.

As there was no final judgement in existence at that date of the hearing, and the decision by the Trustees has been revoked, this Tribunal does not have jurisdiction to hear the Applicant's claim.

DECISION:

By virtue of what is stated above, the Tribunal finds it does not presently have jurisdiction to hear this appeal and accordingly this hearing is concluded without any finding on the merits of the case and without prejudice to any further rights of appeal the Applicant may have.

LICENCE APPEAL TRIBUNAL

David Hunt
Vice-Chair

RELEASED: July 4, 2002

1302406 ONTARIO LTD. O/A COLSON MOTOR CARS AND EFSTARATIOS (STEVE)
COLIVIRAS

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATIONS

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

STEVE COLIVIRAS, Agent, representing himself and 1302406
Ontario Ltd. o/a Colson Motor Cars
AVIVA HARARI, Counsel, representing the Registrar, *Motor
Vehicle Dealers Act*

DATES OF

HEARING: July 19, 2002

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") from a Notice of Proposal issued by the Registrar of the *Motor Vehicle Dealers Act* (the "Registrar") pursuant to section 7 of the *Motor Vehicle Dealers Act* (the "Act"). The Proposal dated February 7, 2002 seeks to revoke the registration of 1302406 Ontario Ltd. o/a Colson Motor Cars ("Colson"), as a motor vehicle dealer and Efstratios (Steve) Coliviras ("Coliviras") as a motor vehicle salesperson.

The Proposal sets out the Registrar's reasons for seeking an order for the revocation of both the above registrations. The reasons are stated as follows:

The intention and objective of the Act is to protect the public interest. The requirements of the Act include that Registrants be financially responsible in the conduct of business and that Registrants carry on business in accordance with the law and with integrity and honesty. The Registrant's past conduct is inconsistent with the intention and objective of the Act, and therefore warrants disentitlement to registration under the Act. Therefore, the Registrar is unwilling to continue to register Colson or Steve Coliviras under the Motor Vehicle Dealers Act.

The particulars upon which the Registrar relies are stated in the Proposal as follows:

- 1) Steve Coliviras has been registered as a salesperson under the Act since on or about September 4, 1986.
- 2) Colson is a corporation which has been registered as a dealer under the Act since on or about November 11, 1998.
- 3) Steve Coliviras is an officer and director of Colson.
- 4) On or about August 20, 2001, a judgement was issued by the Ontario Superior Court of Justice against Colson in favour of Vincent Tyler, Jim Siler and Larry Swanton ("the plaintiffs") This judgement related to the sale of a stolen vehicle to the plaintiffs by Colson.
- 5) Steve Coliviras and Colson have failed to take any reasonable steps to arrange repayment of the judgement.
- 6) Steve Coliviras and Colson are not financially responsible in the conduct of business.

By written Notice of Appeal both Colson and Coliviras informed the Tribunal in terms of Section 7.(2) of the Act that they required a hearing regarding their appeals to the Proposal.

THE EVIDENCE:

The evidence presented to the Tribunal by the Registrar consisted of documentary evidence as well as the oral testimony of Laura Gordon. The evidence presented by Colson and Coliviras consisted of the oral testimony of Coliviras.

Laura Gordon

Laura Gordon ("Gordon") testified that she has been employed by the Ontario Motor Vehicle Industry Council ("OMVIC") since 1997 and currently holds the position of Director of Compliance. Since 1997 OMVIC, a non profit organization, has been charged with administering the Act and its regulations and Ms. Gordon, as Director of Compliance, has the duty of overseeing the registration of dealers and salespersons and ensuring compliance with Section 5 of the Act. She is familiar with Colson and Coliviras as she has carriage of their file at OMVIC.

Ms. Gordon stated that both Colson and Coliviras are presently registered under the Act as dealer and salesperson respectively. Coliviras has been registered since September 1996 and Colson since November 1998. Gordon further stated that certain parties, namely, Messrs. Tyler, Diler and Swanton (the "Plaintiffs") had in April 2000 brought an action in the Ontario Superior Court of Justice against Colson and Messrs. Diamantidis, Petros Koliviras, Nash and Coliviras (the "Defendants"). The Defendants filed a Statement of Defence and Counterclaim to the Plaintiffs' action. Subsequently, on July 20, 2001, Mr. Justice Cameron granted default judgment against Colson in the sum of \$29,425.00 for damages, \$11,843.27 for expenses and loss of profits together with pre-

judgment and post-judgment interest and \$5,000.00 costs. The counterclaim of the Defendants was dismissed.

(Exhibit 3, Tab 6)

Pursuant to the judgment having come to OMVIC's attention Ms. South, the Deputy Registrar, addressed a letter dated October 15, 2001 to Colson and Coliviras in which letter South referred to the judgment and stated,

These are serious allegations which could affect your continued registration as a dealer and as salespersons. Before making a decision concerning your registrations, we would like to give you an opportunity to respond. In order to qualify for or maintain your registration as a motor vehicle dealer or salesperson, you must conduct business with honesty and integrity and in a financially responsible manner. This includes taking all reasonable steps to satisfy your financial obligations. You should also be aware that the ethical responsibilities of a registrant extends further than their legal obligations.

Accordingly, could you please advise me what steps you intend to take to satisfy the above-referenced judgement. May I please have your written response no later than Friday, October 26, 2001.

(Exhibit 3, Tab 8)

On receipt of the letter of October 15, 2001 Coliviras telephoned Ms. South and spoke with her on October 18, 2001. At that time Ms. South entered a memo into OMVIC's computerised record system recording that conversation as follows:

returned msg from Steve Colivars concerning my letter re o/s judgement in favour of Tylor's Blue Ridge. He said that Colson's was closed down and they didn't bother to defend judgement for that reason. I said that he would still be accountable if he was an officer of the corporation. I said that an argument could be made that he's not legally liable but we have standards of honesty, Integrity and financial responsibility to maintain registration. He said his lawyer advised them that they were off the hook wrt the judgement. I said this was not the case in terms of his continued reg'n as a salesperson. I said we would still require a written response to my letter and then I would discuss this file w/ the Registrar.

(Exhibit 6)

Gordon continued to testify that OMVIC obtained a computer print out from the Companies Branch regarding Colson which indicated that Colson was incorporated on June 23, 1998 and was, as of July 4, 2002, still registered. Further, that S. Coliviras was shown to be the sole Director, Treasurer, Secretary and President of Colson as of June 23, 1998 and remains so today.

(Exhibit 3, Tab 11)

Ms. Gordon further stated that the action by the Plaintiffs against the Defendants was instituted when Coliviras was sole Director and Officer of Colson and that when default judgment was entered against Colson, Coliviras remained as sole Director and Officer. Ms. Gordon also maintained that Coliviras has done nothing to satisfy or ensure satisfaction of the default judgment which remains unsatisfied.

Efstratios Steve Coliviras

Coliviras stated in his testimony that the "owner" of Colson was his brother, Petros (Peter) Coliviras. The original funds for the establishment of Colson came from Peter Coliviras who was a Director of Colson but resigned when Coliviras became the sole Director on June 23, 1998.

Coliviras also stated that he was appointed sole Director and Officer of Colson purely for the purpose of attending at auto auctions for Colson and purchasing vehicles at auctions. He contended that he would not have been able to attend auto auctions and obtain a line of credit with the auctioneers unless he was authorised to do so by Colson and was a Director of Colson. Beside attending auto auctions, the only other function Coliviras had in Colson was to occasionally help on Saturdays as salesperson. He at no time dealt with administration matters.

After Petros Coliviras resigned as Director of Colson Petros continued to work in administration for three to four hours a day. Petros Coliviras had authority to sign Colson's cheques while Coliviras only had authority to sign Colson cheques in order to purchase vehicles at auto auctions.

Colson ceased to operate in mid 2001 since which time Coliviras had been employed by another company owned by another brother of Coliviras. The landlord of this other company is a corporation of which Coliviras and two other brothers are Directors and Officers.

Coliviras concluded his testimony by stating that he knew of the civil court action instituted by the Plaintiffs and knew that the Defendants did not persist in their defence of that action due to "financial difficulties."

FACTS FOUND PROVEN:

The following are the facts found to have been proven.

1. Coliviras was originally registered as a salesperson under the Act on September 4, 1986.
2. Colson was incorporated on June 23, 1998, was registered as a dealer under the Act on November 11, 1998 and remains incorporated as at date.
3. Coliviras became the sole Director, Treasurer, Secretary and President of Colson on June 23, 1998 and has retained such appointments at all material times.
4. On August 20, 2001 a default judgment was granted in the Ontario Superior Court of Justice in favour of Plaintiffs Tyler, Diler and Swanton against Defendant Colson for payment of damages in the sum of \$29,425.00 plus \$11,843.27

expenses and loss of profits plus pre and post judgment interest as well as costs in an amount of \$5,000.00.

5. The aforementioned default judgment, to the knowledge of Coliviras, remains unpaid in part or whole.

THE LAW:

Section 5.(1) of the *Motor Vehicle Dealers Act* states:

5(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

(a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law, and with integrity and honesty; or

(c) the applicant is a corporation and

(i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of business, ...

(ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law, and with integrity and honesty; or

Section 6.(2) of the Act states:

(2) Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5 if the registrant were an applicant, or where the registrant is in breach of a term or condition of the registration.

APPLICATION OF LAW TO FACTS:

The issues for consideration by the Tribunal are:

1. Is the Registrar entitled to revoke the registration of Colson as, having regard to its financial position, Colson cannot reasonably be expected to be financially responsible in the conduct of business?
2. Is the Registrar entitled to revoke the registration of Coliviras as having regard to Coliviras' financial position, he cannot reasonably be expected to be financially responsible in the conduct of business?

3. Is the Registrar entitled to revoke the registration of Coliviras as the past conduct of Coliviras affords the Registrar reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty?

It should be noted that it is the Registrar's belief that is at issue and not the belief of this Tribunal. In the case of *Brenner 19 CRAT SCO Decisions and Orders (1971-1989)* page 95, Southey J. held that a Tribunal should only refuse to direct the Registrar to carry out his proposal if it thinks the Registrar was in error in concluding that the past conduct of an Applicant afforded reasonable grounds for belief that such Applicant would not carry on business in accordance with law and with integrity and honesty. Accordingly, to overrule the Registrar's decision the Tribunal must conclude that the Registrar was in error and that the conduct of the Applicant does not afford reasonable grounds for the Registrar's belief that the Applicant will in the future carry on business in contravention of the Act.

An analysis of the issues follows.

Issue 1

It is clear from the evidence that there is an unsatisfied judgment registered against Colson. When this judgment came to the notice of OMVIC, the latter addressed a letter to Colson and enquired what steps had been taken to satisfy this judgment. Despite this letter to Colson and a subsequent discussion between Coliviras, its sole Director and Officer, and the Deputy Registrar nothing was done by Colson to satisfy this judgment or make any arrangement to liquidate the judgment.

The failure of Colson to meet in part or in full or offer to liquidate the substantial judgment, rightfully gives the Registrar justification for concluding that Colson cannot reasonably be expected to be financially responsible in the conduct of business. The Registrar would be derelict in his duty of protecting consumers if he were to ignore this type of conduct which resulted in a group of consumers (the "Plaintiffs") suffering serious losses in their dealings with a registered motor vehicle dealer. The conduct of Colson indicates an inability or unwillingness to meet its financial obligations and the Registrar is consequently justified in proposing that Colson's registration be revoked.

Issues 2 and 3

These issues relate to Coliviras in his personal capacity who is a registered salesperson under the Act and is also the sole Director and Officer of Colson.

The Tribunal finds that the various offices held by Coliviras in Colson indicate he was the controlling mind of Colson. The Tribunal finds that Coliviras had the authority to bind the credit of Colson by signing cheques for purchases of vehicles at auctions. No evidence was placed before the Tribunal that Peter Coliviras was the controlling mind of Colson. Coliviras was from the inception of Colson its sole Director and Officer. This in and of itself indicates that he was Colson's controlling mind from the inception of

Colson. Coliviras in his capacity as sole Director of Colson, and by virtue of that office, was authorized to arrange and direct the affairs of Colson. By virtue of his appointment as sole Director of Colson he was the sole individual with actual power and authority to control the actions and affairs of Colson. Vested with such power and authority, Coliviras had the obligation and duty to ensure that Colson act in a financially responsible manner and meet its obligations, both financial and otherwise, to consumers. In this regard Coliviras has failed to make any efforts to have the Plaintiffs recompensed for their losses and to ensure that Colson acted in a financially responsible manner and this past conduct of Coliviras affords reasonable grounds for belief that he will in the future not carry on business in accordance with law and with integrity and honesty. Coliviras abrogated his responsibility as sole Director of Colson. He showed a personal lack of integrity when, acting as a sole Director and the controlling mind of Colson, he permitted its closure when he was advised by his lawyer that there was no personal liability on the judgment against Colson. (Exhibit 6)

The Tribunal finds the Registrar not to be in error in his belief that the past conduct of Coliviras, Colson's sole Director and Officer, affords reasonable grounds for belief that Coliviras will not carry on business in accordance with law and both integrity and honesty.

DECISION:

Therefore, by virtue of the authority vested in it under section 7(4) of the *Motor Vehicle Dealers Act*, the Licence Appeal Tribunal directs the Registrar to carry out his proposal to revoke the registrations of 302406 Ontario Ltd. o/a Colson Motor Cars ("Colson"), as a motor vehicle dealer and Efstratios (Steve) Coliviras ("Coliviras") as a motor vehicle salesperson.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice Chair

Released: July 26, 2002

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
FRANCIS CHEE LIEW

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: March 8, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

FRANCIS CHEE LIEW

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Francis Chee Liew, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: July 24, 2002

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
North York, ON, M2P 2E9

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON, M4V 1K6

FROM: Francis Chee Liew
9015 Leslie Street, Apt. 619
Richmond Hill, ON L4B 4J8

In accordance with Section 4.1 of the *Statutory Powers Procedure Act*, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereinafter the "Act") the parties to the proceeding, Francis Chee Liew (hereinafter referred to as "the Applicant"), and the Registrar, *Motor Vehicle Dealers Act* (hereinafter the "Registrar") waive the requirement of a hearing and hereby consent to an Order of the Licence Appeal Tribunal (hereinafter the "Consent Order") based on the following terms and conditions to their registrations as a motor vehicle salesperson:

- 1) The Applicant agrees that if he is criminally charged or convicted in the future, he will immediately notify his employer in writing of the charges or convictions against him and provide a copy of the notification signed by his employer to the Registrar, giving the particulars of the charges or convictions.
- 2) The Applicant agrees that if he is convicted under the Criminal Code or convicted of any industry specific offences under any Statute in the future, he will be automatically revoked.
- 3) The Applicant agrees to provide full and accurate disclosure on any applications, documents, statements or other form of communication/information provided to the Registrar or his authorized representatives regardless of previous disclosure.
- 4) The Applicant acknowledges that the Registrar is relying upon the accuracy of the disclosure provided in entering into these terms and conditions.
- 5) The Applicant agrees that he will provide written notification from his employer forthwith, stating that the Applicant has disclosed to them the circumstances of his pending charges.
- 6) The Applicant agrees that his explanation of the circumstances of his pending charges, are substantially as set out in the disclosure provided to the Registrar.
- 9) The Applicant agrees not to transfer his registration as a motor vehicle Salesperson to another dealer without having first obtained the prior written consent of the Registrar.
- 11) The Applicant agrees to immediately enrol in the Ontario Motor Vehicle Industry Council Certification Course and to be responsible for all fees in relation to enrolment. The Applicant further acknowledges that enrolment in the course entitles him to a sixty (60) day conditional registration period that allows for his successful completion of the course (including passing the exam).
- 12) The Applicant agrees not to be involved in the process of buying or selling motor vehicles without the benefit of registration.

- 13) The Applicant acknowledges and understands that his registration will not be used to buy or sell motor vehicles where the Applicant knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
- 14) The Applicant agrees that his registration will not prevent the Registrar from taking administrative action, including a proposal to revoke his registration, arising from matters that may have occurred or may occur in the future related to his financial circumstances and honesty and integrity.
- 14) The Applicant acknowledges that his registration as a motor vehicle Salesperson will not prevent the Registrar from taking legal action, including a Provincial Offences prosecution, arising from matters that may have occurred or that may occur in the future.
- 15) The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
- 16) The Applicant will provide a copy of this order to his employer forthwith.
- 17) The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
- 18) The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
- 19) The Applicant acknowledges that he has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____, this _____ day of _____ 2002.

(Signature) Francis Chee Liew

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Date:

Carl Compton
Registrar
Motor Vehicle Dealers Act

PREHEARING

MARIAN AND IRENE KRZYK

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DAVID HUNT, VICE-CHAIR
SIMON DANN, MEMBER

APPEARANCES: by teleconference MARIAN AND IRENE KRZYK, representing themselves
NETANUS RUTHERFORD, Counsel, representing the Ontario New Home Warranty Program
JOHN VANBROEKHOVEN, Agent, representing JVB Construction Ltd., the Added Party

DATE OF
PREHEARING: July 8, 2002 Toronto

ORDER

Following the attendances by teleconference on July 8, 2002 at a prehearing before this Tribunal of Marian and Irene Krzyk, appearing on their own behalf (the “Applicants”), and Netanus Rutherford, Counsel on behalf of the Ontario New Home Warranty Program (the “Program”) and John Vanbroekhoven, Agent on behalf of JVB Construction Ltd. (the “Added Party”);

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Monday August 12, 2002 at the Middlesex County Building (Old Courthouse) North Room, 399 Ridout Street, London, Ontario. and to continue, if necessary, on August 13, 2002 at the aforesaid address;

- 1) The Parties to the hearing are the Applicant, the Program and the Added Party;
- 2) There were no facts or evidence agreed upon by the parties, other than the documents referenced in the ONHWP's decision letter of April 4, 2002, which documents had been provided by the Applicants, nor was there settlement of any issue or issues;

- 3) The Applicants informed the Tribunal that they had not consulted with nor had they retained a legal advisor or expert in connection with the hearing due to commence on August 12, 2002.
- 4) The Tribunal informed the Applicant that all parties are required by the Rules of Practice of the Tribunal to mail disclosures of documents and things in terms of Rule 6.3 when a party intends to rely on or refer to in the finding of an expert witness at the hearing. The Tribunal informed the Applicants that when they or any other party intends to rely on the evidence of an expert witness at the hearing, the party shall provide to every other party the information set forth under Rule 6.4 (a), (b), (c) and (d) within at least 30 days before the hearing on August 12, 2002.
- 5) More particularly, the Tribunal advised the Applicants that copies of contracts, paperwork, or other evidence not yet provided to the other parties must be provided at least 10 days before the hearing.
- 6) Expert evidence concerning the value of the building at the end of the contract and other such opinions must be provided in a report by the expert or experts together with the qualification of the expert or expenses at least 30 days prior to the hearing dated August 12, 2002.

LICENCE APPEAL TRIBUNAL

David Hunt, Vice-Chair
Presiding

Simon Dann, Member

Released: July 10, 2002

PREHEARING

TONY AND ROSE DURANTE

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DAVID HUNT, Vice-Chair, presiding
VICTOR DREVNIG, Vice-Chair

APPEARANCES:

PATRICK DI MONTE, Counsel, representing the Applicants
MARCUS KNAPP, Counsel, representing the Ontario New Home
Warranty Program
LAWRENCE F. WALLACH, Counsel, representing Rutherford
Generation Investments Inc., the Added Party

DATE OF

PREHEARING: July 22, 2002

Toronto

ORDER

Following the attendances on July 22, 2002 at a prehearing before this Tribunal of Patrick Di Monte, Counsel on behalf of Tony and Rose Durante (the "Applicants"), and Marcus Knapp, Counsel on behalf of the Ontario New Home Warranty Program (the "Program") and Lawrence F. Wallach, Counsel on behalf of Rutherford Generation Investments Inc. (the "Added Party") and Tony Durante, attending on his own behalf and that of his wife, Rose;

The Tribunal makes the following Order respecting the hearing in the matter of Tony and Rose Durante, scheduled to commence at 9:30 a.m. on Monday, September 9, 2002 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto, Ontario and to continue, if necessary, on September 10, 11 and 12, 2002 at the aforesaid address;

- 1) The Parties to the hearing are the Applicant, the Program and the Added Party;

- 2) The Parties agree to provide any and all documents to each other and to the Tribunal within 2 weeks of the prehearing date;
- 3) The Parties agree architects or appraisers will be called as witnesses and brief outlines of their reports and curriculum vitae will be provided to the other parties as soon as they are available;
- 4) The Counsel for the Applicant is to provide the Program and the Added Party with the name of the engineer who measured the home.

LICENCE APPEAL TRIBUNAL

David Hunt, Vice-Chair
Presiding

Victor Drevnig, Vice-Chair

Released: July 26, 2002

PREHEARING

MARIA DURANTE

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DAVID HUNT, Vice-Chair, presiding
VICTOR DREVNIG, Vice-Chair

APPEARANCES:

PATRICK DI MONTE, Counsel, representing the Applicant
MARCUS KNAPP, Counsel, representing the Ontario New Home
Warranty Program
LAWRENCE F. WALLACH, Counsel, representing Rutherford
Generation Investments Inc., the Added Party

DATE OF

PREHEARING: July 22, 2002

Toronto

ORDER

Following the attendances on July 22, 2002 at a prehearing before this Tribunal of Patrick Di Monte, Counsel on behalf of Maria Durante (the "Applicant"), and Marcus Knapp, Counsel on behalf of the Ontario New Home Warranty Program (the "Program") and Lawrence F. Wallach, Counsel on behalf of Rutherford Generation Investments Inc. (the "Added Party") and Tony Durante, attending in the capacity of Agent for his mother, Maria;

The Tribunal makes the following Order respecting the hearing in the matter of Maria Durante, scheduled to commence at 9:30 a.m. on Monday, August 19, 2002 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto, Ontario and to continue, if necessary, on August 20 and 21, 2002;

- 1) The Parties to the hearing are the Applicant, the Program and the Added Party;
- 2) The Parties agree to provide any and all documents to each other and to the Tribunal within 2 weeks of the prehearing date;

- 3) The Parties agree architects or appraisers will be called as witnesses and brief outlines of their reports and curriculum vitae will be provided to the other parties as soon as they are available;

LICENCE APPEAL TRIBUNAL

David Hunt, Vice-Chair
Presiding

Victor Drevnig, Vice-Chair

Released: July 26, 2002

PREHEARING

STEWART GRAHAM AND TOINI JARVINEN

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JEAN-MARC LEFEBVRE, Q.C., VICE-CHAIR

APPEARANCES:

TOINI JARVINEN, Applicant, attending the hearing in person on
her own behalf and on behalf of Stewart Graham
NETANUS RUTHERFORD, Counsel for the Ontario New Home
Warranty Program by telephone

DATE OF

PREHEARING: July 18, 2002

Ottawa

ORDER

At a prehearing before this Tribunal held on July 18, 2002, Toini Jarvinen, appearing on her own behalf and on behalf of Stewart Graham (the "Applicants"), no one appearing at the hearing room on behalf of the Ontario New Home Warranty Program (the "Program"), this Tribunal contacted the Program by telephone and Netanus Rutherford, Counsel on behalf of the Program, indicated that the Program was seeking an adjournment of the prehearing.

Counsel for the Program advised that it was seeking an adjournment of the prehearing on the basis that the Applicants and the Program were actively pursuing efforts to resolve the issues being the subject matter of the appeal, and on the further basis that work had been undertaken on the premises in question and was ongoing which was likely to resolve some, if not all, of the issues,

She drew attention to the following statement in correspondence dated July 10, 2002 received from the Applicants (signed by Toini Jarvinen), addressed to the Program:

“Clearly the pre-hearing could not go ahead before September 23, 2002 if necessary, and then we could proceed to the Hearing on November 13-15, 2002 as proposed by you, if it is necessary.”

She directed the Tribunal's attention to the remainder of the letter, which outlines what is essentially a mutual arrangement whereby the Program would perform work at the Applicants' premises and would thereafter conduct an “Air and Settled Dust Sampling” report. Counsel for the Program and Ms. Jarvinen confirmed that, in fact, the work was presently proceeding as per agreement, although Ms. Jarvinen was seeking conclusion of the work by Friday July 19, 2002 while Counsel for the Program indicated that best efforts would be undertaken to conclude the work by Monday July 22, 2002.

After canvassing that issue, this Tribunal suggested that, barring any unforeseen surprises arising out of the work currently being undertaken, the Program ought to exercise its best efforts to have the work completed on July 22, 2002 and at the latest by July 25, 2002, and Counsel for the Program advised that she would convey this request to the persons involved.

Counsel for the Program and Ms. Jarvinen on behalf of the Applicant were both adamant that it was impossible to deal with procedural matters at this time. The result of the work currently being undertaken and the report which would flow therefrom were likely to address most, if not all, of the issues raised by the appeal. It would be premature, at this time, to attempt to determine the parties and other persons necessary at the hearing or what the scope of their participation thereat would be, as the facts and evidence currently available were likely to evolve, depending upon the contents of the report.

The Tribunal alluded to Rule 15 of the Licence Appeal Tribunal Rules of Practice under the heading “Practice Directions” dealing with the need for efficiency of the Tribunal, to the effect that, an adjournment would be granted only under limited circumstances and that, brief adjournments only, within a time frame of 30-60 days from the dates previously set, would be considered.

Both the Appellant and the Respondent provided compelling reasons in support of their request for adjournment of the prehearing and of the hearing and for the dates which they mutually agreed upon, citing the work in progress, the need for time to prepare and digest the pending report and their own counsels' availability. Since the Appellant is satisfied with the agreed upon hearing date, the Tribunal orders the prehearing to be held on September 23, 2002 and the hearing to be held on November 13-15, 2002, with the proviso that the parties shall advise the Tribunal, at the earliest available date, if they are able to completely resolve the matters under appeal and the appeal is withdrawn.

Counsel for the Program requested that the adjourned prehearing be conducted by teleconference. Ms. Jarvinen professed a preference for a written prehearing, claiming

she was intimidated by the prospect of speaking to a box; however, it is obvious to this Tribunal that a written prehearing in this case would be unduly cumbersome and unlikely to produce a satisfactory result. The Tribunal was able to ascertain that, Toini Jarvinen, despite her reluctance to proceed by way of teleconference, managed very adequately in what turned out to be a teleconference hearing, as this prehearing was conducted by way of speaker phone, albeit at the hearing chambers. It was obvious that Ms. Jarvinen was not intimidated by the teleconference method and that the subject matters to be canvassed at the prehearing could be dealt with very adequately by teleconference.

The Tribunal makes the following Orders:

1. This prehearing is adjourned to September 23, 2002 at 1:30 p.m.
2. The September 23, 2002 prehearing shall be by teleconference.
3. The hearing shall be held on November 13, 2002 with November 14, 2002 and November 15, 2002 reserved for continuation thereof, if and as necessary.

LICENCE APPEAL TRIBUNAL

Jean-Marc Lefebvre, Q.C., Vice-Chair

Released: July 23, 2002

PREHEARING

JOSEPH COUSE AND DIANA PLUMPTON

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DAVID HUNT, VICE-CHAIR
SIMON DANN, MEMBER
FRANK WOLMAN, MEMBER

APPEARANCES: JOSEPH COUSE, representing himself and Diana Plumpton
CAROL STREET, Counsel, representing the Ontario New Home
Warranty Program
MICHAEL COHEN, Counsel, representing Town Wood Homes
Limited, the Added Party

DATE OF
PREHEARING: July 8, 2002 Toronto

ORDER

Following the attendances on July 8, 2002 at a prehearing before this Tribunal of Joseph Couse, appearing on his own behalf and on behalf of Diana Plumbton, (the "Applicants"), and Carol Street, Counsel for the Ontario New Home Warranty Program (the "Program") and Michael Cohen, Counsel for Town Wood Homes Limited (the "Added Party");

The Tribunal makes the following Order respecting the hearing scheduled to be held at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario commencing at 9:30 a.m. on Wednesday, Thursday, and Friday, the 21st, 22nd, and 23rd days of August 2002;

The Tribunal makes the following order respecting the hearing scheduled to commence at 9:30 a.m. on Wednesday, August 21, 2002 at the Tribunal's Chambers at 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario and to continue if necessary on August 22 and August 23, 2002 at the aforesaid address:

- 2) The Parties to the Proceeding are the Applicants, the Program and the Added Party;
- 3) There were no facts or evidence agreed upon by the parties, nor was there settlement of any issue or issues;
- 4) The Tribunal advised the parties that they are required by the Rules of Practice of the Tribunal to make disclosure of documents and things in terms of Rule 6.3 and to make disclosure under Rule 6.4 where a party intends to rely on or refer to the evidence of an expert witness at the hearing. The Tribunal informed the Applicant that where he or any other party intends to rely on the evidence of an expert witness at the hearing that party shall provide to every other party the information set forth under Rule 6.4 (a)(b)(c) and (d) within at least 30 days before the hearing on August 21, 22, and 23, 2002. The Applicant provided a copy of expert witness material to the Program and to the Added Party.
- 5) The Applicant specified that the three issues at the hearing and the three issues listed in the Notice of Appeal and the Tribunal orders that the three issues at the Hearing shall be:
 - a. the set back between the front door and the box windows;
 - b. the size of the living room; and
 - c. the height of the window seats.

LICENCE APPEAL TRIBUNAL

David Hunt, Vice-Chair
Presiding

Simon Dann, Member

Frank Wolman, Member

Released: July 11, 2002

STIK-MAN LOGISTICS INC.

Appeal under section 50.(1) of the *Highway Traffic Act* R.S.O. 1990, Chapter H.8 as amended (the “Act”) from the Suspension and Seizure Order of the Deputy Registrar pursuant to section 47(1) of the Act.

TO APPEAL A SUSPENSION AND SEIZURE ORDER ISSUED BY THE DEPUTY REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: TERENCE WARDROP, Vice-Chair, presiding
 SIMON DANN, Member
 CHARLES SANDIFORD, Member

APPEARANCES: KELLIE J. DALLING
Agent for the Applicant

PATRICK MOORE
Counsel for the Respondent

DATE OF HEARING: July 2, 2002 Toronto

REASONS FOR DECISION

An oral hearing was held appeal pursuant to section 50.(1) of the *Highway* on July 2, 2002, at Toronto, Ontario, to consider the Applicant's *Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO MODIFY the Suspension and Seizure Order imposed by the Deputy Registrar pursuant to section 47(1) of the HTA.

BACKGROUND:

This is an appeal under section 50.(1) of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Deputy Registrar of Motor Vehicles (the "Registrar") made a decision to issue a suspension and seizure order under section 47(1) of the Act.

The Applicant filed an appeal of this suspension and seizure order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 filing fee.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

EXHIBITS:

Exhibit #1 - Suspension and Seizure Order Dated May 22, 2002, issued by the Deputy Registrar of Motor Vehicles.

Exhibit #2 - Notice of Appeal Form received at the Tribunal on May 30, 2002, filed by the Applicant.

Exhibit #3 - The Respondent's Appeal Book

Exhibit #4 - Letter of Kellie Dalling dated June 17, 2002, plus documents

Exhibit #5 - Summary of Invoices, "Just Trucks", July 2, 2002

Exhibit #6 - Summary of Invoices, "Transit Trailers", July 2, 2002

Exhibit #5 - Summary of Invoices, "Beverley Tires", July 2, 2002

FACTS:

The Deputy Registrar of Motor Vehicles grounds for Suspension and Seizure are set out in the Suspension and Seizure Order dated May 22, 2002 based on:

- A) the safety record of Stik-Man Logistics Inc.
- B) the Deputy Registrar's concern for highway safety resulting from Stik-Man Logistics' record of convictions, accidents, vehicle detentions and vehicle out of service rates.

The Registrar's witness was John Miller, whose evidence is as follows:

Mr. Miller is currently a carrier safety rating administrator and has worked for approximately 22 years with the Ministry of Transportation in various positions including, transportation enforcement officer, National Safety Code Auditor, CVOR analyst.

The Commercial Vehicle Operator Summary and Record for Stik-Man Logistics Inc. (Exhibit 3, Tab 5, pg8), shows an unsatisfactory overall violation rate of 152.1% (versus a maximum threshold rate of 100.0%) resulting from 3 accidents, 5 convictions and 9 inspections, the latter having led to 5 out of service inspection results. This record was incurred in the period December 4, 2000 through December 30, 2001 (CVOR Abstract, Exhibit 3, Tab 6, pg 10).

Initially, the MOT's Safety and Regulation Division issued a warning letter (dated August 27, 2001) as a first stage intervention when the safety record of Stik-Man Logistic reached an unacceptable performance level (Exhibit 3, Tab 14, pages 26-27 describes how carrier safety performance is measured).

This was followed by the Notice of Suspension and Seizure letter of January 31, 2002.

Attachments with the letter were:

- (a) Analysis (of the safety record of Stik-Man Logistics Inc.) January 2002
- (b) Commercial Vehicle Operator's Record (Exhibit 3, Tabs 3,5,6)

Mr. Miller confirmed that the intervention process moved quickly, omitting the facility audit stage, because of the short period in which accumulated violation points went from the warning letter stage to the sanction stage. He testified that the accidents were of concern as they were the type that placed the skill of the drivers into question.

A Show Cause meeting was held with the President of Stik-Man Logistics, Kelly Dalling, and Monique Philipp, the company's Safety and Compliance Manager. The purpose was to provide the Applicant with an opportunity to present information that could influence the Suspension and Seizure decision.

Notes from the meeting were taken by Mr. Miller (Exhibit 3, Tab 12) who testified the Applicant was fully cooperative at the meeting.

Based on the information provided at the Show Cause meeting, the Deputy Registrar reduced the Notice of Suspension and Seizure from 30 days to 10 days.

Subsequent to the Show Cause meeting, the Applicant sent by fax, a document (Exhibit 3, Tab 13) outlining the Stik-Man Logistics plan to improve their CVOR rating. This document was faxed to Mr. Miller by Kellie Dalling with a request for his review and comments.

Mr. Miller confirmed that he had problems with the content because it did not set goals, there was no maintenance schedule, there were no details on accident prevention or who would do training. He also testified that he did not send any comments by reply.

The Applicant's evidence did not include any cross-examination questions for Mr. Miller but was comprised of the following testimony points:

- despite having been in the industry for about six (6) years as a dispatch employee, she (Kellie Dalling) was new to the management side of the business and continually learning about the rules and regulations regarding highway safety
- the company has spent substantial amounts of money on vehicle maintenance and is trying to keep its power unit fleet up-to-date
- after receiving the Warning Letter of August 2001, the company hired a Safety and Compliance Manager to develop and implement appropriate training and monitoring practices
- the company had never had a visit from MTO personnel to its facility
- following the Show Cause meeting the Applicant submitted a plan to improve their CVOR rating and asked Mr. Miller to provide his comments to ensure the plan was appropriate
- the Applicant never received any comments in response to their plan of action submission
- it was the Applicant's impression of the Show Cause meeting, that if the company proceeded to take the appropriate corrective actions there would be a follow-up meeting

In response to a question about the Ontario Carrier Safety Rating and Commercial Vehicle Operator's Registration System Public Guideline (CVOR Guideline), the Applicant questioned the fact that it is not referenced on the CVOR application form and while publicly available it was only provided at the intervention stage.

ISSUES:

The only issue in this appeal is whether the Tribunal should confirm, modify or set aside the decision of the Registrar to issue a suspension order for 10 days.

LAW:

47(1) Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) CVOR certificate, on the grounds of,
- (d) misconduct for which the holder is responsible directly or indirectly, related to the operation or driving of a motor vehicle;
- (e) conviction of the holder for an offence referred to in subsection 210(1) or (2); or
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not

- operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d) , (e) or (f).

- (10) The Registrar may, at any time for misconduct or contravention of this Act, the Truck Transportation Act, the Public Vehicles Act or of any regulation thereunder by an owner or lessee of one or more motor vehicles or trailers for which permits have been issued by a jurisdiction or jurisdictions other than the Province of Ontario, order that the permit and number plates issued for the vehicle or vehicles be seized and any police officer or any officer appointed for carrying out this Act or the enforcement of the Public Vehicles Act or the Truck Transportation Act may seize the permit and number plates and deliver them to the Ministry which shall return them to the authority that issued them.

According to Section 22(e) HTA:

- 22(e) the Lieutenant Governor in Council may make regulations, governing the suspension or cancellation of CVOR certificates under subsection 47(1) or the imposition of a limitation on the fleet size operated under a CVOR certificate under subsection 47(2).

The maintenance requirements under the HTA are found, inter alia, at Regulation 575 (commercial motor vehicle inspections); Regulation 577 (covering of loads); Regulation 587 (re brake push rod travel); Regulation 597 (gross vehicle weights); Regulation 625 (tire standards and specifications); Regulation 762/91 (safety inspections); Regulation 614 (security of loads).

The appeal comes to this Tribunal by virtue of s. 50(1) of the HTA which provides:

- 50(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.
- (2) The [Tribunal] may confirm, modify or set aside the decision of the Minister or Registrar.

Regulation 574, also addresses appeals to this Tribunal;

- 3(3) Upon receipt of a notice of appeal under subsection (1) the [Tribunal] shall forthwith notify the Minister or Registrar, as the case may be, and the person notified shall forthwith provide the [Tribunal] with all the relevant documents and other material in his or her possession.
- 3(6) At any hearing under this section, the person making the appeal has the right to attend and make representations and, subject to subsection (7), to adduce evidence respecting the appeal either personally or through counsel.
- 3(7) At any hearing under this section, the [Tribunal] shall hear only such evidence as was submitted to the Minister or the Registrar, as the case may be, respecting the matter in dispute."

CASE LAW SUBMISSIONS:

The Respondent submitted two case law references, citing sanction confirmations on the basis of the achieved violation rate over a short period of time:

(1) Court of Appeal for Ontario in the matter of the Highway Traffic Act, R.S.O. 1990, c.H.8 as amended, RE: Muscillo Transport Limited, Bolton Equipment Sales & Leasing Ltd., Frank S. Coyle Limited and Carmar Enterprises Inc. (Appellants) and The Registrar of Motor Vehicles (Respondent), Date: 19980408, Docket: C27924,

Page 2, para [4] The issue is not simply one of sanction, but rather one of the safety of the public and the appellant's dedication in that regard.

(2) Decision to Confirm Sanction of the Licence Appeal Tribunal RE: 1226795 and 1383546 Ontario Limited, o/a Potatoland – Carr/00/22

Page 8, The Applicant suggests that a period of probation, wherein Potatoland's ability to comply with safety requirements and paperwork could be assessed is the more appropriate penalty

APPLICATION OF FACTS TO THE LAW:

The Tribunal heard how Ontario's Carrier Safety Rating and CVOR System operates, and relevant references to the Commercial Vehicle Safety Alliance and the National Safety Code, stating that the objective of the Ministry of Transportation is to monitor carriers to ensure that they comply with these standards and the provisions of the Act and Regulations.

Mr. Miller, the Carrier Safety Rating Administrator for the Ministry of Transportation reviewed the analysis used to determine a carrier's safety rating and specifically referred to the time period in which the Applicant accumulated an unsatisfactory safety performance rating.

This time frame was regarded as too short to enable the Ministry to conduct a facility audit as part of its analysis process and therefore it proceeded directly to the sanction notice and Show Cause meeting stage.

The evidence showed that the Applicant was cooperative in the Show Cause meeting and followed up with an action plan and a commitment to address the Ministry's safety concerns.

Mr. Miller testified that he did not reply to the Applicant's Action Plan submission.

The result of the Show Cause meeting was that in consideration of the submissions made by the Applicant, the Deputy Registrar reduced the originally proposed 30 day

suspension notice of January 31, 2002 to 10 days and issued a Suspension and Seizure Order to that effect on May 22, 2002.

The Tribunal also learned that the CVOR application form makes no reference to the CVOR Guideline document which states, in its introduction, that "This document was published to help you gain an understanding of the process normally applied when the Ministry of Transportation assigns safety ratings or applies interventions to bus and truck operators" and that "The document also contains many useful examples and appendices to further assist the reader's understanding of the program."

The Applicant's basis of appeal, as presented by Ms. Kellie Dalling, the company President, is that in addition to employing a Safety & Compliance Manager, the company has been fully cooperative with the Ministry in responding to its safety performance concerns.

Ms. Dalling did not dispute the events listed in the CVOR abstract but did submit that...

- some of the offending drivers were no longer with the company
- she is trying to maintain a modern fleet
- the company has spent significant monies on maintenance.

The Applicant testified that as of February 25, 2002, it has done everything that has been requested. The company believed that following the Show Cause meeting, it would receive comments from Mr. Miller regarding the submitted action plan.

The Applicant testified that she was new to this side of the operating business and that she was continually learning but was also taking steps to improve the safety procedures and practices of the company.

In summary, it is clear that the methods used by the Ministry and the Deputy Registrar for determining and addressing a carrier's safety performance, as described in the CVOR Guideline are clear and consistent when applied as prescribed.

However, the Tribunal finds itself concerned with several facts. These are:

- I. that the Ministry failed to conduct a facility audit to further investigate the nature of the Applicant's operations and thereby obtain more substantial insight to either support or modify its intervention action (despite the fact that the Registrar may intervene earlier if action is considered appropriate [ref Exhibit 4, Tab 14, page 70, paragraph describing 'What may happen to a carrier with an unacceptable violation rate?']);
- II. a review of the Applicant's CVOR abstract (Exhibit 3, Tab 6, pgs 12-17) shows an improvement in the company's safety performance record in the post-warning letter period;

- III. Mr. Miller failed to respond to the Applicant's submission of a proposed action plan subsequent to the Show Cause meeting;
- IV. the Applicant submitted sufficient information at the Show Cause meeting to persuade the Deputy Registrar to reduce the sanction period from 30 days to 10 days;
- V. that the CVOR application forms make no reference to the availability of the CVOR Guideline, its purpose, its importance, and the specifically described performance responsibilities of an operator.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.(2) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal modifies the decision of the Registrar of Motor Vehicles to issue a suspension and seizure order for 5 days.

LICENCE APPEAL TRIBUNAL

Terence Wardrop, Vice-Chair,
Presiding

Simon Dann, Member

Charles Sandiford, Member

RELEASED: July 16, 2002

1130-MED-SEIZ

Appeal under Section 50(1) of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 47(1) of that Act.

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ROSS C. BENNETT, M.D., Presiding Member

APPEARANCES: KYLE BIEL, Representative for the Registrar of Motor Vehicles
Applicant, unrepresented

DATE OF HEARING: July 4, 2002 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

EXHIBIT #1 Suspension of Driver's Licence dated January 3, 2002

EXHIBIT #2 Notice of Appeal by the Applicant dated May 28, 2002

EXHIBIT #3 Letter from Physician #1, dated June 4, 2002 introduced by the Applicant

EXHIBIT #4 Letter from Physician #2, dated May 30, 2002 introduced by the Applicant

EXHIBIT #5 Summary of the evidence prepared by the Respondent

PRELIMINARY MATTERS:

The husband of the Applicant requested permission to remain with his wife. Later in the hearing he assisted by presenting evidence.

FACTS:

The Applicant is a 31 year old who had her licence suspended on January 3, 2002 by the Deputy Registrar of Motor Vehicles after receiving a Medical Condition Report, dated September 13, 2001, from the Applicant's family physician, Physician #2. The report simply stated "possible new seizure activity".

The Ministry requested an up-to-date detailed assessment from a neurologist and received one from Physician #1 dated December 13, 2001. The report stated that the Applicant had been diagnosed as having "pseudo seizures" since February 1, 2001 and had been investigated by another neurologist, Physician #3, an epileptologist, Physician #4 and a psychiatrist, Physician #5.

These episodes usually onset with a feeling of nausea, followed by a short spell of unconsciousness. Physician #5 discovered tapping the knee reflex could trigger them. When she regains consciousness she is alert, but feels very tired. She stated that she has experienced approximately 50 of these "pseudo seizures", the last one in November, 2001.

Her physical and neurological examinations were completely normal, including a CT scan, a MR scan and an EEG. Physician #5 diagnosed a Major Depressive Disorder with Panic Attacks and prescribed Paxil 40 mg. daily and Clonazepam, as needed for the panic attacks.

The Applicant attended individual counselling at the Community Health Services and Department of Psychology and continues to see Physician #5 every three weeks.

Physician #2, the Applicant's family physician and Physician #5, her psychiatrist have stated in letters that there is no medical or psychiatric contraindication for her not to drive.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffer from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (f) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

Under the *Highway Traffic Act*, Section 47(1) the Deputy Registrar of Motor Vehicles was obligated to suspend the Applicant's driver's licence when the Medical Condition report was received in September 2001, indicating "possible new seizure activity". Unfortunately the actual suspension did not occur until January 2002, two months after the Applicant's last seizure.

The Applicant has remained seizure free since November 2001 and states she has never felt better. She continues to be followed by her family doctor and her psychiatrist every month and is taking Paxil daily.

Not one of her five attending physicians, four of whom were neurologists and one also a psychiatrist, diagnosed these as being epileptic-type seizures and all of her neurological and physical tests were reported as normal.

Her family physician and her psychiatrist-neurologist, the two who know her best, do not find any contraindications for her to drive. These "seizures" are very unusual and appear to be a result of the Applicant's depressive disorder caused by events that occurred many years ago. One of the events was allegedly sexual abuse by a brother when she was 3 years old.

The anti depressant medication and psychotherapy have been effective in treating the Panic Disorder and Major Depressive Disorder and as a result stopped the "so called pseudoseizures". The Applicant's psychiatrist states in his report that she has no psychotic symptoms, good insight into her psychological difficulties and reasonable judgement.

The Medical Advisory Committee appear to be treating the Applicant as an epileptic and are following the accepted criteria for someone with that condition, in considering reinstatement of her driver's licence. The fact that the Applicant had a valid licence all the time she was having these "pseudoseizures" and did not have any problems, is completely ignored.

The Tribunal did not find enough evidence to support the Ministry's decision under Section 47(1) of the *Highway Traffic Act* to further suspend the Applicant's licence.

DECISION:

Upon the application by the Applicant to appeal the decision dated January 13, 2002 of the Registrar of Motor Vehicles to suspend her driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be set aside.

LICENCE APPEAL TRIBUNAL

Ross C. Bennett M.D., Presiding Member

RELEASED: July 11, 2002

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding Member

APPEARANCES: KYLE BIEL,
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF HEARING: July 3, 2002 *by teleconference*

DECISION

A hearing was held on July 3, 2002, at Toronto, Ontario, by way of an electronic hearing to consider the Applicant's appeal pursuant to Section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: July 4, 2002

1134-ADLS-NOMC

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF
HEARING: July 3, 2002

DECISION
RELEASED: July 4, 2002 *by teleconference*

REASONS FOR DECISION

A hearing was held on July 3, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on July 4, 2002, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an electronic hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated June 5, 2002, and was received by the Tribunal on June 5, 2002, together with the prescribed fee of \$100.00, paid by cheque.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

The Tribunal asked the Applicant if there was a reason page two of the Notice of Appeal had not been completed by his physician, as required. The Applicant explained that he obtained a note from his physician but did not ask him to complete the form.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Suspension Reminder Notice – dated May 28, 2002
- b) Exhibit # 2 Notice of Appeal Form – received June 5, 2002

By the Respondent:

- a) Exhibit # 3 Ministry of Transportation submissions – received June 27, 2002

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is:

Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

- 50.1(1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
 - (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
 - (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

- 15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
 - (a) the name, telephone number and address, with the postal code, of the medical practitioner;
 - (b) the name, date of birth and address of the person who is the subject of the report;
 - (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.

- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

The Applicant's Driver's Licence was suspended "April 08/ 02" as per Notice of Appeal (Exhibit # 2)

Applicant's Evidence

Page two of the Notice of Appeal is blank.

The Applicant introduced a handwritten note from a physician's prescription pad, under the heading, Physician #1.

The note, apparently signed by Physician #1 and dated "5/6/02" states: "This is to certify that the Applicant is (*illegible* ...) shortness of breath suggestive of asthma. He has a family history of asthma and is being assessed. He is being treated with inhaled bronchodilators."

At the hearing, the Applicant testified that the officer told him to "keep going, keep going", but after three attempts the Applicant was unable to provide a satisfactory breath sample.

The Applicant affirmed that he was having chest pains and shortness of breath and that he told the officer that he had a "problem", but did not request medical assistance.

The Applicant stated that he had been having chest pains and shortness of breath for "6 or 7 months" but did not know he had a problem.

In cross-examination the Applicant re-iterated his previous comment that he had seen his physician "...15 to 20 (days)..." after being asked to provide a breath sample.

The Respondent's Representative pointed out that the note from Physician #1 was dated June 06. The Applicant clarified that the June 06 consultation was a follow up visit, to discuss the results of the lab tests ordered by Physician #1. The Applicant stated that he "did not know" why Physician #1 made no mention of the test results in his report.

When asked if his physician had ever proffered a diagnosis "...asthma, bronchitis, allergies...", the Applicant replied "...No, sir ...he just sent me to the lab ...I never told him that I had that problem before ...I just lived with it..."

Respondent's Evidence

The Respondent provided the following Documents:

1. Certified Copy of Notice to the Registrar, sealed June 10, 2002
2. Certified Copy of Driving Record of the Applicant, sealed June 10, 2002

The Applicant's Driver's abstract shows several offences.

The Respondent, called Police Officer #1, a police officer "...for twenty seven years..." as a witness.

Police Officer #1 detailed the events that led to the demand for the demand for a breath sample.

According to Police Officer #1, the Applicant was given a total of ten attempts to provide a breath sample. In his first attempt the Applicant "...blew for one second...". Police Officer #1 explained the procedure for a second time and again asked the Applicant to provide a sample. Each time the Applicant attempted to blow into the Alcotest, the machine showed an "E/O" reading, indicating the breath sample was not suitable.

During the breathalyzer test session, Police Officer #1 did not notice the Applicant showing any signs of discomfort. When asked by Police Officer #1 if he had a medical condition the Applicant replied that he was "fine".

In his closing remarks the Applicant stated that he was not able to provide a breath sample because of a "...medical problem..."

The Respondent's Representative emphasized that it is the Registrar's position that the Applicant does not suffer from a medical condition which would have prevented him from providing an adequate breath sample. The Applicant has introduced no evidence whatsoever to substantiate his position, no detailed medical reports, no PFT results.

Further, Mr. Biel maintains that the note provided by the Applicant's physician, does not comply with the requirements of Section 15 of Regulation 574, which is specific as to the information required in a medical report.

The Respondent's Representative concluded by asking the Tribunal to uphold the decision of the Registrar.

In rebuttal to the Respondent's Representative closing remarks the Applicant repeated his previous testimony that he had informed the Constable of his condition.

APPLICATION OF THE LAW TO FACTS:

An appeal was brought by the Applicant under Section 50.1 (2) (b) of the *Highway Traffic Act*, which prescribes:

“... person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason...”

Thus, as the Respondent’s Representative asserted, at issue is, does the Applicant have a medical condition that could cause the Applicant to fail or not comply with the breath demand.

The Applicant opted to submit a note from Physician #1 in lieu of having page 2 of the Notice of Appeal completed as required.

The Respondent claims that the information contained in this note, does not meet the criteria set out in Section 15 of Regulation 574, in that it provides none of the information required, such as the Applicant’s address and date of birth. The Tribunal concurs.

Further, section 15(1)(c)(d) and 15(2) of Regulation 574 prescribes as follows:

15 (1)	“A report of a legally qualified medical practitioner that is submitted in evidence shall clearly state:
15 (1) (c)	that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the Tribunal from the suspension of a driver’s license under section 50.1 of the Act.”
15 (1) (d)	“the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;”

Section 15 (2):

“The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath sample including the results of any related tests.”

By his own admission the Applicant stated that he did not ask his physician to complete the Notice of Appeal. It is not problematical, thus, for this Tribunal to derive that the Applicant did not inform his physician that he had been asked to provide a breath sample. The Tribunal finds that Physician #1’s handwritten note falls short of the meeting the criteria set out in Section 15 (1) (c) of Regulation 574.

Physician #1's note offers no information as to how long the Applicant has been his patient nor any details of last visit. Thus, Section 15 (1)(d) of Regulation 574 is not met.

Section 15 (2) of Regulation 574 is, perhaps, the most relevant. The essence of this clause requires that the physician established a link between the condition and the inability to provide a breath sample. This clause relates specifically to the detailed information required on page 2 of the Notice of Appeal, which serves as a valuable guideline to the Tribunal as it is designed to provide pertinent details of the Applicant's condition, such as:

- Details and diagnosis of the patient's present condition;
- History of condition;
- Type of Measurements or recent test taken with (date indicated): (Reference to any pathology test (e.g.: PTF represent important corroboration of your medication opinion).
- Relevant details of last visit and when ...patient was last seen

The Tribunal is left unsure as to why page 2 of the Notice of Appeal is blank, but the fact is, that Physician #1 's report fails to meet the test of establishing the grounds for appeal under section 50.1.

Physician #1's comments can be considered guarded at best. He confirms that the Applicant "...has a family history of asthma...", but fails to establish a clear diagnosis for the Applicant.

Physician #1 does not offer any rationalization of how the Applicant's "...shortness of breath suggestive of asthma...", affects the Applicant's breathing pattern. Nor, does Physician #1 provide any justification as to how this problem could have affected the Applicant's ability to provide a breath sample.

At the hearing the Applicant was unable to coherently explain why he was unable to provide a breath sample, other than to state that he has a "problem".

The Tribunal finds that there is absolutely no evidence to substantiate the Applicant's ground for Appeal.

The onus being on the Applicant to establish the merit of the appeal, the Tribunal finds that the Applicant has failed to do so. Thus, the Tribunal finds that the Applicant does not meet the criteria of Section 50.1(2)(b), in that he was not able to demonstrate that he suffers from a medical condition, which would prevent him from providing a breath sample.

The Tribunal finds that there is insufficient medical reasons as to why the Applicant was unable to comply with the request to provide breath sample.

DECISION:

Upon the application by The Applicant to appeal the suspension order dated May 28, 2002 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal **confirms** the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: July 5, 2002

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
BRUCE AND PATRICIA MANN

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

BRUCE AND PATRICIA MANN

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

DAPRAT BROS. LIMITED

Added Party

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter
on September 17, 18, 19 and 20, 2002;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing
peremptory against all parties to commence at the Gillespie Reporting Services, 130
Slater Street, Suite 200, Ottawa, Ontario, at 9:30 a.m., on Monday, September 23, 2002
and to continue until September 26, 2002, if necessary.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: July 26, 2002

REAL ESTATE AND BUSINESS BROKERS ACT
Revised Statutes of Ontario 1990, Chapter R. 4

IN THE MATTER OF
DEAN ARTENOSI

AND IN THE MATTER of the PROPOSAL by
the Registrar, *REAL ESTATE AND BUSINESS BROKERS ACT*
TO REVOKE REGISTRATION
- Proposal dated: May 27, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

DEAN ARTENOSI

Applicant

-and-

REGISTRAR, *REAL ESTATE AND BUSINESS BROKERS ACT*

Respondent

ADJOURNMENT ORDER

PURSUANT to the provisions of the *Real Estate and Business Brokers Act* R.S.O. 1990, Chapter R.4, as amended, Dean Artenosi (the "Applicant") appealed a Proposal of the Registrar, *Real Estate and Business Brokers Act* (the "Registrar"), set out in a Notice of Proposal dated May 27, 2002;

WHEREAS the Applicant filed an appeal with the Tribunal, requesting a hearing;

AND WHEREAS, the Tribunal appointed a time and place for a prehearing in the above matter on August 13, 2002;

AND WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter on September 19 & 20, 2002;

AND WHEREAS, the Tribunal was advised that the parties, on consent, have agreed to adjourn the scheduled prehearing and hearing;

NOW THEREFORE upon consent of the parties, this Tribunal Orders:

1. that the prehearing in this matter is adjourned, *peremptory against all parties*, to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Monday, September 16, 2002;
2. that the hearing in this matter is adjourned, *peremptory against all parties*, to commence at the Tribunal's above Chambers at 9:30 a.m. on Tuesday, October 22, 2002 to continue, if necessary, on Wednesday, October 23, 2002.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: July 15, 2002

KATHERINE McCOY

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: SIMON DANN
Presiding member

APPEARANCES: LUBA NEUWIRTH
Representative for the Registrar of Motor Vehicles

KATHERINE V. McCOY, Applicant
unrepresented

DATE OF HEARING: July 11, 2002

DECISION RELEASED: July 12, 2002 **teleconference**

REASONS FOR DECISION

A hearing was held on July 11, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Katherine V. McCoy (the “Applicant”)
Motor Vehicle:	Chevrolet Cavalier, plate 307 HBO (the “vehicle”)
Date of Appeal:	June 21, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on July 11, 2002 and proceeded as an electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant’s request for a hearing filed with this Tribunal (Exhibit # 2) identifies the basis of the Applicant’s appeal.

Should the Tribunal set aside the Registrar’s order to impound (Exhibit # 1) the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant’s evidence follows.

Applicant’s written submission filed with the Tribunal in support of appeal states:

The License Appeal Tribunal
1 St. Clair Avenue West
12th Floor
Toronto, Ontario
M4V 1K6

To Whom It May Concern:

Please accept this letter as an appeal to you to have my car returned to me before the 45 day impound expires, based on the grounds that the loss of my vehicle will result in exceptional hardship.

My husband and I are pensioners and rely on our vehicle on a daily basis. I require my vehicle to get me back and forth to work where I care for 3 young children in the evening hours. Public transit is not available to me in the late hours to when I finish work. Part of my job also requires me to get the children to various activities in which they are enrolled.

Due to my health conditions it is very difficult for me to get around for doctors appointments which I attend twice a month for my high blood pressure and diabetes. I also am required to use a cane when I walk and can not walk long distances. It is also very difficult to shop for groceries without my car.

I do not want to lose my job because the extra income is much needed. We solely rely on my husband's pension and the additional income is very helpful.

I hope this information is satisfactory and provides you with enough that you may make a favourable decision so I may have my vehicle returned early. Thank you for your consideration in this matter and I look forward to hearing from you soon.

Yours truly,
Katherine McCoy

The Applicant's testimony reviewed and confirmed the submitted information.

As a result of questions by Ms. Luba Neuwirth, the Registrar's Agent, the Tribunal heard the following:

- the Applicant's childcare work starts in the evening but finishes between 12:00 midnight and 1:00 a.m., when there is no transit service and she is unable to get home;
- while it is only a 10-15 minute car ride to her work place transit takes about one hour and two buses;
- the Applicant has missed two doctor's appointments for her high blood pressure and diabetes checks since her vehicle was impounded; she believes the missed appointments are affecting her health as she feels light-headed and uneasy in her balance;
- her daily activities have come to a halt and she has had to take days off work
- during the past five weeks, since her vehicle was impounded, she has missed the last three weeks of work and does not expect to work during the remaining nine days;

- during the time she was able to work she was unable to take the children to their scheduled activities; and
- the family's monthly income, from pension sources, is approximately \$2,022.00 plus the \$400.00 earned by the Applicant for her childcare work; their monthly expenses, are in the \$1,650.00 range.

When asked about alternative vehicle options, Mrs. McCoy stated she did not have any close relatives in London, and she did not have a friend from whom she could borrow another vehicle. She had not investigated rentals or taxis as she did not believe could afford either option.

The Applicant understood she could pursue financial compensation from her son but confirmed she would not be able to take that action against her son. She also stated she would not be able to afford the impound cost and might have to get her belongings out of the car and leave it.

In response to Ms. Neuwirth's question about how the Applicant's son obtained the vehicle, Mrs. McCoy said he must have taken it while she was sleeping. She explained that he would always ask to take it but she never let him take it because she knew he did not have a valid driver's licence.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by John R. Spindler;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Blood/Alcohol Content in Excess of .08 under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until October 3, 2002.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;

- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.

- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

As to the Applicant's appeal to have the impounded vehicle returned on the basis of subsection 50.2(3)(d), that the loss of the vehicle will result in exceptional hardship, the evidence presented was considered on whether or not it met the definition of "exceptional hardship" and if it clearly established the Applicant will experience/is experiencing an unusual circumstance and severe hardship based on the following.

Whether there is "a threat to the health or safety of any person ordinarily transported by the motor vehicle" under section 22.(1)(a)(b);

There was no evidence to show circumstances or personal conditions existed to pose *"a threat to the health or safety of any person ordinarily transported by the motor vehicle"*.

The Applicant confirmed that she did have access to 911 emergency services and that a hospital was within 5 minutes of travel time.

Whether there is “a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used”;

There was no evidence to show that there was such a threat.

Whether “no alternative to the impounded motor vehicle is available” ref section 22(3)(a);

The Applicant gave evidence that she could not afford a vehicle rental or use taxis. She stated that public transit was not available to take her home after midnight and she was not able to get her employer to drive her home.

Whether the “loss will be immediate, significant and lasting;” ref section 22 (3)(b)

The evidence established the loss had been immediate in that the Applicant had not been able to work for the past three weeks and she did not expect to be able to work during the remainder of the impound period.

However, the Applicant gave no evidence that the loss would be lasting or that she would permanently lose her employment due to the impoundment.

As to the Applicant’s claim that she would be unable to pay the impound fee, there was no clear evidence presented to show she would abandon the vehicle.

Whether “the impact of the loss will be upon a person ordinarily transported by the motor vehicle”; ref section 22.(3)(c)

The Applicant testified she had already missed work and that she would miss work for about two-thirds of the impound period (4 of 6 weeks) and lose the income she would have earned during that time.

Whether the impact of the loss “will be upon a person other than the person whose driving while his or her driver’s licence was under suspension resulted in the order to impound the motor vehicle”; ref S.22.(3)(d)(i)

The evidence showed the loss would be to the Applicant who was not the driver at the time of the impoundment.

In summary, while the Applicant has presented evidence to show she has incurred some loss and inconvenience resulting from the vehicle impoundment, the evidence did not clearly show that there was “exceptional hardship” in terms of the loss being exceptional, unusual, and causing “hardness, severity, severe toil or suffering” or “extreme privation”.

There was also no evidence to show that the Applicant, who testified she knew her son's driver's licence had been suspended, had instituted conditions that would prevent or discourage him from finding and or taking the keys to the vehicle.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Simon Dann, Presiding Member

RELEASED: July 12, 2002

BEENA MATHAI

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding member

APPEARANCES: LUBA NEUWIRTH
Representative for the Registrar of Motor Vehicles

BEENA MATHAI, Applicant
unrepresented

DATE OF HEARING: July 12, 2002

DECISION RELEASED: July 16, 2002 London

REASONS FOR DECISION

A hearing was held on July 12, 2002, at London, Ontario, to consider the Applicant’s appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO **SET ASIDE** the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Beena Mathai
Motor Vehicle:	Toyota Tercel, plate ADZH 794 (the “vehicle”)
Date of Appeal:	June 24, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on July 12, 2002 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant’s request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant’s appeal.

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant’s evidence follows.

Applicant’s written submission filed with the Tribunal in support of appeal states:

I, Beena Mathai, owner of one 1996 Toyota Tercel licence plate # ADZH 794 would like to appeal the decision to impound my vehicle on the grounds that the loss of the vehicle will result in exceptional hardship.

As indicated in the order to impound (attached, my vehicle was impounded June 13, 2002. At this time, my husband, Warren Morris, had taken my vehicle without my consent. My husband had had his driver's licence suspended in February 2001 for driving under the influence of alcohol among other charges including violating sections of the highway traffic act.

I, on the other hand, have been driving for almost 14 years with a clear driving record. I have not even had a speeding ticket and I am a law abiding citizen with no criminal record. I would never give permission to anyone without the valid "G" driver's licence go drive my vehicle. As I show in my supporting documents, I brought assault charges against my husband in August 2001. I was making plans to separate from him at this time. However, as Domestic Assault Charges were laid against my husband, he was offered a chance to avoid criminal charges through a special "Early Intervention Program". He completed this 17 week program and I decided at this time not to separate from him. In addition we found that we had our first child due in May.

Our son was born on May 28th, 2002.

Presently I am desperately trying to manage caring for a young baby, manage my expenses (without financial support from my husband), recover from a "C section" delivery and also decide what need to be done about our marriage relationship (separation). Some days I find it extremely difficult to perform daily tasks like doctors visits or paying bills while taking care of my 3 week old baby and without my vehicle this is even more of a hardship. My husband has not worked since May 2002, I am the family's main wage earner (presently on maternity leave). Having to pay the fee for having my car impounded would be another hardship for me.

Please consider my application to appeal this decision. I look forward to hearing from you.

Thank you,
B. Mathai

With her handwritten submissions the Applicant included a copy of a "Promise to Appear" indicating that one Warren Richard Morris, was charged with "... an offence, contrary to Section 266 of the Criminal Code of Canada. (ASSAULT)" and promised to appear before the Presiding Judge on " Monday the 10th day of September 2001."

A letter dated "February 8, 2002" under the heading of "Changing Ways" established that Warren Morris "...completed the basic 17 week Changing Ways program, consisting of Basic Education Group and Consolidation Group." Mr. Morris is invited to participate in " two voluntary groups, the Phase II and Phase III SEGWAY groups..."

The Applicant also entered as evidence a hospital card from the St. Joseph's Health Centre in London, showing the date of a baby boy on "May 28/ 02".

An "Earnings Statement", for the pay date "05/17/2002", for Warren Morris shows that for the Period ending "05/12/2002", Mr Morris received \$100.00 and that his year to date earnings total "\$1,190.00".

At the hearing, the Applicant opted to make a statement instead of proffering evidence under oath. In her statement and in reply to questions from the Tribunal and the Respondent's Representative, the Applicant explained that the vehicle was taken without her consent.

The Applicant resides with her parents, as the Applicant and her husband are no longer living together. The Applicant informed the Tribunal that she does not own another vehicle, nor is she able to rent one due to her current financial situation. The Applicant confirmed that she has just received the Sick Leave benefits due since March, and that those funds had to be applied towards mortgage and bill arrears. No income has been forthcoming as yet from EI or other sources.

Although the Applicant's parents have a vehicle, which she sometimes uses, said vehicle is not always available to her. As for public transportation, bus schedule does not always coincide with the baby's feeding or changing schedule. The Applicant was able to take her infant child to the physician for his check up, but missed her own six-week check up appointment with her obstetrician. The appointment with the obstetrician was re-scheduled. So far there have been no complications, but as the Applicant had a "C section" she is required to go for follow up consultation.

The Applicant's husband is living with friends. He works "sparsely" and is unable to assist the Applicant financially, and is unwilling to help defray the cost of the impoundment.

The \$100.00 fee paid to commence these appeal proceedings has been the Applicant's only extra expense. The Applicant declared that she has not incurred extra expenses, as she has no money to spare.

The Applicant emphasized that the impoundment of the vehicle: "...first of all, has added extra stress, in terms of my marriage, ...I have a stressful relationship with my husband to begin with, this impoundment has tripled my stress ...the added expense ...the extra \$100.00 was hardship for me to part with ...when there is no car, no transportation, I worry ...in an emergency, it is possible I may not be able to get to where I need to..."

In closing the Applicant asked that the Tribunal to take into consideration that: she did not give consent for her husband to take the car; at this time, she is not living with her husband and the responsibility for raising the infant child rests totally on her shoulders; she would prefer not to be dependant on her parents; her freedom has been curtailed.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Warren R. Morris;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Fail to Remain at Accident under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until September 18, 2002.

The Respondent offered no viva voce evidence at the hearing choosing to stand on the information provided.

In closing the Respondent's Representative asked the Tribunal to confirm the Registrar's decision, and quoted the various clauses of section 22 of the Act to substantiate the argument.

The Respondent's Representative claims that the impoundment may be inconvenient to the Applicant, but that inconvenience is not grounds for reversal.

Financial loss or economic loss cannot be considered, unless the Applicant has attempted to mitigate her losses.

The Respondent's Representative contends that the Applicant was not able to substantiate that: she has had financial, employment or educational losses; her losses are immediate, significant and long lasting.

As for alternate vehicles, the Respondent's Representative maintains the Applicant is able to use her parent's car and is able to avail herself of the public transportation system.

Regarding the health and safety issue, the Respondent's Representative argues, that the Applicant was able to keep her baby's appointment with the Family Physician and able to re-schedule her missed appointment with her obstetrician.

In rebuttal to the Respondent's Representative's remarks regarding the use of a vehicle, the Applicant insisted that her parents' car is not always available to her.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

- (4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or

- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The onus is on the Applicant to establish the exceptional hardship grounds of appeal as provided in subsection and 50.2 (d) of the Act.

Section 22 of Regulation 574, R.R O. 1990 as amended by Ontario Regulation 632/98 is in fact, quite specific in establishing the criteria an Applicant must demonstrate for a determination that exceptional hardship will result from the impoundment.

The Respondent's Representative accurately quoted section 22 of Regulation 632, and emphasized that financial loss or economic loss cannot be considered in the event an

Applicant has an alternate mode of transportation. Nonetheless, the first consideration for the Tribunal is Section 22.1 of the Regulation prescribes that the Tribunal:

“...shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,

(a) a threat to the health or safety of any person ordinarily transported by the motor vehicle”.

Does the Applicant have an alternative to the impounded vehicle?

In this case Respondent's Representative asserts that the Applicant has both her parent's car and public transportation at her disposal. The Applicant assured the Tribunal that her parent's car is not available on demand, and that her child's basic needs do not always allow her to meet the schedule of public transportation.

The Tribunal found the Applicant to be credible. As such the Tribunal concurs with the Applicant. The Tribunal accepts and respects the Applicant's right not to impose or be dependant on her parents. As for the issue of public transportation, the Applicant is definitely entitled to adhere to the baby's schedule, rather than trying to adjust to the public transportation system's schedule. In fact she is to be commended for allowing the baby's needs to supercede her own. Taking into consideration that the Applicant owns no other vehicle, that she is unable, due to financial reasons, to rent one, the Tribunal finds, that the Applicant has no alternate means of transportation, and meets the criteria of Section 22 (1) and 22 (3)(a)

After finding that Applicant meets the provisions of Section 22 (1) and 22 (3)(a), the Tribunal will assess whether the provisions Section 22(1) (a) apply.

Is there “a threat to the health or safety of any person ordinarily transported by the motor vehicle”?

The persons ordinarily transported by the vehicle are the Applicant and her infant child. The Respondent's Representative maintains that by her own admission the Applicant confirmed that she is in good physical health. No medical appointments for the baby were missed. The Applicant was able to re-schedule the missed appointment with her obstetrician and no dire consequences have resulted.

The Applicant stated that her state of mind has been affected. Her stress level has “...tripled...” since the impoundment. It appears that because of the impoundment and financial repercussions thereof, an already stressful situation between the Applicant and her husband has worsened. Further, the Applicant worries about what could happen in the event of an emergency.

The Tribunal finds that there is enough evidence to substantiate a decision of exceptional hardship. The Tribunal appreciates that the possible consequences of a cesarean section delivery, and recognizes it is imperative for the Applicant to be examined after a certain interval. The Applicant has had to miss an important appointment with her obstetrician. Hopefully, no harm will ensue.

In arriving at a decision favourable to the Applicant, the Tribunal also took into consideration the harmful consequences that increased stress levels may have on a new mother. It is possible that mental and emotional anguish could result, which could be devastating to the Applicant and to the new born.

After assessing the evidence presented, the Tribunal finds that the Applicant established exceptional hardship ground for appeal, as required under section 50.2 of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal **sets aside** the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: July 16, 2002

REAL ESTATE AND BUSINESS BROKERS ACT
Revised Statutes of Ontario 1990, Chapter R. 4

IN THE MATTER OF
BRIAN HAYWOOD

AND IN THE MATTER of the PROPOSAL by
the Registrar, *REAL ESTATE AND BUSINESS BROKERS ACT*
TO REVOKE REGISTRATION
- Proposal dated: June 17, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

BRIAN HAYWOOD

Applicant

-and-

REGISTRAR, *REAL ESTATE AND BUSINESS BROKERS ACT*

Respondent

ADJOURNMENT ORDER

PURSUANT to the provisions of the *Real Estate and Business Brokers Act* R.S.O. 1990, Chapter R.4, as amended, Brian Haywood (the "Applicant") appealed a Proposal of the Registrar, *Real Estate and Business Brokers Act* (the "Registrar"), set out in a Notice of Proposal dated June 17, 2002;

WHEREAS, the Tribunal appointed a time and place for a prehearing in the above matter on August 1, 2002;

AND WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter on September 27, 2002;

AND WHEREAS, the Tribunal was advised that the parties, on consent, have agreed to adjourn the scheduled prehearing and hearing;

NOW THEREFORE upon consent of the parties, this Tribunal Orders:

1. that the prehearing in this matter is adjourned, *peremptory against all parties*, to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Tuesday, August 27, 2002;

2. that the hearing in this matter is adjourned, *peremptory against all parties*, to commence at the Tribunal's above Chambers at 9:30 a.m. on Wednesday, October 16, 2002.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: July 18, 2002

MARILYN McMILLAN

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

MARILYN McMILLAN, Applicant
unrepresented

DATE OF HEARING: July 23, 2002

DECISION RELEASED: July 25, 2002

Barrie

REASONS FOR DECISION

A hearing was held on July 23, 2002, at Barrie, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO **SET ASIDE** the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Marilyn B. McMillan (the “Applicant”)
Motor Vehicle: 1989 Chevrolet GM4, plate 305 3LC (the “vehicle”)
Date of Appeal: July 5, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on July 23, 2002 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

Prior to the commencement of the Hearing the Respondent provided the Tribunal with original certified copies of the documents on file.

There were no other preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant’s request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant’s appeal.

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant’s evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

TO: LICENCE APPEAL TRIBUNAL
RE: APPLICANT'S POSITION

My reasons for appeal of vehicle impoundment of 45 days are as follows:

Medical Reasons

My husband, Kenneth McMillan, has C.L.L. (Chronic Lymphatic Leukemia) and has constant visits to see his Oncologist, Dr. Rajagopal at the Royal Victoria Hospital in Barrie.

He also has frequent visits to his family doctor, Dr. Mozaffari in Painswick for medication for osteo-arthritis and chronic lower back pain. As of today's date (July 2nd) an appointment with Dr. Kyle Gould at Royal Victoria Hospital has been cancelled because my vehicle is impounded and I do not have access to another vehicle. My friends are presently working, or on holiday.

My mother-in-law, Bernice McMillan (75 years old) who lives on the same property, does not have a vehicle and I am responsible for taking her to Bradford to her doctor and also to Newmarket for her tests. She also suffers with osteo-arthritis and has had two knee replacements.

We live in a rural area, with no public transportation and it truly is a necessity for me to have my vehicle so I am able to keep the various doctor/hospital appointments.

Thank you for listening.

Sincerely,

"Marilyn McMillan"

To: Licence Appeal Tribunal

This letter will serve as my verification that my daughter-in-law, Marilyn McMillan has committed herself to taking me to my doctor, Dr. L. Klassen in Bradford and Drs. Hess and Ragakow in Newmarket or whatever doctors recommended by my family doctor.

I attend Dr. L. Klassen in Bradford on a bi-weekly basis because I am on a series of different kinds of medication. I have had both knees replaced.

I no longer have a vehicle and Marilyn is the only person available to me for transportation I may add that I am 76 years of age, Marilyn is the only person I can depend on.

Yours truly,

"Phyllis Bernice McMillan"

On a handwritten note attached to page two of the Notice of Appeal the Applicant stated: "...husband has C.L.L. (Chronic Lymphatic Leukemia) ...constant visits to the Oncologist ...frequent visits to family doctor ...for medication ...appointment ...cancelled ...friends working or on holidays ...mother-in-law does not have a vehicle ...responsible for taking her to doctor ...live in rural area ...no public transportation..."

Mrs Phyllis Bernice McMillan, the Applicant's mother-in-law in a letter addressed to the Tribunal confirms that "...daughter-in-law has committed herself to taking me to the doctor ...I no longer have a vehicle ...76 years old ...Marilyn is the only person I can depend on..."

A letter dated July 4, 2002 under the signature of Dr. B. Mozaffari, informs that Kenneth McMillan, the Applicant's husband "...needs to see me on a monthly basis for renewal of ...medications and monitoring of his medical condition..."

An RVH Oncology/Medical Appointment Information sheet indicates that an appointment has been made for Kenneth McMillan for "July 22 @ 200/July 22 @ 300" with the Registration and Lab and physician, respectively.

Under the letterhead of Dr. Mozaffari an Appointment form indicates that the July 2nd appointment was cancelled and re-scheduled for August 13th.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Kenneth R. McMillan;
2. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
3. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Blood/Alcohol Content in Excess of .08 under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until March 14, 2004.

At the hearing, in evidence-in-chief, the Applicant re-iterated the statements made in the Notice of Appeal.

The impounded vehicle is needed, as the Applicant has no other means of transporting both her husband and her mother-in-law to their respective appointments with physicians. The Applicant's husband has been diagnosed with Chronic Lymphatic Leukaemia and requires constant monitoring visits to his oncologist at the Barrie Royal Victoria Hospital, as well as monthly visits to his family physician, in order that he may get refills for the medication he has been prescribed for "...osteoarthritis and chronic lower back pain...".

The Applicant testified that thus far, two of her husband's medical appointments have been cancelled, one on July 2nd the other on July 22nd. The Applicant's husband was scheduled to visit the oncologist on July 22nd, and the Applicant is particularly upset about having been forced to cancel. Her husband needs to be examined on a regular basis to determine "...if his cancer has moved to another stage..."

The Applicant affirmed that she does not have access to another vehicle and that her friends, albeit “...*not a whole lot...*” are either working or on holidays.

With respect to the Applicant’s mother-in-law, the Applicant indicated that her 76-year-old mother-in-law, who lives in the same property, does not own a vehicle. The Applicant is also responsible for driving her mother-in-law to her doctor’s appointments. Mrs. Bernice McMillan, the Applicant’s mother-in-law, also suffers from osteoarthritis and has two knee replacements. She too, requires medical attention “...*every couple of weeks...*” for medication refills. The Applicant is concerned about her mother-in-law, as she has developed a “*growth*” on her left side. The Applicant feels her mother-in-law should be looked at by a physician, as soon as possible, and would like to call for ambulance to take her. Yet, Mrs. Bernice McMillan insists that while she can walk and talk she will not take an ambulance from those who cannot and may need it more.

The Applicant lives in a rural area with no public transportation system. She has enquired into the costs of taking cabs from Gilford to and from Newmarket and Barrie, but has found the costs ranging from \$40.00 to \$60.00 each way, to be prohibitively high.

Before completing her evidence the Applicant informed the Tribunal that she had to “...*scramble...*” in order to find a ride to the hearing this morning, as the friend who promised to drive her cancelled at the last moment.

In cross-examination, the Applicant continued to testify that her husband is required to see his oncologist “...*every two months...*” for scans and blood monitoring.

In response to the Respondent’s Representative suggestion she could consider renting a vehicle, the Applicant explained that not having a credit card, this would not be possible. Further, the family income of \$1,400.00 monthly is not sufficient to allow for extra costs such as the cost of renting.

Under questioning by the Respondent’s Representative, the Applicant clarified that her husband’s medication cannot be prescribed over the telephone, as it is narcotic based. The Applicant has a daughter who owns a vehicle but who lives in Bradford. The Applicant’s daughter works for the Red Cross and her schedule is too erratic to allow her to provide assistance to her parents, as needed.

In reply to the Tribunal’s question as to how missing the medical appointments has affected the general health of the family, the Applicant stated that her husband has been psychologically affected. He is worried because he has been having dizzy spells and “...*cancer is cancer... cancer is cancer...*”. As for the Applicant’s mother-in-law, since she has no way of getting to the doctor, she is refusing to take an ambulance to see her physician regarding the lump on her side.

The Respondent offered no viva voce evidence at the hearing other than relying on information previously submitted to the Tribunal, and asking that the Tribunal consider the applicable regulation and the criteria for hardship.

In closing the Applicant emphasized the need to have the vehicle returned in order for her to be able to *"...transport ...husband and ...mother-in-law to the doctor, and not only that, but groceries so they can eat as well."*

In closing the Respondent listed the two levels for an appeal on the grounds of hardship: the health and safety issue, and the loss of employment or education by the person normally transported in the vehicle.

The Applicant has not suffered a loss of income nor incurred extra expenses due to the impoundment. The Applicant's appeal rests solely of the possible threat to the health and safety of her husband and her mother-in-law.

The Respondent's Representative maintains that there are alternate methods of transportation available, as there is Go Transit nearby. The Respondent's Representative suggests that it would be possible to take a *"...taxi cab/bus/taxi cab, to where they need to go... for their doctor's appointments..."*. Another option would be the daughter whose *"schedule could be worked around..."*

As final clarification the Tribunal enquired as to the facilities in the vicinity of the Go Transit bus stops and was informed by both the Applicant and the Respondent's Representative that there are no special enclosures. Some bus stops are out in the open although *"...there is a convenience store nearby..."*

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
 - (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
 - (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
 - (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,

- (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The onus is on the Applicant to establish the exceptional hardship grounds of appeal as provided in subsection and 50.2 (d) of the Act.

Section 22 of Regulation 574, R.R O. 1990 as amended by Ontario Regulation 632/98 is in fact, quite specific in establishing the criteria an Applicant must demonstrate for a determination that exceptional hardship will result from the impoundment.

The Respondent's Representative accurately quoted section 22 of Regulation 632, and emphasized that financial loss or economic loss cannot be considered in the event an Applicant has an alternate mode of transportation. Nonetheless, the first consideration for the Tribunal is Section 22.1 of the Regulation prescribes that the Tribunal:

"...shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,

(a) a threat to the health or safety of any person ordinarily transported by the motor vehicle".

Does the Applicant have an alternative to the impounded vehicle?

The Respondent's Representative argued that there is public transportation at the disposal of the Applicant and the people normally transported in the impounded vehicle.

The Respondent's Representative further suggested that the Applicant can mitigate her losses by taking a "...taxi cab/bus/taxi cab ...".

The Tribunal cannot accept the Respondent's Representative's proposition of public transportation as a viable alternative method of transportation. If the individuals concerned were of a younger age and in good health the Tribunal would definitely consider the Respondent's Representative's arguments differently. According to the

evidence, the people normally transported by the Applicant, in the impounded vehicle are a 76-year-old woman, with two knee replacements and osteoarthritis, and a man suffering from Chronic Lymphatic Leukaemia and osteoarthritis as well. Compelling them to use a mode of transport that would require: a taxi cab, a bus, and a taxi cab, to go to and from their physician's office or to and from the hospital, would be exhausting and could likely pose a risk to their already frail health.

With respect to the Applicant scheduling medical appointments for her mother-in-law and husband around her daughter's schedule, the Tribunal does not concur with the Respondent's Representative's view either. Not only does the Tribunal accept and respects the Applicant's right not to impose or be dependant on her daughter, but also the Tribunal recognizes the fact that it is not always possible to make medical appointments to suit the patient's convenience.

Taking into consideration that the Applicant owns no other vehicle that she is unable, due to financial and other personal reasons, to rent one, the Tribunal finds, that the Applicant has no alternate means of transportation, and meets the criteria of Section 22 (1) and 22 (3)(a)

After finding that the Applicant meets the provisions of Section 22 (1) and 22 (3)(a), the Tribunal will assess whether the provisions Section 22(1) (a) apply.

Is there "a threat to the health or safety of any person ordinarily transported by the motor vehicle"?

The persons ordinarily transported by the vehicle are the Applicant's husband and the Applicant's mother-in-law. There can be no doubt that both these individuals require constant medical supervision. Two appointments have been missed, already. The Applicant's mother-in-law is in need of immediate medical attention due to the recently found lump on her left side. The Applicant's husband state of mind has been adversely affected. He is worried about the possible consequences of having missed an appointment and the fact that he is having dizzy spells.

Hopefully, no harm will ensue. The Tribunal finds that there is enough evidence to substantiate a decision of exceptional hardship.

After assessing the evidence presented, the Tribunal finds that the Applicant established exceptional hardship ground for appeal, as required under section 50.2 of the Act.

Before closing, Tribunal will take the opportunity to caution the Applicant with respect to ensuring that in future her vehicle is not driven under unlawful circumstances, which could lead a second impoundment.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal sets aside the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: July 25, 2002

ALBERT FALZON

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: NIVES MONTANO
Presiding member

APPEARANCES: LUBA NEUWIRTH
Representative for the Registrar of Motor Vehicles

ALBERT FALZON, Applicant,
unrepresented

DATE OF HEARING: July 26, 2002

DECISION RELEASED: July 30, 2002 Toronto

REASONS FOR DECISION

A hearing was held on July 26, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Albert J. Falzon (the “Applicant”)
Motor Vehicle: 1994 Pontiac Bonneville SSE, plate no. 546 TZB (the “vehicle”)
Date of Appeal: July 9, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the motor vehicle was stolen at the time it was being driven as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on July 26, 2002 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant’s request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant’s appeal.

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the motor vehicle was stolen at the time in respect of which the order was made?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant’s evidence follows.

Applicant’s written submission filed with the Tribunal in support of appeal states:

July 9, 2002

RE: Written Appeal

To whom it may concern,

I am appealing the impoundment of my vehicle, a white 1994 Bonneville SSE, license plate # 546 TZB. VIN # 1G2HZ52L6R4206995, held at Abrams Towing, 72 Lepage Drive Toronto.

I charged the person (driver) who drive the vehicle without my permission. He drove it without my knowledge. A statement was given to PC Sauders of 23rd division #8366 and signed by myself.

I am a victim and I demand the return of my property without cost to me.

Sincerely,
"A. Falzon"
Mr. A. Falzon

The following is a summary of the Applicant's sworn testimony.

The Applicant owns 2 vehicles: a 1982 BMW which is driven during the summer months and a 1994 Pontiac Bonneville (the impounded vehicle) which is driven during the winter months.

The Applicant usually stored the vehicles at his place of business, but since a recent move, there would be many risks involved if he stored the vehicles inside this new location. As the Applicant is the owner of a sprinkler business, there are many pipes which are moved by forklifts and the possibility of falling on the vehicles are great due to poor flooring.

Mr. Howes, the driver at the time the vehicle was impounded, has known the Applicant for approximately 6 years. The Applicant has employed Mr. Howes since October, 2001 and retrained him in to work in the sprinkler industry. Mr. Howes was previously a truck driver. Being aware of Mr. Howes' driving history and suspensions, the Applicant would pick up and drop off Mr. Howes everyday from work. He would also drive him to medical tests and to the subway to attend certain programs.

Mr. Howes lives in a basement apartment of a home. As he does not own a vehicle, he offered the parking space to the Applicant at no cost. The Applicant accepted his offer. After storing his car in the driveway, the Applicant removed the ownership papers and removed the insurance on the vehicle. He provided a key to the vehicle to Mr. Howes in the event the vehicle had to be moved due to fire or emergency.

The evening the vehicle was impounded, the Applicant was told that Mr. Howes decided to drive the stored vehicle to purchase some ice cream with his girlfriend and 3 grandchildren as it was too hot to walk.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows (Exhibits 4 & 5):

- 1) Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as plate owner;
- 2) Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by John Henry Howes;
- 3) Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
- 4) Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence Driving While Disqualified under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension for life.

Under section 6.5(2)(c)(ii) of the Rules of Practice for the Tribunal, the procedure is clear:

- (2) The disclosure required under clause (1) above, shall be made,
(c) where the hearing is an appeal under section 50.2 of the Act,
(ii) by any other party at least five (5) days prior to the hearing.

In this case and in a previous case the Representative for the Ministry of Transportation in this matter, Ms. Neuwirth, failed to follow this procedure, filing documents less than five days prior to the hearing.

Although the Applicant consented to these documents being admitted into the record, the Applicant also advised the Tribunal that he was given false hope of the vehicle's release by a different person at the Ministry of Transportation. This hope was based on the Ministry obtaining a copy of the Applicant's statement to the police without charge, which statement could not be obtained. Therefore, the late filing of the documents left insufficient time for any recourse on the part of the Applicant.

The foregoing errors should be reviewed by the Ministry of Transportation.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5)

of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at

- the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(a).

With respect to an appeal under subsection 50.2(3)(a) alleging that the vehicle was stolen, the meaning of “stolen” is not provided in *The Highway Traffic Act*.

The Shorter Oxford Dictionary, provides the definition of “stolen” as follows:

Stolen: 1. Obtained by theft. 2. Accomplished or enjoyed by stealth; secret. 3. Of time: obtained by contrivance

Theft: 1. The action of a thief; the felonious taking away of the personal goods of another; larceny 2. That which is or has been stolen; the proceeds of thieving.

The *Criminal Code (Canada)* R.S.C. 1985, Chap. C-46 provides guidance.

Section 1 of the Code states:

“steal” means to commit theft...

Section 332(1) of the Code states:

322. (1) Every one commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his use or the use of another person, anything, whether animate or inanimate, with intent,
- (a) to deprive, temporarily or absolutely, the owner of it, or a person who has a special property or interest in it, of the thing or of his property or interest in it;
 - (b) to pledge or deposit it as security;
 - (c) to part with it under a condition with respect to its return that the person who parts with it may be unable to perform; or
 - (d) to deal with it in such a manner that it cannot be restored in the condition in which it was at the time it was taken or converted.
- (2) A person commits theft when, with intent to steal anything, he moves it or causes it to move or to be moved, or begins to cause it to become movable.
- (3) A taking or conversion of anything may be fraudulent notwithstanding that it is effected without secrecy or attempt at concealment.
- (4) For the purposes of this Act, the question whether anything that is converted is taken for the purpose of conversion, or whether it is, at the time it is converted, in the lawful possession of the person who converts it is not material.
- (5) For the purposes of this section, a person who has a wild living creature in captivity shall be deemed to have a special property or interest in it while it is in captivity and after it has escaped from captivity.

The Divisional Court held in *Marshall v. Registrar of Motor Vehicles* that the Tribunal should not limit the meaning of “stolen” only to an intention to take the vehicle permanently. The Court held that the term “stolen” could also apply to an intention to take the vehicle temporarily. The Court reviewed the circumstances of that case and stated:

"In our opinion a vehicle is 'stolen' in this context when it is taken without the owner's consent and when the perpetrator intends to deprive the owner of it, whether permanently or temporarily."

APPLICATION OF LAW TO FACTS:

The issue to be considered in this appeal is whether the motor vehicle was stolen at the time in respect of which the order was made.

The burden of proof is on the Applicant to establish whether the impounded vehicle was, in fact, stolen.

Although the Applicant had good intentions, his trust was misused. The Tribunal found no proof that Mr. Howes' intent was to permanently deprive the Applicant of his vehicle, but the evidence was clear that Mr. Howes did wrongfully take the vehicle without the Applicant's consent. He did in fact have a key to the vehicle.

Although the vehicle was stored in the driveway of where Mr. Howes lived, he did not did enjoy a colour of right in this regard.

When the Applicant tried to press charges against Mr. Howes, the police took the Applicant's statement, but refused to lay charges.

The driver did not give evidence before the Tribunal to clarify the nature of his intent respecting the car. In the circumstances of this case, the Tribunal cannot conclude that the driver intended to deprive the Applicant of the possession of his car. Therefore, the Tribunal is of the view that the impounded vehicle was not, in fact, stolen from the Applicant within the meaning of section 50.2(3)(a) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Nives Montano, Presiding Member

RELEASED: July 30, 2002

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario, 1990, Chapter M.42

IN THE MATTER of the REGISTRATION of
WILLIAM B. LIVINGSTON
as a motor vehicle salesperson

AND IN THE MATTER OF the PROPOSAL of the
Registrar under the *Motor Vehicle Dealers Act*
made pursuant to section 7 of the *Motor Vehicle Dealers Act*

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

WILLIAM B. LIVINGSTON

Applicant

-and-

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Motor Vehicle Dealers Act*, R.S.O. 1990, Chapter M.42 as amended (the "Act"), William B. Livingston (the "Applicant") initiated an appeal under section 7(4) of the proposal of the Registrar under the Act, dated May 8, 2002 in terms of which the Registrar proposed to refuse the registration of the Applicant as a motor vehicle salesperson;

AND WHEREAS, the Applicant has failed to pay the filing fee for this proceeding before the Tribunal, required pursuant to section 9 of the *Licence Appeal Tribunal Act*, 1999;

AND WHEREAS, the Applicant has not responded to the Tribunal's Notice of Intent to Dismiss Proceedings sent to the Applicant pursuant to section 4.6 of the *Statutory Powers Procedure Act*, R.S.O. 1990, Chapter S. 22 as amended, and Rule 2.10 of the Rules of Practice of the Licence Appeal Tribunal, whereby a proceeding before this Tribunal may be dismissed without a hearing for failure to pay the required filing fee;

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers Procedure Act*, as amended, this proceeding, initiated by the Applicant's request for a hearing before this Tribunal, is dismissed;
2. Pursuant to the authority vested in it under section 7 of the *Motor Vehicle Dealers Act*, this Tribunal directs the Registrar, *Motor Vehicle Dealers Act* to carry out his proposal dated May 8, 2002 to refuse the registration of William B. Livingston.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek, Chair

Released: July 24, 2002

CARLA TRIPODO AND ONTARIO NEW HOME WARRANTY PROGRAM

MOTION TO CONSIDER AN APPLICATION
FOR EXTENSION OF TIME

TRIBUNAL: CARL F. DOMBEK, Chair, presiding

APPEARANCES: JOHN RICHARD CIRILLO, COUNSEL, representing the Applicant
NETANUS RUTHERFORD, Counsel, representing the Ontario
New Home Warranty Program

DATE OF
HEARING: July 10, 2002 ***By Teleconference***

ORDER

Upon reading the affidavits of Filomena Cece and Patricia Louise Lutz and upon hearing the submissions of Counsel for the Applicant and Counsel for the Respondent, the Licence Appeal Tribunal orders that:

1. The application for an extension of time for the Applicant to file an appeal from a decision letter dated April 7, 2002 of the Ontario New Home Warranty Program be dismissed.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair, Presiding

Released: July 10, 2002

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
ROBERT E. SALHANY AND MARY GARDINER

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF the hearing of a motion to consider an application for an
extension of time to file a Notice of Appeal, pursuant to Section 7 of the *Licence Appeal
Tribunal Act*.

ROBERT E. SALHANY AND MARY GARDINER

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a hearing of a motion in the
above matter on July 26, 2002;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing of the
motion *peremptory against all parties* to commence, by teleconference, at the Tribunal's
Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 2:00 p.m., on
Thursday, August 22, 2002.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: July 23, 2002

1190467 ONTARIO LTD. OPERATING AS A1 CAR SALES, 1296945 ONTARIO INC. AND
ADE TAITLBAUM

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF THE
MOTOR VEHICLE DEALERS ACT

TO REVOKE REGISTRATIONS

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

SIMON ZUCKER, Counsel, representing 1190467 Ontario Ltd.
operating as A1 Car Sales, 1296945 Ontario Inc. and Ade Taitlbaum
A. MICHAEL ROTHE, Counsel, representing the Registrar, *Motor
Vehicle Dealers Act*

DATE OF
HEARING:

August 8, 2002

Toronto

ORDER

WHEREAS the Registrar under the *Motor Vehicle Dealers Act* (the "Respondent") issued a Proposal dated January 8, 2002 to revoke the registrations of 1190467 Ontario Ltd. operating as A1 Car Sales, 1296945 Ontario Inc. and Ade Taitlbaum (the "Applicants");

AND WHEREAS pursuant to the provisions of the *Motor Vehicle Dealers Act*, Section 7(4) a hearing to consider the Proposal dated January 8, 2002 was scheduled to take place before this Tribunal at 9:30 a.m. on May 21, 2002 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario;

AND WHEREAS the above hearing date was adjourned by Order of the Tribunal to commence at the Tribunal's Chambers on Thursday, August 8, 2002 at 9:30 a.m.;

AND WHEREAS the matter did commence on August 8, 2002 but all evidence was not heard on that date;

NOW THEREFORE, this Tribunal orders that:

1. the hearing of this matter be adjourned to recommence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto at 9:30 a.m. on Monday, October 21, 2002,

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: August 13, 2002

JOSEPH BRESSI

APPEAL FROM A PROPOSAL OF THE REGISTRAR
OF THE *REAL ESTATE AND BUSINESS BROKERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: JOHN ORT, Member

APPEARANCES: THOMAS W. ZWIEBEL, Counsel for the Applicant
GEORGE P. DRAMETU, Counsel for the Respondent,
Registrar of Real Estate and Business Brokers

DATE OF
HEARING: July 19, 2002 Toronto

DECISION AND REASONS

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") under Section 9(2) of the Act by Joseph Bressi (the "Applicant") respecting a Notice of Proposal to Refuse to Grant Registration (the "Proposal") by the Registrar, *Real Estate and Business Brokers Act* (the "Registrar"), dated January 10, 2002, and a Supplementary Notice of Proposal to Refuse to Grant Registration (the "Supplementary Proposal") by the Registrar dated May 1, 2002.

EXHIBITS:

Exhibit #1 - Notice of Proposal to Refuse to Grant Registration by the Registrar, *Real Estate and Business Brokers Act* dated January 10, 2002;

Exhibit #2 - Notice of Appeal dated January 25, 2002;

Exhibit #3 - Registrar's Book of Documents; and

Exhibit #4 - Registrar's Supplementary Book of Documents.

FACTS:

The Registrar's grounds for refusal are set out in the Proposal, exhibit 1, as follows:

In the Registrar's opinion, the Applicant is not entitled to registration under section 6 of the Act as:

1. Having regard to the Applicant's financial position, the Applicant cannot reasonably be expected to be financially responsible in the conduct of business;
2. The past conduct of the Applicant affords reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.

The Registrar's additional grounds for refusal are set out in the Supplementary Proposal, exhibit 4, tab 1, as follows:

In the Registrar's opinion, the Applicant is not entitled to registration under section 6 of the Act as:

- 1) The Applicant is carrying on activities that are, or will be, if the Applicant is registered, in contravention of the Act.

The Registrar's witnesses were Yvonne Nandalall, Alan Shiner, and Brian Schlotzhauer. The evidence of Yvonne Nandalall was as follows:

Ms. Nandalall has been a Registration Officer with the Real Estate Council of Ontario (RECO) since 1997. She held a similar position under the Act with the Ministry of Consumer & Commercial Relations for about ten years.

Mr. Bressi was a salesperson under the Act with nine real estate firms from September 4, 1985, to July 31, 2000, with interruptions, as set out in Director's Certificate at tab 2 of exhibit 4.

Mr. Bressi failed to advise RECO of his termination with the last employer shown on the Director's Certificate, Royal LePage RCR Realty, on July 31, 2000. Only the broker advised RECO by a Notice of Employee Change, exhibit 3, tab 12. The broker advised that Mr. Bressi's conduct while in his employ was satisfactory. On cross-examination, Ms. Nandalall admitted that in the normal course of events RECO does not receive notice of termination from both the broker and the salesperson.

An Application for Employee (the "Application") to reinstate Mr. Bressi as a salesperson under the Act, exhibit 3, tab 13, was received by RECO on May 23, 2001.

Question 6 on the Application is as follows: "Are you now or have you ever been involved in personal bankruptcy proceedings? If yes, attach - Assignment, List of Creditors OR Discharge papers." The Applicant ticked the "Yes" box as a response. Attached to the Application was a document entitled "Statement of Affairs of Non-Business Bankrupt" (the "Statement of Affairs").

Question 6 of the Statement of Affairs on page 8 of tab 13 of exhibit 3, dated April 4, 2000, states:

"Name of Present Employer - SELF; Occupation - (Bankrupt) REAL ESTATE SALES".

Question 5 of the Section 170 Report in the Matter of the Bankruptcy of Joseph Bressi dated November 7, 2000, on page 13 of tab 4 of exhibit 4 sets out the following:

5. Any material changes during period of bankruptcy? - Yes; The bankrupt resigned from his position as a real estate agent at Royal LePage and is now working for 1-2-3 Real Estate. The debtor has been requested to provide the Trustee with monthly income and expense statements in order for the Trustee to calculate surplus income. The debtor's income fluctuates relating to commission sales."

Ms. Nandalall found no entry in the Registrar's database for 1-2-3 Real Estate. She did find a record for 1 2 3 Realty Services Inc. and spoke to the broker at that firm. She was advised that Joseph Bressi had not worked there.

Upon receipt of the Application, Ms. Nandalall carried out a judgment search and found two executions filed against the Applicant. There is a judgment in favour of the Department of Justice - Canada for an original amount of \$31,252.86, tab 14 of exhibit 3. There is another judgment in favour of Sears Canada Inc. originally for \$3,665.57 and \$90.00 costs, tab 15 of exhibit 3.

Question 8 on page 2 of the Application at tab 13 of exhibit 3 states:

"Are there any unpaid judgements outstanding against you? If yes, submit a copy of each judgement. State amount outstanding and repayment arrangements on separate sheet."

The "No" box is ticked in response.

Mr. Alan Shiner testified that he is a trustee of the estate of Joseph Bressi, a bankrupt. He has been a Trustee in Bankruptcy since the early 1980s.

Mr. Shiner stated that he has had difficulty obtaining information from Mr. Bressi regarding certain transactions. Indeed, Mr. Shiner is still trying to get information from Mr. Bressi. He is investigating the transfer of properties in Aurora made eleven months before bankruptcy. Also, Mr. Shiner has been unable to find evidence of deposits said to have been made regarding a mortgage advance. Further, Mr. Shiner believes that the Bressi family trust, which the Applicant conducted business through, was not properly designated.

The Statement of Affairs includes claims by the Canada Employment Centre for unemployment insurance collected by Mr. Bressi while he was self-employed and by the Ministry of Finance for unpaid retail sales tax. There are also claims by Sears Canada and the Canada Customs and Revenue Agency, the outstanding judgement debtors.

The evidence of Brian Schlotzhauer is as follows:

Mr. Schlotzhauer has been Assistant Registrar at RECO for over two years.

He is concerned about the size of the Applicant's bankruptcy and that the creditors include government agencies, individuals, small businesses, and mortgagees. He has no information that the individuals dealt with the Applicant in real estate transactions. He admitted that there have been instances where an undischarged bankrupt was granted registration as a salesperson under the Act.

Mr. Schlotzhauer stated that if Mr. Bressi was working without a salesperson registration at 1 2 3 Realty and was receiving commissions, as disclosed to the bankruptcy trustee, then Mr. Bressi, on the surface, appears to be in violation of the Act.

Mr. Schlotzhauer is not aware of any complaints against the Applicant as a real estate salesperson.

The Applicant's witnesses were Ehud Estreicher, Sandro Giuliani, Joseph Bressi, and Ross Norman Phillips.

The testimony of Ehud Estreicher was as follows:

Mr. Estreicher is a mortgage broker. He dealt with Mr. Bressi on projects in the late 1980s and in 2001. Mr. Estreicher stated that Mr. Bressi maintained himself in an honest fashion, with integrity. He testified that Mr. Bressi was very straight with him and that he would have no problems dealing with Mr. Bressi now.

The evidence of Sandro Giuliani was as follows:

Mr. Giuliani is a real estate broker and runs 1 2 3 Realty Services Inc. He did not recall that someone from RECO called him about Mr. Bressi. He stated that he would recall if someone did so.

Mr. Giuliani found Mr. Bressi to be competent and financially responsible. Mr. Bressi dealt with him in an honest and truthful manner.

Mr. Bressi worked for Mr. Giuliani as an assistant in November and December of 2000. Mr. Bressi was not paid commission; he was paid \$6,000 by one cheque. Mr. Bressi was not a real estate broker, a real estate salesperson, or a mortgage broker. Mr. Bressi helped with administration of the office, the M.L.S., drafting offers, research, and valuing property.

The evidence of Joseph Bressi was as follows:

Mr. Bressi stated that his debtors as shown on the Statement of Affairs include the following:

- a) Cybernetic Exchange Inc. with a claim of about \$76 million;
- b) claims by mortgagees for about \$3 million on 3 or 4 mortgages that he personally guaranteed on properties that were sold under power of sale; and
- c) other claims totaling about half a million dollars.

He explained that the Cybernetic Exchange Inc. claim related to his prior investment banking business. The corporation obtained a default judgement against him in Florida for about \$74 million.

Mr. Bressi claimed that he cooperated with his bankruptcy trustee, that he gave what was asked for, and that he consented to all requested orders. The bankruptcy trustee and Cybernetic Exchange Inc. were objecting parties to his bankruptcy discharge.

His duties at 1 2 3 Realty Services Inc. included providing advice on commercial properties, valuation, research, some administrative work, and mostly work as a consultant.

Mr. Bressi did not mention 1 2 3 Realty as a previous employer on the Application for Employee for reinstatement of previous registration as a salesperson, tab 13 of exhibit 3, because he thought that only companies where he worked as a real estate salesperson must be mentioned. On cross-examination, Mr. Bressi admitted that on similar prior applications, such as those at tabs 4 and 7 of exhibit 3, he disclosed employers who were not real estate related.

The testimony of Ross Norman Phillips was as follows:

Mr. Phillips stated that he is engaged in building development. He has known Mr. Bressi for twenty-three years and they are friends. Mr. Phillips worked with Mr. Bressi on projects in 1995, 1996, 1997, and more recently, and he found Mr. Bressi to be honest and truthful.

ISSUES:

Should the Tribunal direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with the Act and the regulations?

LAW:

The *Real Estate and Business Brokers Act*, R.S.O. 1990 Chapter R.4 as amended, provides as follows:

3(1) No person shall,...

(b) trade in real estate as a salesperson unless he or she is registered as a salesperson of

a registered broker;....

6(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

- (a) having regard to the applicant's financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
- (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty;...
- (d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations....

8(1) Subject to section 9, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 6 or 7.

9(1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the registrar shall serve notice of the proposal, together with written reasons therefor, on the applicant or registrant....

9(4) Where an applicant or registrant requires a hearing by the Tribunal... the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar....

9(5) The Tribunal may attach such terms and conditions to its order or to the registration as it considers proper to give effect to the purposes of this Act.

21(2) Every salesperson shall, within five days after the event, notify the Registrar in writing of,

- (a) any change in address for service;
- (b) any commencement or termination of his or her employment, appointment or authorization by a broker.

APPLICATION OF THE LAW TO THE FACTS:

Having regard to the Applicant's financial position, he cannot reasonably be expected to be financially responsible in the conduct of business. There are unpaid judgments outstanding against him. There are executions filed against him. He is an undischarged bankrupt. The total claims against him in bankruptcy are huge. Further, the Applicant's bankruptcy trustee testified that the Applicant is not fully cooperating with him. The bankruptcy trustee opposed the Applicant's discharge in bankruptcy. There is no indication if and when the Applicant will obtain a discharge.

The past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Claimants in his bankruptcy include the Canada Employment Centre for unemployment insurance collected by Mr. Bressi while he was self-employed. The Canada Customs and Revenue Agency obtained judgement against him for unpaid retail sales tax. The Applicant provided incomplete information to RECO;

he failed to advise them of his employment at 1 2 3 Realty Services Inc.

There is some evidence of conduct by the Applicant in contravention of the Act. The Applicant advised the office of his bankruptcy trustee that he was employed by a real estate broker and that he was receiving commissions while he was not registered as a salesperson under the Act. Contrary to section 21(1)(b) of the Act, the Applicant failed to notify the Registrar of the termination of his employment at Royal LePage RCR Realty.

In summary, the Registrar's opinion that the Applicant is disentitled to registration under section 6 of the Act is not in error.

DECISION:

IT IS THE DECISION OF THE TRIBUNAL to direct the Registrar to carry out his Proposal and Supplementary Proposal to refuse to grant registration to the Applicant as a salesperson under the *Real Estate and Business Brokers Act*.

LICENCE APPEAL TRIBUNAL

John Ort, Member

RELEASED: August 7, 2002

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice or Divisional Court is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

R & S TRANSPORTATION INC.
590029 B.C. LTD.
HARJ-MIN EXPRESS CARRIERS INC.

IN THE MATTER OF THE *HIGHWAY TRAFFIC ACT*, R.S.O.1990
CHAPTER H.8 AS AMENDED;

AND IN THE MATTER OF AN APPLICATION BY R & S
TRANSPORTATION INC., 590029 B.C. LTD., AND HARJ-MIN
EXPRESS CARRIERS INC. DATED MARCH 14, 2002, FOR A
HEARING BEFORE THE LICENCE APPEAL TRIBUNAL PURSUANT
TO SECTION 50(1) OF THE *HIGHWAY TRAFFIC ACT* APPEALING
THE CANCELLATION AND SEIZURE ORDER DATED MARCH 7,
2002;

AND IN THE MATTER OF THE COMMERCIAL VEHICLE
OPERATOR'S REGISTRATION CERTIFICATES (126-488-670, 134-
764-539 & 133-189-137) ISSUED TO R & S TRANSPORTATION
INC., 590029 B.C LTD., AND HARJ-MIN EXPRESS CARRIERS INC.;

AND IN THE MATTER OF THE SAFETY RECORD OF R & S
TRANSPORTATION INC., 590029 B.C. LTD., AND HARJ-MIN
EXPRESS CARRIERS INC.

TRIBUNAL: JOHN ORT, Presiding Member
SIMON DANN, Member
CHARLES SANDIFORD, Member

APPEARANCES: CHRISTOPHER E. CHOP, Counsel for the Applicants
PATRICK MOORE, Counsel for the Registrar of Motor Vehicles

DATE OF
HEARING: July 15 and 16, 2002 Toronto

DECISION AND REASONS

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") by R & S Transportation Inc., 590029 B.C. Ltd., and Harj-Min Express Carriers Inc. (the "Applicants") respecting a

Cancellation and Seizure Order of the Deputy Registrar of Motor Vehicles dated March 7, 2002, (the "Order"), ordering pursuant to section 47 & 47.1 of the *Highway Traffic Act* (the "Act") that as of March 19, 2002, the Commercial Vehicle Operator's Registration (CVOR) certificates number 126-488-670, 134-764-539 & 133-189-137 and the plate portion of permits for all commercial motor vehicles and trailers issued to H & S Transportation Inc., 590029 B.C. Ltd., and Harj-Min Express Carriers Inc. be cancelled and the plate portion of permits, or if issued by a jurisdiction other than Ontario, the permits, and the number plates be seized.

EXHIBITS:

- Exhibit #1 – Cancellation and Seizure Order of the Deputy Registrar of Motor Vehicles dated March 7, 2002;
- Exhibit #2 – Notice of Appeal dated March 14, 2002;
- Exhibit #3 – Prehearing Order released April 26, 2002;
- Exhibit #4 – Appellants' Appeal Book;
- Exhibit #5 – Respondent's Appeal Book;
- Exhibit #6 – Calculations marked R&S Fleet Size 7, 8, and 9; and
- Exhibit #7 – Calculations marked R&S fleet size 10.xls and 11.xls.

FACTS:

The Deputy Registrar's grounds for cancellation and seizure as set out in the Order, dated March 7, 2002, exhibit 1, is concern for highway safety.

The Deputy Registrar's grounds for cancellation of CVOR certificates number 126-488-670, 134-764-539 & 133-189-137 and the plate portion or permits for all commercial motor vehicles and trailers in the names of the Applicants in a Notice of Cancellation and Seizure of the Deputy Registrar of Motor Vehicles dated February 18, 2002, tab 3 of exhibit 5, was that the Deputy Registrar was not satisfied with the Applicants' on-road performance record.

The witness for the Registrar of Motor Vehicles (the "Registrar" and the "Respondent") was Bernadette McKenna, whose evidence was as follows:

Ms. McKenna has worked for the Ministry of Transportation for twenty-five years. She is now a Carrier Safety Rating Administrator.

The records of the three Applicants were analyzed together because they have common

corporate officers. Harjeet Virk is an officer of all three Applicants and Mohinderpal Virk is an officer of both R & S Transportation Inc. and Harj-Min Express Carriers Inc., as set out at tab 7 of exhibit 5.

Ms. McKenna testified about prior sanctions.

R & S Transportation Inc. received a CVOR certificate on August 6, 1997 as shown at exhibit 5, tab 7, page 23. On July 20, 1998, the Ministry of Transportation sent a warning letter, tab 20 of exhibit 5, to R & S Transportation Inc. advising the company that a review of its operating record indicates unacceptable performance and that the problem areas are detentions and convictions. On August 3, 1999, the Ministry of Transportation interviewed Mohinderpal Virk concerning the CVOR record of R & S Transportation Inc., as set out at tab 21 of exhibit 5. Mr. Virk was warned that failure to substantially improve the CVOR record could lead to a sanction. The company filed an action plan and was warned that failure to meet the commitments of the action plan can lead to a sanction.

590029 B.C. Ltd. received a CVOR on March 17, 2000, as shown at tab 11 of exhibit 5. The Ministry of Transportation sent to the company a warning letter dated August 14, 2001, page 17 of tab 5 of exhibit 5, concerning its operating record.

A Notice of Suspension and Seizure of the Deputy Registrar of Motor Vehicles dated May 15, 2000, tab 22 of exhibit 5, purported to suspend for thirty days the CVOR certificates and the plate portion of permits for all commercial motor vehicles and trailers registered in the name of R & S Transportation and Harj-Min Express Carriers Inc. A Suspension and Seizure Order of the Deputy Registrar of Motor Vehicles dated June 26, 2000, ordered CVOR certificate # 126-488-670 issued to R & S Transportation Inc. and CVOR certificate # 133-189-137 issued to Harj-Min Express Carriers Inc. and the plate portion of permits for all commercial motor vehicles and trailers registered in the names of the two companies suspended for a period of thirty days. An order of the Licence Appeal Tribunal, tab 25 of exhibit 5, incorporating a written consent signed by the two companies and the Registrar of Motor Vehicles, varied the Suspension and Seizure Order of June 26, 2000, to provide for a suspension of twenty-four days starting December 18, 2000, and ending January 11, 2001, as set out in tabs 25 and 26 of exhibit 5.

Ms. McKenna explained that the CVOR System evaluates a carrier based on the events in its CVOR Record, including accidents, convictions, and inspections. The accident violation rate is based on accident points per vehicle per month. The conviction violation rate is based on safety-related conviction points per vehicle per month. The inspection violation rate is based on points on vehicle inspections per vehicle unit inspected. In calculating an overall violation rate, accidents are weighted at double the severity of convictions and inspections as shown at page 334 of tab 20 of exhibit 5. The calculations are based in part on the adjusted fleet size, which is calculated using information provided by the carrier in the CVOR Certificate - Application/Change of Information form. The carrier is required to advise of a change in fleet size within fifteen days.

The Commercial Vehicle Operator Summary for R & S Transportation Inc. for December 2,

1999 to December 1, 2001 from the Ministry of Transportation set out at tab 6 of exhibit 5 reports seven pointable accidents and thirty-four safety-related convictions. Details of the convictions include the following; fail to maintain/carry log book, speeding 122 kmh in 90 kmh zone, fail to surrender permit for trailer, fail to stop vehicle upon direction, failure/improper use seat belt assembly-driver, improper drive on divided hwy-lane change, and speeding 115 kmh in 90 kmh zone. Based on information provided by R & S Transportation, an adjusted fleet size of twelve was used in the calculations. Both the accident violation rate and the conviction violation rate are unacceptably high. The overall violation rate is also over 100 and is thus unacceptably high.

Ms. McKenna testified that for all R & S Transportation Inc. accidents where charges were laid, those charges resulted in convictions.

The Commercial Vehicle Operator Summary for 590029 B.C. Ltd., tab 11 of exhibit 5, shows two pointable accidents from March 17, 2000, to December 1, 2001. The accident violation rate is unacceptably high. Likewise, the overall violation rate is over 100, which is unacceptably high.

Ms. McKenna presented calculations of the overall violation rate for R & S Transportation Inc. for various time periods, exhibits 6 and 7. In each case the rate was over 100 and was unacceptably high -

The U.S. government Safer Web report included at tab 19 of exhibit 5 shows a rating of unsatisfactory for R & S Transportation Inc. There are no ratings for the other Applicants.

The witness for the Applicants was Shaun Garvey, whose evidence was as follows:

Mr. Garvey holds a Certified Risk Manager Programme diploma from the Insurance Institute of Canada. He has worked in the trucking industry for about eighteen years. Mr. Garvey was accepted as an expert in risk management by the Tribunal.

He gave an overview of the British Columbia system for monitoring carriers. He explained that, unlike Ontario, British Columbia does not take into account charges. It only considers those charges that result in convictions.

Mr. Garvey states the following in his report at tab 6 of exhibit 4: "The CVOR records, supplied by the Ontario MOT [Ministry of Transportation], were scrutinized to determine inconsistencies or errors. All accident, violation and inspection data is consistent with actual fleet records of these incidents."

Mr. Garvey also says the following in his report: "The vast majority of drivers responsible for either violations and/or accidents affecting R & S Transportation Inc.'s CVOR are no longer employed by the organization, having left in advance of the latest sanctions." Mr. Garvey testified that R & S Transportation Inc. has a policy of immediately terminating such drivers unless there

are extenuating circumstances. Such a policy is not set out in the Operations Manual, tab 2 of exhibit 4. During cross-examination Mr. Garvey admitted that Bajinder Mann, one such driver, was involved in an accident on August 31, 2001, and was let go only on November 11, 2001. Satinderpal Dhaliwal, another driver, who was involved in an accident on December 12, 2000, only left the company November 15, 2001.

Mr. Garvey found the supporting information for Ms. McKenna's calculation of adjusted fleet size to be out of date.

He calculated a fleet size of one less than the number used by Ms. McKenna in exhibits 6 and 7 by rounding a calculation to the nearest whole number rather than rounding it up to the next higher whole number. He did not agree with Ms. McKenna that rounding the number up benefits the carrier. Mr. Garvey's calculation of the overall violation rate for R & S Transportation Inc. also resulted in a figure over 100, an unsatisfactory rate.

LAW:

The *Highway Traffic Act*, R.S.O. 1990 Chapter H.8 as amended provides as follows:

16(2) No person shall drive or operate a commercial motor vehicle on a highway unless the operator is the holder of a CVOR certificate that is not under suspension.

17(3) The Registrar may refuse to issue a CVOR certificate to an applicant if the applicant is related to,...

(c) a person who the Registrar has reason to believe, having regard to the person's safety record and any other information that the Registrar considers relevant, will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety.

(4) An applicant is related to a person for the purposes of subsection (3) if,...

(c) either the applicant or the person, directly or indirectly, controls or controlled or manages or managed the other; or

(d) the applicant and the person have or have had common officers or directors or they are or have been controlled, directly or indirectly, by the same shareholders.

47(1) Subject to section 47.1, the Registrar may suspend or cancel,

(a) the plate portion, of a permit as defined in Part II;...

(b) a CVOR certificate,

on the grounds of,...

(f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar Considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway

safety;....

47(2.1) Subsection 17(4) applies, with necessary modifications for the purpose of determining who are related persons under clause (1) (f).

47(10) The Registrar may, at any time for misconduct or contravention of this Act,... or of any regulation thereunder by an owner or lessee of one or more motor vehicles or trailers for which permits have been issued by a jurisdiction or jurisdictions other than the Province of Ontario, order that the permit and number plates issued for the vehicle or vehicles be seized and any police officer or any officer appointed for carrying out this Act or the enforcement of the *Public Vehicles Act* or the *Truck Transportation Act* may seize the permit and number plates and deliver them to the Ministry which shall return them to the authority that issued them.

47.1(1) Before taking any action under clause. 47(1) (a) and (c)... the Registrar shall notify the person whose plate portion of a permit or CVOR certificate is to be affected of his or her proposed action.

50(1) Every person aggrieved by... a decision of the Registrar under section 47 may appeal the decision to the Tribunal.

(2)The Tribunal may confirm, modify or set aside the decision of the Minister or Registrar.

Regulation 424/97 under the Act as amended states:

5(1) The safety record of an operator shall contain a record of the following information:

1. Any suspension or cancellation of the plate portion of the permit under clause 47(1) (a) of the Act.
2. Any suspension or cancellation of the operator's CVOR certificate under clause 47(1)(c) of the Act....
6. Any warning letters sent by, or interviews held with, Ministry officials relating to the operator's safety performance and practices.
7. Any conviction related to the operation of a commercial motor vehicle or a vehicle drawn by it, for an offence committed by an operator, its agents or employees,
 - i) under this Act or under any other Act of the Legislature or the Parliament of Canada or any regulation or order made under any of them, or
 - ii) for an offence under a municipal by-law regulating traffic on the highways, or orders made under any of them, except convictions for of fences for standing or parking.
8. The particulars of any accident involving a commercial motor vehicle operated by the operator or a vehicle drawn by it.
9. The results of any inspection under section 82 or 82.1 of the Act or any similar inspection of a commercial motor vehicle operated by the operator, or a vehicle drawn by it....
11. Any safety rating that has been assigned to the operator....
13. Any record from another jurisdiction in respect of the operator that is comparable to that described in any of paragraphs 1 to 12....
17. Any compilations or analyses of any of the information in paragraphs 1 to 16.

APPLICATION OF LAW TO FACTS:

The Applicants 590029 B.C. Ltd., and Harj-Min Express Carriers Inc. are persons related to the Applicant R & S Transportation Inc. within the meaning of section 17(4) of the Act. The companies have common officers. Harjeet Virk is an officer of all three companies and Mohinderpal Virk is an officer of both R & S Transportation Inc. and Harj-Min Express Carriers

Inc.

The safety record of R & S Transportation Inc. is poor. The evidence discloses numerous convictions related to the operation of its trucks and trailers in Ontario. There were also many accidents involving vehicles operated by the company in Ontario. Shaun Garvey, the witness for the Applicants, found no inconsistencies or errors in the CVOR records. Analysis of the company's Commercial Vehicle Operator Record results in calculation of an unacceptably high overall violation rate no matter what reasonable time period was selected. Such calculation is not tainted by reliance on charges laid rather than convictions. All such relevant charges resulted in convictions. Analysis by the Ministry of Transportation is supported by the U.S. government Safer Web report, which shows a rating of unsatisfactory for R & S Transportation Inc.

R & S Transportation Inc. has had sufficient notice that a serious sanction may be applied. It received a warning letter, its officer met with ministry officials to discuss the company's poor performance, and the company appeared previously before the Licence Appeal Tribunal. The company's CVOR certificate and the plate portion of its permits were suspended for twenty-four days.

Based on the evidence, the Tribunal finds that the Registrar is not in error. Having regard to the safety record of R & S Transportation Inc., a person related to both 590029 B.C. Ltd. and Harj-Min Express Carriers Inc., there is sufficient grounds for the belief that the Applicants will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety, as required by section 47(1) (f) of the Act. The Applicants' motion for nonsuit must fail.

DECISION:

IT IS THE DECISION OF THE TRIBUNAL to confirm the Cancellation and Seizure Order of the Deputy Registrar of Motor Vehicles dated March 7, 2002.

LICENCE APPEAL TRIBUNAL

John E. Ort, Member,
Presiding

Simon Dann, Member

Charles J. Sandiford, Member

RELEASED: August 1, 2002

GORAN J. ILIEV

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
MOTOR VEHICLE DEALERS ACT

TO REFUSE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

GORAN J. ILIEV, appeared on his own behalf
YOVANKA McBEAN, Agent, representing the Registrar, *Motor Vehicle Dealers Act*

DATES OF

HEARING: July 30, 2002

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") from a Notice of Proposal (the "Proposal") by the Registrar of the *Motor Vehicle Dealers Act* (the "Act"). The Proposal, dated April 7, 2002, seeks to refuse the registration of Goran J. Iliev (the "Applicant") as a motor vehicle salesperson.

The Proposal sets out the Registrar's reasons for seeking an order for the refusal of the Applicant's registration. The reasons are stated as follows:

The intention and objective of the Act is to protect the public interest. The requirements of the Act include that Registrants be financially responsible in the conduct of business and that Registrants carry on business in accordance with the law and with integrity and honesty. The Applicant's past conduct is inconsistent with the intention and objective of the Act, and therefore warrants disentitlement to registration under the Act. Therefore, the Registrar is unwilling to register Goran Iliev under the Motor Vehicle Dealers Act.

The particulars upon which the Registrar relies are stated in the Proposal as follows:

- (1) Goran Iliev applied for registration as a motor vehicle salesperson on or about February 27, 2002.
- (2) On the application submitted to the registrar's office, Iliev failed to disclose that he had charges pending for possession under \$5000.00.

Subsequent to the Proposal the Registrar filed a Notice of Further and Other Particulars (the "further particulars") dated July 9, 2002 which state as follows:

1. A credit check revealed that Mr. Iliev has bad debts with the following companies:

Household Financial Corp.
Trans Canada Credit
CitiFinancial
GE Capital Equipment Financial

By written Notice of Appeal dated April 22, 2002 the Applicant informed the Tribunal, in terms of Section 7.(2) of the Act, that he required a hearing regarding his appeal to the Registrar's Proposal.

THE EVIDENCE:

The evidence presented to the Tribunal by the Registrar consisted of documentary evidence as well as the oral testimony of Mary Jane South, the Deputy Registrar. The evidence of the Applicant consisted of his oral testimony.

Mary Jane South

Ms. South testified that she is the Deputy Registrar under the Act and is employed by the Ontario Motor Vehicle Industry Council ("OMVIC"). OMVIC is a non profit organization with authority to administer the Act and ensure that the Act is being complied with. Ms. South's duties include overseeing the registration of motor vehicle dealers and salespersons and ensuring they are registered in compliance with the Act. She stated that she is familiar with the Applicant and his application for registration.

She testified further that the Applicant made written application for registration as a motor vehicle salesperson on February 20, 2002. In the course of reviewing the application she noted that in relation to question number 9 in that application form which posed the following question

9. Have you ever been found guilty or convicted of an offence under any law or are any charges pending? (This includes those instances where a conditional or absolute discharge has been ordered). If yes, list all charges and/or convictions, and the circumstances surrounding each (attach additional sheets if necessary).

(space for answer)

Note: Applicants are subject to background and criminal record searches. Submitting a false or incomplete disclosure is an offence under the MVDA and will result in disqualification. Do not assume that convictions are automatically deleted from your record. If you have any questions about the information you must disclose please call OMVIC.

the Applicant had answered "No."

A CPIC report was obtained by OMVIC pursuant to receipt of the Applicant's written application. This CPIC report revealed that the Applicant had a pending criminal charge for possession of stolen property under \$5,000.00. When this report was received by OMVIC a letter dated March 14, 2002 was addressed to Craig Hind Chrysler Dodge Jeep Ltd. the sponsoring dealer of the Applicant. This letter stated that after reviewing the Applicant's application, the Applicant's conditional registration was being cancelled due to the Applicant's failure to disclose a pending criminal charge and the dealer was asked to:

"Please review this matter with your salesperson. If there are any charges pending and/or convictions under any law which were not disclosed, the applicant must explain in writing why the information was not disclosed and the circumstances surrounding each charge and/or conviction. Please submit the written explanation, signed by the salesperson and yourself to the Registrar's office within ten days."

Pursuant to this letter the Applicant wrote to OMVIC and stated as follows in regard to not disclosing the pending charge:

"...I probably misunderstood (sic) the questions & their meaning...."

Ms. South further stated that at the date when the Applicant signed his application for registration, the criminal charge referred to in the CPIC report was already pending and accordingly was within the Applicant's knowledge.

Ms. South went on to testify that the Applicant had a number of "bad debts" which were recorded against him in the files of a credit bureau. These "bad debts" totalled over \$11,000.00. Additionally, G.E. Capital, a creditor of the Applicant had been obliged to repossess a vehicle due to non payment by the Applicant of \$40,000 owing to it by the Applicant.

The "bad debts" recorded against the Applicant were in respect of monies due, owing, and unpaid by the Applicant to Household Financial Corp. in a sum of \$570.00; to Trans Canada Credit in a sum of \$6,651.00; to Yes Charge in a sum of \$1,200; and to CitiFinancial in a sum of \$2790.00. Furthermore, Chrysler Goldkey, a further creditor, had reported that the Applicant was at least 120 days past due date under an agreement to repay monies advanced to him relating to the financing of a motor vehicle and that the amount past due amounted to \$2,507.00 as at April 2002.

Ms. South stated that the Registrar relies on the honesty and integrity of applicants and registrants when completing their applications. False disclosure or non disclosure by applicants and registrants is an indication of failure to be forthright and honest. Non disclosure of material facts are not only misleading but mislead the Registrar when he is required to make an informed decision.

Finally, Ms. South stated that the various bad debts of the Applicant and the Applicant's failure to meet his financial obligations indicate that the Applicant cannot reasonably be expected to be financially responsible in the conduct of business.

Goran Jordanco Iliev

The Applicant testified he has been in Canada for the past 12 years. He also testified that he signed and completed the application form for registration as a motor vehicle salesperson. He was assisted in completing the application by a person with whom he was then employed.

He went on to state that in 1999 his driver's licence was suspended for 90 days. At that time he was operating a cartage or transport business and due to his prohibition from driving for 90 days, he lost business and found himself in financial difficulties. He was then obliged to earn a living as a musician, a carpet layer and a drywaller. The suspension of his driver's licence has led to his not being able to pay his debts.

The Applicant testified that he did not know what the word "pending" meant in question number 9 on his application and that is why he failed to disclose his pending criminal charge. He did admit to his "bad debts", the involuntary repossession of his vehicle due to non payment and the fact that he was some \$2507.00 in arrears to Chrysler Goldkey.

FACTS FOUND PROVEN:

The Tribunal has found the following facts proven.

1. The Applicant completed and signed a written application for registration as a motor vehicle dealer dated February 20, 2002
2. The Applicant failed to answer question 9 in the above application truthfully in that he denied that there were any charges pending against him whereas in fact and to the Applicant's knowledge there was a pending criminal charge for possession of stolen property.
3. The Applicant has outstanding and unpaid debts to:
 - (i) Household Financial Corporation in the sum of \$570.00.
 - (ii) Trans Canada Credit in the sum of \$6,651.00.
 - (iii) Yes Charge in the sum of \$1,200.00
 - (iv) CitiFinancial in the sum of \$2,790.00.

THE LAW:

Section 5.(1) of the *Motor Vehicle Dealers Act* states:

5(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

(a) having regard to the financial position of the applicant, the applicant cannot reasonably be

expected to be financially responsible in the conduct of business; or

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law, and with integrity and honesty;...

APPLICATION OF LAW TO FACTS:

The onus of proof rests upon the Registrar in this matter.

There are two issues to be dealt with and they are:

1. Did the Applicant in completing his application for registration knowingly fail to disclose a pending criminal charge?
2. Is the Applicant's financial position such that the Applicant cannot reasonably be expected to be financially responsible in the conduct of business?

In the leading case of *Brenner 19 CRAT SCO Decisions and Orders (1971 - 1989) page 95* Southey J. held that a Tribunal should only refuse to direct the Registrar to carry out his proposal if it thinks the Registrar was in error in concluding that the past conduct of an Applicant would not carry on business in accordance with law and with integrity and honesty.

To overrule the decision of the Registrar, the Tribunal must conclude that he was wrong in his decision and that the conduct of an Applicant does not afford reasonable grounds for the Registrar's belief that the Applicant will in the future carry on business in contravention of the Act and its Regulations. This was confirmed by Divisional Court in the matter of *Albert Fascenda (1994) 26 CRAT Part II 1050* where that court on appeal quashed the Tribunal's decision to direct a Registrar not to carry out his proposal and in sending the matter back for re-hearing stated at page 1051.

It follows that the Tribunal should have refused to direct the Registrar to carry out his proposal only if it thought the Registrar was in error in his belief.

The proper function of the Tribunal is to review the decision of the Registrar and the evidence presented to the Tribunal at the hearing in order to determine whether or not the Registrar was in error in coming to his decision to refuse the Applicant's registration. That which follows is therefore a review of the Registrar's decision as well as the evidence presented at the hearing.

1. FAILURE TO DISCLOSE PENDING CRIMINAL CHARGE

There is no doubt that the Applicant, at the time he completed his application for registration on February 27, 2002, failed to disclose a pending criminal charge. In fact the Applicant did not deny either the pending criminal charge or that he had failed to disclose that pending charge in

his February 27, 2002 application. The charge arose out of an allegation of possession of stolen property on September 4, 2002. This is apparent from the CPIC report.

(Exhibit 3 tab 5)

When, on March 21, 2002 the Applicant wrote to OMVIC he stated and by way of an explanation for his failure to disclose the pending charge that he "probably misunderstood the questions and their meaning".

When the Applicant testified at the hearing he gave a different explanation to the Tribunal for his failure to disclose the pending charge which was that he did "not know what charges pending meant". The Applicant had changed his reasons for failing to disclose the pending charge.

The Tribunal had the opportunity to observe the Applicant when he testified and finds that the Applicant, while not entirely proficient in English, was quite comfortable in that language and at no time found difficulty in expressing himself in English or in responding to or understanding questions put to him in English.

The Tribunal finds that the Applicant, who admitted reading the application prior to his signing it, did understand the question asking whether he had charges pending. The Tribunal further finds that he denied that he faced a pending charge when he well knew of the pending criminal charge. The Tribunal believes that the Applicant deliberately did not disclose the pending charge as he feared that if he did disclose the charge he would jeopardise his chances of registration as a motor vehicle salesperson. This failure to disclose a material fact is both dishonest and indicates a lack of integrity.

Accordingly, the Tribunal finds that the Applicant's conduct affords the Registrar reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.

2. THE APPLICANT'S FINANCIAL POSITION

The Applicant did not dispute the fact that he had debts which remain due, owing and unpaid to Household Financial Corp., Trans Canada Credit, Yes Charge and CitiFinancial. The above debts total over \$11,000.00. The Applicant presently owes a past due amount of \$2507.00 to Chrysler Goldkey and in addition has suffered an involuntary repossession of a leased vehicle with a reported balance of \$40,000.00 owing to G.E. Capital Equipment Finance, the lessor of that vehicle.

The Applicant contended that the 90 day suspension of his driver's licence which occurred in November, 1999 led to his "bad debts." He did testify that after his truck was repossessed by G.E. Capital Equipment Finance he worked in various jobs such as a carpet installer at \$85.00 per day, a drywaller at \$100.00 per day and as a musician earning over \$2,000.00 per month.

Quite clearly the Applicant has not been a large earner by any means but the Tribunal notes he

made no effort to liquidate any of his debts. His past record insofar as his finances are concerned show numerous bad debts where firms with whom the Applicant did business suffered not insubstantial financial losses.

The Tribunal does not believe that the 90 day driver's licence suspension was the cause of his financial problems. The Tribunal believes rather that the Applicant's numerous defaults in his financial responsibilities indicate the Registrar's fears are well founded that the Applicant cannot reasonably be expected to be financially responsible in the conduct of business and is not a suitable person to be registered as a motor vehicle salesperson.

DECISION:

Accordingly, pursuant to the authority vested in it by Section 7.(4) of the *Motor Vehicle Dealers Act*, the Tribunal directs the Registrar to carry out his Proposal dated April 7, 2002 to refuse the registration of Goran J. Iliev as a motor vehicle salesperson under the Act.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice Chair

Released: August 7, 2002

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice or Divisional Court is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

PREHEARING

SHARLENE GONCALVES

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: TERENCE A. WARDROP, Q.C., Vice Chair
 NIVES MONTANO, Member

APPEARANCES: SHARLENE GONCALVES, appearing on her own behalf
 FIL CECE and SHERRI LUMLEY, representing the Ontario New Home
 Warranty Program
 ALDO MIRIGELLO, appearing for Blue Creek Estates Inc.

DATE OF
PRE-HEARING: July 25, 2002

Toronto

ORDER

PURSUANT to the provisions of the *Ontario New Home Warranties Plan Act* R.S.O. 1990, Chapter O.31, as amended, Sharlene Goncalves (the "Applicant") appealed a Decision of the Ontario New Home Warranty Program (the "Program") set out in a Decision Letter dated April 17, 2002;

WHEREAS the Applicant filed an appeal with the Tribunal, requesting a hearing, which hearing was scheduled for August 28 and 29, 2002, at the Tribunal's Chambers;

AND WHEREAS the pre-hearing commenced on July 25, 2002 and all parties advised the Tribunal that they had arrived at a settlement of the issues;

AND WHEREAS the Applicant, at the onset of the pre-hearing, requested the Tribunal to remove Jose Goncalves as party to this matter as he is not a registered owner on title to 112 Freemont Street, Concord, Ontario, the property in which this pre-hearing is related to;

AND WHEREAS having reviewed the Full and Final Release signed by the Applicant, this

document is filed and attached hereto as Schedule "A" in which a 30-day term of monetary settlement was agreed to by all parties;

NOW THEREFORE this Tribunal orders that the proceedings in this matter are hereby settled in accordance with the terms outlined in Schedule "A", the scheduled hearing is cancelled and this matter is hereby concluded.

LICENCE APPEAL TRIBUNAL

Terence A. Wardrop, Q.C.,
Vice Chair, Presiding

Nives Montano,
Member

Released: August 2, 2002

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
AIDA REIS AND ANA REIS O/A ALLIANCE TRAVEL AGENCY
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: April 16, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal
AIDA REIS AND ANA REIS O/A ALLIANCE TRAVEL AGENCY

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by Aida Reis and Ana Reis o/a Alliance Travel Agency, the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek, Chair

Released: August 8, 2002

LICENCE APPEAL TRIBUNAL

BETWEEN:

AIDA REIS AND ANNA REIS O/A ALLIANCE TRAVEL AGENCY

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

BACKGROUND

1. Aida Reis and Ana Reis o/a Alliance Travel Agency (hereinafter referred to as the "Registrant") have been registered as a travel agent (registration number 2076562/R) under the *Travel Industry Act*, R.S.O., c. T-19, as amended (hereinafter referred to as "the Act") since April 6, 1983. The Registrant's fiscal year end is December 31st.

DEFICIENT FILINGS

2. By letter dated February 21, 2002, the Registrant was advised that it had failed to file its Form 1 and make the corresponding payment to the Ontario Travel Industry Compensation Fund for the period ended December 31, 2001, which were due by February 15, 2002. The Registrant was given an extension to submit the required filing by March 7, 2002.
3. By letter dated March 7, 2002, the Registrant was sent a final request for its Form 1 and given a filing deadline of March 21, 2002, failing which the Registrant was advised that a proposal to revoke its registration would be issued.
4. By April 16, 2002, the Registrant had failed to submit its Form 1 filing. On that date, the Registrar issued a Proposal to Revoke the Registrant's registration.
5. On May 2, 2002 and following the Registrar's April 16th Notice of Proposal to Revoke Registration, the Registrant provided its Form 1 Filing for its year ended December 31, 2001, which was due by February 15, 2002. The filing disclosed sales of \$430,000.00 for the six month period ended December 31, 2001.
6. By letter dated November 23, 2001, the Travel Industry Council of Ontario ("TICO") requested that the Registrant file its financial statements for its fiscal year ending December 31, 2001 by March 31, 2002.

7. On April 11, 2002 TICO advised the Registrant that its financial statements, which were due by March 31, 2002, were not yet received and must be submitted by April 30, 2002.
8. On May 1, 2002, the Registrar, *Travel Industry Act* advised the Registrant that he would initiate administrative action if the financial statements were not received by May 15, 2002.
9. To date, the Registrant has not submitted its financial statements for its fiscal year ended December 31, 2001, which were due by March 31, 2002.
10. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsections 6 (4) and (5) of the *Travel Industry Act* directing that:

1. the Registrar refrain from carrying out the Proposal to Revoke Registration dated April 16, 2002;
2. the Registrant's registration is to be subject to the following terms and conditions:
 - (a) The Registrant agrees to forthwith voluntarily suspend its registration as a travel agent and deliver its Certificate of Registration to the Registrar, *Travel Industry Act*;
 - (b) The Registrant shall not act or hold itself out as being available to act as a travel agent until its registration is reinstated by the Registrar, *Travel Industry Act*;
 - (c) The Registrant's registration shall not be reinstated until it is up-to-date with its prescribed Form 1 filings and contributions, its prescribed financial statement requirements, its prescribed renewal fees, and has demonstrated that it is maintaining the prescribed minimum working capital; and
 - (d) For the one year period immediately following the Registrant's registration under clause (c) above, the Registrant shall satisfy the prescribed Form1 and financial statement requirements.
3. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) to (d) inclusive the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery, registered mail, or facsimile transmission.
4. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by its signature below that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED at Mississauga this ____ day of August, 2002

Ms Aida Reis
Aida Reis and Ana Reis o/a Alliance Travel Agency
I have authority to bind the company

Mr. Michael Pepper
Registrar, *Travel Industry Act*

PREHEARING

ROBERT R. JANISSE

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: DEREK ISRAEL, VICE CHAIR

APPEARANCES:

KEVIN G. FANICK, Counsel, representing Robert R. Janisse, by
teleconference

TIM SNELL, Counsel, representing the Registrar, *Real Estate and
Business Brokers Act*

DATE OF

PRE-HEARING: August 1, 2002,

by teleconference

ORDER

Following attendances on August 1, 2002 at a prehearing before this Tribunal of Kevin G. Fanick, Counsel appearing by teleconference on behalf of Robert R. Janisse (the "Applicant"), and Tim Snell, Counsel appearing on behalf of the Registrar, *Real Estate and Business Brokers Act* (the "Registrar");

The Tribunal makes the following order respecting the hearing scheduled to commence at 9:30 a.m. on Wednesday, September 4, 2002 at the Holiday Inn Select, Kingsville "A" Room, 1855 Huron Church Road, Windsor, Ontario;

1. The Parties to the hearing are the Applicant and the Registrar.
2. The Applicant's Counsel confirmed to the Tribunal at the prehearing that the Applicant admits the allegation made in paragraphs;

Number 2

Number 3

Number 4

Number 5

Number 6
Number 7
Number 8
Number 9
Number 11
Number 13
Number 14
Number 15

in the Registrar's Notice of Proposal dated May 2, 2002 to refuse the registration of the Applicant.

3. The Applicant does not admit the allegation made in paragraphs;

Number 1
Number 10
Number 12
Number 16
Number 17
Number 18
Number 19

in the Registrar's Notice of Proposal dated May 2, 2002 to refuse the registration of the Applicant and puts the Registrar to the proof thereof.

4. The Applicant's Counsel undertakes, at least 10 days prior to the hearing, to provide the Registrar with copies of the Applicant's character witnesses' statements, including their names and addresses, that will be referred to at the time such witnesses testify at the hearing.
5. All parties to the hearing shall fully comply with the requirements of disclosure of documents or things as set forth in Rule 6.3 of the Rules of Practice of the Tribunal. All parties shall also fully comply with the disclosure requirements set forth in Rule 6.4 of the Rules of Practice of the Tribunal dealing with expert witnesses.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair,

PREHEARING

BRIAN GRIFFIN

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, VICE CHAIR
NIVES MONTANO, MEMBER

APPEARANCES:

CATERINA GUCCIARDI, Counsel, representing the Applicants
CAROL STREET, Counsel, representing the Ontario New Home
Warranty Program
TERRY BROWN, Agent, representing the added party T & R BROWN
CONSTRUCTION LTD.

DATE OF
PRE-HEARING: August 1, 2002, Toronto

ORDER

Following attendances on August 1, 2002 at a prehearing before this Tribunal of Caterina Gucciardi, Counsel on behalf of Brian Griffin (the "Applicant"), and Carol Street, Counsel on behalf of the Ontario New Home Warranty Program (the "Program"), and Terry Brown, Agent on behalf of T & R Brown Construction Ltd. (the "Added Party");

The Tribunal makes the following order respecting the hearing to commence at 9:30 a.m. on Monday November 25, 2002 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario and to continue, if necessary, on November 26, 27, 28 and 29, 2002 at the Tribunal's above chambers;

1. The Parties to the hearing are the Applicant, the Program and the Added Party.
2. Within 14 days of the date of this Order the Applicant shall advise the Program's Counsel, Carol Street, and the Added Party in writing as to the Applicant's position regarding the 10 undermentioned claims in the Program's decision letter of May 6, 2002 and whether the Applicant continues to contest the Program's decision regarding the 10 undermentioned claims and that those claims remain to be decided at the hearing;

CLAIM

Number 1
Number 2
Number 5
Number 16
Number 20
Number 26
Number 27
Number 31
Number 32
Number 33

3. Within 7 days of the date of this Order the Program's Counsel, Carol Street, shall provide the Applicant's Counsel, Caterina Gucciardi, and the Added Party with a copy of Tibor Pal's two page written report dated December 20, 2001.
4. The Program's warranty representative and/or its designated expert as well as the Added Party and/or its designated expert shall be entitled to reasonable access to the Applicant's home for the purpose of inspection of the items in dispute. Notice of the inspection shall be given in writing to the Applicant at least 14 days prior to the proposed date of inspection.
5. At the prehearing conference the Applicant's Counsel handed to the Program's Counsel and the agent for the Added Party, copies of the written report of Mr. Bernard Finney, dated July 29, 2002, consisting of 23 pages plus appendix A, B and C thereto and further annexures.
6. At least 14 days prior to the hearing the Added Party shall furnish the other Parties, with the full name and address of the licenced electrician who attended to the electrical installations in and about the Applicant's home prior to its completion for possession on August 27, 1999.
7. All parties to the hearing shall fully comply with the requirements of disclosure of documents or things as set forth in Rule 6.3 of the Rules of Practice of the Tribunal. All parties shall also fully comply with the disclosure requirements set forth in Rule 6.4 of the Rules of Practice of the Tribunal dealing with expert witnesses.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair,
presiding

Nives Montano, Member

Released: August 6, 2002

PREHEARING

BRUCE MANN AND PATRICIA MANN

APPEAL FROM DECISIONS OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW CLAIMS

TRIBUNAL: MARJORIE HILEY, Vice-Chair, presiding
VICTOR DREVNIG, Vice Chair

APPEARANCES:

BRUCE MANN, Applicant, representing the Applicants
NETANUS RUTHERFORD, Counsel, representing the Registrar, *Ontario
New Home Warranties Plan Act*
MARC NADON, Counsel, representing the Added Party, Daprat Bros.
Ltd.

DATE OF

PREHEARING: August 8, 2002

teleconference

ORDER

Following attendances via teleconference on August 8, 2002 at a pre-hearing before this Tribunal of Bruce Mann, Agent, appearing on behalf of himself and Patricia Mann (the "Applicants"), Netanus Rutherford, Counsel, appearing on behalf of the Registrar, *Ontario New Home Warranties Plan Act*, (the "Program"), Perry Harkin, a representative of the Program, and Marc Nadon, Counsel, appearing on behalf of the Added Party, Daprat Bros. Ltd. (the "Added Party");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 am on Monday, September 23, 2002 at Gillespie Reporting Services, 130 Slater Street, Ottawa, Ontario and to continue, if necessary, on September 24th, 25th, and 26th, 2002;

1. The Parties to the hearing are the Applicants, the Program and the Added Party.
2. Bruce Mann will file with the Tribunal at or prior to the date of the hearing a letter of

authorization from his wife, Patricia Mann, permitting him to act on her behalf at the hearing.

3. There is no settlement of the issue as to whether the claim for warranties under section 13(1) was made in compliance with section 13(4) of the *Ontario New Home Warranties Plan Act*. There is an issue as to whether the date of possession is April 11, 2001 or May 3, 2001. There is an issue as to whether the Program received notice of the claim on May 3, 2002 or May 6, 2002. All parties must be prepared to deal with these matters at the hearing.
4. Regarding the supplementary decision letter of July 11, 2002 there are five items in issue: 1. Stucco on the second story is thin; 2. Metal railing on front porch installed crooked; 3. Ventilation fan in main bathroom not operating properly; 4. Ventilation fan in powder room not operating properly; 6. Exterior cladding. Issue #5, exterior vents not finished properly is not being contested at this hearing.
5. The Applicants will permit the Program's representative, Perry Harkin, access to their property in order to inspect the following items: (# as numbered in the Notice of Appeal of the Applicants)
 - a. garage floor not sloped properly (#2)
 - b. height of pavement on the driveway (#3)
 - c. gas fireplace logs and ember material not installed properly (#10)
 - d. gas line to fireplace (#11)
 - e. fireplace vent (#12)
 - f. ceiling lights on ground floor (#14)
 - g. 24 light fixtures (#19)
 - h. kitchen natural gas line (#20)
 - i. defective toilet tank valves (#21)
 - j. drip edge of roof (#34)

These items may or may not be second year warranty items. Following his inspection Mr. Harkin will issue a second supplementary decision letter on these items. Mr. Mann undertakes to inform the Program, the Added Party and the Tribunal whether or not he will contest any of these items within a short time period of receiving the second supplementary decision letter.

6. The decision letter of May 22, 2002, the supplementary decision letter of July 11, 2002 and the second supplementary decision letter of August, 2002 (yet to be completed) will all be consolidated and dealt with in the hearing scheduled to commence on September 23, 2002. The Applicants have responded in writing to the first decision letter and to the supplementary decision letter and will do so for the second supplementary decision letter. The Applicants do not need to pay any further filing fees to the Tribunal.
7. The hearing commencing on September 23, 2002 will deal with the threshold issue under section 13(4). As well the second year warranty issues as found in the supplementary decision of July 11, 2002 and in the yet to be completed second supplementary decision of August, 2002 will also be heard at this hearing.

8. All the parties are aware of the Rules of Practice of this Tribunal as amended and will comply with the rules of disclosure of the Tribunal.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley, Vice-Chair,
presiding

Victor Drevnig, Vice-Chair

Released: August 13, 2002

DAY NURSERIES ACT
R.S.O. 1990, Chapter D.2, as amended by the *Licence Appeal*
Tribunal Act, 1999, S.O. 1999, Chapter 12, Schedule G

IN THE MATTER OF
1492475 ONTARIO LTD. c.b.a. RAINBOW DAYCARE CENTRE

AND IN THE MATTER of the NOTICE OF DIRECTION of
the Director under the *Day Nurseries Act*
- Notice of Direction dated: May 30, 2002

AND IN THE MATTER of a requirement for a hearing respecting said Notice of Direction
1492475 ONTARIO LTD. c.b.a. RAINBOW DAYCARE CENTRE

Applicant

-and-

DIRECTOR, UNDER THE *DAY NURSERIES ACT*

Respondent

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a prehearing in the above matter on August 1, 2002;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the prehearing *peremptory against all parties* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 1:30 p.m., on Friday, August 9, 2002.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: August 1, 2002

1170-MED-ALCL

Appeal under Section 50(1) of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 47(1) of that Act.

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ROY MELVIN, M.D., Presiding Member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF
HEARING: July 30, 2002 *by teleconference*

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of *the Highway Traffic Act* (Ontario).

FACTS:

The Applicant was stopped by the Ontario Provincial Police ("O.P.P") on March 24, 2000 while driving erratically and was taken by ambulance to the Royal Victoria Hospital in Barrie. There was no alcohol in his car or on his breath. His story was that he had just come from his pharmacy, where he renewed his medications: Atenalol, Paxil, Antabuse, Tiamin and Valium, and that he had just taken a pill. He was kept at the hospital overnight for monitoring. The Emergency Room physician sent a Medical Report to the Ministry of Transportation as per Section 177 of the *Highway Traffic Act*, indicating that the Applicant was not able to drive. He was discharged to the care of his family physician. He has a longstanding history of alcohol consumption, at times excessive.

On June 7, 2000 the Ministry of Transportation informed the Applicant that his driver's licence was suspended because of his medical condition which might impair his ability to operate a motor vehicle safely (Highway Traffic Act, section 41.(1). Reconsideration by the Ministry would be based on medical reports from a neurologist and if cleared - a driving evaluation at a rehabilitation centre.

On June 26, 2002 the Applicant's family doctor at the time, Physican #1, Barrie, referred him to Physican #2, neurologist at St. Michael's Hospital in Toronto. Physican #2's report includes the history of off and on heavy drinking for approximately 20 years. There were minimal neurological findings viz: tremor of the outstretched hands and leg ataxia, attributable to the effects of alcohol on his nervous system.

On November 30, 2000 the Applicant was reviewed by the "Skill Builders" rehabilitation centre of Barrie to evaluate his fitness to drive. The scores and skill demonstrated by the Applicant indicated that he has adequate skills for driving despite the mild tremors of his hands.

The above reports were reviewed by the Medical Review Section of the Ministry of Transportation who notified the Applicant on December 11, 2000 that he would need a up-to-date assessment and laboratory tests (M.C.V. and G.G.T.) to indicate the nature and extent (if any) of his alcohol related disability. He was given an Alcohol Assessment form to give to his doctor for completion.

Physican #3 of Barrie signed this from on December 28, 2000 but did not provide any information regarding alcohol consumption. Physican #3 has been the Applicant's new family doctor since July 2000. Several laboratory reports from September 2000 to January 2001 show very high values of the G.G.T., marginally high values of M.C.V. and negative urine drug screening.

On February 21, 2001 the Medical Review Section of the Ministry of Transportation informed the Applicant that they had decided his driver's licence should remain under suspension, with the usual notice that reinstatement would be considered on receipt of satisfactory medical reports.

An Administrative Review was done April 30, 2001. The Applicant was again advised that no decision would be made until updated medical information was received.

A report was received from a Physican #4 of Barrie, dated February 28, 2002. This included 24 urine drug screen tests from December 1, 2001 to February 13, 2002 - all of which were negative for drugs and alcohol.

On May 21, 2002 the Medical Review Section acknowledged Physican #4's report but again deferred consideration to the reinstatement of the Applicant's driver's licence pending receipt of the previously requested medical information.

The Applicant sent a Notice of Appeal to the Licence Appeal Tribunal which was received June 19, 2002. There is some question as to the date he submitted his appeal, or whether it was received because a second filing fee of \$100.00 was returned to him as not required for reinstatement.

At the hearing, held July 30, 2002 by telephone to the Applicant in Barrie, certain relevant history was elicited. In 1994 he spent 3 weeks in prison in Windsor Ontario followed by a psychiatric disorder for which he was hospitalised at the St. Thomas Hospital for 6 weeks. He was prescribed medication in decreasing dosages as he improved.

Also in 1994 he was referred by his employer's medical advisors to Homewood for rehabilitation and treatment of alcoholism, but signed himself out after one day.

In 1998 he was convicted of a driving infraction "ability impaired" and his licence was suspended for 15 months.

The Applicant has worked for his employer for 23 years and since his licence suspension has been given a ride by fellow employees to where he works. He is single. He is presently drinking up to 8 bottles of beer every 2nd or 3rd day and/or on weekends. He does not partake of any sports or physical activities. He states that he has stopped all his medication and claims that Antabuse is a placebo but it is not clear that he understands what that means.

While giving his evidence the Applicant made a number of accusations against the police and the Ministry. His tirade continued to the point where he made derogatory remarks to the Chair. Then he abruptly hung up the telephone which, of course, terminated the hearing and left many questions unanswered.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
 - (b) a driver's licence; or
 - (c) a CVOR certificate,
- on the grounds of,
- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
 - (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
 - (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
 - (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

The Ministry of Transportation suspension of the Applicant's driver's licence was in compliance with the *Highway Traffic Act*, Section 47.(1) and Regulation 390/94, Section 14(b) "...be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely."

The Applicant has a long history of excessive alcohol consumption, albeit intermittent, with resulting medical and legal complication. The Ministry has requirements for reinstatement and the Applicant has passed the initial stages, a neurological assessment which shows that he does not have any serious neurological defect and the driving assessment, which he passed.

Unfortunately, he has not presented any satisfactory, up-to-date medical evidence of his present physical condition and his compliance with an alcohol rehabilitation program. He needs to establish an ongoing relationship with a physician who can monitor him and attest to his ability to drive, relative to his alcohol consumption. The proper completion of the Ministry of Transportation Alcohol Assessment Form would also be quite useful.

As an intermittent drinker he may very well pass but with the information on file now it is uncertain whether he can drive a motor vehicle safely at all times.

DECISION:

Upon the application by the Applicant to appeal the decision dated June 18, 2000 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the Highway Traffic Act ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

Roy Melvin, M.D., Presiding Member

RELEASED: August 1, 2002

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of
MARY SCHMIDT

AND IN THE MATTER of a decision of the
Travel Industry Council of Ontario

TO DISALLOW A CLAIM
- Decision dated: June 28, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Decision

MARY SCHMIDT

Applicant

- and -

TRAVEL INDUSTRY COUNCIL OF ONTARIO

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a prehearing in the above matter on August 13, 2002;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the prehearing *peremptory against all parties* to commence, by teleconference, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto at 2:00 p.m., on Tuesday, August 20, 2002.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: August 7, 2002

1184-MED-CARD

Appeal under section 50(1) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Minister pursuant to section 32(12)(b)(i) of that Act.

TO CHANGE THE CLASS OR CLASSES OF MOTOR VEHICLE IN RESPECT OF WHICH THE LICENCE WAS ISSUED

TRIBUNAL: ROY MELVIN, M.D., Presiding Member

APPEARANCES: KYLE BIEL, Respondent
Representative for the Minister

Applicant,
unrepresented

DATE OF
HEARING: August 7, 2002

by teleconference

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Minister (the "Respondent") pursuant to section 32(12)(b)(i) of the *Highway Traffic Act* (Ontario).

FACTS:

The Applicant, age 43, has had a number of syncope attacks since the age of eight. It is not clear how many or at what intervals but there have been none in the past two years. When her younger sister died suddenly of hypertrophic cardiomyopathy, other members of the family were investigated because of the congenital nature of this disease. The Applicant was diagnosed with this disease by Physician #1, Windsor, Ontario, whose report of October 1, 2001 suggests the prophylactic implantation of a defibrillator. This was subsequently done by Physician #2 at the London Health Science Centre on November 16, 2001.

Physician #1's report was also sent to the Ministry of Transportation indicating concerns

regarding her ability to drive a motor vehicle safely. The Ministry suspended her licence on the basis of Section 47(1) of the *Highway Traffic Act* and advised her that reconsideration would be dependent on the results of follow up cardiac assessments. She was monitored by her specialist in Windsor, Ontario, and by the Arrhythmia Service in London, Ontario. Holter monitor tests were satisfactory. Physician #3's latest report of June 28, 2002 was satisfactory.

A review by Physician #4 of the Hypertrophic Cardiomyopathy Clinic at the Toronto General Hospital on July 5, 2002 reports that the Applicant is asymptomatic, has no evidence of defibrillator shock and suggested that she should be allowed to drive.

The Ministry of Transportation thereupon approved her "G" licence and she was so notified on July 23, 2002.

Her present appeal is for the reinstatement of her class "B" licence to enable her to resume her job as a school-bus driver.

ISSUES:

Should the decision of the Minister to change the class or class of motor vehicles in respect of which the licence is issued, in accordance with the result of the examination be varied, modified or set aside?

Does the Applicant suffer from a mental, emotional, nervous or physical disability likely to significantly interfere with her ability to drive a motor vehicle of the applicable class safely?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffer from any mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Regulation 340/94, Section 17 and 18 states:

- 17. (1) Qualifications required by an applicant for a holder of a Class A, B, C, D, E or F driver's licence are that the applicant or holder,
 - (a) has no history or clinical diagnosis of diabetes that requires insulin for control;

- (b) is not taking any drug that could, in the dosage prescribed or in the dosage recommended by the manufacturer, impair his or her ability to drive a motor vehicle of the applicable class safely;
 - (c) has no established medical history of myocardial infarction, angina pectoris, coronary insufficiency or thrombosis;
 - (d) has no established medical history of heart disease including arrhythmia or of respiratory dysfunction likely to interfere with the safe driving of a motor vehicle of the applicable class;
 - (e) is not suffering from an aortic aneurysm, whether resected or not;
 - (f) is not suffering from hypertension accompanied by postural hypotension resulting in giddiness when under treatment;
 - (g) has no established medical history of loss of consciousness or awareness due to a chronic or recurring condition;
 - (h) has no established medical history of a disorder of the musculoskeletal or nervous system that may interfere with the safe driving of a motor vehicle of the applicable class;
 - (i) has no established medical history of an intractable psychotic or psychoneurotic disorder, having particular regard for sustained hostile, aggressive, paranoid, suicidal or other destructive tendencies or depression unless it is medically determined that the condition from which the person has suffered is corrected or controlled;
 - (j) has a visual acuity by Snellen Rating, with or without the aid of corrective lenses, no poorer than 20/30 in the better eye and 20/50 in the weaker eye; and
 - (k) has a horizontal visual field of at least 120 degrees in each eye as measured by confrontation tests.
- (2) An applicant for or a holder of a Class A, B, C, D, E or F driver's licence who fails to meet the qualifications referred to in clauses (1)(a) to (i) may, despite the failure, qualify for the class of licence applied for or held if he or she demonstrated the ability to drive a motor vehicle in the applicable class as safely as any person who meets those qualifications.
- (3) An applicant for or a holder of a Class D driver's licence who fails to meet the qualification referred to in clause (1)(c) may, despite the failure, qualify for that class of licence if it is medically determined that he or she has made a full recovery and there is no established history of a second occurrence of myocardial infarction, thrombosis or recurring angina pectoris.
- (4) An applicant for or a holder of a Class B, C, E or F driver's licence whose hearing in one ear is better than in the other must be able to perceive in the better ear, with or without a hearing aid, a forced whisper at a distance of 1.5 metres or, if an audiometer is used to test the person's hearing, must not have a loss in the better ear of more than 40 decibels at 500, 1,000 and 2,000 hertz.

18. An applicant for or a holder of a G, G1, G2, L, M, M1, M2, or R driver's licence must have,
- (a) in the case of a person whose vision in one eye is better than in the other, visual acuity in the better eye that is no poorer than 20/40 as measured by Snellen Rating; and
 - (b) a horizontal visual field of at least 120 degrees as measured by confrontation tests.

Section 32(12)(b)(i) states:

- 32 No person shall drive a motor vehicle on a highway unless the motor vehicle is within a class of motor vehicles in respect of which the person holds a driver's licence issued to him or her under this Act.
- (12) An applicant for a driver's licence or a person who holds a driver's licence shall submit to the examinations that are authorized by the regulations relating to this section and required by the Minister at the time and places that the Minister may require and the Minister may,
- (b) in the case of a person who holds a driver's licence,
 - (i) impose or remove the conditions or endorsements authorized by the regulations or change the class or classes of motor vehicles in respect of which the licence is issued in accordance with the result of the examinations, or

Section 50 states:

- 50(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or Registrar.

APPLICATION OF THE LAW TO FACTS:

The *Highway Traffic Act*, Section 17.(1)(d) states that a holder of a class "B" driver's licence "has no established medical history of heart disease including arrhythmia or of respiratory dysfunction likely to interfere with the safe driving of a motor vehicle..."

The Canadian Medical Association's guidelines "*Determining Medical Fitness to Drive*" 6th edition, Section 8.1.4 Subsection B, *Disturbances of Cardiac Rhythm (1) Ventricular fibrillation and/or sustained ventricular tachycardia* disqualifies a person from commercial driving even with an implanted cardioverter/defibrillator.

The Applicant's medical situation fits both parameters described above. Hypertrophic Myocardiopathy is a serious congenital progressive heart disease characterized by disturbances of heart rhythm. If this disease process is arrested or controlled by medication and/or implantation of a defibrillator, this person may qualify for a "G" driver's licence since the risks involved are negligibly higher than for the general population. However, when this risk is multiplied by the number of passengers in a school bus and you consider that these passengers are children, the added risk becomes unacceptable.

DECISION:

Upon the application by the Applicant to appeal the decision dated February 6, 2002 of the Minister ("Respondent") to change the class or classes of motor vehicle in respect of which the licence was issued pursuant to Section 32(12)(b)(i) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Respondent and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

Roy Melvin, M.D.,
Presiding Member

RELEASED: August 13, 2002

CHRISTINE M. TWEEDLE

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: ANTOINE AOUAD, M.D., Presiding Member
BARBARA FRASER, Member

APPEARANCES: LUBA NEUWIRTH
Representative for the Registrar of Motor Vehicles

CHRISTINE M. TWEEDLE, Applicant
unrepresented

DATE OF HEARING: August 9, 2002

DECISION RELEASED: August 13, 2002 **St. Catharines**

REASONS FOR DECISION

A hearing was held on August 9, 2002, at St. Catharines, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO SET ASIDE the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Christine M. Tweedle (the "Applicant")
Motor Vehicle:	1984 GMC Van, licence plate AHDM 256 (the "vehicle")
Date of Appeal:	July 23, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the driver's licence was not under suspension and that the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(b) and (d) of the Act.

This matter came before this Tribunal on August 9, 2002 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

The Respondent's Representative provided the Tribunal with original certified copies of the documents on file.

The Applicant introduced in evidence two photographs of the van, which on consent were entered as exhibits # 4.

Witnesses were excluded at the suggestion of the panel.

The Tribunal notes that portions of the evidence proffered at the hearing, more particularly details of a previous incident concerning the suspended driver Randy Stewart, as well as allegations made with respect to the officer involved in this matter, are not germane to the issue and will not, therefore, be transcribed.

There were no other preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the bases of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

To: Vehicle Impound Tribunal
From Christine Tweedle
7150 Waters Ave
Niagara Falls On.
(905) 353-1097

To whom it may concern:

On July 15/2002 myself and Randy Stewart
My Boyfriend, left for St Catherines courthouse and as we where leaving our sitter and
Friend Willie Tracey ask if Randy had everything for court. He opened the driver side
door and I got in rolled the window halfway down and said good-bye. Before going on
the highway we stopped at the Tim Horton's.
We then took the Q E W to St Catherines we took the Niagara St exit to Wellend ave. As
I was turning onto and around the corner I notice a Police Cruiser b ehind us I told Randy and that
he should do up his seatbelt
We continued down Welland ave the Cruiser was still about 5 cars behind after going just
through the Vine st set of lights
The cruiser lights where activated I pulled over to the side of the road, I rolled down my
window the rest of the way and then
I reached behind the passengers seat to get my owner ship and insurance papers in a box I
keep them in. When the officer reached my side
He looked into the van an asked over me to randy that he wanted to see his License he
then went around the van and opened the door
And told randy he was under arrest of driving while disqualified and then put him in the
cruiser and then told me to get my stuff
and that he was impounding my van. He then called a cab and left me there standing.
This is the same officer that Randy has had problems

in the past He's the same officer that arrested Randy for and that s why we where going to court that day. I received the impound papers on Friday and this is why I'm writing to you. With out my van I cannot take my newly born baby to his Doctors in Grimsby I also have 3 other kids I need to drive around I also need it to go to work with. I can not also pay the amount of the impound if it stays in the full 45 days This is not my fault I was driving my own van and I am the one that has to suffer Because this Police Officer has issues with someone else. I shouldn't have to go through this hardship with all I have with 4 kids and a job. So I ask you to please help me to get my van back for my Children and me.

P.S I have Pictures of the van and the tinted windows
As proof and this statement from our sitter.
Sincerely Yours
"Christine Tweedle"

To Whom it may Concern:

On July 15/2002 I witnessed Christine Tweedie and Randy Stewart leave their house at 7150 Waters Ave in Niagara Falls When they left I saw that Christine Tweedle Was in the drivers seat of her 1984 Chevy van This van belongs to her and I've never seen Randy drive this van I've known Randy Stewart for 25 years and Crhistine for the last 7 years.I give this statement under truth and first hand knowledge.

Sincerely Your
"William Tracey"
William.j. Tracey

(sic)

At the hearing the Applicant testifying under oath, opted to focus on the hardship grounds for appeal and so stated several times during the hearing.

In her evidence-in-chief and in cross-examination, the Applicant cited both economic and health factors of hardship.

Economic reasons being loss of income. On or about July the 25th, the Applicant was unable to accept a job due to her inability to arrange for a babysitter to come to her home. Taking the four children to a babysitter, would have required two trips, as the Applicant's second vehicle, a Camaro, only has four seat belts. The Applicant is aware that the law makes it illegal to transport young children without the mandatory precautions of the use of seat belts, and believes that she would have been fined had she attempted to do so. The loss of the vehicle has also resulted in a loss of income, in that the van is used to haul "...vehicles ...furniture ...brings in \$400.00-\$500.00 a month..."

Without the extra income the family is finding it difficult to "...pay the bills and the mortgage...". The Applicant is also very concerned that she may not continue to be able to afford buying the special formula her son requires, as he is lactose intolerant.

Although her baby's health has not apparently been affected, the Applicant has been forced to miss two appointments with his physician. The Applicant testified that the doctor's office has "threatened" that if another appointment is missed "...they will have to call Children's Aid because he has to see the doctor..."

During her testimony, the Applicant related to the Tribunal an incident that took place the day before the hearing. Her daughter fractured her arm. Given the fact that the Applicant is not able to take all the children in the Camaro, the Applicant had to call and wait for a baby sitter to arrive at her home, before being able to take her young daughter to the hospital.

Under questioning by the Respondent's Representative the Applicant confirmed that she was the driver of the vehicle at the time of the impoundment.

The Applicant was admittedly reluctant to comment on the issue of whom was driving the vehicle at the time they were stopped by the police. As a means of clarification the Applicant explained: "*I don't know if this statement will be used when we do go to the Court house, so I don't want to say too much. Because if it is used at the court house, than he is going to know everything that is against him when we do go to the Court house, because he has been subpoenaed...*".

The Applicant called Randy Michael Stewart as a witness. Mr. Stewart testified that they have four children and that it is difficult to make ends meet, due to the loss of income realized by the use of the van.

In reply to the Respondent's Representative question as to who was driving the car "...on the morning of June the 15th...", Mr. Stewart replied: "*Gee, I don't know if I can say anything, because I am going to court with this, right. I don't want to say anything that is going to jeopardize...*". After insistence from the Tribunal that the question be answered, Mr. Stewart stated: "...*She was...*"

In closing the Applicant reiterated her statements regarding her need for the vehicle. The Applicant emphasized the extra cost of babysitting, and the loss of income.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;

2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Randy M. Stewart;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving While Disqualified under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until November 16, 2003.

The Respondent called Dwayne Pardoe, an officer with the Niagara Regional Police Services, as a witness.

Reading from his notes, Constable Pardoe testified that on the morning of July the 15th, he was traveling westbound, in uniform, in a marked police cruiser, on the Queen Elizabeth Highway. Observing a black GMC van, also westbound on the QEW, and having “...recognized ...vehicle...”, Constable Pardoe followed the vehicle as it exited off the Queen Elizabeth Highway. Immediately behind the vehicle, and “...taking a sharper corner ...as the vehicle rounded the corner...”, Constable Pardoe was able to see the driver of the van, whom he described as “...a male wearing sun glasses ...recognized ...male, known ...as Randy Stewart...”.

Constable Pardoe described for the Tribunal his observation after the vehicle pulled to the side of the roadway and stopped: “...As I approached the driver's side of the vehicle I observed that the vehicle was rocking on its suspension as if someone was moving inside of the vehicle. I approached the driver's side door and there was a female in the driver's seat, who identified herself as Ms Christine Tweedle. Mr. Stewart was in the passenger's seat ...”

The van in the pictures introduced by the Applicant was identified by Constable Pardoe as the van in question. Constable Pardoe could not recollect whether the windows were rolled down or not, but insisted that his view was unobstructed and that he was able to see clearly Mr. Stewart driving, as the van made the turn.

The Applicant did not wish to cross-examine the officer, as “...he is already going to be subpoenaed in court...”, but did state that she had seen him four or five car lengths behind her. Constable Pardoe denied being so far behind and reaffirmed that he was directly behind the van.

In reply to a question posed by Ms Barbara Fraser, a member of the Tribunal, Constable Pardoe stated that it took approximately "...sixty seconds..." for him to get from his cruiser to the side of the van.

In her closing remarks, the Respondent's Representative rebutted only the hardship issue, maintaining that hardship was the single issue on which the Applicant based her appeal.

The Respondent's Representative referred to section 22 of Regulation 632 which sets out the criteria for hardship, and argued that Applicant must prove that her losses are immediate, significant and long lasting. According to the Respondent's Representative, the Applicant has demonstrated that there have been immediate and significant losses, but these losses are not long lasting.

With respect to the health and welfare of the family, the Respondent's Representative contends that although there have been some missed appointments, the family has survived for the past three weeks, and as there is only two more weeks for the impoundment, there should not be any further risk.

The Respondent's Representative claims that the impoundment may be inconvenient to the Applicant, but that inconvenience is not grounds for reversal.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
 - (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(b) and (d).

With respect to an appeal under subsection 50.2(3)(b) alleging that the driver's licence of the driver driving at the time of the impoundment order was not under suspension, section 55.1(2) of the Act states:

Where a police officer or officer appointed for carrying out the provisions of this Act is satisfied that a person was driving a motor vehicle on a highway while his or her driver's

licence is under suspension under section 41 or 42 or 43, even if it is under suspension at the same time for any other reason, the officer shall,

- (a) notify the Registrar of the fact or cause the Registrar to be notified; and
- (b) detain the motor vehicle that was being driven by the person whose driver's licence is under suspension until the Registrar issues an order under subsection (3).

Section 41 of the *Highway Traffic Act* identify the type of appeals for which a licence is suspended in sections 41(1)(a), (b), (c), (d), and (e) and 41(7) and 42(1) and 42(5) as follows:

Section 41(1) Subject to subsections 41.1 (1), (2) and (3), the driver's licence of a person who is convicted of an offence,

- (a) under section 220, 221 or 236 of the *Criminal Code* (Canada) committed by means of a motor vehicle or a street car within the meaning of this Act or a motorized snow vehicle within the meaning of *Motorized Snow Vehicles Act*;
- (b) under section 249, 252, 253 or 255 of the *Criminal Code* (Canada) committed while driving or having the care, charge or control of a motor vehicle or street car within the meaning of this Act or a motorized snow vehicle within the meaning of the *Motorized Snow Vehicles Act*;
- (c) under subsection 254 (5) of the *Criminal Code* (Canada) committed in relation to the driving or having the care, charge or control of a motor vehicle or street car within the meaning of this Act or a motorized snow vehicle within the meaning of the *Motorized Snow Vehicles Act*;
- (d) under a provision that is enacted by a state of the United States of America and that is designated by the regulations; or
- (e) referred to in a predecessor to this sub-section, is thereupon suspended

Section 42.(1) The driver's licence of a person who is convicted of an offence under subsection 259 (4) of the *Criminal Code* (Canada) or under a provision that is enacted by state of the United States of America and that is designated by the regulations is thereupon suspended for a period of,

- (a) upon the first conviction, one year; and
- (b) upon a subsequent conviction, two years,

in addition to any other period for which the licence is suspended and consecutively there to.

- (4) This section applies in the same manner as if a person were convicted of an offence if the person pleads guilty to or is found guilty of an offence referred to in subsection (1) and,
 - (a) an order directing that the accused be discharged is made under section 730 of the Criminal Code (Canada) or under a provision that is enacted by a state of the United States of America and that is designated by the regulations; or
 - (b) a disposition is made under section 20 or sections 28 to 32 of the *Young Offenders Act* (Canada), including a confirmation or variation of the disposition. R.S.O. 1990, c.H.8, s.42 (1-4).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

- (4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.

- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

During the hearing the Applicant asserted that she was basing her grounds for appeal solely on the issue of hardship. In her closing remarks the Respondent's Representative chose to refute only the matter of hardship.

Nonetheless, the Tribunal has reviewed this matter at great length, and finds section 50.2(3)(b) of the Act to be of paramount importance.

Section 50.2(3)(b) prescribes as follows:

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are...

- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;

The Tribunal's premise that the Applicant is relying on Section 50.2(3)(b) is corroborated by the Notice of Appeal filed by the Applicant, which clearly indicates that the Applicant also appealed on the grounds: "*the driver's licence was not under suspension*".

There can be no argument that the Notice of Appeal constitutes part of the proceedings. Therefore, the contents therein simply cannot be ignored. In this case, before considering the issue of possible hardship, the Tribunal must primarily determine whether there was just cause for the impoundment of the Applicant's vehicle.

At issue is the identity of the driver when the vehicle was pulled over by officer Pardoe.

All witnesses agree that the Applicant was sitting in the driver's seat when Constable Pardoe approached the vehicle.

Controversy arises due to the conflicting evidence, as to how the Applicant came to be sitting behind steering wheel. Although, irrelevant, as the issue was raised, the Tribunal will proceed to examine the particulars.

In her written submissions to the Tribunal the Applicant explicitly notes that "... *The cruiser lights where (sic) activated I pulled over to the side of the road, I rolled down my window...* ". At the hearing the Applicant introduced evidence by way of photographs, that the van in question had tinted windows. Constable Pardoe was able to identify the van in the photographs, but could not recollect whether the windows were down or up, nor whether the van had tinted windows. Nonetheless, Constable Pardoe attested that he plainly saw the disqualified driver, Randy Stewart driving the van. Furthermore, Constable Pardoe asserted that tinted windows did not hinder his line of vision, therefore it can be inferred that the windows were down.

The Applicant told the Tribunal that she had been driving since they left the house. Constable Pardoe claims that the van was "... *rocking on its suspension as if someone was moving inside of the vehicle...* ". With all due respect to Constable Pardoe's instincts the Tribunal cannot make a finding based on assumption or speculation.

The Tribunal finds that the Applicant was in fact the driver of the vehicle at the time of the impoundment, and that since the Applicant's driver's licence was not under the suspension, the van is deemed to have been improperly suspended.

Hardship is a consequence of impoundment. There being no grounds for impoundment, there is no need for the Tribunal to address the issue of hardship.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal **sets aside** the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

Barbara Fraser,
Member

RELEASED: August 13, 2002

HIGHWAY TRAFFIC ACT
R.S.O. 1990, CHAP. H.8 AS AMENDED, SECTION 50.2

IN THE MATTER of an application by Theresa
Willar to appeal the decision of the Registrar of
Motor Vehicles pursuant to Section 55.1 of the
Highway Traffic Act;

AND IN THE MATTER of

THERESA WILLAR

APPLICANT

and

REGISTRAR OF MOTOR VEHICLES

RESPONDENT

ADJOURNMENT

WHEREAS a hearing in the above matter was scheduled to be held, by teleconference, on Monday, August 19, 2002 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario;

AND WHEREAS letters were filed, dated August 9, 2002, by the Applicant and August 8, 2002 by the Respondent, requesting an adjournment to August 15, 2002;

TAKE NOTICE, upon consent of all parties, the Tribunal Orders:

- (1) this matter is adjourned; and
- (2) the appeal is scheduled to be heard, by teleconference, at 1:30 p.m., on Thursday, August 15, 2002 at the Tribunal's above Chambers,

AND TAKE FURTHER NOTICE that upon failure to attend at the aforesaid time and place, the Tribunal may make a Decision in your absence and without further notice to you.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: August 12, 2002

HIGHWAY TRAFFIC ACT
R.S.O. 1990, Chap. H.8 as amended

JOHN BRICKER

MOTION TO CONSIDER AN APPLICATION
FOR EXTENSION OF TIME

TRIBUNAL: CARL F. DOMBEK, Chair, presiding

APPEARANCES: JOHN BRICKER, Applicant
KIM BEINTEMA, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: August 7, 2002 ***By Teleconference***

ORDER

Upon hearing the submissions of the Applicant and the Agent for the Respondent, the Licence Appeal Tribunal orders that:

1. The application for an extension of time for the Applicant to file an appeal from an Order of the Registrar of Motor Vehicles to impound a motor vehicle, dated June 10, 2002, is granted.
2. The matter will be heard by teleconference from the Tribunal's Chambers.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair, Presiding

Released: August 7, 2002

DEREK SCANLAN

MOTION TO CONSIDER AN APPLICATION
FOR EXTENSION OF TIME

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: JAMES N. AITCHISON, Counsel, representing the Applicant
AVIVA HARARI, Counsel, representing the
Registrar, *Motor Vehicle Dealers Act*

DATE OF
HEARING: July 26, 2002 *Via Teleconference*

REASONS FOR RULING AND ORDER

BACKGROUND:

This is an application to the Licence Appeal Tribunal to extend the time for the Applicant, Derek Scanlan, to file an appeal to the Notice of Proposal dated May 9, 2002 of the Registrar under the *Motor Vehicle Dealers Act*. The proposal is to revoke the Applicant's registration as a motor vehicle salesperson.

The hearing of this motion proceeded as an electronic hearing. The Applicant filed a Notice of Motion with the Tribunal dated July 2, 2002 together with supporting documentation. The reasons for the Applicant's motion to extend the time for filing his appeal are set forth in the documentation filed with the Tribunal. The Applicant contends that he did not receive the Registrar's Notice of Proposal as it was mailed by the Registrar to an incorrect address. When ultimately the Applicant learned of the Registrar's proposal, the time within which the Applicant was required to appeal the proposal to the Tribunal in terms of Section 7.(2) of the *Motor Vehicle Dealers Act* had expired. The Applicant's solicitors requested the Registrar's consent to an extension of time for the filing of an appeal but such request was refused, hence the Applicant's motion to the Tribunal. The Registrar has filed materials opposing the Applicant's motion.

FACTS FOUND PROVEN:

Having heard Counsels' submissions and having considered the documentation filed by the Applicant and the Registrar the Tribunal finds the following facts to have been proven.

1. The Applicant was on January 2, 2001 registered as a motor vehicle salesperson.
2. In or about May 9, 2002 the Registrar executed a written Notice of Proposal to revoke the Applicant's registration as a motor vehicle salesperson.
3. The aforesaid proposal was on May 10, 2002 sent by registered mail to the Applicant at 60-53 Tannton Road East, Oshawa, Ontario, L1G 3T6.
4. On May 31, 2002 the proposal was returned, marked "unclaimed" by the postal authorities, to the Registrar.
5. The proposal came to the notice of the Applicant on or about June 13, 2002 when the Applicant's employer was notified by the Registrar, by way of "Final Notice" that, as the Applicant had not exercised his right to a hearing in terms of section 7.(2) of the *Motor Vehicle Dealers Act*, the proposal had become final.
6. By letter dated June 19, 2002 the Applicant's solicitor forwarded to the Tribunal a Notice of Appeal by the Applicant to the Registrar's Notice of Proposal.
7. The Applicant was on March 26, 2002 found guilty and convicted on one count of unlawfully by deceit, falsehood or other fraudulent means defrauding Wayne Bolahood, operating as J-Bee Motors Limited, of a sum not exceeding \$5,000.00 contrary to section 380(1)(a) of the *Criminal Code of Canada* and amendments thereto. The Applicant received a suspended sentence.

THE LAW:

Section 7 of the *Licence Appeal Tribunal Act*, 1999 states:

"Despite any limitation of time fixed by or under any Act for the giving of any notice requiring a hearing by the Tribunal or an appeal from a decision or order of the Tribunal under section 11 or any other Act, if the Tribunal is satisfied that there are reasonable grounds for applying for the extension and for granting relief, it may,

"(a) extend the time for giving the notice either before or after the expiration of the limitation of time so limited; and

"(b) give the directions that it considers proper as a result of extending the time.".

Section 7 of the *Motor Vehicle Dealers Act*, R.S.O. 1990, states:

"(1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the Registrar shall serve notice of the proposal, together with written reasons therefor, on the applicant or registrant.

"(2) A notice under subsection (1) shall state that the applicant or registrant is entitled to a hearing by the Tribunal if the applicant or registrant mails or delivers, within fifteen days after service of the notice under subsection (1), notice in writing requiring a hearing to the Registrar and the Tribunal, and the applicant or registrant may so require a hearing.

"(3) Where an applicant or registrant does not require a hearing by the Tribunal in accordance with subsection (2), the Registrar may carry out the proposal stated in the notice under subsection (1)..."

APPLICATION OF LAW TO FACTS:

The test for determining whether there are reasonable grounds for applying for an extension of time to file an appeal and for the granting of relief are dealt with in *Re Bilodeau and ONHWP (1994) 25 CRAT 930*. In order to be successful in a motion to extend the time for filing an appeal, an Applicant must show:

1. That there was an intention to appeal within the time limit;
2. That the reason the notice of appeal was not served on time is such that the Applicant should be excused for not doing so and allowed to do it later if he did so as soon as the true situation was apprehended;
3. That there is not some overriding prejudice to the Respondent in allowing the application.
4. That there is a substantial point in issue and the Applicant has some reasonable chance of success.

The Tribunal, when considering whether or not to grant an extension of time for the filing of an appeal must be cognizant of the fundamental principle that justice must be done.

In applying the tests above mentioned to the facts found proven in this particular matter, the Tribunal finds that the Applicant did have the intention to appeal within the time limit. The Applicant only became aware of the proposal when it was brought to his attention by his employer after June 13, 2002. Within six days thereafter the Applicant's solicitor had notified the Tribunal of his client's intention to appeal the proposal. This was well within the 15 days permitted by Section 7.(2) of the Act. The reason why the Applicant did not serve his Notice of Appeal earlier was due to the Registrar's proposal having been mailed to an incorrect address.

There is no overriding prejudice to the Registrar in allowing the extension of time. No evidence was presented to the Tribunal by the Registrar that he would suffer prejudice if an extension was granted and the Tribunal finds there to be no prejudice caused by the delay in the Applicant's filing of his Notice of Appeal. The situation that gave rise to this motion was caused by the inadvertence of the Registrar.

Finally, the Tribunal has considered whether the Applicant has some reasonable chance of successfully appealing the Registrar's Notice of Proposal. The bar is not set high for an Applicant to show a reasonable chance of success before the Tribunal in opposing the Registrar's proposal. Upon being found guilty and being convicted on one count of fraud under

\$5,000.00, the passing of sentence upon the Applicant was suspended. No background information regarding the conviction and passing of a suspended sentence was placed before the Tribunal. It is conceivable that at the hearing of the Registrar's proposal there will be information placed before that hearing that may indicate the reason and circumstances for a suspended sentence being passed. To deny the Applicant an opportunity to fully and fairly deal with the conviction and the reasons for a suspended sentence being imposed would be a denial of a just resolution regarding the proposal.

ORDER:

Accordingly, pursuant to the authority vested in it by Section 7 of the *Licence Appeal Tribunal Act, 1999*, the Tribunal orders:

1. That the application to extend the time for the filing of the Applicant's appeal to the Registrar's Notice of Proposal dated May 9, 2002, be and is hereby granted.
2. That the Applicant, within 10 days of this order, shall provide in writing to the Registrar, with a copy to the Tribunal:
 - (a) full and precise particulars of the "extraordinary circumstances surrounding" the Applicant's conviction of March 26, 2002 on a charge of fraud as referred to by the Applicant in schedule "A" to the Applicant's Notice of Appeal dated June 19, 2002.
 - (b) full and precise particulars of the "error in both fact and in law made by the Registrar in refusing to register" the Applicant.
 - (c) full and precise particulars of the Registrar's error "in fact and in law in refusing to register" the Applicant on the basis of past conduct.
 - (d) full and precise particulars of what past conduct of the Applicant is inconsistent "with the intention and objectives of the Act."

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: August 1, 2002

MARGARET PERGUNAS

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MARJORIE L. HILEY, Vice-Chair

APPEARANCES: ORREN LOUCH, Agent, representing the Applicant
SARA KARGES, Counsel, representing the Registrar, *Ontario New Home Warranties Plan Act*,
JEFFREY WILKER, Counsel, representing the Added Party,
1660773 Ontario Limited

DATE OF
HEARING: May 6 & 7, 2002 Kingston

REASONS FOR DECISION AND ORDER

BACKGROUND:

This matter arose from the decision dated May 4, 2001 of the Registrar, *Ontario New Home Warranties Plan Act*, denying the major structural defect claim of Margaret Pergunas. The Program found that the cracking of the ceramic tiles was not a major structural defect. As well the inadequacy of the joist header, the inadequate joist support at the stairway opening and the distance between two floor joists were not defects that met the definition of major structural defect. By the Notice of Appeal filed by the Applicant's agent on May 21, 2001 the Applicant contested the denial of the claim and requested a hearing before the Tribunal. This matter had originally been scheduled for hearing on October 4 and 5th, 2001. The Applicant had requested an adjournment in order to permit her expert to complete his report. Hearing dates were scheduled for December 11 and 12, 2001. But the Program requested an adjournment of those dates in order to permit its expert to complete his report. On consent of parties the matter was adjourned to January 21 and 22, 2002. A further adjournment requested by the Applicant was granted and the hearing was rescheduled for May 6 and 7th, 2002. The hearing proceeded on May 6 and 7th, 2002 with all the parties in attendance.

ISSUE:

Does the claim by Margaret Pergunas fall within the definition of Major Structural Defect as found in Regulation 892 of the *Ontario New Home Warranties Plan Act*?

EVIDENCE:

The Applicant Margaret Pergunas testified as did her expert, Alasdair Higginson.

Margaret Pergunas' testimony:

Mrs. Pergunas testified that she took possession of her home on August 14, 1998. She noticed the first cracks in her floor tiles in late October, 1999. Her first reaction was to have the installer, Discount Carpet, fix the problem. She informed them of the problem in November, 1999 and an employee from Discount Carpet did come to her home in January, 2000. But in March, 2000 she noticed new cracks and by April, 2000 she found there were cracks all over her ceramic floor.

Mrs. Pergunas then got the Program involved with this problem and Mr. Brent Caskenette did an inspection of her home on November 16, 2000. In his report of February 20, 2001 Mr. Caskenette stated the problems did not fall under the major structural defect warranty and the claim was denied.

On the advice of friends she sought the assistance of Mr. Louch, currently acting as her agent at this hearing, who did a report dated March 6, 2001 in which he stated that the tile was cracking due to the structural failure of the floor system.

The builder had offered to put a wall in the basement in January, 2001 but she had not accepted that offer as Mr. Louch had told her that the wall needed to have a foundation.

Mrs. Pergunas said she was getting conflicting information from the Program and the builder as to whether or not the problem was due to the method by which the ceramic tiles had been laid initially. The person from the floor system, Mr. Bucci, had stated in his report of December 20, 2000 that there had been overlay panels. But her builder, Mr. Farmer, said her floor was not overlaid.

Mrs. Pergunas got an estimate from Floor and Wall Centre in Brockville in March, 2001. After repairs to the floor joists and subfloor they estimated the cost of replacing the existing ceramic floor to be \$7,476.64.

Then Mrs. Pergunas got the report from her expert, Mr. Higginson, dated September 26, 2001. He found that the subfloor did not meet the Ontario Building Code and the

floor joists were not installed in accordance with the manufacturer. Her expert estimated the cost of repairs at over \$18,000.00, which included not only replacement of the ceramic tiles but repairs to the floor assembly.

Mrs. Pergunas stated that in December, 2001 the builder again stated he would build a wall in her basement. Her agent, Mr. Louch, responded on her behalf in January, 2002 and listed a number of conditions before the wall could be built. The builder did not agree to these conditions and the wall has not been built.

Mrs. Pergunas stated that she was not happy with the work of Discount Carpet and did not want them to do further repair work at her home. She feels that all the tiles will need to be replaced as the design is not discontinued. She wants a proper subfloor with the joists positioned properly. She wants the wall in the basement to be done properly.

Mrs. Pergunas stated that the cracks are now from wall to wall. The repaired cracks are now cracking again. There are cracks in the floor of her entrance way, her hallway, her bathroom, her broom closet, and in a number of places in her kitchen.

Under cross examination Mrs. Pergunas agreed that in her letter to the Program dated February 10, 2000 she had not mentioned the problem with the ceramic tiles. She agreed that the builder had replaced her hardwood floor at no cost to her. She agreed that there had been issues with the casement windows and the builder had tried to correct it. She was still not happy with that situation. She had paid \$1,795.00 for the upgrade for the ceramic tiles.

Mrs. Pergunas stated that Mr. Walker had screamed at her and wanted to buy back her house plus 3% increase.

She thought that she might have refused to allow the floor joist company to inspect her floor in the fall of 2000.

Mrs. Pergunas stated that she continued to live in the house despite her concerns with the safety of the subflooring. The wall was not constructed in the basement as she relied upon the advice of Mr. Louch.

Testimony of Alasdair Higginson

Mr. Higginson graduated from civil engineering in 1996 from Carleton University. He has worked as a structural engineer for over three years. He was registered as a professional engineer in June, 2001 and has worked with Buchan, Lawton, Parent since August, 2001. He works in the field of building science and building envelope. This is his first report on flooring and his first time giving testimony. He was qualified as a structural engineer expert.

Mr. Higginson spoke of the issue of the joists near the stairway opening not being adequate to carry the load of the house. The joist members were picking up a large amount of the kitchen load. In his opinion the floor system is not properly designed and is unsafe. The joists were not supposed to carry that kind of load. Photo 3 in his report shows how the joist was being used as a pick up beam. He stated that in order to calculate the weight load you need to consider the different types of beams. With engineered wood products you should use the LVL beam.

Mr. Higginson pointed out the basement plan of the house which showed that there was to have been a wall to support the floor joist. You would need footings as this is a load bearing wall. This is stated in the OBC 9.15.3 As the plywood underlay is not in compliance with the Ontario Building Code it could possibly crack.

Mr. Higginson also stated that the floor joists and the subfloor must act together. If the subfloor is not glued but just nailed then it is overspanned and does not meet the manufacturer's specifications. It will deflect more and over exceed the maximum limits specified by the manufacturer as set out in the vibration controlled floor span tables. For instance in a subfloor that is nailed only the span should be 13' 11" but he found the joist spans to be 15' 1", 14' 7½ " and 14' 3".

He found the major structural defect to be that the subfloor assembly does not meet the building code. The underlay used was ½" but the code requires 5/8", section 9.30.6.3(1)(b). He stated that photo #4 in his report shows that the thickness of the underlay in the front hallway measured as ½". He was unable to tell if the joints are offset.

Mr. Higginson stated that he could not agree with Mr. Finney's calculations as these calculations were based on the subfloor and the underlay working together. He was not sure if that is the case here as he is unsure of the location of the joints and underlay. He also stated that the proper way to test a floor would be to flood it with water. Deflection does not mean anything if there is no live load.

As well Mr. Higginson stated that the Terrazzo Guild has requirements for the subfloor and the current joist spacing and underlay in the house does not meet those requirements.

Under cross examination Mr. Higginson stated he had not viewed the building plans or made any inquiries to the building department of the City of Brockville. He was unsure as to the extent that the floor would flex and shear. He did not know the number of joists in the home. He was making engineering assumptions as to where the load was going and that the floor could possibly collapse. It was common sense that the load was being transferred. He agreed that he had not seen compression at that location nor the floor deflecting when stepped on. He was assuming that the two joists were supposed to be beams. The structural integrity was being compromised by the tiles cracking. The major structural defect is the two joists at the staircase.

Mr. Higginson stated that this defect was not affecting the use of the house by Mrs. Pergunas. Maybe if there were a number of people in the house at one time the floor might not support the load. He had not suggested any remedial steps in his report and he did not feel the house was severely unsafe. He had not told Mrs. Pergunas to put in two Jposts to support the wall and floor. He agreed that most homes has some sort of structural deficiencies. He agreed that with a ¾" subfloor, which is the floor installed in this house, the joists are installed in compliance with the tables provided by the manufacturer. As well the tables he had used came into force in July, 1998 and when Mrs. Pergunas's house was being built the manufacturer would have been using the older manual and tables. Mr. Higginson stated that he had not seen any evidence of glue on the joists but he agreed that if Mr. Finney saw such glue, then the floor is correctly spanned.

Mr. Higginson did not agree with Mr. Finney's conclusion that one can combine the underlay and subfloor thickness and find that the system is better than required by the OBC. According to Mr. Higginson the OBC requires 5/8" for the underlay so there is a violation of the Code.

Mr. Higginson could not give a definitive answer to what was causing the ceramic tile to crack. He had no evidence whether or not the installation procedures had caused the tile to crack. In his opinion the floor system is inadequate to support the ceramic tile. He agreed that his reference to the Terrazzo Association standards was not relevant as these standards do not apply to pre manufactured systems.

The Added Party called the builder, William Farmer, as its witness.

Testimony of William Farmer:

Mr. Farmer is one of two principals of the numbered company which is the Added Party to these proceedings. Since 1989 he has built about two hundred homes. This is his first hearing and his first claim with the Program. He had changed the windows for Mrs. Pergunas and redid her hardwood floors even though she had initially picked the colour of the hardwood and then had not liked it. If she had not upgraded to ceramic tile there would have been vinyl floors in the kitchen and bathroom and carpet in the hallway.

Mr. Farmer agreed that they should have put in the wall as outlined in the floor plans. They had asked her for permission to put the wall in but that had not happened due to the dispute over the method of installing the wall. It does not have to have footings nor be drywalled. The engineering drawings do not require footings for that wall. The subfloor and overlay are glued and screwed down. It is an overlay method with the plywood offset from the edge of the wafer board.

Mr. Farmer stated that there is no previous bad experience with using Discount Carpet as his supplier. Another subcontractor installed the tiles in the Pergunas house. He felt that the cost of replacement for the same quality of tiles would be \$3879.66 for cost of tiles and \$374.50 for wood.

Mr. Farmer stated that there is no evidence of improper deflection or squealing or noise on the tile. It is not a major structural defect. Either the stud wall or two Teleposts would rectify any deficiencies. The City of Brockville was happy with the wall being constructed. He provided a quote of \$375.00 which included drywall.

The Program called Mr. Fernando Bucci, Mr. Bernard Finney and Mr. Philip Mayhew as its witnesses.

Testimony of Fernando Bucci:

Mr. Bucci is the technical representative for True Joist, the manufacturer of the flooring system. He has a degree in architectural/building sciences from McGill University and experience in construction with his father. He has worked for True Joist since 1988.

Mr. Bucci explained that the True Joist floor system was invented in the late 1960's. It uses engineered lumber and is sold as a package through the lumberyard dealers to builders. The manual used by the manufacturer at the time of the construction of the Pergunas house was not the Limited States Design.

He was asked to inspect the Pergunas house by the builder. He did so on December 8, 2000. In the hallway and kitchen he found telegraph cracks in the ceramic tiles which were on the edges of the underlay. One needs to consider the type of joists, their span and bearings, the spacing of the joists, the type of subfloor and such components as strapping. He examined the knock out holes used to pass wiring through. He saw no difficulty with these holes and felt they made no impact on the capacity of the joists.

Mr. Bucci felt that the tiles were cracking due to the expansion and contraction of the overlay. The fact that one joist is 22.5" does not make any difference to the subfloor. Indeed with $\frac{3}{4}$ " one can space the joists up to 24" apart. He did feel that one needs to put in a wall or two header joists in lieu of a wall by the stairway. Otherwise you cannot load it to its ultimate load, that being 40 lb. live load per square foot and 15 lb dead load. The Ontario Building Code factors in a safety factor of over 2 $\frac{1}{2}$. He did some tests using measurements which differ from those of Mr. Finney. His tests did show that the joist was insufficient for the load but that does not mean it will collapse. It is not a major failure and indeed Mr. Bucci felt that it is not unusual to have these stress situations in up to 75% of the homes that he has inspected. He felt that the stud wall would take the load off the header joist. Or you can install two header joists.

Mr. Bucci stated that he knew the definition of major structural defect as found in Regulation 892 and did not feel this situation met that definition. There was no failure of the structure, no evidence of load failure, and no structural integrity problem.

Under cross examination Mr. Bucci stated he could not say with certainty why the tiles were cracking. He thought the definition of major structural defect required a total collapse. Here there was no evidence of excessive deflection. The stairs are safe to walk on but he would consider doing the recommended repairs.

Testimony of Bernard Finney:

Mr. Finney has his Masters in Engineering from Waterloo. He worked as a structural engineer for five years and since 1978 has had his own practice in Lindsay. He does 220 to 250 projects per year. He is recognized as an architect as well as a professional engineer. He does approximately 50 forensic engineering/architect cases per year. Mr. Finney was recognized by the Tribunal as an expert in structural engineering and architectural engineering.

Mr. Finney visited Mrs. Pergunas's home on December 11, 2001. His terms of reference were to review the ceramic tiles, consider the floor frame and the floor sheathing system and consider any major structural defect. He is familiar with the definition of major structural defect as found in Regulation 892. He reviewed a number of previous reports, obtained a copy of the floor plans and discussed the computer analysis with Mr. Bucci.

Mr. Finney discussed the methodology of determining the surface failure load and the design factors used to determine loads and safety factors. The allowable stress factor involves a formula of dividing the surface load stress by a flexor factor of 1.6 or a shear factor of 2.25. For example, a floor could be flexible enough but not strong enough. The methodology involves taking the amount of load and equating to the amount of deflection. Mr. Finney defined flexor, shear and deflection.

In a residential situation Mr. Finney stated you have about 12 lbs of live load and between 12 to 15 lbs of dead load. If your surface load is close to the design load then there are serious problems. The Ontario Building Code is used as a standard of care. Mr. Finney stated that in this case, with a TGI floor system, the safety factors are flexibility at $2\frac{1}{2}$ the design load and shear at $3\frac{1}{2}$ the design load.

Mr. Finney testified that he saw no visible structural defects at the home of Mrs. Pergunas. There were no cracks or fractures in the structure. He spent $2\frac{1}{2}$ hours viewing the home. Mrs. Pergunas showed him the cracks in her ceramic tiles. The TGI floor system is engineered timber. The subfloor is glued and screwed to it. He saw evidence of glue over 75% of the timber. The underlay is not part of the system

but is a finish element for the ceramic tile. The subfloor is $\frac{3}{4}$ " OSB and the underlay is $\frac{1}{2}$ " OSB. He did no destructive testing of the system.

Mr. Finney explained that in an engineered floor system such as Tres Joist all the elements are controlled and should be 100% reliable. The manufacturers of Tres Joist use their own tables and procedures to analyze their product. Mr. Bucci did not take exact measurements when he did his site visit so Mr. Bucci's measurements differ slightly from those taken by Mr. Finney.

Mr. Finney stated that the 2 span continuous is the dominant span in the house. His analysis is that the floor system is more than adequate. The ceramic tile is not attributable to the TGI floor system. He had walked and jumped in the travel areas of the home and did not find any uncomfortable situations. He did this to consider the surface load deflections.

Regarding the holes complained of by Mr. Louch Mr. Finney would not spend any money fixing them. While the holes reduce capacity of the shear by 15% the safety factor is still 46%. He found no evidence of sagging joists. Only three of the holes were improper and they would have no impact on the deflection performance of the floor system.

Mr. Finney saw no need for footings for the stud wall. He would do it in accordance with the floor plan. You could also put in a jackpole with a bigger base plate.

Mr. Finney found that the trimmer joist was 10 to 12% overstressed and the header joist was 60% overstressed. The header joist only has a sphere of influence of 4 feet, while the trimmer joist has a different sphere of influence. Mr. Finney's tests on the trimmer and header joists were different from Mr. Bucci as Mr. Finney's measurements were more exact. He did agree that the design load condition was overstressed and the transfer of load to adjacent joist in the stairway area could be 15 to 20%. He agreed with Mr. Bucci that the stairs are safe to use but he also would repair them.

Mr. Finney stated that the missing stud wall does not compromise the structural integrity of the home in any material or adverse fashion. It has no impact on the intended use of the home. In order for there to be material or adverse affect the overstressed conditions would need to be much higher. He saw no evidence of movement of the vertical support elements though there was some transfer by the header joist but no shedding or visible signs of stress on that header joist.

Regarding the joist that is at 22 $\frac{1}{2}$ " Mr. Finney stated that joist was taking 8% more load than the adjacent joists but there is a 26% reserve factor. The subfloor is rated for joists at 24". He found no evidence of distress on any TGI over the whole house.

The subfloor consists of OSB (oriented strand board) which is an engineered product. It is used to improve quality as it is superior to plywood. The subfloor is $\frac{3}{4}$ "

OSB and the underlay, which should be 5/8 plywood, is actually 1/2 OSB. According to his calculations the combination makes for 25% greater stiffness. So while it is not in strict compliance with the Ontario Building Code, it is 25% stiffer. There is no major structural defect of the floor components.

Regarding the ceramic tile Mr. Finney has expertise in ceramic tile installation, both commercial and residential. Mr. Higginson had experience in concrete floors. Mr. Finney felt the tile used was of low quality. The issue is to use tile with a low water absorption rate. Otherwise the tile expands dramatically and will have voids in its structure. One needs to look at the humidity level of the floor and whether or not the tile is adhered directly to the underlay. Control joints are required and the humidity level of the home must be monitored in the winter.

Mr. Finney found the need for a control joint at the north end of the foyer and one at the door of the washroom. As well the tiles in the Pergunas house were laid at 45 degree diagonal which leads to more cracking in the tiles. Putting them on top of mortar also increases risk of cracking. In such cases it is now industry standard, according to Mr. Finney, to use a decoupling membrane such as polyethylene membrane. The tiles are telegraphed on the joints of the underlay. If the floor joists were the problem there would be far more cracking of tiles and there would be a pattern of cracking tiles at the joists. The tiles would crack within the sphere of influence of the floor stress. He felt that the cracking of the tiles was due to a number of these factors: 45 degree angle, direct adhesion to underlay, moisture and temperature changes and no proper control joints. The tiles were not cracking due to the joists, subfloor or the underlay. So the problem is improper installation which is a defect in workmanship and not due to major structural defect. The moisture levels in the subfloor, the tile and in the air are the major issues.

Regarding the issue of the cost to repair Mr. Finney felt his estimate was consistent with that of the contractor. Mr. Finney estimates the cost of repairs to be \$7,458.55.

In conclusion Mr. Finney felt that the replacement of the tiles is for esthetic purposes. The overstressed header beam is a significant deficiency but is not a major structural defect.

Testimony of Philip Mayhew:

Mr. Mayhew is a certified civil engineering technologist of over 25 years experience. He has been a warranty representative for 24 years. He does about 120 inspections per year and major structural defect problems account for about 20% of those inspections.

Mr. Mayhew stated that he agreed with the decision of Mr. Caskenette, the original representative for this matter who made the original decision to refuse the claim. Mr.

Caskenette no longer works for the Program. Mr. Mayhew inspected the home on May 5, 2002. and stated that he agreed with the decision of Mr. Caskenette to refuse the claim.

Mr. Mayhew stated that the date of possession of the home was August 14, 1998. The letter of February 10, 2000 was the first written notice to the Program of any problems. The letter of September 13, 2000 was the first written notice on these particular problems. Mr. Mayhew testified that this specific builder has an excellent rating with the Program and has no chargeable conciliations.

Mr. Mayhew stated that regarding claim #1 in the decision letter he found no evidence of joist sagging, no evidence of compression or acceleration and no significant deflection with Ontario Building Code standards. He found no evidence to support claim #2. He accepts the evidence of Mr. Finney regarding claim #3. He also agrees with the evidence of Mr. Finney regarding claim #4 as the all joists are 19.2" except for the one near the stairs which is 22.5".

Mr. Mayhew stated that the panel underlay and the tile are not structural elements but finish elements. He felt that under section 2.7 of the OBC an engineer has latitude for design that meets with the intent of the Code. It is sufficient for the Program if the intent of the Code is met. Here there is a defect of workmanship and material but not a major structural defect. There is no failure of load bearing portion and the problem does not materially or adversely affect use. It is speculative to consider future damage.

It is the understanding of Mr. Mayhew that the builder wished to put in the stud wall but Mrs. Pergunas would not allow it. The Program can do nothing if the homeowner will not allow the builder to rectify the problem.

Under cross examination Mr. Mayhew stated he had seen glue and screws in a number of areas of the flooring. He is not aware of any complaint by Mrs. Pergunas that she cannot use her house.

Closing statements:

Mr. Louch stated that Mrs. Pergunas has no trust in this builder due to the previous problems with the windows and the hardwood floor. The Tribunal should rely on the deficiencies in the joists as found in the tests of Mr. Bucci. There have been violations of the Ontario Building Code. Mr. Louch submitted that there had to be a review of the stamped drawings to see if the stud wall requires footings. There is at least one crack of the tile floor due to the problem with the joist at the stairs that materially and adversely affects the house.

Counsel for the Program states that the onus is on the Applicant to show the problem meets the definition of major structural defect. After reiteration of the evidence Counsel directed the Tribunal to a number of cases.

In the case of Re Galko (1997) O.C.R.A.T.D. no.111 there is a discussion of the concept of major structural defect. It is stated at page 3 "A major structural defect in our view and as we have found in the past must inter alia be one which renders a home virtually uninhabitable, uncomfortable beyond reason, unsafe or in a state of imminent collapse."

In the case of Re Buss O.C.R.A.T.D. No. 257 it is stated that prospective fears do not make a defect a major structural defect. In the case of Re Lowry O.C.R.A.T.D. no. 256 the Tribunal quotes two cases Proestos (1992) CRAT 758 and Dan Vera (1988) 17 CRAT 185 for the proposition that fear of future problems cannot constitute a major structural defect. In the case of Re Restagno O.C.R.A.T.D. no 129 the Tribunal found that there was no major structural defect as there was "no failure to any load bearing portions or any major negative impact on its load bearing function. The use of the building has not been materially and adversely affected."

Regarding the issue of whether or not the homeowner has received a benefit under section 14 (2) of the Act, Counsel for the Program relied upon the case of Re Wilkinson O.C.R.A.T.D. 78 whereby the offer by the builder to remedy the problem was found to be a benefit within the meaning of the Act and the homeowner had not suffered any damages. As well, in the case of Re Baldassarre O.C.R.A.T.D. no. 83 the Tribunal found that the refusal of the homeowner to allow the builder to remedy the problems was a denial under section 14(3) of the Act. This section permits the Program the opportunity to perform or arrange to have performed the work in lieu of or in mitigation of damages.

Counsel for the Added Party pointed out the inconsistencies in the testimony of the homeowner and her expert and requested that the Tribunal accept the evidence of the Program and the Added Party if there were differences between their evidence and that of the Applicant. He stated that the builder was prepared to put in the stud wall but that had been denied by the homeowner.

LEGISLATION:

The relevant legislation is that of the *Ontario New Home Warranties Plan Act* and Regulation 892.

Ontario New Home Warranties Plan Act:

s. 13 (1) Every vendor of a home warrants to the owner,...

(b) that the home is free of major structural defects as defined by the regulations;

...

s. 14 (1) Where,...

- (c) the owner suffers damage because of a major structural defect as defined in the regulations for the purposes of section 13, and the claim is made within four years after the warranty expires or such longer time under such conditions as are prescribed,...

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

(2) In assessing damages, the Corporation shall take into consideration any benefit, compensation or indemnity payable to the person or owner from any source.

(3) The Corporation may perform or arrange for the performance of any work in lieu of or in mitigation of damages claimed under subsection (1).

Regulation 892

"major structural defect" means, for the purposes of section 13(1) (b) of the Act, any defect in work or materials

- (a) that results in failure of the load bearing portion of any building or materially and adversely affects its load bearing function, or
- (b) that materially and adversely affects the use of such building for the purpose for which it was intended,

including significant damage due to soil movement, major cracks in basement walls, collapse or serious distortion of joints or roof structure and chemical failure of materials, but excluding flood damage, dampness not arising from failure of a load bearing portion of the building, damage to drains or services, damage to finishes and damage arising from acts of God, acts of the owners and their tenants, licensees and invitees, acts of civil and military authorities, acts of war, riot, insurrection or civil commotion and malicious damage

Section 15

(2) Every vendor of a new home warrants to the owner,...

- (e) that the home is free of major structural defects.

Section 16

Where a home was enrolled after the 31st day of December, 1990, the claim for damages because of a major structural defect may be made within seven years of the date specified in the certificate of completion and possession.

ANALYSIS:

The Applicant is claiming that her home has a major structural defect. She is claiming for the replacement of her ceramic tiles, and repairs to her floor assembly which would cost over \$18,000.00. The Program states that while she has problems with the cracking of her ceramic tiles, that in itself is not a major structural defect. The

cracking of the ceramic tiles is not due to any defect with the floor assembly but with the method of installation and the type of tiles used on the floor. The installation of two Jposts or of a stud wall would solve any issues of stress around the basement stairs. The cost of repairs would be approximately \$7,500.00 to replace the ceramic tiles and fix the floor assembly near the staircase.

The issue here is whether or not the problem fits within the definition of Major Structural Defect as stated in Regulation 892. In the opinion of the Tribunal it fails to meet that definition.

The defect must be one that either results in the failure of a load bearing element, or materially and adversely affects its load bearing function, or materially and adversely affects the intended use of the home. None of these components of the definition can be found in this claim.

The experts disagreed as to the causes of the cracking of the ceramic floor. Mr. Higginson felt that the cracking of the tiles was symptomatic of serious problems with the floor assembly. Mr. Finney, on the other hand, felt that the tiles were cracking due to a combination of factors: water absorption of the tiles; humidity level of floor; and how tile was installed: 1. Directly to underlay or using a decoupling membrane, 2. At an angle, 3. Use of control joints. In his opinion the problem was due to improper installation.

The Tribunal accepts the evidence of Mr. Finney over that of Mr. Higginson. Mr. Finney is acknowledged to have expertise in ceramic tile installation while Mr. Higginson stated his experience was with concrete floors. Mr. Finney gave a detailed explanation on the factors which led to the tiles cracking while Mr. Higginson could not give a definitive answer to the problem. As well Mr. Higginson relied on practices and procedures which were not correct for the subfloor, current joist spacing and underlay for the Pergunas home.

Regarding the floor assembly the experts disagreed as to whether the issues with the joists at the basement stairway met the definition of major structural defect. Mr. Higginson stated that the joists near the stairway opening were not adequate to carry the load of the house. There was a wall missing from the plans for the basement. The plywood underlay did not comply with the OBC. It was ½" instead of 5/8". The major structural defect was that the subfloor did not meet Code.

But Mr. Higginson did not find that this defect affected the use of the house by Mrs. Pergunas. He had not suggested any remedial steps in his report and he did not feel the house was severely unsafe. He had not told Mrs. Pergunas to put in 2 Jposts to support the stairway opening. This is significant. Mr. Higginson did not fully understand the definition of major structural defect. You can have a problem and not be in compliance with the Ontario Building Code and yet that does not in itself constitute a major structural defect. The load bearing capacity has to be affected in a severe way or the use of the house has to be materially and adversely affected. This

is not the case here. Mrs. Pergunas has done no repairs to support her floor assembly. She continues to use all parts of her home.

The Tribunal prefers the evidence of Mr. Finney and Mr. Bucci. They both agree that it would be preferable to put either a stud wall or Jposts near the basement opening in order to assist with stress of the joists in that area. But they do not feel that defect, or the fact that the underlay is ½" rather than 5/8", constitutes a major structural defect.

Mr. Bucci had done tests using approximate measurements. Though the two joists failed the tests he felt that the safety factors were more than sufficient. He found no evidence of excessive deflection, no failure of the structure nor evidence of load failure. The Tribunal was impressed with his demeanor and evidence and accepts his opinion.

Mr. Finney has a great deal of experience with similar problems. His report was thorough and comprehensive. He disagreed with Mr. Higginson that failure to meet the Code constitutes a major structural defect. The Code is a standard of care. He saw no visible structural defects, no excessive surface load deflections, and no shedding or visible signs of stress. The holes in the joists do not affect the performance of the floor assembly. In his opinion the combination of the subfloor and underlay made for a greater degree of stiffness than that required under the Code. He would put in a stud wall with no footings or two Jposts to reduce the stress on the header beam. None of the deficiencies met the definition of major structural defect. His evidence, both in its scope and complexity, was impressive and the Tribunal accepts his conclusions.

It is unfortunate that Mrs. Pergunas did not accept the offer of the builder to install the stud wall. The Tribunal found Mr. Farmer to be a sincere and honest person who has tried to appease Mrs. Pergunas throughout the construction of her home. Mrs. Pergunas has somewhat unrealistic expectations of her new home and has unfortunately placed her trust in individuals who lack the expertise to inform her of how to correct her problems. Indeed Mrs. Pergunas is suffering with deficiencies in her ceramic tiles and with the joists near her stairway opening. Due to the limitations of the legislation her remedy does not lie with the warranties offered by the Program. She must seek other venues for redress.

The Tribunal agrees with the case of RE Wilkinson that the offer of the builder is a benefit within section 14 (2) of the Act. As well the Tribunal agrees with the case of Re Baldassarre that the homeowner has violated section 14(3) by not permitting the Program to have the builder construct the stud wall.

The definition of major structural defect does not include speculation over future problems. The Tribunal accepts the conclusion as stated in Re Lowry which relies on the cases of Proestos and Dan Vera, supra that concern that in the future the defect

could lead to the floor to collapse does not meet the components of major structural defect.

ORDER:

Pursuant to the authority vested in it by section 16(3) of the *Ontario New Home Warranties Plan Act* the Tribunal directs the Program to disallow the claim of Mrs. Pergunas.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley, Vice-Chair

RELEASED: August 16, 2002

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice or Divisional Court is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

MOHEBALI MOJARRAB O/A UPTOWN USED CARS

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
MOTOR VEHICLE DEALERS ACT

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: FREDERICK YACK, Counsel, representing Mohebalí Mojarrab
AVIVA HARARI, Counsel, representing the Registrar, *Motor Vehicle Dealers Act*

DATES OF
HEARING: July 2, 2002 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal before the Licence Appeal Tribunal (the “Tribunal”) from a Notice of Proposal (the “proposal”) pursuant to Section 7 of the *Motor Vehicles Dealers Act* (the “Act”). The proposal dated January 7, 2002, seeks to revoke the registration of Mohebalí Mojarrab o/a Uptown Used Cars (the “Applicant”), as a motor vehicle dealer under the Act. The proposal sets out the Registrar’s reasons for seeking an order for the revocation of the Applicant’s registration as a motor vehicle dealer. The reasons are stated as follows:

The intention and objective of the Act is to protect the public interest. The requirements of the Act include that the financial position of Registrants be such that they can be reasonably expected to be financially responsible in the conduct of business and that Registrants carry on business in accordance with the law and with integrity and honesty. The Registrants’ past conduct and financial position is inconsistent with the intention and objective of the Act, and therefore warrants disentitlement to registration under the Act. Therefore, the Registrar is unwilling to continue to register Mohebalí Mojarrab o/a Uptown Used Cars (the “Dealer”) under the *Motor Vehicle Dealers Act*.

The Particulars upon which the Registrar relies are stated in the proposal, as follows:

1. Mohebalí Mojarrab o/a Uptown Used Cars (hereinafter referred to as the “Dealer”) is a sole proprietorship, which was first registered as a dealer on February 9, 1999.

2. A criminal record search found Moheballi Mojarab has the following criminal convictions:

August 30, 1999: Assault
 Utter Threats
 Breach of Recognizance x2

3. A criminal record search found Moheballi Mojarab has the following charges pending:

June 11, 2001: Threatening Death or Injury x2

4. The Dealer has failed to make full disclosure on application submitted to the Registrar.
5. On or about September 18, 2002 the Dealer purchased a 1992 Acura Legend (VIN JH4KA7673N800346) at auction. The odometer disclosure at the time of purchase was 201,152 kilometers. The vehicle was subsequently sold to a consumer named Juliet Pokuaa with an odometer disclosure of 145,856 kilometers. The Dealer failed to disclose the true distance travelled by the vehicle at the time of sale.

(Exhibit 5 Tab 1)

Subsequent to the proposal, by way of Notice of Further and Other Particulars dated May 22, 2002 the Registrar added the following allegations to his proposal,

1. The Dealer has an outstanding judgment against him dated December 3, 2001 and to the date the judgment remains outstanding.
2. The Dealer has breached the terms and conditions of his registration, signed on February 2nd 1999, particularly clause "k") which states:
 - k) The Dealer agrees that he is under a positive obligation to disclose all material facts about the vehicles he sells to his customers. The Dealer agrees to make reasonable efforts to research the history of all his vehicles prior to sales to ensure all material fact are disclosed. The Dealer agrees that should any information come to light, which the Registrar deems to be a material fact, concerning a vehicle the Dealer has sold, the Dealer will comply with all reasonable requests made by the Registrar to provide compensation to the purchaser.

(Exhibit 5 Tab 1)

By written Notice of Appeal the Applicant, in terms of section 7.(2) of the Act, informed the Tribunal that he required a hearing regarding his appeal to the Registrar's proposal.

THE EVIDENCE:

The evidence presented to the Tribunal by the Registrar consisted of documentary evidence as well as the testimony of Lloyd Amponsa and Laura Gordon. The evidence presented by the Applicant consisted of his testimony and that of Ali Mahmoodpour Tehrani.

LLOYD AMPONSA

Amponsa stated in his testimony, that he was looking to purchase a vehicle for his mother and that in response to an advertisement in the "Auto Trader", a motor trade publication, he viewed a 1992 Acura motor vehicle (the "Acura") on January 4, 2001 at the premises of Uptown Used Cars at Finch Avenue West, Toronto. He met with one "Ali", a salesperson who showed him the Acura and gave him the keys to the vehicle to enable him to test-drive it. After test driving the vehicle Amponsa decided to negotiate the purchase of the Acura and a price, inclusive of tax, was agreed in the amount of \$12,000.00. Although no bill of sale was then presented to him, Amponsa paid to Ali a cash deposit of \$200.00 and said he had to arrange with the bank for financing of the balance. On January 7, 2001 Amponsa returned with a bank cheque of \$10,000.00 which together with the cash deposit of \$200.00 he had already paid as well as further cash which he then paid, amounted to \$12,000.00. A bill of sale was presented to Amponsa for his signature

(Exhibit 5, Tab 9).

Amponsa was shown a copy of this bill of sale at the hearing. He stated that there was no handwriting on the left hand side of the original bill of sale that he signed. He also testified that when he viewed the Acura, test-drove and later took delivery of the vehicle, he was not told the vehicle had done over 201,000 kilometers. On taking delivery of the Acura on January 7, 2001, he noticed the odometer was not "reading" and he took the vehicle back to the dealership where an argument ensued over the defective odometer. Amponsa sought the assistance of the Ontario Motor Vehicle Industry Council ("OMVIC") who later informed him that they had investigated and ascertained that the Acura had in fact travelled a distance of over 201,000 kilometers, whereas the bill of sale between Amponsa and the Applicant stated the distance travelled as 145,856 kilometers. Amponsa confirmed in testimony that 145,856 kilometers was the reading of the Acura's odometer when the vehicle was delivered to him on January 7, 2001.

Subsequently, at the suggestion of OMVIC, Amponsa accepted the sum of \$500.00 from the Applicant as a rebate on the purchase price.

In cross-examination Amponsa stated that he met the Applicant for the first time when he took delivery of the Acura on January 7, 2001. The Applicant is known as "Moe".

Amponsa stated that the initials or signature on the bill of sale immediately under the handwritten words on the left hand side of that document (Exhibit 5 Tab 9) is his. He stated that when he signed the bill of sale on January 7, 2001, when taking delivery of the Acura, there were no words written on the left side of the bill nor were the words "customer knows the odometer has been changed on January 9, 2001, customer knows and agrees" on the bill of sale at the time of his signing. In answer to the question as to why he had signed under those handwritten words Amponsa stated, "I had to agree to the odometer being changed before

they could change it". He went on to state that these words were added so that the defective odometer could be changed by the Applicant.

On cross-examination by the Applicant's Counsel, Amponsa was shown a document which Applicant's Counsel stated was the original bill of sale. (Exhibit 6) This document had not been disclosed by the Applicant in terms of the Rules of Practice of the Tribunal but Applicant's Counsel was permitted by the Tribunal to put this document to Amponsa solely for the purpose of cross-examination.

Amponsa, when shown the original bill of sale (Exhibit 6), was asked by Applicant's Counsel why he had signed under the following additional written words that appear on Exhibit 6 but do not appear on Exhibit 5 Tab 9:

"Customer has been informed the car has 201,000 kilometers and has been changed because it has been defective."

Amponsa explained that these words were added by the Applicant to the original bill of sale which was in the Applicant's possession when, some three or four months after delivery of the Acura, Amponsa went to the Applicant's premises to pick up the Applicant's cheque for \$500.00 which OMVIC has arranged as a rebate on the purchase price. Amponsa stated that he placed his signature under these words as he had become tired of the entire affair and did not know what else he could do other than accept the \$500.00 rebate negotiated on his behalf by OMVIC.

LAURA GORDON

The second person to testify on behalf of the Registrar was Laura Gordon ("Gordon").

Gordon stated that she is the Director of Compliance with OMVIC having been with OMVIC since 1997. She stated that OMVIC is a non-profit organization empowered to administer the Act and its regulations.

Gordon further testified that when the Applicant was originally registered he consented to registration subject to written terms and conditions. The following three terms and conditions were included in the general terms and conditions to which he had consented. Those three terms and conditions read as follows:

- a) The Dealer acknowledges and understands that it will not retain the services of a salesperson unless the salesperson is registered as a salesperson to the Dealer.
- b) The Dealer further acknowledges that the restrictions concerning the activities of salespersons referred to in these terms and conditions, applies to both buying and selling on behalf of a dealer. "Buying and selling" refers to showing a vehicle to be prospective purchases or any form of negotiation concerning the purchase or sale of a vehicle and is not limited to the signing of contracts. This further includes attendance at auctions on behalf of the Dealer."

- k) The Dealer agrees that he is under a positive obligation to disclose all material facts about the vehicles he sells to his customers. The Dealer agrees to make reasonable efforts to research the history of all his vehicles prior to sale to ensure all material facts are disclosed. The Dealer agrees that should any information come to light, which the Registrar deems to be a material fact, concerning a vehicle the Dealer has sold, the Dealer will comply with all reasonable requests made by the Registrar to provide compensation to the purchaser.

(Exhibit 5 Tab 5)

Gordon also testified that the distance travelled by a vehicle is a material fact that should be disclosed by the dealer to a prospective purchaser. This was the type of positive obligation envisaged by paragraph "k" in the terms and conditions. Gordon went on to state that when an OMVIC inspector called upon the Applicant on January 20, 1999 the inspector advised the Applicant in writing that he was to disclose "in writing on the bill of sale all material facts known". The inspector also gave the Applicant a written example of how to complete a bill of sale, which example reads "odometer was replaced at 250,000 kilometers, current reading 131,000 kilometers, true mileage unknown".

(Exhibit 12)

Gordon also referred to the wholesale bill of sale dated September 12, 2000 entered into by the Applicant when he purchased the Acura at an auction conducted by Toronto Auto Auctions. On this bill of sale the signature of the Applicant appears as the purchaser of the Acura and the odometer reading of the Acura is stated to be 201,152 kilometers. Gordon stated that OMVIC obtained possession of this document when the Applicant handed it to OMVIC during OMVIC's investigation.

(Exhibit 5 Tab 9)

Gordon also referred to the Applicant's February 5, 2001 application for registration as a motor vehicle dealer. In that application in answer to the question:

"Are there any charges pending or has the Applicant been found guilty or convicted under any law?"

the Applicant answered "No".

(Exhibit 5 Tab 7)

The above answer, Gordon contended, is untruthful as according to the C.P.I.C. report of the Ontario Provincial Police dated October 3, 2001 the Applicant has the following convictions:

AS OF: OCTOBER 3, 2001

...

AUG 30 99
NEWMARKET

(1) ASSAULT
(2) UTTER THREATS
BREACH OF
RECOGNIZANCE X2

(1-3 60 DAYS, 18 MOS
PROB AND S110
ORDER 5 YRS

In addition the C.P.I.C. report states the following charges are pending:

THREATEN DEATH INJUR X2
OFFENCE DATE: 11-JUN-2001

Gordon also testified that the Applicant has an unsatisfied civil judgement against him. This judgement was obtained in the Toronto Small Claims Court on December 5, 2001 for \$4,572.76.

(Exhibit 5 Tab 4 Page2)

ALI MAHMOODPOUR TEHRANI

Tehrani testified for the Applicant and stated that in January 2001, he was in auto sales and carried on business as such under the name of A.M.P. Sales at Finch Avenue West, Toronto. The Applicant also operated a motor vehicle dealership at that address, although from different premises. In early January 2000, the Applicant was relocating his premises from 2300 Finch Avenue West to 5109 Steeles Avenue West. However, the Applicant's motor vehicles were still at 2300 Finch Avenue West, when Amponsa called at that address on January 4, 2001. As the Applicant was not present when Amponsa called and as the latter was interested in the Acura, which was owned by the Applicant, Tehrani attended to Amponsa. He showed the Acura to Amponsa, gave him the vehicle's keys and permitted Amponsa to test drive the vehicle. When on the completion of the test drive, Amponsa expressed an interest in purchasing the Acura Tehrani accepted a \$200.00 deposit from Amponsa and drew up a bill of sale dated January 4, 2001. Amponsa arranged bank financing after he paid a \$200.00 deposit. Amponsa returned on January 9, 2001 when he had arranged finance so as to complete the purchase of the Acura. On this latter visit both Tehrani and the Applicant were present with Amponsa. When Amponsa attended on January 9, 2001 and paid the agreed balance of the purchase price of the Acura, the bill of sale drawn up by Tehrani on January 4, 2001 was torn up and Tehrani drew up a new bill of sale which he dated January 4, 2001. This bill of sale was then signed by Amponsa and the Applicant.

(Exhibit 5 Tab 9)

On January 4, 2001 after the original bill of sale was draw up and Amponsa had paid the \$200.00 deposit, Tehrani reported to the Applicant by telephone. The Applicant then "asked if I had told him about the odometer" and told Tehrani there was a defect in the vehicle's odometer. Tehrani had not informed Amponsa regarding the odometer as he has not known it was defective but at the meeting between Amponsa, the Applicant and himself on January 9, 2001 he heard the Applicant inform Amponsa of the defective odometer and this was when the words

"Customer knows the odometer has been changed on January 9, 2001, customer knows and agrees"

were placed on the new bill of sale. Tehrani further testified that Amponsa had the opportunity at that time "to walk away" but did not do so as he said he wanted the Acura. The bill of sale (Exhibit 5 Tab 9) was then signed by Amponsa.

After January 9, 2001 the vehicle's odometer was changed by the Applicant and it was on January 12, 2001 that the handwritten additions were added on the original bill of sale by the Applicant and which were signed by Amponsa.

(Exhibit 6)

Tehrani stated in conclusion that he was at no time a registered salesperson with the Applicant.

MOHEBALI MOJARRAB

The next person to testify was Mojarab (the "Applicant")

Insofar as the sale of the Acura was concerned, the Applicant stated that he bought that vehicle at an auto auction on September 12, 2000 and that the vehicle's odometer then read 201,152 kilometers. Upon taking the vehicle from the auction he noted the odometer was not working and on September 14, 2000 he had the vehicle's odometer replaced by "Good Guys" who charged him with the replacement costs. The replacement odometer read 145,000.

(Exhibit 10)

Under cross-examination the Applicant stated that Amponsa was not given a copy of Exhibit 6. When shown a letter dated June 10, 2002 addressed to OMVIC from Acura Woodbine in which letter the latter stated that, according to its records, the vehicle's odometer was in working order when it sold the vehicle on September 12, 2000, the Applicant had no comment. The Applicant also stated he did recollect the OMVIC inspector's visit in January 1999 when he was then instructed in writing by that inspector on how to comply with disclosure requirements regarding replacement odometers in vehicles being sold by the Applicant.

(Exhibit 12)

The Applicant also acknowledged that he signed terms and conditions at the time the Registrar registered him as a dealer. However, he stated that "I didn't know what I signed".

(Exhibit 5 Tab 5)

The Applicant confirmed that Tehrani was not a registered motor vehicle salesperson in the

employ of the Applicant when Tehrani showed the Acura to Amponsa on January 4, 2001.

Insofar as the convictions for assault, uttering threats and breach of recognizance were concerned, the Applicant admitted such convictions and further admitted not having disclosed those convictions to the Registrar in his application of February 5, 2001.

(Exhibit 5, Tab 4 and Tab 7)

The Applicant stated that the reason for his failure to disclose such convictions was that the convictions related to a domestic dispute involving his wife which he did not think he had to disclose "as it was a family matter and my probation Officer said I need not disclose".

Insofar as the civil judgement registered against him is concerned, the Applicant stated that he disputes that he owes the Plaintiff any amount and further disputes that he was served with either the Plaintiff's statement of claim or the judgement which was registered against him. He also stated that he has a good defence on the merits and that since he became aware of the default judgement entered against him, he has taken steps to have that default judgement set aside and a motion in that regard is presently pending.

FACTS FOUND PROVEN:

The following are the facts found by the Tribunal to have been proven.

1. The Applicant was registered as a motor vehicle dealer in terms of the Act on January 9, 1999, subject to the terms and conditions as set forth in Exhibit 5, Tab 5.
2. Tehrani acted as a salesperson for or on behalf of the Applicant without being registered as a salesperson of the Applicant.
3. The Applicant was aware at the time of the sale of the Acura by the Applicant to Amponsa that the Acura had an odometer reading of 145,856 kilometers.
4. The Applicant was aware that at the time of the purchase by him of the Acura on September 12, 2000 that vehicle had an odometer reading of over 201,000.
5. The Applicant after purchasing the Acura on September 12, 2000 caused the odometer in the Acura to be exchanged and to be replaced by a replacement odometer with a reading of 145,856 kilometers.
6. The Applicant when selling the Acura to Amponsa, failed to ensure that the identical kilometer reading that appeared on the vehicle's odometer prior to that odometer's replacement, namely 201,152 kilometers, appeared on the vehicle's odometer after the exchange or replacement.

7. The Applicant failed to disclose in his February 5, 2001 application for registration as a motor vehicle dealer that he at that time had convictions for assault, uttering threats and breach of recognizance.
8. The Applicant has a default judgement registered against him in the sum of \$4,572.00 arising out of claim made against the Applicant in the Toronto Small Claims Court under claim T50269/01.
9. On January 20, 1999 the Applicant was visited by an OMVIC inspector who instructed the Applicant regarding the necessity to disclose to purchasers all material facts known regarding the vehicle being sold, including specifically how to complete a bill of sale where there has been an odometer replacement.

THE LAW:

Section 5(1)(b) of the *Motor Vehicle Dealers Act* states:

5.(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

- (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or

Section 6.(2) of the Act states:

.....

(2) Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5 if the registrant were an applicant, or where the registrant is in breach of a term or condition of the registration.

Section 3.(1)(b) of the Act states:

(1) No person shall,

- (b) act as a salesperson of or on behalf of a motor vehicle dealer unless the person is registered as a salesperson of such dealer and such dealer is registered as a motor vehicle dealer under this Act.

Section 4 of the Act states:

4. A motor vehicle dealer shall not retain the services of a salesperson who is not registered under this Act.

Section 19(2) of Regulation 801, as amended states:

(2) Where a motor vehicle dealer exchanges an odometer or effects any repairs to the odometer of a motor vehicle in the dealer's possession or control or to any other part of the motor vehicle that is directly related to the odometer, the dealer shall record in the reconditioning record of that motor vehicle the reading in miles or kilometers that was on the odometer prior to the exchange or repair and shall ensure that the identical reading appears on the odometer of the motor vehicle after the exchanges or repairs have been effected. R.R.O. 1990, Reg. 801, s. 19 (2).

APPLICATION OF LAW TO FACTS:

There are a number of issues for consideration by the Tribunal. These issues are:

1. Did the Applicant comply with the terms and conditions of his registration as a motor vehicle dealer?
2. Did the Applicant permit Tehrani to act as his salesperson when Tehrani was not registered to the Applicant as a salesperson?
3. Did the Applicant know that the Acura motor vehicle at the time of its sale to Amponsa's mother had travelled over 201,000 kilometers and if so did the Applicant disclose this fact to Amponsa?
4. Did the Applicant comply with Section 19.(2) of Regulation 801 to the Act?
5. Did the Applicant make full and true disclosure of his criminal convictions in his application for registration as a motor vehicle dealer?

The following is an analysis of the above issues and the conclusion and findings of the Tribunal regarding those issues.

1. Did the Applicant comply with the written terms and conditions of registration of February 2, 1999?

The Applicant consented to and signed written terms and conditions dated February 2, 1999. These terms and conditions (Exhibit 5 Tab 5) have been referred to in this decision and in the evidence of Laura Gordon.

The Applicant failed to comply with paragraph (a) of the terms and conditions in that he permitted Tehrani to act as his salesperson in the transaction of sale involving Amponsa when he knew that Tehrani was not registered as a salesperson of the Applicant. Accordingly, the Applicant in permitting Tehrani to act as his salesperson when he knew, or ought to have known, that Tehrani was not permitted to act as his salesperson, breached Section 3.(1)(b) of the Act.

2. Did the Applicant permit Tehrani to act as his salesperson when Tehrani was not registered to the Applicant as a salesperson?

The evidence of both Amponsa and of the Applicant and Tehrani clearly indicate that Tehrani acted as the Applicant's salesperson in connection with the Amponsa transaction. It was Tehrani that met with Amponsa on January 4, 2001 to show the Acura vehicle to Amponsa. It was Tehrani that discussed price with Amponsa, gave Amponsa the keys to the vehicle so that he could test drive it and it was Tehrani that wrote up the initial bill of sale of January 4, 2001. Tehrani reported by telephone to the Applicant immediately after concluding the deal with Amponsa and it was Tehrani that accepted and received the initial deposit on the vehicle from Amponsa. At a meeting between Amponsa and the Applicant subsequent to Amponsa's January 4, 2001 meeting with Tehrani, the latter was also present.

All the aforesaid facts indicate that the Applicant considered Tehrani to be his salesperson and permitted Amponsa to so believe. Tehrani was at no time registered as a motor vehicle salesperson to the Applicant. Allowing Tehrani to act as his salesperson was a clear violation of clause (a) of the signed terms and conditions that the Applicant consented to when he was registered by the Registrar. Not only was this a breach of a term of the Applicant's registration but it was clearly a breach of section 3.(1)(b) of the Act.

3. Did the Applicant know that the Acura motor vehicle, at the time of its sale to Amponsa's mother, had travelled over 201, 000 kilometers and if so did the Applicant disclose this fact to Amponsa?

The Applicant, according to his own testimony as well as the documentation disclosed by the Registrar, attended on September 12, 2000 at the auction conducted by Toronto Auto Auctions when the Applicant purchased the Acura motor vehicle. The Applicant not only attended at the auction but purchased the Acura when he signed the bill of sale (Exhibit 5, Tab 9). This bill of sale disclosed on its face that the Acura had an odometer reading at the time of the sale of 201,152 kilometers. The Applicant in his testimony did not deny that he knew of this disclosure when he purchased the Acura.

When on January 3, 2001 the Applicant sold the Acura to Amponsa's mother there was no disclosure on the bill of sale that the vehicle had travelled 201,152 kilometers. Indeed, the bill of sale indicated 145,856 kilometers, a clear falsehood in that the Applicant knew or ought to have known that it was false. At no stage prior to OMVIC becoming involved in this matter did the Applicant admit to the vehicle having travelled over 200,000 kilometers. It was OMVIC that brought the true kilometers to Amponsa's notice some time after the bill of sale had been signed by Amponsa.

The evidence of both the Applicant and Tehrani is rejected by the Tribunal in so far as disclosure of the true distance travelled by the Acura is concerned. The Tribunal specifically finds that Exhibit 6 was filled in by the Applicant insofar as the handwriting on the left hand side

of the bill is concerned without the knowledge or acquiescence of the Amponsa. It is interesting to note that the Applicant did not forward a copy of Exhibit 6 to OMVIC when OMVIC requested a bill of sale but forwarded instead a copy of the document found at Exhibit 5 Tab 9. The Applicant made no reference to Exhibit 6 when in negotiations with the Registrar. The first and only time this exhibit appeared was when the Applicant's Counsel attempted to hand it in at the hearing. At no time prior thereto did the Applicant or his Counsel attempt to disclose this document.

The Tribunal finds that it is both material and fundamental to the transaction that the Applicant should have disclosed the vehicle having travelled a distance of 201,152 kilometers. This the Applicant failed to do. The Applicant disclosed a patently false figure of 145, 856 kilometers. The Applicant failed to comply with section 19.(2) of Regulation 801 to the Act in that the Applicant did not ensure that the replacement odometer recorded the kilometers that was on the odometer prior to replacement and failed to ensure that 201, 152 kilometers appeared on the vehicle's odometer after the replacement odometer had been fitted into the vehicle.

The Tribunal finds that the Applicant had been fully instructed by an OMVIC inspector in 1999 as to how to precisely complete a bill of sale where an odometer had been changed. Despite this the Applicant ignored the instructions and in so doing misled and prejudiced the Applicant. As was stated in the *Registrar v. Morato Cars and Radomir Miljkovic* released on June 4, 2001, and with which statement the Tribunal associates itself;

There can be no doubt that when a member of the public purchases a second hand motor vehicle he wishes to make an informed decision before committing himself to a purchase. It is clearly material to any purchaser of a second hand motor vehicle that the vendor has disclosed to him all relevant and material information concerning the vehicle. It is both relevant and material to the contract that the purchaser knows the true mileage the vehicle has travelled which will help indicate if the price asked is fair and reasonable.

The Tribunal accordingly finds that the Applicant knowingly misled Amponsa insofar as the true distance travelled by the vehicle was concerned and that the Applicant violated section 19.(2) of Regulation 801 to the Act. The Tribunal, for the reasons already stated above finds the past conduct of the Applicant affords the Registrar reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.

In the leading case of *Brenner 19 CRAT SCO Decisions and Orders (1971 – 1989) page 95* Southey J. held that a Tribunal should only refuse to direct the Registrar to carry out his proposal if it thinks the Registrar was in error in concluding that the past conduct of an Applicant afforded reasonable grounds for belief that such Applicant would not carry on business in accordance with law and with integrity and honesty.

To overrule the decision of the Registrar, the Tribunal must conclude that he was wrong in his decision and that the conduct of an Applicant does not afford reasonable grounds for the Registrar's belief that the Applicant will in the future carry on business in contravention of the Act and its Regulations. This was confirmed by Divisional Court in the matter of *Albert Fascenda (1994) 26 CRAT Part II 1050* where that court on appeal quashed the Tribunal's

decision to direct a Registrar not to carry out his proposal and in sending the matter back for re-hearing stated at page 1051.

It follows that the Tribunal should have refused to direct the Registrar to carry out his proposal only if it thought the Registrar was in error in his belief.

4. Did the Applicant comply with Section 19.(2) of Regulation 801 to the Act?

This issue has been dealt with in the third issue above.

5. Did the Applicant make full and true disclosure of his criminal convictions in his application for registration as a motor vehicle salesperson?

The uncontested evidence presented by the Registrar shows that the Applicant was on August 30, 1999 convicted of assault, utter threats and two counts of breach of recognizance.

In his February 5, 2001 application for registration the Applicant was specifically asked if he had been found guilty of or convicted under any law to which he answered in the negative. This answer is both false and misleading. It misled the Registrar into believing the Applicant was conviction free. The question posed by the Registrar in the application form was a material and important question for it assisted the Registrar in making a decision as to whether or not the Applicant may be a suitable and acceptable Applicant. The Registrar relied upon the honesty and integrity of the Applicant to answer the question truthfully. The Applicant's failure to truthfully answer the question indicates a lack of honesty and integrity on the Applicant's part. That the convictions were not industry related but were of a domestic nature is no justification for deliberately giving a misleading and untruthful answer. This past conduct on the part of the Applicant does not imbue the Tribunal with confidence that the Applicant's future conduct will be any more honest than his past conduct and that consumers will not be adversely affected in their dealings with the Applicant.

The Registrar is mandated in the Act with the duty and obligation to ensure that the general public is being ensured protection from malpractice by dealers and salespersons. It would be an abrogation of his duties for the Registrar to ignore or overlook the conduct of the Applicant which led to a hearing of the various issues in this matter. Serious issues arose in this matter and the evidence adduced has led to this Tribunal's finding that there is no error in the Registrar's reasons and conclusions for his proposal that the Applicant's registration be revoked.

DECISION:

Accordingly, pursuant to the authority vested in it by Section 7.(4) of the *Motor Vehicle Dealers*

Act, the Tribunal directs the Registrar to carry out his Proposal of January 7, 2002 to revoke the registration of Moheballi Mojarrab o/a Uptown Used Cars as a motor vehicle dealer under the Act.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice Chair

Released: August 16, 2002

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice or Divisional Court is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

PREHEARING

METROPOLITAN TORONTO CONDOMINIUM CORPORATION No. 1101, and
METROPOLITAN TORONTO CONDOMINIUM CORPORATION No. 1120

APPEAL FROM DECISIONS OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW CLAIMS

TRIBUNAL: TERENCE A. WARDROP, Q.C., Vice Chair
 NIVES MONTANO, Member
 FRANK WOLMAN, Member

APPEARANCES:

IRVING MARKS, Counsel, representing Metropolitan Toronto
Condominium Corporation No. 1101, and Metropolitan Toronto
Condominium Corporation No. 1120, the Applicants
KEN ROSENBERG, Counsel, representing the Ontario New Home
Warranty Program, the Respondent
HARRY RIVA, Counsel, representing Concorde Square Limited,
the Added Party

DATE OF
PRE-HEARING: July 19, 2002 Toronto

BACKGROUND:

At the request of Metropolitan Toronto Condominium Corporation No. 1101, and Metropolitan Toronto Condominium Corporation No. 1120, (hereinafter called the "Applicants"), the Registrar of the Tribunal appointed the time and place for a Prehearing Conference in this matter on July 19, 2002 at Toronto (hereinafter called "the Conference").

The matter involves an appeal pursuant to the *Ontario New Home Warranties Plan Act*, RSO 1990 c. O.31 (hereinafter called "the Act") in each of two nearly identical decisions made by Ontario New Home Warranty Program (hereinafter called the "Program") each

dated March 25, 2002, (hereinafter called the "Decisions"). The Applicants issued a Notice of Appeal dated April 3, 2002 with respect to each of the Decisions (hereinafter called the "Appeals") for a determination pursuant to the Act by the Licence Appeal Tribunal (herein called the "Tribunal") of the issues raised in the Appeals and noted in the Decisions.

Pursuant to the Rules of Practice of the Tribunal, no testimony of witnesses was heard by the Tribunal at the Conference and all statements made by the Parties thereat were confidential and without prejudice to the various rights of the Parties at the eventual hearing of the issues by the Tribunal. At the Conference submissions were received from each Party and heard by the Tribunal as to the manner in which this matter should proceed in an orderly and expeditious way.

ISSUES:

It would appear that the Applicants are each the owner of nearly identical 12 story residential high-rise complexes situate at 18 Concorde Place in the City of Toronto, which were registered in the late winter of 1995 and spring of 1996, respectively. Both structures suffer water penetration and this condition was subjected in December of 1996 to a technical audit report (hereinafter called the "Medhurst Report"). The Added Party, Concorde Square Limited, (hereinafter called "the Builder") effected repairs to rectify the water penetration from August of 1996 to the autumn of 1999, but conditions of water penetration continued thereafter despite these attempts to repair effectively the condition. There would appear to be other deficiencies alleged by the Applicants such as the lack of a continuous air barrier and compliance with applicable regulation of the roof safety anchors. The claim is made by Robins, Appleby & Taub, Barristers & Solicitors, on behalf of both Applicants and is dated February 5, 2002, (hereinafter called "the claim"). The claim was evidently supplemented by a further letter from the said solicitors dated February 25, 2002, but this letter was not included in the material before this Tribunal at this time.

The Program, in its Decisions does not dispute the facts alleged in the claim as supplemented, but rather relies in its rejection thereof on the timeliness of the claim falling outside the two year statutory period prescribed by the Act and also citing a formal release document executed between the Applicants and the Added Party as the Builder. Counsel for the Program urged on this Tribunal that the Program had not in any way abandoned whatever further defence to the claim it might have by reason of its statutory rights, but rather chose the time limitation and its reliance on the executed release as the essential first step in its rejection of the claim and the expeditious way to proceed squarely with the legal issues before dealing with the more complex technical and engineering matters of the claim at a much greater cost.

The Appeals likewise confine the hearing to the legal issues in their rejoinder and request a prehearing conference, inter alia, "to clarify the issues to be dealt with at the hearing."

The conference also examined into the anticipated duration of the hearing given the number of witnesses to be heard and the testimony relevant to the execution of the formal release document. This Tribunal is content with the discovery process which took place at the conference and that all necessary parties were named and representatives of each were present.

ORDER

The Tribunal hereby orders:

- (1) That this matter should proceed without any further Prehearing Conference, and commence on Monday, October 21, 2002, at Toronto at 9:30 a.m., and shall continue, if necessary, on October 22 to 25, inclusive, 2002. Insofar as it is estimated that a further five days of hearing before the Tribunal will be required, Counsel for each of the Parties are forthwith required to consult among themselves and with the Registrar of the Tribunal to fix a further five-consecutive-working-day period for a continuation of the hearing as expeditiously as possible;
- (2) The issues to be heard by the Tribunal shall be confined to those issues of law contained within the Decisions and the Appeals, and shall include an understanding of the circumstances and intent of the formal release document executed by the Applicants and whether or not such can be relied upon by the Respondent as a bar to any relief sought by the Applicants under the Act or to the compensation fund administered by the Respondent;
- (3) Testimony by expert witnesses as to alleged technical deficiencies in the construction of the condominium structures, water penetration and any remedial action shall be limited at the hearing to an appreciation of the issues raised by the Decisions and Appeals only, so that the trial of these legal issues can be determined by the Tribunal at the hearing;
- (4) Notwithstanding Sections (2) and (3) hereof, this Tribunal reserves the rights of the Respondent to raise all other consistent or inconsistent defences, statutory or non-statutory, at a further hearing or reference to the Tribunal should the technical or engineering issues be required to be heard and determined, whether before or after its decision and order; and
- (5) At the commencement of the hearing, the Tribunal may hear and determine any and all motions by the Parties as to the procedures it should adopt or follow respecting a full equitable hearing of the matters raised and law which applies.

LICENCE APPEAL TRIBUNAL

Terence A. Wardrop, Vice-Chair,
presiding

Nives Montano, Member

Frank Wolman, Member

Released: August 20, 2002

MARIA DURANTE

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JOHN E. ORT, Member

APPEARANCES:

PATRICK DI MONTE, Counsel for Applicant
ANDREW LEWIS, Counsel representing the Ontario New Home
Warranty Program
LAWRENCE F. WALLACH, Counsel for Added Party, Rutherford
Generation Investments Inc.

DATE OF
HEARING: August 19, 2002 Toronto

ORDER

WHEREAS pursuant to the provisions of the *Ontario New Home Warranties Plan Act* R.S.O. 1990, Chapter O.31, as amended, Maria Durante (the "Applicant") appealed a Decision of the Ontario New Home Warranty Program (the "Program") set out in a Decision Letter dated April 12, 2002;

AND WHEREAS the Applicant requested a hearing before the Licence Appeal Tribunal to appeal the above noted proposal;

AND WHEREAS the Tribunal scheduled a hearing of this matter to commence at 9:30 a.m. on August 19, 2002 at the Tribunal's Chambers;

AND WHEREAS at the commencement of the hearing on August 19, 2002, after some preliminary discussion, Counsel for the Applicant informed the Tribunal that the Applicant was withdrawing her request for a hearing before this Tribunal;

NOW THEREFORE this Tribunal orders that these proceedings are concluded before this Tribunal.

LICENCE APPEAL TRIBUNAL

John E. Ort, Presiding Member

Released: August 20, 2002

WILLIAM G. LONG

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE MOTOR VEHICLE DEALERS ACT

TO REFUSE REGISTRATION

TRIBUNAL: DAVID J. HUNT, Vice Chair

APPEARANCES:

WILLIAM G. LONG, on his own behalf.
MICHAEL ROTHE, Counsel representing the Registrar
under the *Motor Vehicle Dealers Act*.

DATE OF HEARING: August 7, 2002 Toronto

REASONS FOR DECISION AND ORDER

This is a hearing before the Licence Appeal Tribunal (the 'Tribunal') arising out of a Notice of Proposal issued by the Registrar under the *Motor Vehicle Dealers Act* ("the Registrar", and "the Act" respectively). The Notice of Proposal dated April 18, 2002 proposed to refuse the registration of William G. Long ("Long") under the Act.

REASONS

The reasons for this proposal are:

The intent on (sic) and objective of the Act is to protect the public interest. The requirements of the Act include that Registrants be financially responsible in the conduct of business and that Registrants carry on business in accordance with the law and with integrity and honesty. The Applicant's past conduct is inconsistent with the intention and objective of the Act, and therefore warrants disentitlement to registration under the Act. Therefore, the Registrar is unwilling to register William G. Long under the *Motor Vehicle Dealers Act*.

PARTICULARS

The reasons for this proposal are:

- 1) The Applicant applied for registration as a motor vehicle salesperson on or about April 4, 2002.
- 2) The Applicant had his registration as a motor vehicle salesperson previously refused.
- 3) On the application to become a registered salesperson question 9 asks:
"Have you ever been found guilty or convicted of an offence under any law or are any charges pending? (This includes those instances where a conditional or absolute discharge has been ordered)."

The Applicant said "yes", and indicated in the space provided:

"Assault w/ Firearm (Misdemeanor) B.B. Gun
Explanation already on file w/ OMVIC
Theft Under (Fail to Pay for Gas) Explanation
already on file w/ OMVIC"

- 4) A criminal record search found that the Applicant has the following convictions:

August 23, 1991:	Assault with a Weapon (x2)
May 30, 1995:	Theft Under \$1000 (x2)
	Fail to Appear

FURTHER PARTICULARS

It is further alleged as follows:

1. On or about March 27th 2002, William G. Long (hereinafter "Long") engaged in conduct that resulted in convictions under the *Highway Traffic Act* for Failing to Report an Accident and Improper Driving on Highway.
2. The vehicle involved in the accident was the property of Long's employer, Laurie Williamson Pontiac Buick GMC Ltd.
3. Long provided false information to Laurie Williamson Pontiac Buick GMC Ltd. and to the Registrar, MVDA regarding the vehicle.
4. Long has violated the terms of his Consent Order released by the Licence Appeal Tribunal on August 23, 2000.

THE LAW

Section 3 of the *Motor Vehicle Dealers Act* (the "Act"), states as follows,

(1) No person shall,

- (a) carry on business as a motor vehicle dealer unless the person is registered under this Act; or
- (b) act as a salesperson of or on behalf of a motor vehicle dealer unless the person is registered as a salesperson of such dealer and such dealer is registered as a motor vehicle dealer under this Act

Section 5 of the Act, states as follows;

5(1) An applicant is entitled to registration by the Registrar except where,

- (a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
- (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law, and with integrity and honesty; or
- (c) the applicant is a corporation and
 - (i) having regard to its financial position, it cannot reasonable be expected to be financially responsible in the conduct of business, or
 - (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or
- (d) the applicant is carrying on activities that are or will be, if the applicant is registered, in contravention of this Act or the regulations.

(2) A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant, imposed by the Tribunal or prescribed by the regulations.

Section 6 of the Act states as follows;

(1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion , the applicant is disentitled to registration under section 5.

(2) Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5, if the registrant were an applicant, or where the registrant is in breach of a term or condition of the registration.

Section 140 of the *Criminal Code of Canada* states as follows:

140. (1) Every one commits public mischief who, with intent to mislead, causes a peace officer to enter on or continue an investigation by

(a) making a false statement that accuses some other person of having committed an offence;

(b) doing anything intended to cause some other person to be suspected of having committed an offence that the other person has not committed, or to divert suspicion from himself;

(c) reporting that an offence has been committed when it has not been committed; ...

CASE LAW

Brenner v Ontario (Registrar of Motor Vehicle Dealers and Salesman) 1983 O. J. No. 1017 Ontario Supreme Court-High Court of Justice Divisional Court

This was an appeal by the Registrar of Motor Vehicle Dealers and Salesmen from a decision of the Commercial Registration Appeal Tribunal in which the Tribunal directed the Registrar to grant a conditional registration to the Respondent. The Applicant had a very serious criminal record which he had disclosed in his application but he had not disclosed three further convictions which were considered by the Registrar to be minor offences. The Tribunal heard evidence from a potential employer and a criminal lawyer who testified that the Applicant had rehabilitated himself. The Court found that the Tribunal had not applied the proper test, and set out this test in paragraph nine of the judgment as follows:

"the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was the possibility that he, indeed, might have reformed himself."

ISSUES

The legal issue in this case is whether the Registrar was wrong in his decision to refuse the registration of the Applicant as a motor vehicle sales person under the Act.

WITNESSES FOR THE REGISTRAR

SONYA KLOSE MacDONALD

Sonya Klose MacDonald testified that she is the Sales Manager at Laurie Williamson Pontiac Buick GMC. ("Williamson"). In that capacity she was in charge of the sale of both new and used motor vehicles and had been the manager of the Applicant while he was at the dealership. She explained that she had been employed at Williamson for 10 years and prior to that had spent seven years at Holly Pontiac and was the business manager when she left that company. The witness stated that she had hired the Applicant, and that he had only worked for the company for 1½ to 2 days. On his first day he was given a company car but on the next day he called to advise them that the car was missing. Her recollection was that he told her that the car had been stolen from his driveway. Following this, the dealership received a phone call from the police, advising them that the vehicle had been found on the Queen Elizabeth Way and had been seriously damaged in an accident.

The police told her that the car had struck the guardrail and had been abandoned. She later had a conversation with the Applicant to find out if he had the car keys. However, he was not able to provide them and they were never returned. He did offer to pay the insurance deductible of \$1,500.00 for the vehicle, and then asked if he still had the job at the dealership. The witness advised him that he had lost his job. Ms. MacDonald explained that most of the information she received concerning the accident was from the police, as the Applicant was forthcoming with very little information. A few days later the dealership arranged for the car to be towed from the police pound, and it was found that the damage to the vehicle was over \$24,000 00

VINCE LIPAROTI

Mr. Vince Liparoti testified that he was employed at Williamson and had been the Used Car Manager there for four years. Prior to that he had been employed in the auto industry for approximately 17 years. He stated that he knew the Applicant although the Applicant had worked at Williamson for only a short period of time. Within three or four days of beginning his employment Mr. Long called the witness and told him that the vehicle he had been given by the dealership had been stolen from his driveway. The witness advised the Applicant to call the police. The Applicant told him he had already done so, and the witness asked for the name and the badge number of the officer.

Mr. Liparoti was unsure of exactly when this was, and originally said it was at the end of May 2002. Then he later reconsidered and said it was at the end of March 2002. He did remember that it was on a Wednesday morning after a 10:30 a.m. sales meeting. Mr. Liparoti also recalled that the Applicant offered to pay the \$1,500.00 deductible and even asked if he was still employed at the dealership.

The witness stated that the dealership was advised that the vehicle had been found abandoned on the Queen Elizabeth Way, and had been taken to the police pound. They knew that the Applicant had been in possession of the vehicle at the time of the accident. When asked if he could form an opinion about the honesty and integrity of the Applicant, the witness stated that he could not form an opinion on the matter as the Applicant had only been at Williamson for three days.

In cross examination Mr. Liparoti confirmed that when the Applicant was hired, there was a discussion of what he was bringing to the dealership. He also stated that new salesmen were normally not given a 'demo' to drive until he or she had been there for 90 days. In this case the dealer agreed to provide a vehicle to the Applicant due to his sales record and his commuting distance.

MARY JANE SOUTH

The last witness for the Registrar was Mary Jane South who explained that she is the Deputy Registrar for the Ontario Motor Vehicle Industry Council ("O.M.V.I.C.") and reports directly to the Registrar. In this capacity she oversees the registration of motor

vehicle dealers and salespersons. She has been employed by O.M.V.I.C. since 1997 and prior to that was employed by the Registrar of Motor Vehicles when the agency was administered by the Ministry of Consumer and Commercial Relations. Before that, she held financial positions for 10 years with the government of Ontario.

Ms. South explained that a person is entitled to registration under the Act, pursuant to section 5, unless there are reasonable grounds to believe that they will not conduct themselves with honesty, integrity, and in accordance with the law. The Act also provides for consideration of financial responsibility, but that it is not an issue here. She explained that her concerns in this particular case were the prior criminal charges, the circumstances of the accident, the failure to provide correct particulars to the employer; the lie told initially to the police, and the failure to disclose the pending charges to O.M.V.I.C.

The Applicant is not currently registered but was previously registered based on a Consent Order (Exhibit 3, Tab 9), with conditions. These conditions required that he notify the Registrar under the Act, as well as his employer, if he was charged in the future under any law, and notify the Registrar under the Act of any convictions against him. Failure to comply with any of these conditions would result in an automatic revocation of his registration. He was also to immediately notify the Registrar under the Act of the disposition of any current pending charges. The Applicant was required to give full and complete disclosure on all future applications and he acknowledged that he understood that this disclosure would be relied upon by the Registrar. This order was issued on consent by the Commercial Registration Appeal Tribunal on August 23, 2000. In substance, the Applicant agreed to provide accurate information about any criminal charge pending or conviction in a timely fashion, with the understanding that it would be relied on by the Registrar and that a failure to do this would result in the immediate revocation of his registration. At the time that this order was agreed to by the Registrar the primary concern was his existing criminal record.

On April 4, 2002 an application for reinstatement, signed by the Applicant, was received by O.M.V.I.C. In question 9 there was a requirement that he disclose his criminal record as well as any pending charges and give an explanation of the circumstances. In section D. of the forms he was required to fill in particulars of his employment and other activities for the last three years. On the form, there was a warning that an incomplete answer would result in the application being returned as deficient. The Applicant listed a charge of 'Assault with Firearm', and a 'Theft Under' indicating that explanations for these convictions were already on the file with O.M.V.I.C. In the area for previous employers within the past three years, he only listed Unique Chrysler, Islington Chrysler and Friedrich Motors (Exhibit 3 Tab 4).

In March 2002, the witness got a call from Mr. Long who advised her that he had been working for about a year for "Unique Chrysler". Mr. Long told her that he thought that his employer had sent in the necessary paperwork to re-activate his registration, but they had apparently failed to do so. He discovered this when he was going to work for

Williamson. At this time Ms. South advised the Applicant that she intended to register him on the same terms and conditions as in the previous consent order.

As result of this discussion, she contacted Mr. Ironside from Glenleven Chrysler which was the dealer listed in the application for reinstatement received April 4, 2002. Mr. Ironside advised her that he had received information from the previous employer, Williamson, concerning the accident and his subsequent dismissal. Upon discovering that information, Ms. South contacted Williamson and was told about the circumstances and aftermath of the accident. When she called the Applicant to get his side of the story, she asked him why he had been dismissed by Glenleven and was advised that things had simply not worked out and there was nothing else. When she asked him about having reported the vehicle stolen, he denied it and said that the accident was during a snow storm. She received a letter from him by fax on Tuesday May 7, 2002 (Exhibit 3, Tab 7) in which he stated that there had been a traffic accident which he didn't report until the following day, which caused the police to do unnecessary investigation leading to a public mischief charge as well as a *Highway Traffic Act* ticket for Failure to Report. He went on to say that he was as cooperative as possible with the police and expected to have that Public Mischief charge withdrawn and plead guilty to the *Highway Traffic Act* charge of Fail to Report Accident. The witness explained that she had concerns with regard to the application by the Applicant, sponsored by Lockwood Chrysler Ltd., signed by the Applicant on April 1, 2002, and received by O.M.V.I.C. on May 3, 2002 as there was no reference to the pending charges.

Ms. South testified that complete and honest disclosure on the application form is considered to be important by the Registrar as it is the first test of honesty for the Applicant. Customers require full and complete disclosure due to the nature of an automobile purchase, and the giving of false or incomplete information is a serious concern. Although the *Highway Traffic Act* charge itself is of some concern she was more troubled by the Applicant's dishonesty with his employer, with the Registrar; and with the police as he first reported the car stolen.

In cross examination she explained that his personal driving record is not a primary concern but in some circumstances could have a bearing on the Registrar's decision. She agreed that she had no information about any customer complaints and stated that O.M.V.I.C. does not do any customer surveys and explained that she was mainly concerned about why he was leaving the different dealerships. As far as she knew, Mr. Ironside knew about his prior history in the industry but had a serious concern over the incident at Williamson, as he had told her that there were "issues" there. Ms. South was asked if she knew that the Applicant was charged three days after the driving incident, and she explained that she had heard he was in jail for it. Ms. South could not remember the source of the information but when she checked her notes, she found that Mr. Ironside had advised her that he had been told by someone at Williamson that the Applicant had charges against him and had spent two or three days in jail, though she did not have information from a first-hand source.

Ms. South explained that the Registrar originally had concerns over the Applicant's criminal record and he was therefore registered subject to terms and conditions. As a result of the notice provisions in the terms and conditions, Ms. South was concerned when the Applicant did not give O.M.V.I.C notice of the pending charges or his explanation until he was specifically confronted by her. She explained that she was advised of the situation on May 8, 2002 by Mr. Bailey at Williamson and on May 7 received her first indication from Williamson that there was a problem. On May 9, 2002 she had a conversation with the Applicant and advised him that people from Williamson had said that he had reported to them to them that the car had been stolen. She would liked to have spoken to the investigating officer but she was not given sufficient information.

Once she confronted Mr. Long with the allegations he advised her that there would be a plea to the *Highway Traffic Act* charge of Fail to Report Accident and he denied that he had ever reported the car stolen. While asking his questions the Applicant made statements asserting that he was the only possible source of the information that he had reported the car stolen. However, the witness testified that she could have obtained the information through other sources

WITNESS FOR THE APPLICANT

Mr. Long testified on his own behalf, and stated that in the past he had disclosed everything at the time that the original registration with terms and conditions was given. In his opinion he had not breached any of the terms or conditions, and the criminal record was of little importance as it was between 10 and 12 years old. He stated that he believed he had notified the police and the Registrar as soon as was reasonably possible and pointed out that he was not convicted of Public Mischief. The Applicant explained that he was initially nervous, but when he got together with the police officer, he did the right thing as the options were laid out for him by the officer. Although he had initially phoned in report the vehicle stolen, the officer seemed to know that this was a false story and explained the situation to him.

The Applicant explained in great detail that he has good business ethics and there have been no complaints by customers as he is diligent at putting the customers into the proper vehicle for them and does not try to sell them vehicles that are beyond their needs or financial ability. His relationships with his customers are so sound that customers will follow him from dealership to dealership and he will even book their service for them.

He explained that when he was at Unique Chrysler they advised him that they were doing the paperwork to reinstate his license but they did not do this and he did not find out until he went to Glenleven. In his opinion, he did not break the rules and he does not really think that his *Highway Traffic Act* charges are any of O.M.V.I.C.'s business. He admitted that he made a mistake in reporting the car stolen to Williamson, but repeated that the police told him he did the right thing.

In cross examination he said he was in the car business for 4 years, although when he was shown the date of August 23, 2000 on the Consent Order, he stated that it was just an honest mistake and said it felt like four years. He went into detail about how he was a valuable asset to a dealership as he could move 16 to 20 cars per month. Although he did not do the actual sales contracts, he did do the initial worksheet and took down the information from the customer for the sale. Again, he explained that he has excellent business sense and an ability to focus on people and their ability to pay. He again repeated his statements about how customers follow him from dealership to dealership. Mr. Long said that he began his career at Simcoe Honda, then Friedrich Motors, Islington Chrysler, Unique Chrysler, and spent a few days at Leggatt Chev Olds but did not want to work there and ended up at Williamson, and Glenleven. He explained that he had no shortage of jobs available to him due to his record in the industry.

During the cross examination, he repeated the allegations that he had tried to interject during the examination of Ms. McDonald and stated that he had told the management at Williamson that he could not be on the sales floor due to his lack of registration. He said that they had told him that he could sell, but they would put another salesman's number on the paperwork. Mt Long explained that he was never really on the payroll at Williamson and therefore did not consider himself an employee so he did not include Williamson as a past employer on his application to Lockwood (Exhibit 3, Tab 5). He then provided an alternative reason and stated that any reference to Williamson was also left off his application to Glenleven Chrysler as it was his fourth application in two months so he thought it was redundant. The Applicant confirmed that he had signed both of the application forms.

Mr. Long stated that he was not charged with the offences related to the accident until April 4 or April 6, 2002 so did not disclose those charges in his application to Glenleven Chrysler or Lockwood Chrysler as they were not in existence at the time of the applications. He explained that he had been speaking to Ms. South every day or two during that time, and thought that he had disclosed it to her. The Applicant testified that on July 11, 2002 he was convicted of Fail to Report under the *Highway Traffic Act* and that the charge of Public Mischief under the *Criminal Code* was withdrawn. He confirmed that he did not disclose it to Ms. South until she raised the issue and confronted him with it.

The Applicant agreed that the Registrar and the dealers would rely on information provided In the Application forms

With regard to the accident and the events following, he agreed that there was a single car accident and that he called Vince at Williamson the next morning and advised him that the car had been stolen from him and that Vince told him to call the police. But by then he had already called the police and told them that the car was stolen. He explained that 2 days later he went to the police station and met with the investigating officer, who thought that he was not telling the truth and outlined his options for him. He then advised the officer that the car was not in fact stolen, so that the official report of

the theft was not entered into the system. The Applicant disagreed that the accident was on the Queen Elizabeth Way but stated that it happened on a street 10 minutes from his home. He agreed that when he gave information to Ms. South he told her there was an accident but did not mention that he had reported the car stolen to the police and later admitted that he had made a false report.

In redirect, he explained that he wanted to sell cars and thinks that he had an amazing sales record. As proof of this, Vince at Williamson was so impressed that he gave the Applicant a car immediately, rather than after the normal three month waiting period. He stated that he was unclear on dates as he had so many jobs in a short period of time. As to why he did not disclose the Public Mischief charge in the applications, he explained that he knew it would be dropped and Ms. South knew about it anyway so he didn't think it had to be put into the forms. He testified that while he was at Lockwood, he sold 12 cars in 14 days. The witness testified that he thought he was able to sell cars, as Patrick told him that he had received a fax from O.M.V.I.C advising him of this.

Once the dealership found out about the Tribunal hearing, he was released. Rather than suspend him, they terminated his employment so that he could claim Employment Insurance benefits. He would not go back to that dealership in any event as he said that he had a monetary dispute with them.

FACTS FOUND PROVEN

The facts found by the Tribunal are that the Applicant had been registered as a motor vehicle salesperson in August 2000, pursuant to the terms of a Consent Order, and according to these terms he was to notify the Registrar of any charges or convictions or any pending charges under any law. Failure to do this was to lead to the automatic revocation of his registration.

The Applicant worked for a series of motor vehicle dealers from the time of his registration and eventually worked at Williamson. Within three days of commencing work for Williamson, he was driving a motor vehicle given to him for his use by the employer when he had a serious motor vehicle accident on or about March 27, 2002. He did not remain at the scene of the accident, abandoned the vehicle and failed to report the accident to the police in a timely fashion. When he called his employer to advise them of the accident he told them that the car had been stolen from his driveway. In his initial call to the police he reported that the car had been stolen and the police contacted him to carry out the accident investigation. When he went to the police station, the investigating officer suspected that the car was not stolen and that he had been the driver. After the officer explained the situation, and the possible consequences to him, he admitted that he was in fact the driver, and was then charged with Public Mischief for having made a false report of the theft, and Fail to Report for not having reported the accident in a timely fashion. The police contacted the dealership and they were made aware that the car had not in fact been stolen and advised that the Applicant had lied to them when he said the car had been stolen.

His employment had already been terminated once Williamson was made aware of the accident. At this time the Applicant was already in the process of applying for the reinstatement of his registration as a salesman for other dealerships. In the application forms he did not notify them of the pending charges and did not mention his short term employment at Williamson. The Applicant characterized this as an innocent error caused by the confusion of having worked so many places and putting out so many applications, but the Tribunal finds that this is a case of his trying to conceal the incident at Williamson. Multiple reasons for this failure were put forward in his evidence, and the same goal would have resulted from successfully concealing his employment at Williamson.

Based on his discussions with the officer or a prosecutor Mr. Long quickly formed the opinion that the Public Mischief charge would be withdrawn. He did not, however, notify the Registrar of the pending charges until he had no other option after being contacted by Ms. South, who already knew of the charge. In his written response to her he did not disclose the particulars about having falsely reported the theft of the vehicle and tried to pass off the Public Mischief charge as having been caused by the officer having to do unnecessary investigation as a result of his failure to report the accident until the next day. He then indicated in the letter to Ms. South that he had been as cooperative as possible with the police and thereby completely mischaracterized the situation by leaving out all reference to the false report of a theft. He correctly advised that he expected the Public Mischief charge to be dropped and a plea of guilty taken on the Fail to Report charge, but there was clearly a misstatement of what happened in an attempt to mislead the Registrar

APPLICATION OF LAW TO FACTS

The Act provides that the Registrar may refuse the registration of the Applicant where the Applicant's past conduct affords reasonable grounds for belief that the Applicant will not carry on business in accordance with the law, and with integrity and honesty. The Tribunal finds the following facts to be relevant past conduct

The Applicant found himself in a difficult situation when he had a serious car accident with a vehicle given to him by a new employer. Certainly most people would be nervous in the situation. However, he made a series of serious mistakes.

The first one was that he fled the scene and did not report the accident immediately. Fortunately for him he was not charged with Fail to Remain. However, when he did report the accident, he concealed the fact he was driving by reporting the car as stolen. He continued this charade by also advising his employer that the car was stolen. It was not until he was confronted by an experienced police officer who did not believe this story and outlined the probable consequences for the Applicant that he changed his story and finally admitted to the officer that he had been the driver of the vehicle.

As a consequence of his initial false report to the police he was charged with Public Mischief, but that charge was eventually dropped when he pleaded guilty to the charge of Fail to Report. He again failed to notify the Registrar of the charges and did not admit the Public Mischief charge until he was confronted. Even then he tried to mislead the Registrar in his letter to Mary Jane South, where he characterized the Public Mischief charge of as having been a result of his failure to report, rather than his initial lie to the police.

In his applications for registration he also concealed the fact that he worked at Williamson, as well as the circumstances surrounding his more recent charges. A pattern of behaviour emerges in which the Applicant is willing to use concealment when it suits his purposes. It may also be that he does not fully appreciate the seriousness of his deceptive behaviour and chooses to focus on the fact that he appears to be a very effective car sales person.

In testifying before the Tribunal he was also willing to provide different explanations when he was faced with difficult questions. At one time he explained that he did not include the new charges on his applications as they had not been filed yet, and at another time stated that he did not include them as they had already been disclosed to Ms. South. There was then another explanation that he did not include them because he knew that the Public Mischief charge would be withdrawn. This explanation, of course, does not explain why he would not have mentioned the Fail to Report charge.

Whether or not the Applicant provides correct information in the application document is a crucial matter in assessing the honesty of an Applicant, as this information is clearly intended to be relied upon by the Registrar. If information is intentionally concealed, or if false information is given, the Registrar has good reason to have serious concerns that the Applicant will withhold information or provide false information in the future in his dealings with the public, or with the Registrar. A motor vehicle dealer or salesperson deals with members of the public who are purchasing or selling products of substantial value, and is depended upon not to misrepresent to value or quality of the vehicles. By withholding or falsifying information, salespersons are in a position to take advantage of vulnerable consumers, and the public must have confidence that the dealer or salesperson will not put their own personal interests ahead of their responsibility to conduct business with honesty and integrity. The Tribunal finds that this Applicant made one initial mistake in abandoning the vehicle and leaving the scene of the accident. However, he compounded this many times over with his lack of honesty with his employer, the police, and the Registrar.

This false information, very recently and intentionally provided, demonstrates a pattern of dishonest behaviour which provides reasonable grounds to believe that there will be future behaviour which does not meet the statutory standard of acting with honesty and integrity, and in accordance with the law.

The legal test to be used by the Tribunal is whether the Registrar was in error in deciding that the past conduct of the Applicant provided reasonable grounds to believe

that the Applicant would not carry on business with integrity honesty and in accordance with the law. On the basis of the facts as found, and the application of the law to those facts, the Tribunal finds that the decision by the Registrar was not in error.

DECISION

Therefore, by virtue of the authority vested in it under s. 7(4) of the *Motor Vehicle Dealers Act* the Licence Registration Appeal Tribunal directs the Registrar to carry out his proposal to refuse the registration of the Applicant.

LICENCE APPEAL TRIBUNAL

David J. Hunt, Vice Chair

Released: August 16, 2002

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice or Divisional Court is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

CHRISTOPHER DAVID CLERMONT

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: BRIAN MAROTTA, Vice-Chair

APPEARANCES:

The Applicant, appearing on his own behalf
Aviva Harari, Counsel representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: August 7th, 2002 Ottawa

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is a hearing before the Licence Appeal Tribunal (the "Tribunal") arising out of a Notice of Proposal issued by the Registrar under the *Motor Vehicle Dealers Act* (the "Registrar", and the "Act" respectively). The Notice of Proposal dated April 22nd, 2002, proposed to refuse the registration of Christopher David Clermont, as a motor vehicle salesperson under the Act.

FACTS:

On February 22, 2002, the Applicant completed an Application for Registration under the *Motor Vehicle Dealers Act*. Question 9 on the Application stated:

"Have you ever been found guilty or convicted of an offence under any law or are any charges pending? (This includes those instances where a conditional or absolute discharge has been ordered). If yes, list all charges and/or convictions and the circumstances surrounding each. (Attach additional sheets if necessary)."

There was a space to check off "Yes" or "No" and the Applicant checked "Yes" and answered as follows:

"267(b)266 (when younger got into fight). Have come a long way from that. Can't change the past, but can certainly learn from it".

A criminal record search was done on the Applicant and the Applicant was aware, and consented in his Application, for O.M.V.I.C. to conduct a criminal record search. The result of the criminal record search included a conviction in Ottawa Youth Court. The Youth Court record was found to be admissible, but the list of offences has been deleted from this Decision due to the public availability of this Decision. The balance of the Applicant's convictions were as follows:

<u>DATE AND PLACE</u>	<u>CHARGE</u>	<u>DISPOSITION</u>
July 27, 2000 Ottawa	(1) Fraud under \$5,000.00 Section 380 (1) (b) CC 2 charges	(1-2) 30 days on each charge concurrent
	(2) Attempt Fraud Under \$5,000.00 Section 380 (1) (b) cc (5 charges) and Section 463 CC	
January 15, 2001 Ottawa	Assault causing bodily harm Section 267 (b) CC	18 months conditional sentence order and probation 18 months and mandatory probation order Section 109 CC

On April 22, 2002, the Registrar of the *Motor Vehicle Dealers Act* issued a Notice of Proposal to Refuse Registration. The reasons given in the Notice were:

"The intention and objective of the Act is to protect the public interest. The requirements of the Act include that registrants be financially responsible in the conduct of business and that registrants carry on business in accordance with the law and with integrity and honesty. The Applicant's past conduct is inconsistent with the intention and objective of the Act, and therefore warrants disentitlement to registration under the Act. Therefore, the Registrar is unwilling to register Christopher David Clermont under the Motor Vehicle Dealers Act".

The Applicant appealed the Registrar's proposal to the Licence Appeal Tribunal.

THE LAW:

5(1) An applicant is entitled to registration by the Registrar except where,

- (a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business;
- or
- (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law, and with integrity and honesty; ...

6(1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion, the applicant is disentitled to registration under section 5.

ISSUES:

After taking into consideration the Applicant's past conduct, including his criminal record and his failure to adequately disclose his record in his Application, was the Registrar in error in concluding that the past conduct of the applicant afforded reasonable grounds for the belief that the applicant would not carry on business in accordance with law and with integrity and honesty?

EVIDENCE:

The evidence for the Registrar was presented by Jennifer Andrew who was team leader of inspections with O.M.V.I.C. Ms. Andrew explained that O.M.V.I.C. was established in 1997 as a non-profit corporation to administer the *Motor Vehicle Dealers Act*, which is a public protection statute. The purposes of O.M.V.I.C. are to regulate the registration process, deal with complaints and carry out inspections and investigations of non-compliance. As a public protection statute, the goal of the Act is to ensure that the public is able to have confidence in the individuals and companies working in the automotive sector. Under Section 5 of the Act, there are certain criteria for registration of a salesperson. An applicant under the Act is entitled to registration except where the Registrar has reasonable grounds or belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.

In the case of this application, the Registrar relied upon the past conduct of the Applicant, the convictions of the Applicant and the failure of the Applicant to make full disclosure on his application for registration submitted to the Registrar.

The application of the Applicant dated February 22, 2002, was received by the Registrar on February 26, 2002. The Registrar noted that Section 9 asked the question of whether the Applicant had ever been found guilty or convicted of an offence under any law or if there were any charges pending. To this the Applicant answered "Yes". Section 9 continued to ask the Applicant to list all charges and/or convictions, and the circumstances surrounding each. Under that there was space for the Applicant to list all charges and/or convictions and the circumstances surrounding them. The Applicant simply listed two section numbers, 267(b) and 266 and stated that when he was younger he got into a fight, but he had come a long way from that. He continued to say that he could not change the past, but could certainly learn from it.

In the same Section 9, there was a note to the Applicants which stated:

"Applicants are subject to background and criminal record searches. Submitting a false or incomplete disclosure is an offence under the MVDA and will result in disqualification. Do not assume that convictions are automatically deleted from your record. If you have any questions about the information you must disclose, please call O.M.V.I.C."

The two section numbers that were stated were for assault and assault causing bodily harm. On February 28, 2002, O.M.V.I.C. sent the standard letter to the dealer principal where the Applicant wanted to work and stated that O.M.V.I.C. did not receive a complete explanation of the convictions and the circumstances surrounding them. It advised the dealer principal that the convictions and circumstances must be reviewed and discussed with the proposed salesperson. A response, together with two pieces of identification, was requested.

The Applicant responded by faxing a letter to O.M.V.I.C. explaining the circumstances of one assault charge and further disclosing one fraud charge. The Applicant answered the request for a complete explanation of the convictions and the circumstances surrounding them as follows:

"When in a bar my friends and I were playing pool. We started getting involved until other guys came around that looked really aggressive. As the game ended our loonie was next that would mean we were next as to who plays next. As I went to put my loonie, I was confronted by this other guy who told me his loonie was there first but they just got there and we knew they were just trying to play first. I told him again and he began swearing and out of know where he hit me in the face so out of self-defence I hit him back.

My self and another person would go into a store and purchase something under five dollars. When the cashier gives back the change we would complain and say we gave them a twenty and we would try get money back for twenty and not a five ".

O.M.V.I.C. conducted a criminal record search, as they do for every application for registration. The criminal record search showed the conviction in Youth Court for which the Applicant served one year in custody with one year probation. The record continued on July 27, 2000, showing two convictions for fraud under \$5,000.00 under Section 380 (1) (b) and five convictions for attempt fraud under Section 380 (1) (b) and 463, with a sentence of thirty days concurrent on each of the charges. The criminal record further revealed a conviction on January 15, 2001 for assault causing bodily harm in which the Applicant received eighteen months conditional sentence and eighteen months probation.

A certified copy of the information was obtained which revealed that on March 31, 1999, the Applicant attempted to defraud the Christmas Store contrary to Section 463 of the Criminal Code; on the 6th day of May 1999, the Applicant defrauded the Canadian Imperial Bank of Commerce contrary to Section 380 (1) (b) of the Criminal Code; on the 7th day of May 1999, the Applicant attempted to defraud the Royal Bank contrary to Section 463 of the Criminal Code and on the 10th day of May 1999, the Applicant defrauded the Royal Bank contrary to Section 380 (1) (b) of the Criminal Code.

The Applicant was given a further chance to fully explain the charges and convictions. He responded to the Registrar that, regarding the May 1996 conviction, someone had hit him in the face with a snowball at a bus stop so he ran after the person and punched him in the face. He was convicted and sentenced to two years because his lawyer was from Legal Aid and the person he punched had rich parents.

Regarding the July 27, 2000 charge of fraud under \$5,000.00, he reported that on his 20th birthday, he got into an argument with his father and by the end of the yelling match he did not have a home anymore. He was on the streets and stole from stores on the market totaling \$300.00.

Regarding the January 15, 2001 conviction for assault causing bodily harm, he stated that was the same case where he stole from a few stores on the market, totaling \$300.00. Because there were two stores, there were two different Court dates. The clerk in the second store said that he had pushed him while the clerk was running after him with a knife. Because he had a previous assault charge they automatically took the clerk's side and assault was attached to the charge for stealing under \$300.00. The Applicant had previously said that this conviction was the result of a fight in a pool hall.

The Registrar had grave concerns about the Applicant not being forthcoming concerning his criminal record. The witness explained that the Applicant had been given three opportunities to fully disclose his offences and convictions. On all chances given to him, the Applicant failed to fully disclose the offences and convictions. He had misled the Registrar in regard to the assault charges, giving two completely different explanations for the same incident. He misled the Registrar into believing that there was one assault charge that had occurred in the past when he was a youth, when there were two separate assault convictions. He had failed to disclose any convictions for fraud or attempted fraud against the Canadian Imperial Bank of Commerce and the Royal Bank.

The Applicant, Christopher David Clermont, gave evidence on his own behalf.

In regard to question 9 on the application, Mr. Clermont stated that he called his lawyer and asked what charges he had because his recollection was poor. He stated that he was told by his lawyer that 267(b) was the fraud and attempted fraud and he was very confused about the charges. He did mention the assault, but he should have checked more thoroughly. He said that he did mention the second assault charge in his letter to the Registrar.

He stated that his sales manager really wanted him to continue to work there. He also stated that he had sat down with the sales manager on his first day of employment and explained both assault charges and all fraud charges to the sales manager. He commenced employment at his dealership sponsor on February 20, 2002 and was terminated April 11, 2002.

According to the Applicant, the total of all fraud charges was \$150.00 and that he had paid back \$300.00. At the bank he would go in and ask for change for a \$20.00 but would not give them a \$20.00 bill and this composed his attempted fraud charge. He stated that for all fraud charges, he served a total of fifteen days in custody. He stated that he is still in school but now was training for a Personal Training Certification and working weekends for his sister who runs the Gymnastics Association. He produced a letter from the Gymnastics Association commending his work with that group and a

letter from his employer/sponsor acknowledging that the Applicant possessed many of the attributes needed for a successful career in automotive sales and his feeling that he was of good character.

The Applicant said that he was being honest and wasn't trying to hide his criminal record and that he would be willing to accept a probationary period with conditions.

On cross examination, the Applicant stated that he was aware that the criminal record search would be conducted on him. He admitted that he signed the Application after reading the part that said that he swore that all of the information in the application was true to the best of his knowledge and belief.

When asked about his answer to question 9 in his application, he said that he thought that one of the section numbers that he mentioned related to the fraud charges and that the assault he referred to was the one in Youth Court.

He stated that his memory was very poor and he did not recall the fight or the conviction for assault in 2001. In the letter that he sent to O.M.V.I.C. after his application and the questions from O.M.V.I.C. he did mention the second assault conviction, but he did not mention anything about the Youth Court conviction.

Relating to the fraud charges, he said that he just considered the stores and banks to be the same thing and, therefore, he didn't disclose any fraud or attempted fraud against the banks.

When further questioned in cross examination about the charges for fraud and attempted fraud against the Christmas Store, the Royal Bank and the Canadian Imperial Bank of Commerce, he stated that all of those were done within a few months period and he pleaded guilty because he had a Legal Aid lawyer representing him.

Regarding the conviction for assault in January 2001, he was asked why his one letter to O.M.V.I.C. stated that it was a fight over a pool table, but the next letter to O.M.V.I.C. described it as pushing a clerk who was chasing him after one of his thefts at a store in the market. The only explanation given by the Applicant was that he was confused.

FACTS FOUND PROVEN:

The Applicant commenced working at a motor vehicle dealership on February 20, 2002 pending the approval on his licence. On the first day of his employment, his uncontradicted evidence was that he disclosed to his sales manager all convictions and circumstances relating to the assault and fraud convictions. The Applicant completed an

application to the Ontario Motor Vehicle Industry Council to be registered as a salesperson on February 22, 2002.

In his application the Applicant answered question 9 by simply inserting two section numbers and mentioned one fight, which he stated occurred when he was younger and that he had come a long way since then and learned from it.

The Applicant failed to disclose the more recent assault conviction or the convictions for fraud and attempted fraud.

The Applicant was given an opportunity by O.M.V.I.C. to further disclose details of his convictions and the circumstances surrounding the convictions and he replied by acknowledging an assault charge resulting from a fight in a pool hall and one \$20.00 value fraud.

The Applicant was given a further opportunity by O.M.V.I.C. to give full particulars of the charges, convictions and circumstances and he responded by disclosing the Youth Court charge, stealing from stores on the market, totaling \$300.00 and the most recent assault conviction that resulted from him pushing a store clerk who was chasing him with a knife. The Applicant failed to disclose any of the fraud or attempted fraud convictions on the Royal Bank and Canadian Imperial Bank of Commerce.

The Tribunal fails to find the Applicant to be a credible witness. It is inconceivable that he would be able to disclose to his sales manager the circumstances relating to both assault convictions and all fraud and attempted fraud charges on February 20, 2002, yet not remember these charges or convictions when he completed his application just two days later on February 22, 2002. His explanation that he just forgot about the most recent assault conviction is not plausible. The inconsistencies in his application, his letters and his evidence lead the Tribunal to the conclusion that he was trying to mislead O.M.V.I.C. and hoped that O.M.V.I.C. would not carry out a criminal record search and simply approve his application based upon his answers. The Applicant's answers to question 9 were inadequate, incomplete and misleading, yet he swore in the application that all of his answers were true to the best of his knowledge and belief.

When the Applicant was put in a position of choosing between honest disclosure and the risk of being refused his licence because of his past record, he saw the possibility of avoiding detection and he chose to conceal the truth when he thought that the criminal record check might not be done. When given further opportunities to rectify the situation, he chose to compound his problem by releasing small bits of information and continuing the deception.

APPLICATION OF LAW TO FACTS:

In Re: (Moodie) vs. Registrar under the Motor Vehicle Dealers Act, June 19, 1998, Ontario Commercial Registration Appeal Tribunal, the Applicant had failed to disclose

some criminal charges. He explained that he thought the question on the application form only related to recent charges involving motor vehicles. He later admitted to two drug offences whereas a criminal record search revealed six charges. The Tribunal found that the failure to answer the question correctly may have been due to a lack of thoroughness on his part and not in an attempt to mislead, but his criminal record combined with the non-disclosure gave reasonable grounds for the Decision by the Registrar not to grant registration.

In the case of Brenner v. Ontario (Registrar of Motor Vehicle Dealers and Salesmen) 1983, O.J. No. 1017, Ontario Supreme Court - High Court of Justice Divisional Court, the Court heard an appeal from a Decision of the Commercial Registration Appeal Tribunal. In that case the Applicant had a serious criminal record which he had disclosed in his application, although he had not disclosed three further convictions. Evidence was heard from his potential employer and a criminal lawyer who were both of the opinion that the Applicant had rehabilitated himself and, therefore, his past record should not be held against him and he should be allowed registration under the Act. The Tribunal agreed that the Applicant had rehabilitated himself and directed the Registrar to grant a conditional registration. On appeal, the Court found the Tribunal had not applied the proper test and set out this test in paragraph 9 of the Judgment as follows:

“...the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error concluding that the past conduct of the Applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty”.

In the present case, the Applicant was aware that the application document was crucial in assessing his honesty as the information contained in the application was clearly intended to be relied upon by the Registrar. If any information was intentionally concealed or false information was given, the Registrar had good reason to have serious concerns that the Applicant would withhold information or provide false information in the future in his dealing with the public or with the Registrar.

The Applicant was less than candid in his answer to question 9 on his application. Although given subsequent chances to rectify the situation, the applicant continued to provide partial and misleading information without ever fully revealing his criminal convictions and charges or the circumstances surrounding them. His excuse that he forgot about the most recent criminal assault charge, although telling his employer of it two days before filling out the application, is a stretch to the imagination. His continued non-disclosure of several of the fraud and attempted fraud convictions demonstrate a continuation of the dishonest behaviour. This combined with his past conduct, provides reasonable grounds to the Registrar to believe that there will be future behaviour which does not meet with the statutory standard of acting with honesty, integrity and in accordance with the law. On the basis of the facts found and the application of the law to those facts, the Tribunal finds that the decision by the Registrar was not in error.

DECISION:

Therefore, by virtue of the authority vested in it under section 7(4) of the *Motor Vehicle Dealers Act*, the Licence Appeal Tribunal directs the Registrar to carry out his proposal to refuse the registration of the Applicant.

LICENCE APPEAL TRIBUNAL

Brian K. Marotta
Vice Chair, Presiding.

Released: August 19, 2002

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice or Divisional Court is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

PREHEARING

1492475 ONTARIO LTD. c.b.a. RAINBOW DAYCARE CENTRE

APPEAL FROM A NOTICE OF DIRECTION DATED MAY 30, 2002
AND A NOTICE OF INTENTION DATED JULY 3, 2002 OF THE
DIRECTOR UNDER THE *DAY NURSERIES ACT* RESPECTING
1492475 ONTARIO LTD. C.B.A. RAINBOW DAYCARE CENTRE
LOCATED AT 260 THE QUEENSWAY, TORONTO, ONTARIO,
UNDER SECTION 15 OF THE *DAY NURSERIES ACT*

TRIBUNAL: JOHN ORT, Member

APPEARANCES:

MARVIN H. FLANCNAN, Counsel, representing the Applicant
KATHARINE RENISON, Counsel, representing the Director under
the *Day Nurseries Act*

DATE OF

HEARING: August 9, 2002

Toronto

ORDER

Following attendances on August 9, 2002, at a prehearing before the Licence Appeal Tribunal (the "Tribunal") of Marvin H. Flancman, Counsel, representing the Applicant 1492475 Ontario Ltd. c.b.a. Rainbow Daycare Centre, and Katharine Renison, Counsel, representing the Director under the *Day Nurseries Act* (the "Director");

The Tribunal makes the following Order:

1. The parties to the hearing are the Applicant and the Director.
2. On consent of the Applicant and the Director, the Applicant's appeal of the Notice of Direction of the Director under the *Day Nurseries Act* dated May 30, 2002, and the Applicant's appeal of the Notice of Intention of the Director under the *Day Nurseries Act* dated July 3, 2002, will be heard together by the Tribunal.
3. The parties recorded that there had been no resolution of any of the issues in this matter.
4. The parties shall comply fully and in a timely manner with the disclosure requirements as required by Rule 6 of the Tribunal's Rules of Practice.

5. The hearing will commence at 9:30 a.m. at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, on Monday, September 9, 2002, and continue on Tuesday, September 10, Wednesday, September 11, and Thursday, September 12, 2002, if necessary.

LICENCE APPEAL TRIBUNAL

John Ort, Member

Released: August 21, 2002

1168-MED-CARD

Appeal under section 50(1) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Minister pursuant to section 32(12)(b)(i) of that Act.

TO CHANGE THE CLASS OR CLASSES OF MOTOR VEHICLE IN RESPECT OF WHICH THE LICENCE WAS ISSUED

TRIBUNAL: JOHN A. CARMICHAEL, M.D., Presiding Member

APPEARANCES: KYLE BIEL, Respondent
Representative for the Minister

Applicant,
by written submissions only

DATE OF
HEARING: August 16, 2002

Written

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Minister (the "Respondent") pursuant to section 32(12)(b)(i) of the *Highway Traffic Act* (Ontario).

FACTS:

The Applicant is a 40 year old male truck driver who on April 26th, 2002 received notice from the Ministry of Transportation ("MTO") that his driver's licence status was to be reviewed (exhibit #1). This was based on a report from Physician #1, cardiologist, that the applicant had newly diagnosed "idiopathic dilated cardiomyopathy" (exhibit #2). On January 4th, 2002 the MTO advised the applicant that his licence was to be changed to class G (exhibit #3). From the time of initial diagnosis to the appeal, the applicant has undergone numerous cardiology assessments (exhibits # 4,5,6,7,8,9,10, 11). Despite the encouraging reports of

the applicant's cardiac status, (exhibit # 12, 13, 14), the Medical Advisory Committee confirmed the downgrade to a class "G M" Licence on the basis of "sever left ventricular dysfunction grd. 5" (exhibit #15). As a result of this decision the applicant filed an appeal. July 4th, 2002(exhibit #16), followed by two letters presenting his arguments (exhibits # 17 & 18), accompanied by letters of support from his family physician (exhibit #19) and his cardiologist (exhibit # 20).

ISSUES:

Should the decision of the Minister to change the class or class of motor vehicles in respect of which the licence is issued in accordance with the result of the examination be varied, modified or set aside?

The Applicant no longer suffers from a mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffer from any mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Regulation 340/94, Section 17 and 18 states:

- 17. (1) Qualifications required by an applicant for a holder of a Class A, B, C, D, E or F driver's licence are that the applicant or holder,
 - (a) has no history or clinical diagnosis of diabetes that requires insulin for control;
 - (b) is not taking any drug that could, in the dosage prescribed or in the dosage recommended by the manufacturer, impair his or her ability to drive a motor vehicle of the applicable class safely;
 - (c) has no established medical history of myocardial infarction, angina pectoris, coronary insufficiency or thrombosis;
 - (d) has no established medical history of heart disease including

arrhythmia or of respiratory dysfunction likely to interfere with the safe driving of a motor vehicle of the applicable class;

- (e) is not suffering from an aortic aneurysm, whether resected or not;
 - (f) is not suffering from hypertension accompanied by postural hypotension resulting in giddiness when under treatment;
 - (g) has no established medical history of loss of consciousness or awareness due to a chronic or recurring condition;
 - (h) has no established medical history of a disorder of the musculoskeletal or nervous system that may interfere with the safe driving of a motor vehicle of the applicable class;
 - (i) has no established medical history of an intractable psychotic or psychoneurotic disorder, having particular regard for sustained hostile, aggressive, paranoid, suicidal or other destructive tendencies or depression unless it is medically determined that the condition from which the person has suffered is corrected or controlled;
 - (j) has a visual acuity by Snellen Rating, with or without the aid of corrective lenses, no poorer than 20/30 in the better eye and 20/50 in the weaker eye; and
 - (k) has a horizontal visual field of at least 120 degrees in each eye as measured by confrontation tests.
- (2) An applicant for or a holder of a Class A, B, C, D, E or F driver's licence who fails to meet the qualifications referred to in clauses (1)(a) to (i) may, despite the failure, qualify for the class of licence applied for or held if he or she demonstrated the ability to drive a motor vehicle in the applicable class as safely as any person who meets those qualifications.
- (3) An applicant for or a holder of a Class D driver's licence who fails to meet the qualification referred to in clause (1)(c) may, despite the failure, qualify for that class of licence if it is medically determined that he or she has made a full recovery and there is no established history of a second occurrence of myocardial infarction, thrombosis or recurring angina pectoris.
- (4) An applicant for or a holder of a Class B, C, E or F driver's licence whose hearing in one ear is better than in the other must be able to perceive in the better ear, with or without a hearing aid, a forced whisper at a distance of 1.5 metres or, if an audiometer is used to test the person's hearing, must not have a loss in the better ear of more than 40 decibels at 500, 1,000 and 2,000 hertz.
18. An applicant for or a holder of a G, G1, G2, L, M, M1, M2, or R driver's licence must have,
- (a) in the case of a person whose vision in one eye is better than in the other, visual acuity in the better eye that is no poorer than 20/40 as measured by Snellen Rating; and

- (b) a horizontal visual field of at least 120 degrees as measured by confrontation tests.

Section 32(12)(b)(i) states:

32 No person shall drive a motor vehicle on a highway unless the motor vehicle is within a class of motor vehicles in respect of which the person holds a driver's licence issued to him or her under this Act.

(12) An applicant for a driver's licence or a person who holds a driver's licence shall submit to the examinations that are authorized by the regulations relating to this section and required by the Minister at the time and places that the Minister may require and the Minister may,

(b) in the case of a person who holds a driver's licence,

(i) impose or remove the conditions or endorsements authorized by the regulations or change the class or classes of motor vehicles in respect of which the licence is issued in accordance with the result of the examinations, or

Section 50 states:

50(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.

(2) The Tribunal may confirm, modify or set aside the decision of the Minister or Registrar.

APPLICATION OF THE LAW TO FACTS:

The Tribunal has reviewed in detail the applicant's cardiac history and acknowledges the appreciable improvement in the applicant's cardiac status and symptomatology as expressed in the several cardiology consultant notes and the multiple cardiac laboratory assessments.

The Tribunal recognises the lack of correlation between symptoms and left ventricular function (ejection fraction). Although not critical in the decision, the Tribunal did not have the report of the Holter monitor assessment referred to in the consultant's note of Jan 29th. 2002.

Despite the applicant's general improvement in cardiac status the most recent investigation continues to demonstrate an ejection fraction considerably below the minimal 35% required of commercial drivers. The applicant clearly has an established and current history of heart disease which on the basis of *The Highway Traffic Act*, Reg. 340/94, sec 17. (1) (d) prohibits the applicant from holding a class "A" drivers licence.

DECISION:

Upon the application by the Applicant to appeal the decision dated June 18, 2002 of the Minister ("Respondent") to change the class or classes of motor vehicle in respect of which the licence was issued pursuant to Section 32(12)(b)(i) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Respondent and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be confirmed

LICENCE APPEAL TRIBUNAL

John A. Carmichael, M.D.
Presiding Member

RELEASED: August 21, 2002

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

1183-MED-CARD

Appeal under section 50(1) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Minister pursuant to section 32(12)(b)(i) of that Act.

**TO CHANGE THE CLASS OR CLASSES OF
MOTOR VEHICLE IN RESPECT OF WHICH
THE LICENCE WAS ISSUED**

TRIBUNAL: ROSS BENNETT, M.D., Member

APPEARANCES: LUBA NEUWIRTH, Respondent
Representative for the Minister

Agent for Applicant

DATE OF
HEARING: August 7, 2002

Whitby

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Minister (the "Respondent") pursuant to section 32(12)(b)(i) of the *Highway Traffic Act* (Ontario).

EXHIBITS

1. Ministry's letter to the Applicant, dated June 26, 2002, downgrading his driver's licence from a Class DZ to a Class G.
2. Applicant's Notice of Appeal received at the Tribunal July 15, 2002.
3. Applicant's Holter report processed July 6, 2002.
4. Respondent's File Summary.

PRELIMINARY MATTERS

Agent #1, Health and Safety Manager for the Applicant's employer, introduced himself as the Applicant's agent and presented a copy of a Holter Report (exhibit #3), processed on July 6, 2002, to the Tribunal.

FACTS:

The Applicant is a 53-year-old garbage truck driver, who had his licence downgraded on June 26, 2002, on a recommendation by the Medical Advisory Committee (MAC) that he not hold a licence higher than a Class G.

The Ministry of Transportation had received a Medical Condition Report from Physician #1 on February 12, 2002 stating the Applicant had a condition of coronary heart disease. The Ministry informed him he had to submit an up-to-date cardiologist's report by July 8, 2002, in order to determine whether he can safely operate a class D vehicle.

A report dated February 12, 2002 prepared by Physician #1, who is a cardiologist, stated the Applicant's final diagnosis is:

- congestive heart failure
- carotid sinus hypersensitivity requiring pacemaker
- severe triple vessel disease for urgent bypass
- hypertension
- diabetes.

The Applicant was treated with Lasix to control the cardiac failure and a pacemaker was installed on January 31st. A triple bypass was performed on February 13, 2002.

After discharge an echo was carried out and showed mild left ventricular dysfunction and borderline LVH. A stress cardiolute on April 22, showed a previous infarction and some reversible ischemia in the circumflex area.

The Applicant had one episode of chest pain, which was relieved with nitroglycerine, but enjoys good exercise capacity. His EKG shows sinus rhythm with associated ventricular pacing. A stress test was carried out and the Applicant was able to walk 6 minutes and 21 seconds of the Bruce protocol without chest pain.

In a Medical Waiver Certificate dated May 28, 2002, Physician #1 concluded that compliance was improving and the Applicant has a class 1-exercise capacity. He stated there was fair, but incomplete revascularization. Physician #1 recommended reinstatement of the Applicant's Class DZ driver's licence.

On June 25, 2002, the MAC recommended that the Applicant's driver's licence be

downgraded to a Class G. The Applicant would be reconsidered for a commercial licence, on receipt of a cardiologist's assessment confirming there is an improvement in his cardiac condition, including the results of a Holter and that he meets the Canadian Cardiovascular functional Class 1 requirements.

The reasons given for this decision were:

1. Demonstrated triple vessel coronary artery disease with poor exercise tolerance and evidence of ischemia.
2. Reversible defect with marked severity on stress test.
3. Demonstrated left ventricular dysfunction.
4. Requires a pacemaker.
5. Recent episode of chest pain requiring nitro.
6. Does not meet C.C.S. functional Class 1 requirements for a commercial Vehicle (NSC 3.4.1).

The Applicant's Agent introduced a Holter Report (exhibit #3), which they had just obtained that morning. The comments are:

1. occasional unifocal PVC's with 3 couplets
2. no symptoms reported
3. no ischemic changes demonstrated
4. normal sinus rhythm.

The Ministry accepted the MAC recommendations and informed the Applicant on June 26, 2002 that his licence was being downgraded from Class DZ to Class G. The decision was made because the Applicant did not meet the medical standard, but his case would be reviewed on receipt of a satisfactory cardiologist's assessment. This assessment must indicate there is improvement in his cardiac status, include the results of a Holter monitor and that he meets the Canadian Society functional class 1 standards.

ISSUES:

Should the decision of the Minister to change the class or class of motor vehicles in respect of which the licence is issued, in accordance with the result of the examination, be varied, modified or set aside?

The Applicant stated in evidence that he has lost 30 pounds, his diabetes is under control, his exercise tolerance was much improved and he has not felt as well in 15 years.

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffer from any mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Regulation 340/94, Section 17 and 18 states:

- 17. (1) Qualifications required by an applicant for a holder of a Class A, B, C, D, E or F driver's licence are that the applicant or holder,
 - (a) has no history or clinical diagnosis of diabetes that requires insulin for control;
 - (b) is not taking any drug that could, in the dosage prescribed or in the dosage recommended by the manufacturer, impair his or her ability to drive a motor vehicle of the applicable class safely;
 - (c) has no established medical history of myocardial infarction, angina pectoris, coronary insufficiency or thrombosis;
 - (d) has no established medical history of heart disease including arrhythmia or of respiratory dysfunction likely to interfere with the safe driving of a motor vehicle of the applicable class;
 - (e) is not suffering from an aortic aneurysm, whether resected or not;
 - (f) is not suffering from hypertension accompanied by postural hypotension resulting in giddiness when under treatment;
 - (g) has no established medical history of loss of consciousness or awareness due to a chronic or recurring condition;
 - (h) has no established medical history of a disorder of the musculoskeletal or nervous system that may interfere with the safe driving of a motor vehicle of the applicable class;
 - (i) has no established medical history of an intractable psychotic or psychoneurotic disorder, having particular regard for sustained hostile, aggressive, paranoid, suicidal or other destructive tendencies or depression unless it is medically determined that the condition from which the person has suffered is corrected or controlled;
 - (j) has a visual acuity by Snellen Rating, with or without the aid of corrective lenses, no poorer than 20/30 in the better eye and 20/50 in the weaker eye; and
 - (k) has a horizontal visual field of at least 120 degrees in each eye as measured by confrontation tests.

- (2) An applicant for or a holder of a Class A, B, C, D, E or F driver's licence who fails to meet the qualifications referred to in clauses (1)(a) to (i) may, despite the failure, qualify for the class of licence applied for or held if he or she demonstrated the ability to drive a motor vehicle in the applicable class as safely as any person who meets those qualifications.
- (3) An applicant for or a holder of a Class D driver's licence who fails to meet the qualification referred to in clause (1)(c) may, despite the failure, qualify for that class of licence if it is medically determined that he or she has made a full recovery and there is no established history of a second occurrence of myocardial infraction, thrombosis or recurring angina pectoris.
- (4) An applicant for or a holder of a Class B, C, E or F driver's licence whose hearing in one ear is better than in the other must be able to perceive in the better ear, with or without a hearing aid, a forced whisper at a distance of 1.5 metres or, if an audiometer is used to test the person's hearing, must not have a loss in the better ear of more than 40 decibels at 500, 1,000 and 2,000 hertz.
- 18. An applicant for or a holder of a G, G1, G2, L, M, M1, M2, or R driver's licence must have,
 - (a) in the case of a person whose vision in one eye is better than in the other, visual acuity in the better eye that is no poorer than 20/40 as measured by Snellen Rating; and
 - (b) a horizontal visual field of at least 120 degrees as measured by confrontation tests.

Section 32(12)(b)(i) states:

- 32 No person shall drive a motor vehicle on a highway unless the motor vehicle is within a class of motor vehicles in respect of which the person holds a driver's licence issued to him or her under this Act.
- (12) An applicant for a driver's licence or a person who holds a driver's licence shall submit to the examinations that are authorized by the regulations relating to this section and required by the Minister at the time and places that the Minister may require and the Minister may,
 - (b) in the case of a person who holds a driver's licence,
 - (i) impose or remove the conditions or endorsements authorized by the regulations or change the class or classes of motor vehicles in respect of which the licence is issued in accordance with the result of the examinations, or

Section 50 states:

- 50(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.

(2) The Tribunal may confirm, modify or set aside the decision of the Minister or Registrar.

APPLICATION OF THE LAW TO FACTS:

The Ministry was obligated, under Regulation 340/94 Section 17 & 18 of the *Highway Traffic Act*, to investigate the Applicant's medical status when informed by Physician #1 on February 12, 2002 that he had coronary heart disease. Unfortunately this investigation took until June 26, 2002 to be completed.

By this time the Applicant had been hospitalized, treated for congestive heart failure, had a pacemaker installed, had triple bypass surgery at the Toronto General and returned to work driving a garbage truck for 2 months. This information was provided to the Ministry, in Physician #1's letter of May 22, 2002 with a recommendation for reinstatement of the Applicant's Class DZ licence, but appears to have been largely ignored.

This letter was from the attending cardiologist, who knows the Applicant better than anyone else. The information provided appears to be exactly what the MAC is requesting after the fact. The surgery was successful, the pacemaker was functioning properly and he has only had one episode of angina. His stress test did not produce any chest pain or specific EKG abnormalities.

The Holter test was recorded on July 24, 2002, but was not available until the day of the hearing would put the Applicant in a functional Class 1 category.

The Tribunal did not find enough evidence of any cardiac disability to justify the Applicant's Class DZ licence not being reinstated.

DECISION:

Upon the application by the Applicant to appeal the decision dated June 26, 2002 of the Minister to change the class or classes of motor vehicle in respect of which the licence was issued pursuant to Section 32(12)(b)(i) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Respondent and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be set aside.

LICENCE APPEAL TRIBUNAL

Ross C. Bennett, M.D.,
Presiding Member

RELEASED: August 20, 2002

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice or Divisional Court is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

1192-MED-MDIS

**Appeal under Section 50(1) of the Highway Traffic Act,
R.S.O. 1990, Chap. H.8 as amended, from a Decision of the
Registrar of Motor Vehicles pursuant to Section 47(1) of
that Act.**

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ROSS C. BENNETT, M.D., Presiding Member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

Applicant,

DATE OF
HEARING: August 15, 2002 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

EXHIBITS:

1. Notice of Applicant's licence suspension from the Ministry of Transportation dated February 11, 2002.
2. Notice of Appeal by the Applicant to the Ministry dated July 18, 2002.
3. Respondent's File Summary received at the hearing.

4. Certified copy of the Applicant's driving record.

PRELIMINARY MATTERS:

The daughter of the Applicant asked to be allowed to assist the Applicant with translations in the proceedings and act as his agent.

FACTS:

The Applicant is a 52 year old, former truck driver and driving instructor, of Italian descent, who had his licence suspended for psychiatric reasons, on February 11, 2002. The Ministry had received a Medical Report from Physician #1, a psychiatrist at the Whitby Mental Health Centre on January 25, 2002, informing them of the Applicant's diagnoses:

1. Schizophrenia
2. Cognitive Impairment -? Dementia

The Applicant had a long psychiatric history of schizophrenia dating back to 1977, but had retained his licence during this period. He had been a truck driver but could not work because of his illness from 1987 until 1988 when a change of medication improved his mental health. In 1998 he opened a driving school, which he operated successfully, until November 2001.

His early problems were depression, which culminated in a month's hospitalization in Mount Sinai in 1977. He was followed for a number of years by a psychiatrist, Physician #2, who had advised the Applicant not to work in 1987.

The Applicant was admitted to the Humber River Regional Hospital November 30, 2000 on a Form 1, with a diagnosis of depressive psychosis, anxiety traits and moderate stress, with strong paranoid symptoms. He was quite suspicious of his wife and daughter and on one occasion became aggressive towards his wife. In June 2001, the Applicant had an altercation with his accountant and was arrested for assault, but the charge was later dropped.

During a month's hospitalization the Applicant was started on a new antidepressant medication, Celexia and Imovane for sleeping. His new psychiatrist was a Physician #3.

On November 1 2001, the Applicant was taken to Markham Stouffville Hospital by the York Regional Police on a Form 1, issued by his new psychiatrist, Physician #3, after the Applicant's son reported the Applicant had threatened to kill his wife and daughter. He had pushed his daughter and hit her on the head with a Mason jar. When his wife came home he pushed her to the floor. When the police arrived the Applicant's wife was still on the floor and they noted redness and swelling of her left knee. The Applicant was very angry and told the police his family would pay and he threatened to kill them. The police felt that if the Applicant

were released he would severely injure someone. They wanted him assessed at a secure hospital to prevent any subsequent danger to the public.

He was transferred to the Humber River Hospital and eventually discharged on November 14, 2001. He was reassessed several times by Physician #3 and on December 3, 2001, he found him to be paranoid and suspicious towards his family, had poor judgement, was not sleeping and not responsible for his actions. Physician #3 completed another Form 1 on December 5. The Applicant assaulted his daughter again and she called 911 thinking he would be taken back to the hospital, but he was arrested and taken to jail. He remained in jail until December 28, 2001, when he was finally admitted to the Whitby Mental Health Centre. The Applicant was treated with antipsychotic medications, Zyprexa and Olanzapine, as well as an antidepressant, Celexa.

Psychological testing revealed the Applicant to be cognitively impaired with difficulties in memory, for example - remembering instructions and perseveration(an inability to switch "sets"), along with perceptual disturbances.

The psychologist had great concerns about the Applicant driving a car and notified the Ministry. The Applicant was advised not to drive a car.

Physician #1 did not feel the Applicant was a significant threat to anyone at that time, but felt he should be followed closely by his psychiatrist, Physician #3.

The diagnoses at discharge were:

1. Schizophrenia, Rule Out Dementia
2. Major Depressive Disorder in Remission

A Medical Advisory Committee ("MAC") Case Study on July 5, 2002 determined the Applicant's licence should remain suspended for the following reasons:

1. Very serious history of long-standing mental illness requiring numerous hospitalizations. One of these included an episode of violent behaviour resulting in assault charges.
2. Requires a demonstrated one-year period of freedom from psychiatric symptoms, compliance with treatment and cognitive review before consideration can be given to the reinstatement of his driving privilege.

Physician #3 assessed the Applicant on July 22, 2002. He stated in a letter to the Ministry that the Applicant has been stable for the last seven months and has not shown any evidence of a relapse or any symptomatology. He added that being unable to drive has been having a negative effect on him and very stressful.

Physician #3 could not find any reason for him not to have his licence reinstated. He stated an unnecessary suspension would only be detrimental for him and not advisable.

He had not found any evidence of impairment of his cognitive status, which would jeopardize his competency to drive.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

When Physician #1 informed the Ministry of the Applicant's diagnoses, under Section 47(1) of the *Highway Traffic Act* the Deputy Registrar had no alternative, but to suspend the Applicant's driver's licence.

There is no question that the Applicant has chronic Schizophrenia and recurrent depression. He has responded well to therapy and has been free of symptoms since January, 2002.

Physician #3 has given the Applicant a clean bill of health and recommended that his licence be reinstated. He did not find any evidence of impairment, which would jeopardize his competency to drive. He even said that it would be detrimental to the Applicant's mental health and therefore not advisable to return his licence.

The Tribunal, however, is reluctant to act too quickly, because the Applicant's condition is a chronic type and he has suffered several exacerbations over the past 2 years. He has been symptom free for 8 months, but he has not been under any stress during this period.

The Applicant is requesting reinstatement of his Class AZ licence, so he would be able to return to being a driving instructor. The Tribunal feels this could be a very stressful occupation for someone on antipsychotic and antidepressant medications and who is just recovering from months of mental illness.

The Tribunal agrees with the MAC recommendation that the Applicant should be symptom-free for a period of 12 months before his licence is reinstated to conform to Section 47(1) of the *Highway Traffic Act*.

DECISION:

Upon the application by the Applicant to appeal the decision dated February 21, 2002 of the Registrar of Motor Vehicles to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act*, and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

Ross C. Bennett, Presiding Member

RELEASED: August 21, 2002

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

1211-ADLS-ASTHMA

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding Member

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles

Applicant

DATE OF
HEARING: August 14, 2002

Toronto

DECISION

A hearing was held on August 14, 2002, at Toronto, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: August 16, 2002

1211-ADLS-ASTHMA

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles

Applicant

DATE OF
HEARING: August 14, 2002

DECISION
RELEASED: August 16, 2002

Toronto

REASONS FOR DECISION

A hearing was held on August 14, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on August 14, 2002, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that her appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated July 29, 2002 and was received by the Tribunal on July 29, 2002, together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

There were no preliminary matters and the hearing proceeded.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice to the Registrar dated July 20, 2002, issued by the Registrar of Motor Vehicles.
- b) Exhibit # 2 Notice of Appeal received by the Tribunal July 29, 2002, filed by the Applicant.

By the Respondent:

- a) Exhibit # 3 Ministry of Transportation submissions received August 9, 2002.
- b) Exhibit # 4 Copy from the Canadian Medical Association Guide to Prescription and Over the Counter Drugs, received August 14, 2002

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under

subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

- 50.1(1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
 - (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
 - (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

- 15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
 - (a) the name, telephone number and address, with the postal code, of the medical practitioner;
 - (b) the name, date of birth and address of the person who is the subject of the report;
 - (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

Applicant's Driver's Licence was suspended "July 20, 2002" as per Notice of Appeal (Exhibit #2)

Applicant's Evidence:

Page 2 of the Notice of Appeal is blank, but refers to documentation attached.

The first attachment to the Notice of Appeal is a letter dated July 26, 2002 from Physician #1, the Applicant's physician since "January 31 1995".

Physician #1 confirms that she is aware the Applicant was stopped by police and charged with "...failing to provide a breath sample". Physician #1 reports: "...she has frequent visits for her asthma and allergies ...suffered since the age of 7...asthma worsens due environmental triggers such as smoke or pollens more difficulty breathing in humid weather ...this summer has been extremely humid ...finds it difficult to take a deep breath ...professional opinion ...it would have been extremely difficult for the Applicant to have taken a long enough breath to blow into the breath analyser..."

The Applicant in a letter dated July 25, 2002 describes the state of her health on the day prior to her being stopped by the police as well the events leading up to the demand for a breath sample: "...uneasy sleep ...awoke ...with swollen, red and watery eyes, a runny nose and a sore throat ...at this bar from approximately 8 pm July 19 to 2 am July 20 ...after leaving the bar ...took 2 puffs of ...Ventolin inhaler..." (SIC).

The Applicant introduced a number of letters from friends and co-workers confirming their awareness of her condition and the symptoms noticed on the dates in question. Summaries of said notes follow hereinafter:

Witness #1 the Applicant's house mate, informs the Tribunal per letter dated July 26, 2002, that the Applicant "...has numerous allergies ...sneezes, coughs, gets itchy, reddened watery eyes and complains of tightness in her chest and wheezing ...Friday July 19 ...at about 9:30 am ...looked ill ...eyes were very red and puffy ...not sure she was well enough to work and may go home sick." (SIC)

In a note also dated July 26, 2002 addressed to the Applicant, Witness #2 states: "As requested by you, the Applicant, this letter will confirm my observations the morning of Friday July 19, 2002 ...I had a conversation with you shortly after your arrival at work ...focused on your ill health, which was visible and remarked on by myself and your co-workers ...observed and commented that your eyes were swollen and watery, your sinuses were stuffed and your voice strained ...asked if you had a cold ...discussion centred

around your many allergies this time of year and other times due to your numerous allergies.” (SIC)

Witness #3 in a note dated July 24th, 2002, addressed “To Whom it May Concern” confirms: *“...I saw the Applicant on Friday July 19, 2002 ...when she arrived at the office ...her poor health condition was very obvious ...questioned the Applicant about her health ...she explained that she was ill due to a severe asthma and allergy attack and that she had been up most of the night ...the Applicant’s condition included puffy and watery eyes, coughing, stuffed sinuses and a hoarse voice ...not the first time I have seen the Applicant ill from allergies.” (SIC)*

Addressed “To Whom it May Concern”, a short note, dated July 23, 2002 portrays the events of the evening of July 19, 2002 as viewed by Witness #4: *“...I was with the Applicant from 9:15pm to 2:00am ...spent much of the time either engaged in conversation or dancing ...she had been ill that day and the previous evening.” (SIC)*

A letter from Witness #5, dated August 09, 2002 is addressed to the Tribunal. Witness #5 relates: *“I have known the Applicant for 5 years ...have had occasions to go out socially with her ...the Applicant was out with me for my Birthday on the evening of July 19, 2002 ...had dinner ...we all talked, danced and mingled ...I have know the Applicant to have asthma as long as I have known her ...my opinion that the Applicant’s asthma would have prevented her from be able to blow hard enough into the breath analyser, especially given she was ill with her asthma and allergies that morning...” (SIC)*

Also attached to the Notice of Appeal, and forming part of the proceedings, are a series of newspaper articles and Internet information concerning the triggers, symptoms and consequences of asthma and allergies, as well as air quality reports.

At the hearing, the Applicant offered evidence by reading from a prepared statement.

After thanking the Tribunal for the opportunity to state her case the Applicant proceeded to re-iterate the events of the day and evening leading to the demand for the breath sample.

The Applicant asserted that she had been at a bar but had “...very little to drink...” The officer permitted the Applicant four attempts to provide a breath sample. When told that her license was being suspended the Applicant told the officer that she had asthma and showed him her prescription. The Applicant’s request to take a puff of Ventolin and try again was dismissed by the officer who remarked that the Applicant had been given “enough chances”.

At this time the Applicant asked the officer if there were any other means to prove that she was not intoxicated such as “walking the line” or “touching ...nose...”

The day after the demand for a breath sample the Applicant wondered why the officer had not

requested a blood sample. The Applicant's father placed a call to the station, on the Applicant's behalf, to seek the reason a blood test was not offered. Police Officer #1 explained that blood tests are performed only "*...if there is something wrong with someone's mouth...*" The Applicant argues that "*...if there is something wrong with a person's mouth it is almost the same as having something wrong with ...lungs, it is very similar, if something is wrong, something is wrong...*"

The Applicant objected to the statement made "twice" by the officer that he smelled alcohol on her breath.

Due to the incident, the Applicant and her family have suffered "*...extreme hardship...*" The Applicant described herself as single mother. Since the incident the Applicant has "*...not been able to carry out ...work duties...*" and has had to rely on family and friends to transport her and the children to and from Mississauga three times a week. In order to ease transportation problems the Applicant is being forced to make alternate living arrangements for September.

For the Tribunal's benefit, the Applicant chose to testify about herself, her "*...asthma ...witnesses ...doctor's notes...*"

The Applicant has been gainfully employed with the Ontario Government for thirteen years and is respected by her colleagues.

After fleeing from an abusive marriage, the Applicant has been staying with a co-worker. The financial and emotional costs of litigation and custody disputes have brought considerable stress to the Applicant's life. The Applicant testified that the recent two-month strike she had to endure was a great burden due to the loss of income. Further, having had to undergo surgery, added an extra dose of stress.

All the stress in her life plus the unusually smoggy, hot, humid weather this summer, have combined to make the Applicant's asthma more difficult that it has been "*...or many years ...and more difficult to recover...*"

The Applicant went on to read the various "*...stressors...*" of asthma, noting that these triggers keep her sick the whole year, but have particularly unhealthy effects in the summer.

In order to validate her grounds for appeal the Applicant read into evidence portions of a pamphlet from the Lung Association describing "*...what asthma is...*" as well as selected passages from the newspaper articles attached to the Notice of Appeal. The Applicant continued by reading the symptoms and consequences of the disease, highlighting that different people have different triggers. Smoke is one the triggers and the Applicant pointed out that she had spent all evening in a smoky environment.

The Applicant listed the normally prescribed medication for asthma and verified that she has been prescribed the same medication. The Applicant also confirmed that because she has had asthma for so long, she is able to self-medicate, therefore frequent visits to the physician are not required.

Alluding to the illustration of a woman wearing a collar who looks like she is under water, the

Applicant accentuated that, that is exactly what asthma feels like, “...it is easier to blow out than it is breathing in ...but ...it is hard to blow out as well ...difficult to get a deep breath ...struggling to get the air in the first place and ...then struggle to get it out ...cannot blow up balloons...”

Heat being one of the stressors of asthma, the Applicant used the article reporting the heat wave in July to substantiate her premise that the month of July was particularly difficult for asthma sufferers like herself.

The next point of reference mentioned by the Applicant was the “Air Quality Index Reports” for Mississauga and Brampton. These reports indicate that there were several days in July that were designated as “...high smog days...” Looking at the dates when smog alerts were issued, it is clear that the worst days were immediately prior to July the 20th, the date the Applicant was stopped.

Continuing with her testimony the Applicant briefly read some comments from the letters from her friends and co-workers.

The Applicant maintained that she would not be nervous about providing a breath sample as she “...was not worried about going over...” To this effect, the Applicant selected the passages from her friends’ letters that mentioned her alcohol intake, on the evening in question.

The Applicant challenged Dr. Goldstein’s report claiming it is not “very valid” due to the fact that by his own admission, Dr. Goldstein cannot “render a meaningful opinion”. Dr. Goldstein did not examine her. Dr Goldstein had ample time to examine her but failed to do so. The Applicant stated that she would have been willing to sign a consent form allowing Dr. Goldstein access to the complete history of her condition.

In refuting Dr. Goldstein’s report the Applicant referred to the paragraph wherein Dr. Goldstein reports on the results obtained in tests performed in the “44-77” age groups. The Applicant feels these results should not be applied to her as she is younger than the group tested. If comparative data is to be used then it should, at least be comparative data from the same age group.

Further, the Applicant questioned whether the conditions the test group was subjected to, were similar to hers. Unless the conditions were identical, the statistics provided are not applicable.

A third point of refute was the wording used by Dr Goldstein: “...the vast majority of individuals...”. The Applicant finds the phrase “...the vast majority” to be non-specific and relative. The actual percentage of people who can and cannot satisfactorily provide a breath sample should be identified, in order to allow the relevancy and accuracy of the statement to be properly determined.

With respect to the pulmonary function tests the Applicant explained that she has had the tests administered twice, “...both on being admitted into an hospital for an asthma attack ...had tests years and years ago ...as a child ...first time, then only other times ...when ...admitted to hospital during an attack...”. The Applicant commented that pulmonary function tests are

not done routinely: *"there is no reason for those tests, other than ...when having extreme difficulty breathing or ...when you are first being assessed or when you are first being diagnosed ...to determine how bad is ...asthma, so that they know how to measure ...medication..."*

The Applicant emphasized that although Physician #1 has been her family physician for only 7 years, she is privy to the file containing details of the Applicant's condition since 1990. Another physician at the clinic saw the Applicant from 1990 to 1995 and the file has been transferred to Physician #1.

The Applicant quoted passages from her own physician's report: *"...unfair ...valid medical conditions ...difficult to take a successfully deep breath ...frequent visits for asthma and allergies ...worsen with environmental triggers such as smoke ...more difficulty breathing in humid weather ...warnings issued several times ...weather improves ...it takes several days ...to return to ...normal..."*

By way of clarification the Tribunal asked the Applicant to describe the respiratory distress symptoms she was experiencing, at the time of the breath demand, specifically. The Applicant replied that she was nervous and unable to take a deep enough breath to provide a sample. Her condition worsened with each try, yet, there was no need to ask for medical assistance. It was not until a week after the demand for a breath sample incident that the Applicant visited her physician. The Applicant told the Tribunal that the reason for the visit was to obtain a letter of support to the Tribunal and to be assessed.

In cross-examination, the Applicant repeated the evidence proffered in evidence-in-chief. She has been an asthma sufferer since age of 7 and because it has been so long, her physician now trusts her to adjust own medication.

On July 19th, the Applicant worked five consecutive hours without a lunch break. She left work early because she was not feeling well, not because she needed to go home and rest before the party.

From the reports presented, the Respondent's Representative, Mr. Biel, inferred that *"...it seems this summer has been very trying on ...respiratory problems..."*. Mr. Biel then questioned the Applicant as to whether she had required medical treatment for asthma during this period. The Applicant's replied: *"...seeked (SIC) medical treatment not just for my asthma but mostly for my emotional stress and stability through a psychiatrist ...discussed that with her because my current doctor was on maternity leave..."*. When asked expressly, if she has seen a physician for asthma during this summer, the Applicant replied *"No, no ...but, I did discuss the asthma with my psychiatrist. She said ...under all the stress ...it is no wonder ...asthma not doing well..."*.

The Respondent's Representative asked the Applicant to describe to the Tribunal how she was feeling on July 19th. The Applicant minutely detailed her daily medicinal morning routine, then declared: *"...this day in particular I woke up stricken with allergies and asthma. I had taken several bouts of different medications to try to clear some of those symptoms. I felt I was able to breathe well enough to drive to work ...physically did not feel well ...physically*

did not look well ...symptoms did not clear, continued to have difficulty breathing, I kept taking my medicine way too much, and I went home and rested..."

In response to Mr. Biel's question as to why she went out if she was not feeling well, the Applicant commented that after a four-hour rest she *"...was feeling better..."*. The Applicant felt she needed to make her *"...best efforts..."* to attend her friend's birthday as her friend was very supportive during the stressful moments of her life.

The Respondent's Representative pursued his line of questioning by asking the Applicant why she spent six hours in a smoke filled room instead of just making an appearance, especially if not feeling well. The Applicant answered that she *"...got caught up in the discussions ...was catching up with everybody..."*

The Applicant left the club at two AM, by which time the band had stopped playing and she was *"...starting to not feel well ...very tired..."*. While at the club the Applicant *"...did one or two slow dances ...was mostly standing and talking..."*. During the course of the evening the Applicant did not use her inhaler as she had used it prior to going to the club. She did however need to use the inhaler immediately after leaving the club.

Mr. Biel quoted the Toronto Star article introduced by the Applicant: "Asthma can be treated very effectively with inhaler medication...", then read the information on Salbutamol, commonly known as Ventolin, from the Canadian Medical Association Guide which elucidates that the onset effect of an inhalation is *"...within 5-15 minutes..."* and can last *"...up to 6 hours..."*. A copy of the Canadian Medical Association Guide to Prescription and Over-the Counter Drugs was entered as exhibit # 4.

The Applicant disputed the admissibility of the information imparted by the Canadian Medical Association Guide to Prescription and Over-the Counter Drug, as the *"copyright"* date is unknown. The Applicant suggests that because smog levels are worse today then they were five years the information may be inaccurate. The Applicant was adamant that Ventolin does not always work after the first inhalation. To substantiate her position the Applicant recounted the incident of a man who had to be taken to hospital because the use of Ventolin was not sufficient to relieve his symptoms.

The Respondent's Representative asked the Applicant directly: *"Did it (Ventolin) work when you took it that night?"*, to which the Applicant replied: *"Briefly"*. Alluding to the Applicant's testimony regarding the hospitalisation of a man after the use of Ventolin, Mr. Biel asked the Applicant: *"Did you go to the hospital?"* The Applicant replied: *"I was on my way home and hoping to get rest..."* Mr. Biel insisted: *"Did you go to the hospital?"* The Applicant replied: *"No, I was not having an asthma attack..."*.

The Applicant testified that at the time, her breathing was *"...short and shallow ...slower take in and slower takeout ...effort to breathe in and an effort to breathe out so it takes longer..."*. Having taken a puff upon leaving the club, a second puff at the time of the breathalyzer test would be over dosing. Ventolin is to be used as needed but a maximum of once every four hours.

After being released by the officer the Applicant went *"...home..."*. Replying to the

Respondent's Representative question as to why she did not seek a hospital or walk-in clinic for medical assistance, the Applicant stated that she was not thinking rationally she was: "...*extremely upset, flustered and discouraged and hurt...*" and "...*needed to get home and speak to ...father....needed to get home to calm ...down...*".

The Applicant explained that she gave Physician #1 a copy of the Notice of the Appeal, but Physician #1 felt she could "...*do more justice...*" by submitting a report to the Tribunal than by filling in the prescribed Notice of Appeal. Physician #1 did not conduct a physical examination of the Applicant prior formulating her report.

The last time the Applicant was seen by a respirologist was in 1997, when she was admitted to the hospital's emergency ward. The Applicant was unable to recollect whether pulmonary function tests were done at the time.

Respondent's Evidence

The Respondent provided the following Documents:

1. Certified Copy of Notice to Registrar, sealed August 1, 2002.
2. Certified Copy of driving record of the Applicant, sealed August 4, 2002.
3. Medical opinion of Dr. Roger S. Goldstein, MB, ChB, FRCP(UK)FRCP(C) FCCP.

The Respondent's evidence further contains a report dated August 2m 2002 from a specialist in respiratory medicine. Dr. Roger S. Goldstein, MB, ChB, FRCP(UK)FRCP(C) FCCP, Director of Program in Respiratory Rehabilitation - University of Toronto, states that he is a "...consultant respirologist in practice since 1979 with particular interest in chronic respiratory conditions such as: asthma, emphysema and chronic bronchitis ...Director of the University of Toronto, Respiratory Divisional Program in Rehabilitation, ...medical advisor to the pulmonary function laboratories for over 16 years ...familiar with the Alcotest and the Intoxilyzer 5000C having evaluated both machines in ...Pulmonary function laboratory ...have tested both the portable and the station monitor among a variety of individuals (men and women) age range 44-77 years, vital capacity range 1.6 to 4.5 litres, FEV1 range 0.4 to 2.9 litres, FEV1/FVC range 20% to 78% ...The vast majority of individuals, even with an FEV1 of 0.7 are able to satisfactorily provide a breath sample notwithstanding their respiratory condition...".

After reviewing the Applicant's medical history as provided by Physician #1 letter, Dr. Roger S. Goldstein notes that, "...no pulmonary function tests have been enclosed ...the Applicant has not been seen since prior to December 2001 for her asthma ...unable to provide a more detailed opinion other than indicating this letter does not contain sufficient information to explain why the Applicant did not provide a satisfactory breath sample ...not been provided with sufficient information to render a meaningful opinion as to the severity of the Applicant's asthma at the time of the episode in question..."

The Respondent called Police Officer #1, a member of the Ontario Provincial Police— Toronto Detachment as a witness. Police Officer #1 testified that he has been “...*on the job since ‘96...*”, has been a Qualified breath Technician for over a year and a member of RIDE team for approximately two months.

Police Officer #1 described the events that led to the Applicant being stopped and the subsequent demand for a breath sample.

The Applicant was given a total of three opportunities to provide a breath sample, but failed to do so. Each time the Applicant blew into the machine the screen registered and “E0” indicating that the Applicant was “...*not blowing long enough.*”

After the second attempt as the Applicant was not providing an adequate sample, although Police Officer #1 did not observe any symptoms of breathing difficulties, he asked the Applicant if she had any breathing problems and if she used an inhaler. The Applicant said she did and opened her purse to show him the inhaler. Police Officer #1 then asked the Applicant if she wished to take a puff, and she replied: “...*I don’t need it, I don’t feel wheezy...*”

Police Officer #1 testified that he is familiar with the symptoms of asthma. During his dealings with the Applicant Police Officer #1 noticed nothing that would indicate that Applicant was breathing irregularly or was nervous.

With respect to the possibility of a blood samples being obtained by police officers, Police Officer #1 informed the Tribunal that the procedure is discretionary and only used in the event of a visible physical injury that prevents an individual from blowing into the breathalyzer instrument.

In her questioning of Police Officer #1, the Applicant asked why Police Officer #1 did not suggest to her that she could go to the hospital to obtain a blood sample. Police Officer #1 replied that after being released the Applicant was “...*free to do whatever she wants...*”.

The Applicant insisted on ascertaining Police Officer #1’s knowledge of asthma. Police Officer #1 stated that he has seen both children and adults exhibiting symptoms of asthma.

The Applicant further questioned Police Officer #1 as to why he did not ask the reason she did not acquiesce to the suggestion she use the inhaler.

At the request of the Applicant a brief recess was taken prior to closing remarks.

In her closing remarks the Applicant opened by saying that “...*the experience has been very upsetting, the discrepancies of the police officer’s report are upsetting ...and are not the same recollection ...to some of the details...*”

The Applicant clarified for the Tribunal how her long-term illness affects her daily life. She has “...*difficulty taking in deep breaths ...difficulty breathing...*”. She tries to cope with scarred and weak lungs by living as normal a life as possible without running to the hospital each time she feels afflicted.

The Applicant recapped her objections to Dr. Goldstein's report and the reasons why her physician's report should be given more weight.

The Applicant emphasized she was not under the influence, and that the reason she was not able to provide a breath sample was due to a medical condition.

In closing the Respondent's Representative pointed out that the Registrar does not deny that the Applicant has an asthma condition. It is the Registrar's contention that the Applicant had no intention of providing a breath sample to Police Officer #1.

Notwithstanding her illness, it appears that Applicant is quite capable of managing her condition and live a normal life. In fact she places herself around known triggers such as a smoky environment and a cat.

The Respondent's Representative drew attention to the fact that the Applicant "*...spent more hours in the night club than she did at work...*". Thus, Mr. Biel posited that he was at a "*...loss as how ill she was that would have precluded her from giving a breath sample...*"

The Respondent's Representative asked the Tribunal to carefully review the letters submitted by the Applicant. Mr. Biel notes that neither Witness #4 nor Witness #5 makes any mention of the Applicant's illness while she was at the club.

Mr. Biel reviewed the Air Quality reports introduced by the Applicant. He argued that given the number of "*...good...*" quality air days, it is difficult to understand how the weather and air quality could have been a factor in the Applicant's inability to provide an adequate breath sample.

The fact that the Applicant did not ask for or follow up medical assistance after she was released is a clear indication, according to the Respondent's Representative, that the Applicant was not as ill as she would have the Tribunal believe. Furthermore, the Applicant told Police Officer #1 that she did not need Ventolin and that she was not wheezing.

Referring to Physician #1's report Mr. Biel commented that Physician #1 does not offer any indication as to the severity of the condition. Since there are no pulmonary function test results or respiratologist reports available, Mr. Biel conjectures, that Physician #1 "*...is guessing whether or not she could provide a breath sample...*". In her report Physician #1 states that the Applicant may have had "*...difficulty...*" providing a breath sample, not that it would be "*...impossible or even unlikely...*".

Mr. Biel continued his critique of Physician #1's report by noting that Physician #1 acknowledges in her report that she had not seen the Applicant in "*...nine months...*"; that the Applicant told the Tribunal that Physician #1 prepared the report without examining her. Thus, the "*most glaring*" deficiency in Physician #1's report is the lack of any up to date medical information on the Applicant's condition.

In conclusion the Respondent's Representative asked that the Tribunal uphold the Registrar's decision.

In rebuttal the Applicant confirmed that she did not have an asthma attack in front of the officer. The Applicant described that her asthma “...*inhibits the ability to breath in and out ...may look normal to everybody else...*” and emphasized that she does not like to take the Ventolin “...*in front of other people...*”.

APPLICATION OF THE LAW TO FACTS:

Prior to setting out the reasons for the decision, the Tribunal will address issues not germane to the case but which, nonetheless appear to be of concern to the Applicant.

The Tribunal commends the Applicant for her thoroughness in researching her condition and for her presentation of the evidence. In order to avoid repetition and non-relevance evidence transcribed herein, had to be summarized. Nonetheless, the Tribunal reassures the Applicant that both written and oral submissions were carefully reviewed and considered by the Tribunal.

The Tribunal understands the Applicant’s argument that knowing she was not impaired, she had nothing to hide and would have provided a breath sample had she been able to do so. For that reason the Applicant told the Tribunal, she would have been willing to provide a blood sample, had the officer told her she could get one. Certainly, as Police Officer #1 stated, after the Applicant was released “...*she was free to do whatever she wants...*”. The Applicant could have opted to seek medical assistance or to obtain a blood sample to substantiate her argument.

As far as Police Officer #1 asking for a blood sample, subsection 48.3 (3) 1 of the Highway Traffic Act, R.S.O. 1990, Chapter H-8 as amended is clear in its provision, the concentration of alcohol in the blood may be obtained “...by an analysis of the person’s breath sample or blood taken...”. However, the decision to request a blood sample is at the discretion of the officers, according to established policy. At the time, the Applicant, was neither physically injured nor did she show visible signs of respiratory impairment, such as wheezing or chocking. Thus, the issue of a blood sample is inconsequential.

Furthermore, the Applicant resented the insinuation she felt was being made by Police Officer #1, that she was impaired. For the record, the Tribunal would like to establish that at issue, is not whether the Applicant was impaired or had been drinking at all.

Section 50.1 (2) (b) of the *Highway Traffic Act* allows for an appeal in circumstances where a

*“...person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood **because he or she was unable to do so for a medical reason...**”*

Thus, at issue, is whether the Applicant has a medical condition that could cause the Applicant to fail or not comply with the breath demand.

The Respondent’s Representative conceded that the Applicant is asthmatic. The Tribunal concurs. The Tribunal does not dispute the Applicant’s testimony or Physician #1’s diagnosis.

The Tribunal also acknowledges and accepts the evidence introduced by the Applicant with respect to the triggers of asthma.

The question that remains is: was the Applicant's condition, at the time of the breathalyzer test, severe enough to preclude her from providing an adequate breath sample.

As the Applicant read into evidence, Physician #1 opines that *"...it would have been extremely difficult for the Applicant to have taken a long enough breath to blow into the breath analyser..."*. Dr. Goldstein, the Registrar's expert witness, concludes he is unable *"...to render a meaningful opinion due to the lack pulmonary function tests..."*

The Applicant dismissed Dr. Goldstein's report on the grounds that he did not take the time to examine her nor request her complete medical file. The Tribunal would like to point out that Dr. Goldstein is an expert witness for the Registrar. The onus is on the Applicant to provide the Tribunal with evidence to substantiate the ground for appeal. The Applicant thus, had the opportunity to submit her own expert witness reports.

The Applicant has not provided the Tribunal with medical reports from any specialists. In fact, it appears that Physician #1, who has known the Applicant for over seven years, did not feel that the Applicant's history was severe enough to warrant sending her to a respiratologist, nor to order pulmonary function tests to periodically assess the Applicant's condition.

Since neither Physician #1, nor Dr. Goldstein was at the scene of the roadside breathalyser test session, the Tribunal must rely on the eyewitness testimony of both the Applicant and Police Officer #1.

There are certain unmistakable indicators of asthma that are visible even to an untrained person. At no time, was the Applicant observed by Police Officer #1 to be in an afflicted breathing state. By her own admission, the Applicant was *"...nervous..."* but *"...not wheezing..."* and *"...not having an asthma attack..."*. It is apparent that the Applicant did not exhibit any of the symptoms commonly associated with severe respiratory illness, such as wheezing, coughing or shortness of breath.

As the Respondent's Representative aptly pointed out the Applicant's condition was not severe enough to warrant medical intervention. In fact, not only did the Applicant not request medical assistance, at the time, she was not even examined by own physician until some time after the incident.

The onus being on the Applicant to establish the merit of the appeal, the Tribunal finds that the Applicant's testimony although credible, failed to substantiate the basis for an appeal on medical grounds. Thus, the Tribunal finds that the Applicant does not meet the criteria of Section 50.1 (2) (b), in that she was not able to demonstrate that she suffers from a medical condition, which would prevent her from providing a breath sample.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated July 20, 2002 of

the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal **confirms** the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: August 20, 2002

THERESA WILLAR

**Appeal under section 50.2 of the *Highway Traffic Act*,
R.S.O. 1990, Chap.H.8 as amended (the "Act"), from
the Order of the Registrar of Motor Vehicles
pursuant to section 55.1(3) of the Act.**

**TO APPEAL AN ORDER TO IMPOUND A MOTOR
VEHICLE ISSUED BY THE REGISTRAR OF MOTOR
VEHICLES**

TRIBUNAL: CHARLES SANDIFORD
Presiding member

APPEARANCES: LUBA NEUWIRTH
Representative for the Registrar of Motor Vehicles

THERESA WILLAR, Applicant
Unrepresented

DATE OF HEARING: August 15, 2002

DECISION RELEASED: August 20, 2002 ***by teleconference***

REASONS FOR DECISION

A hearing was held on August 15, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Theresa D. Willar (the "Applicant")
Motor Vehicle:	1999 GMC SIE pick-up, plate no. 5744CR (the "vehicle")
Date of Appeal:	July 31, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence (i.e. all reasonable efforts) to determine that the driver's licence was not suspended and the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(c) and (d) of the Act.

This matter came before this Tribunal on August 15, 2002 and proceeded as an electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

My common law husband drove my vehicle on July 20/02 3:00 in morning he was stopped on highway and was charged with his licence being under suspension from 1½ prior for a drinking and driving charge. He had served his jail time and I thought he had 1 year suspension because he still had his licence on him and this is a year and ½ later. He now is in jail and knowing about his suspension he will not or anyone will never drive my truck again. This is causing such hardship because now I am on my own to look after 3 small children. I need my truck for work. I work early hours in the morning. There is no other transportation for me. I cant leave my children alone in the house so I need my truck to drive later then I'm with my kids longer. With only 20 hours of work each week I cannot afford taxis with three small children I need my truck for everything.

P.S. I have no material except what I have written here.

Testimony by the Applicant revealed that she had been together with her partner for 17 years and should therefore be very aware of his very poor driving record. The licence of her common law husband and the driver of her truck, Anthony, R, Maffrett, was under suspension until Feb. 2004. He has had more than 12 previous traffic convictions, 5 alcohol related. It is beyond reason to accept that any family member would not be aware of his licence not being under suspension. A need for Ministry of Transport verification of the validity of her husband's driver's licence should have been obvious, especially in light of her knowledge of his poor driving record and the severe consequences that would result from any apprehended driving infraction.

While there is a good deal of stress and inconvenience to the Applicant as a result of the impoundment of her vehicle many unexplored avenues to substitute her vehicle remain, not the least of which is his family's help. Getting her three children looked after while she works is the main problem, which would be solved by a substitute vehicle. The Applicant has not pursued this alternative very vigorously. She has not asked her husband's family for help or her Union, who often assist in matters such as hers.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Anthony R. Maffrett;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until February 7, 2004.

The Respondent questioned the Applicant at length in regard to public transportation which was declared unsuitable to her needs as she had to work on call which at times was early morning or late at night when transit is unreliable. Her credit card was "maxed out" which precluded rental cars as an option. Family sources for transportation seemed to evoke a vague response from the Applicant. The key to the Applicant's hardship is a substitute car at this time but this will be resolved and not prove lasting once her vehicle is released, and sooner if a more vigorous pursuit of a substitute vehicle is successfully achieved. Her common-law husband's family continues to provide the best solution.

The Respondent concluded by enumerating the requirements under the Act to support the Applicant's basis for her Appeal which the Respondent stated, had not been met by the evidence presented.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
 - (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) That the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) That the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) That the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(c) and (d).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to,

caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. *Law.* The attention and care due from a person in a given situation....

Also, “due diligence” in Black’s Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional: Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or

- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant has appealed under section 50.2(3)(c) and (d) of the Act.

With respect to 50.2(3)(c) the Applicant, given her common law husband's driving record, did not meet the standards of diligence that would be clearly due as defined in the Act.

The Applicant has also appealed under 50.2(3)(d) of the Act, on the basis that the impoundment of her vehicle will and has resulted in exceptional hardship. Section 22 of the Regulation 632/98 is very specific and provides the Tribunal with clear criteria that must be met by the Applicant in order to establish exceptional hardship as a result of the impoundment. The Tribunal cannot consider any other factors arising from or directly related to the

impoundment itself.

Under section 22(2) of Regulation 632/98 the Tribunal cannot consider financial or economic loss or loss of employment or employment opportunity unless the Applicant demonstrates that all criteria set out in section 22(3) apply. One of those criteria is that no alternative to the impounded vehicle is available.

Furthermore section 22(4) of the Regulation requires the Applicant to demonstrate that every reasonable option has been explored including an alternative vehicle.

In this case the Applicant has not proven she has explored every reasonable option for a vehicle to substitute for the impounded vehicle.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Charles Sandiford, Presiding Member

RELEASED: August 20, 2002

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
ILYA YAGUDAYEV

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: August 7, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

ILYA YAGUDAYEV

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Ilya Yagudayev, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: August 19, 2002

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
789 Don Mills Road, Suite 800
Toronto, ON M3C 1T5

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Ilya Yagudayev
316 – 262 Ridley Blvd.
North York, ON M5M 4N6

Pursuant to subsection 5(2) of the *Motor Vehicle Dealers Act* Ilya Yagudayev (hereinafter referred to as “the Applicant”) and the Registrar, *Motor Vehicle Dealers Act*, (hereinafter referred to as “the Registrar”), in accordance with section 4.1 of the *Statutory Powers Procedure Act*, do hereby waive the requirements of a hearing and consent to an Order of the Licence Appeal Tribunal based upon the following Terms and Conditions:

1. The Applicant agrees, if he is charged in the future, to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.
2. The Applicant agrees if he is convicted under any law of an industry specific offence or if he is convicted under the Criminal Code, the Registrar is directed to and shall carry out the proposal.
3. The Applicant agrees not to transfer his registration as a salesperson under the *Motor Vehicle Dealers Act* to another dealer without the prior written consent of the Registrar.
4. The Applicant agrees not to be involved in the process of buying, selling or leasing motor vehicles without the benefit of registration.
5. The Applicant shall not be an officer, director, owner or partner in a dealership.
6. The Applicant agrees to provide full and complete disclosure on all future applications and discussions with the Registrar, regardless of whether disclosure has been previously provided to the Registrar.
7. The Applicant confirms that the circumstances surrounding the convictions are substantially as disclosed to the Registrar.
8. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.
9. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.
10. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
11. The Applicant will provide a copy of this order to his employer forthwith.

12. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
13. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
14. The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____ this _____ day of _____ 2002.

Ilya Yagudayev (signature)

These Terms and Conditions are accepted by the Registrar, *Motor Vehicle Dealers Act*.

Date:

Carl Compton
Registrar
Motor Vehicle Dealers Act

NIZAMUDDEEN, SIRMALI, SAFRAZ and SHABANA MOHAMED

MOTION TO CONSIDER AN APPLICATION
FOR EXTENSION OF TIME

TRIBUNAL: TERENCE A. WARDROP Q.C., Vice Chair

APPEARANCES: NIZAMUDDEEN MOHAMED, on behalf of himself and Sirmali,
Safraz and Shabana Mohamed, Applicants
NETANUS RUTHERFORD, Counsel, on behalf of the Ontario New
Home Warranty Program, Respondent

DATE OF
HEARING: July 25, 2002 *Via Teleconference*

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an application to the Licence Appeal Tribunal under Section 7 of the *Licence Appeal Tribunal Act, 1999*, to extend the time for Nizamuddeen N. Mohamed, one of the Applicants, to file an appeal on behalf of himself and Sirmali, Safraz and Shabana Mohamed, the other Applicants (herein collectively referred to as "the Applicants"), from a decision letter dated May 8, 2002, of the Ontario New Home Warranty Program (herein referred to as "the Program"), pursuant to Section 16(2) of the *Ontario New Home Warranties Act*. R.S.O. 1990, Ch. O. 31. A Notice of Appeal dated June 6, 2002, was filed by Nizamuddeen N. Mohamed on June 11, 2002 and received by the Licence Appeal Tribunal on June 13, 2002.

The hearing of this Motion proceeded on the consent of both Parties as an electronic hearing. The Tribunal was provided with a facsimile copy of a Notice of Motion for an extension of time from the Applicants and an facsimile copy of an affidavit of Nizamuddeen Mohamed sworn on July 23, 2002, who also by affirmation, provided the Tribunal with testimony confirming the facts as stated in the said Notice of Motion. The Program provided to the Tribunal the affidavit of Rob Rosset and attached Conciliation Inspection Report dated November 8, 2001, the affidavit of Filomena Cece sworn on July 15, 2002 and a facsimile copy of a supplementary affidavit of Filomena Cece sworn on July 24, 2002. Mr. Rob Rosset was also in attendance at the hearing. Nizamuddeen Mohamed verbally confirmed that he represented the Applicants at the hearing. The Tribunal marked the Decision Letter of the Program dated May 8, 2002, the Notice of Appeal of Nizamuddeen N. Mohamed dated June 6, 2002, and the foregoing noted supporting documentation as Exhibits to the hearing.

ISSUES AND EVIDENCE:

The sole issue before the Tribunal is whether it should exercise its the discretion under Section 7 of the *Licence Appeal Tribunal Act, 1999*. Section 7 is as follows:

"Despite any limitation of time fixed by or under any Act for the giving of any notice requiring a hearing by the Tribunal or an appeal from a decision or order of the Tribunal under section 11 or any other Act, if the Tribunal is satisfied that there are reasonable grounds for applying for the extension and for granting relief, it may,

(a) extend the time for giving the notice either before or after the expiration of the limitation of time so limited; and

(b) give the directions that it considers proper as a result of extending the time."

The criteria which the Tribunal has adopted in considering its discretion under Section 7 was laid down in the case of *In Re Bilodeau and Ontario New Home Warranty Program (1994)*, 26 CRAT 930 and restated in the case of *Douglas and Marie Freeman and Ontario New Home Warranty Program*. The four criteria are as follows:

- (1) That there was an intention to appeal within the time limited;
- (2) That the reason the notice of appeal was not served on time is such that the Applicants should be excused for not doing so and allowed to do later if they did so as soon as the true situation was apprehended;
- (3) That there is not some overriding prejudice to the Respondent in allowing the application;
- (4) That there is a substantial point in issue and the Applicants have some reasonable chance of success.

The evidence presented by the Applicants in this case fails to establish the necessary facts to support the use by the Tribunal of its discretion with respect to the first two of the criteria stated. Nizamuddeen Mohamed repeated on several occasions that he was still anticipating a further inspection, or re-inspection, of the residential dwelling by the Program subsequent to his receipt of the Decision Letter dated May 8, 2002, in spite of the statements made by representatives of the Program to the contrary. He did not accept that the decision of the Program was the final position of the Program and was in fact still in a negotiating mode even at the date of the hearing. The Tribunal is not part of this process.

The Applicants urged upon the Tribunal that they should be excused for not serving their notice of appeal within the time required due to the medical condition of Nizamuddeen Mohamed and the necessary attention and/or stress which he was experiencing at his place of employment. At the same time, there were three other adult applicants who were able and capable of completing the documentation required in making the appeal within the time limitation. It is notable that the notice of Appeal is dated June 6, 2002, yet the postmark on the envelope containing the said Notice indicates June 11, 2002.

The Tribunal therefore finds as a fact that the Applicant Nizamuddeen Mohamed did not have the intention to appeal the decision within the time limited and the other Applicants have omitted to express any such intention. Furthermore, it is a fact that the Applicant, Nizamuddeen Mohamed, did not comply in a timely manner as soon as the true situation became apparent to him, if indeed, it has. The medical condition and employment related stress of Nizamuddeen Mohamed are not factors in these circumstances which would allow the Tribunal to exercise its discretion pursuant to Section 7 of the *Licence Appeal Tribunal Act*.

It is unnecessary to deal with the remaining criteria noted above.

DECISION AND ORDER:

Accordingly, pursuant to the authority vested in it by the *Licence Appeal Tribunal Act*, the Tribunal refuses the Applicants' request for an extension of time within which to appeal the decision of the Program.

LICENCE APPEAL TRIBUNAL

Terence A. Wardrop Q.C, Vice-Chair

Released: August 19, 2002

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice or Divisional Court is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

HELEN PIRES AND MARIO BELFRUTTO

MOTION TO CONSIDER AN APPLICATION
FOR EXTENSION OF TIME

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: JORAM GOLD, Agent, representing Mario Belfrutto and Helen Pires
NETANUS RUTHERFORD, Counsel, representing the Ontario New
Home Warranty Program

DATE OF

HEARING: August 15, 2002

Via Teleconference

REASONS FOR RULING AND ORDER

BACKGROUND:

This is an application to the Licence Appeal Tribunal to extend the time for Mario Belfrutto and Helen Pires (the "Applicants") to file an appeal from a decision of the Ontario New Home Warranty Program (the "Program") pursuant to Section 16.(2) of the *Ontario New Home Warranties Plan Act* (the "Act").

The hearing of this motion proceeded on consent as an electronic hearing. The Tribunal was provided with:

- a copy of the Program's decision letter of May 27, 2002. (Exhibit 1)
- a copy of the Applicants' Notice of Appeal dated June 14, 2002 to which is attached a document marked Schedule A. (Exhibit 2)
- Applicants' Notice of Motion seeking an order for an extension of time for filing an appeal. (Exhibit 3)
- a copy of Canada Post's written advice of delivery of a registered letter on June 3, 2002 to Helen Pires. (Exhibit 4 page 3)
- a copy of the Applicants' agent's letter to the Program dated August 6, 2002 confirming that Helen Pires signed for receipt of a registered letter on June 3, 2002 delivered by Canada Post. (Exhibit 4 pages 4 & 5)
- Affidavit of Mario Belfrutto sworn to on August 8, 2002. (Exhibit 4 pages 6 & 7)
- Affidavit of Helen Pires sworn to on August 8, 2002. (Exhibit 4 pages 8 & 9)
- Affidavit of Filomena Cece dated August 7, 2002. (Exhibit 5 tab 1)
- Affidavit of Warren Charles Northcott dated August 9, 2002. (Exhibit 5 tab 2)
- Affidavit of Sharon Henderson dated August 9, 2002. (Exhibit 5 tab 3)

In addition to the above documentation Mario Belfrutto gave oral testimony, under affirmation. No other oral testimony was present to the Tribunal.

ISSUES:

The following issues arise in this matter.

Have the requirements for service of a notice under sections 16 and 20 of the *Ontario New Home Warranties Plan Act* been met and if such requirements have been met and the Notice of Appeal was not filed with the Tribunal within the time prescribed by statute is this an appropriate case for leave to be extended pursuant to section 7 of the *Licence Tribunal Act, 1999*?

THE EVIDENCE:

Oral Testimony of Mario Belfrutto

The evidence of Mario Belfrutto ("Belfrutto") was both oral and in affidavit form.

Belfrutto contends that upon clearing his mailbox either on June 7, 2002 or on June 10 or 11, 2002 he found a letter from the Program. This letter was the Program's decision letter of May 27, 2002. He gave this letter "a few days" later to his agent, Joram Gold and requested Gold to complete a Notice of Appeal to the decision letter. Belfrutto went on vacation and understands Gold filed the Notice of Appeal on June 19, 2002. He contends he had the intention to appeal the Program's decision, hence his instructions to Gold. He believed he had "done everything" within the 15 days for the filing of his appeal.

He went on to state that his wife, Helen Pires, at no stage gave him the registered letter for which letter she had signed receipt nor did she inform him of receipt by her of such registered letter.

(Exhibit 4, pages 6 and 7)

Affidavit evidence of Helen Pires

Helen Pires ("Pires") did not give oral testimony but did file a sworn statement in which she stated that "on or about June 3, 2002" she signed for a registered letter which she believed was from the Program.

She did not open the envelope nor did she give the envelope to her husband. She did not realize that the envelope contained the Program's decision letter. She stated that she "forgot" to give the envelope to her husband, Mario Belfrutto, "who was dealing with the Ontario New Home Warranty Program."

Affidavit evidence of Filomena Cece

Filomena Cece ("Cece") stated that she is employed by the Program as Dispute Resolution Coordinator and was advised by Canada Post that on June 3, 2002 it had delivered the Program's May 27, 2002 decision letter which had been mailed by registered mail to Mario Belfrutto and Helen Pires. Receipt of the registered letter was signed for by Pires according to the information verified by Canada Post.

Cece further stated that the 15 day appeal period prescribed in Section 16 of the *Ontario New Home Warranties Plan Act* expired on June 18, 2002 and that, according to what she had been informed by the Tribunal's Hearing Supervisor, the Notice of Appeal was hand delivered to the Tribunal on June 19, 2002. The Notice of Appeal was accordingly filed one day late.

(Exhibit 5, tab 1)

Affidavit evidence of Warren Charles Northcott

The sworn statement by Warren Charles Northcott ("Northcott") was to the effect that he is a Warranty Representative with the Program and is the author of the Program's decision letter of May 27, 2002. He further stated that the standard practice of the Program, which the Program followed in this matter, is to send only one decision letter and such one decision letter is sent by registered mail.

Northcott then dealt with the parquet flooring which was one of the issues dealt with by the Program in its decision letter of May 27, 2002. Northcott stated as follows:

...

3. I wish to respond in particular to the Applicants' allegation that they verbally raised the issue of the parquet flooring with me at a conciliation inspection in the first year. The only conciliation conducted in the first year was on November 22, 2000. I attended as the Warranty Representative, and my colleague, Sharon Henderson, attended as an observer. During the course of the conciliation, Mr. Belfrutto identified several items that he wanted to add to his list of complaints, and I made a note of each additional item. He did not ask me to add any complaint about the parquet flooring. At the end of the conciliation, I reviewed the list of additional items with him, and asked him to sign it, which he did. A true copy of the list of additional items signed by him is attached hereto as Exhibit "A".
4. I do not recall any discussion at all about the parquet flooring. However, I am advised by Sharon Henderson, and do believe, that she recalls a brief passing reference that occurred about midway through the actual inspection. Ms. Henderson recalls that, as we were walking from the dining room to the bedroom to look at another complaint, Mr. Belfrutto looked back over his shoulder at the dining room floor in the sunlight and asked: "Is that what my hardwood floor is supposed to look like?" I looked back at the floor and said: "Yes, that's normal." That was the extent of it. Mr. Belfrutto did not say whether he thought there was anything wrong with the floor or what was wrong with it. He did not ask me if he should or could add it to the list of additional items, nor did I tell him not to do so.

5. Further, the Applicants knew or should have known about the notice requirements. Their Warranty Certificate contains standard wording, in bold letters, as follows: "A COMPLAINT MUST BE REPORTED TO BOTH ONHWP AND THE BUILDER IN WRITING BEFORE THE APPROPRIATE WARRANTY PERIOD EXPIRES". If the Applicants had wanted to make an actual complaint about the parquet flooring, or if they had thought I missed something in the conciliation report, they could have given written notice in the month between the delivery of the conciliation report in late November 2000 and the expiry of their first year warranty on January 11, 2001. A true copy of the Warranty Certificate is attached hereto as Exhibit "B."

(Exhibit 5, Tab 2)

Affidavit evidence of Sharon Henderson

Sharon Henderson ("Henderson") stated in her sworn statement that she is a Customer Service Representative employed by the Program and that she attended as an observer at the conciliation inspection at the home of Belfrutto and Pires on November 22, 2001. Henderson went on to state in her sworn statement that:

... I recall that Mr. Northcott commenced the conciliation by asking the Applicants if they wanted to withdraw or add anything to their list of complaints. Mr. Belfrutto did identify several additional items but did not mention anything about the parquet flooring at that time. The only such mention was a brief passing reference that occurred about midway through the actual inspection. As we were walking from the dining room to the bedroom to look at another complaint, Mr. Belfrutto looked back over his shoulder at the dining room floor in the sunlight and asked: "Is that what my hardwood floor is supposed to look like?" Mr. Northcott looked back at the floor and said: "Yes, that's normal." That was the extent of it. Mr. Belfrutto did not say whether he thought there was anything wrong with the floor or what was wrong with it. He did not ask Mr. Northcott if he should or could add it to his list, no did Mr. Northcott tell him not to do so.

(Exhibit 5, tab 3)

FACTS FOUND PROVEN:

1. The Applicants' home situate at 54 Belwood Boulevard, Maple Ontario was completed for possession on January 12, 2000.
2. The Applicants have made a claim against the Program in terms of the Act in respect of three alleged outstanding deficiencies in the Applicants' home.
3. The alleged deficiencies are:
 - (i) the parquet flooring in the kitchen and living room of the home.
 - (ii) the heating vents in the children's bedroom of the home, and
 - (iii) the cracked and leaking basement wall in the home.
4. The alleged deficiency relating to the home's parquet flooring in the kitchen and living room were first reported in writing to the Program on April 18, 2001.

5. The alleged deficiency relating to the heating vents in the children's bedroom of the home was first reported in writing to the Program on April 29, 2002.
6. The alleged deficiency relating to a cracked and leaking basement wall of the home was first reported in writing to the Program on March 14, 2002.
7. The Program issued a decision letter dated May 27, 2002 which decision letter was forwarded to the Applicants by registered mail and received by Helen Pires, one of the Applicants, on June 3, 2002.
8. Other than the original decision letter dated May 27, 2002 which was mailed by the Program to the Applicants by registered mail, and which was received by and signed for by Helen Pires, the Program did not forward to the Applicants a duplicate copy of that decision letter.
9. The Applicants' Notice of Appeal, dated June 14, 2002, was delivered to the Program on June 19, 2002.

THE LAW:

Section 14 of the *Ontario New Home Warranties Plan Act* states:

(1) Where,

.....

(b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty; or

.....

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

.....

Section 16 of the Act states:

(1) Where the Corporation makes a decision under section 14, it shall serve notice of the decision, together with written reasons therefor, on the person or owner affected.

(2) A notice under subsection (1) shall state that the person or owner served is entitled to a hearing by the Tribunal if the person or owner mails or delivers, within fifteen days after service of the notice under subsection (1), notice in writing requiring a hearing to the Corporation and the Tribunal.

(3) Where a person or owner gives notice in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and may by order direct the Corporation to take such action as the Tribunal considers the Corporation ought to take in accordance with this Act and

the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Corporation.

(4) The Corporation, the person or owner who has required the hearing and such other persons as the Tribunal may specify are parties to proceedings before the Tribunal under this section.

Section 20 of the Act states:

Any notice or document required by this Act to be served or given may be served or given personally or by registered mail addressed to the person to whom notice is to be given at the person's last known address and, where notice is served or given by mail, the service shall be deemed to have been made on the fifth day after the day of mailing unless the person to whom the notice is given establishes that the person, acting in good faith, through absence, accident, illness or other cause beyond the person's control, did not receive the notice, or did not receive the notice until a later date.

Licence Appeal Tribunal Act, 1999 states:

Section 7. Despite any limitation of time fixed by or under any Act for the giving of any notice requiring a hearing by the Tribunal or an appeal from a decision or order of the Tribunal under section 2 or any other Act, if the Tribunal is satisfied that there are reasonable grounds for applying for the extension and for granting relief, it may,

- (a) extend the time for giving the notice either before or after the expiration of the limitation of time so limited; and
- (b) give the directions that it considers proper as a result of extending the time.

APPLICATION OF LAW TO FACTS:

The decision of the Tribunal in *Re Bilodeau (1994)*, 26 CRAT 930 deals with the factors to be taken into account when there is an application to the Tribunal for an extension of time. The following are the factors to be taken into account:

- (1) That there was an intention to appeal within the time limited;
- (2) That the reason the notice of appeal was not served on time is such that the Applicants should be excused for not doing so and allowed to do later if they did so as soon as the true situation was apprehended;
- (3) That there is not some overriding prejudice to the Respondent in allowing the application;
- (4) That there is a substantial point in issue and the Applicants have some reasonable chance of success.

The Tribunal is cognizant that the fundamental principle in deciding whether to allow an extension is to ensure justice is done.

The Tribunal accepts and finds that the Applicants had the intention to appeal within the time limited. In fact, it was conceded by the Program's Counsel that the Applicants had the intention to appeal within the time limited and it was further conceded by the Program's Counsel that there is not some overriding prejudice to the Program in the allowing of the application.

The Tribunal finds that it is the normal practice of the Program to issue only one decision letter to Applicants and in doing so it mails the decision letter by registered mail. The Tribunal also finds that the May 27, 2002 decision letter was received and signed for by Helen Pires on June 3, 2002 and rejects the evidence of Mario Belfrutto that when he cleared his mail box on either June 7 or on June 10 or 11, 2002 he found the decision letter from the Program. The Tribunal believes that the only decision letter that the Applicants received from the Program was the registered letter that was received and signed for by Helen Pires on June 3, 2002.

The 15 day period for the filing of an appeal commenced to run on delivery of the decision letter. Section 16.(3) of the Act is clear and unambiguous and states that an "owner served is entitled to a hearing by the Tribunal if the person or owner mails or delivers, within fifteen days after service of the notice under subsection (1), a notice in writing requiring a hearing to the Corporation and the Tribunal." Clearly, having accepted delivery and service of the decision letter on June 3, 2002, the fifteen day time limit within which the Applicants had to file their Notice of Appeal was June 18, 2002. This they failed to do by one day.

The Tribunal does not find that the Applicants' explanation why the Notice of Appeal was not served on time is such that the Applicants should be excused for not doing so.

Insofar as the fourth factor to be considered by the Tribunal is concerned, the Tribunal finds the Applicants have no reasonable chance of success. In respect of the Applicants' first claim regarding the parquet flooring such claim must be brought within one year after the warranty takes effect. This means the claim was to be made by no later than one year from date of possession which is one year from January 12, 2000. The Tribunal accepts the evidence by way of sworn statements of Northcott and Henderson that no claim was made by January 11, 2001. No evidence was placed before the Tribunal by the Applicants that they reported the alleged deficiency in writing or at all prior to April 18, 2001 and the Applicants' claim must therefore fail.

Insofar as the Applicants second claim is concerned, regarding heating vents in the children's bedroom, there is no evidence to indicate that written notice was received by the Program prior to April 29, 2002. Section 15.(3) of Regulation 802 to the Act requires a claim of this nature to be made within 2 years after the home was completed for possession. The Applicants failed to meet this requirement and their claim must therefore fail.

In regard to the Applicants' third claim, regarding the basement wall, the contention of the Program as set forth in their decision letter is not either disputed or contested. No facts or evidence have been presented by the Applicants to dispute that the leak had in fact been repaired prior to November 2000 and was no longer an issue after the repair. Only on March 14, 2002 did they again report a leak in the same area. The March 14, 2002 claim was

received more than one year after these repairs had been completed and accordingly this claim will also fail.

Given what is stated above the Tribunal does not believe it to be appropriate that it exercise its discretion and thereby order that the time for giving notice of appeal be extended.

ORDER:

Accordingly, pursuant to the authority vested in it by the *Licence Tribunal Act, 1999* the Tribunal orders that the Applicants' application to extend the time for filing of their appeal be dismissed.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: August 21, 2002

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice or Divisional Court is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

VALUE VACATIONS LTD.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *TRAVEL INDUSTRY ACT*

TO REVOKE REGISTRATION

TRIBUNAL: BRIAN K. MAROTTA, Vice-Chair

APPEARANCES:

ADAM ALTMID, Counsel for Applicant, Value Vacations Ltd.,
Applicant

TREVOR BRANION, Counsel for Registrar, *Travel Industry Act*
Respondent

DATE OF
HEARING: August 16, 2002

Toronto

ORDER

WHEREAS Value Vacations Ltd. (the "Applicant") appealed the Notice of Proposal of the Registrar, *Travel Industry Act* (the "Registrar"), dated June 21, 2001, to Revoke the Registration of the Applicant under the Act;

AND WHEREAS by Interim Order released July 27, 2001, this Tribunal extended the Registrar's Order of Interim Suspension respecting the Applicant's registration under the *Travel Industry Act*;

AND WHEREAS the Tribunal heard representations and evidence in this matter on September 24, 2001; December 6, 2001; December 14, 2001; February 7, 2002; February 27, 2002; March 21, 2002; May 1, 2002; June 20, 2002; July 16, 2002 and July 31, 2002;

AND WHEREAS the Tribunal scheduled a further date for this appeal to be heard on August 16, 2002;

AND WHEREAS upon commencement of the hearing on August 16, 2002, the Applicant's Counsel requested an adjournment of the hearing;

AND WHEREAS Counsel for the Registrar, *Travel Industry Act* consented to the aforesaid adjournment:

AFTER HEARING SUBMISSIONS for Counsel as to their availability;

THIS TRIBUNAL ORDERS:

- 1) The hearing of this matter is adjourned on consent of the parties to continue at 9:30 a.m. at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario on Thursday, September 12, 2002 and on Thursday, November 14, 2001 and to continue on Friday, November 15, 2002, if necessary;
- 2) By consent of the Applicant and the Respondent, the Applicant shall by no later than 10 business days after the date of this Order, pay the amount of \$200.00 to the Registrar in respect of costs.

LICENCE APPEAL TRIBUNAL

Brian K. Marotta,
Vice-Chair

RELEASED: August 23, 2002

DANIEL CAIN and JANNETT LEWIS CAIN

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSE OF THE ONTARIO NEW
HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM.

TRIBUNAL: DAVID J. HUNT, Vice Chair

APPEARANCES:

KAREN JONES, Counsel representing the Ontario New Home
Warranty Program.

JANNETT LEWIS CAIN on her own behalf, and on behalf of
DANIEL CAIN

LAWRENCE WALLACH Counsel representing Emery Homes,
Williamstown Limited, Added Party.

DATE OF
HEARING:

August 16, 2002

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND

This is an appeal from the decision of the Ontario New Home Warranty Program ("the Program") dated April 26, 2002, denying the claim by Daniel Cain and Jannett Lewis Cain (the Applicants) for damages for a breach of the Vendor's warranty under the *Ontario New Home Warranty Plan Act* (the "Act"). The claim was for a total of \$3,400.00. As set out herein, the Tribunal found that the Applicants are not entitled to succeed in their claim against the Program.

FACTS

It is not disputed by the parties that the Applicant's home is a town home built by the Vendor, Emery Homes Williamstown Limited ("Emery"), and sold to the Applicants with a final closing date of October 30, 2001.

A Delayed Closing Information for Freehold Homes form was filed by the Applicants on February 14, 2002 by which a claim was made on the stated grounds that:

Compensation of \$5000.00 was received for the delays in closing up until September 27 2001 but a further delay of 34 days occurred and the closing did not occur until October

30, 2001. Further expenses of \$3400 were incurred and the Applicants seek additional compensation for this amount.

The Program disputes the entitlement of the Applicants to compensation under Section 17 of Regulation 892 under the *Ontario New Home Warranties Plan Act* (the "Act").

The Applicants established a period of delay for which the vendor was responsible, however Regulation 892 of the Act set the maximum limit of compensation at \$5000. Pursuant to section 14(2) of the Act the Program must take into account any benefit or compensation received by an Applicant, when assessing the amount they would be entitled to receive from the guarantee fund. The Applicants in this case had already received \$5000 from the vendor for the delayed closing so the vendor has already paid out the maximum benefit payable under the warranty.

WITNESSES FOR THE APPLICANT

Jannett Lewis Cain testified that she was not given sufficient notice of the last delay from September 27 to October 30, 2001. As a result of this, she gave up her apartment and had to find alternate accommodation as she otherwise had no place to live. This was difficult, and lead to additional expenses for this period for accommodation, food, storage, and moving. On July 20, 2000, the Applicants signed a waiver accepting the amount of \$5000 to be credited on the statement of adjustments as compensation for the extension of the closing date to September 27, 2001. She explained that she and her husband had accepted this amount of compensation on the understanding that the transaction would close on September 27, 2001 and did not anticipate that they would be put to significant further expense due to a further delay. When the final closing date arrived on October 30, 2001 the house was not fit for habitation as the heating system was not functional so they were not able to move in until the following day. As they were not able to stay in the house that night, the vendor paid for their hotel accommodation.

In cross examination the Applicant agreed that there had been five delays in the closing date and she had received a total of \$5000 compensation by way of an adjustment on the statement of adjustments. She agreed that she had provided receipts and stated that some of them had become lost. The witness agreed that the in her claim form dated January 15 2002 (Exhibit 30 Tab 10) she had acknowledged the receipt of \$5000.00 and claimed a further \$3400.00 for her living expenses.

The second witness Elaine Walrond testified that she was with the Applicants when they purchased the home. Each time there was of delay they would approach the builder and she stated that the builder never had a good answer for them about the date of completion. Often they saw nothing been done to the site, however the builder would send the letter to notify them of the delay just within the time limit. There was an extension to September 27 and compensation of \$5000 was given specifically to that date. The Applicant gave up her apartment and had nowhere to live after September 27 and had to find whatever accommodation she could. The builder's representative at the

site agreed to compensate her for her further expenses, but this changed after the closing date and she was refused.

WITNESSES FOR THE PROGRAM

No evidence was called by the Program.

FACTS AS FOUND

The Applicants in this case purchased a home from the vendor with an initial closing date on the Agreement of Purchase and Sale of March 1, 2001. On November 30, 2000 the vendor sent a notice by registered mail to the Applicants extending the closing to April 30, 2001. On February 12, 2001 the vendor send a notice by registered mail to the Applicants extending the closing to June 28, 2001. On April 12, 2001 the vendor sent a notice by registered mail to the Applicants extending the closing date to August 27, 2001. On June 1, 2001 the vendor sent a notice by registered mail to the Applicants extending the closing date to September 27, 2001. On Aug. 30, 2001 the vendor sent a notice by registered mail to the Applicants extending the closing date to October 30, 2001. On July 28, 2001 the Applicants signed a waiver, release, and indemnification document in which they agreed to accept \$5000 to be credited (on the statement of adjustments) as compensation as result of the closing date being extended beyond 120 days to September 27 2001. When the closing took place on October 30, 2001, \$5000.00 was credited to the Applicants in the Statement of Adjustments as had been agreed. After the closing the transaction the Applicants sought further compensation in the amount of \$3400.00 for expenses incurred from September 27, 2001 to October 30, 2001.

The Tribunal finds that the final notice sent by registered mail by the vendor on August 30, 2001 was less than 35 days before the September 27, 2002 date, and extended the closing for a period greater than 15 days. This notice was therefore not in compliance with Section 17 (3) (b) of the Act and there was therefore a breach of warranty. All of the other notices had been well within the appropriate times.

ISSUES

The issue in this case is whether the Applicants have a cause of action against the vendor for a breach of warranty as a result of the delayed closing over and above the \$5000.00 compensation received upon the closing of the transaction.

APPLICABLE LAW

Section 1, *Ontario New Home Warranties Act*:

"home" means,

(a) a self-contained one-family dwelling, detached or attached to one or more others by common wall,

(b) a building composed of more than one and not more than two self-contained, one-family dwellings under one ownership,

(c) a condominium dwelling unit, including the common elements ...

and includes any structure or appurtenance used in conjunction therewith, but does not include a dwelling built and sold for occupancy for temporary periods or for seasonal purposes;

Section 13 *Ontario New Home Warranties Act*:

13. (1) Every vendor of a home warrants to the owner,
- (a) that the home,
 - (i) is constructed in a workmanlike manner and is free from defects in material,
 - (ii) is fit for habitation, and
 - (iii) is constructed in accordance with the Ontario Building Code;
 - (b) that the home is free of major structural defects as defined by the regulations; and
 - (c) such other warranties as are prescribed by the regulations.
- (2) A warranty under subsection (1) does not apply in respect of,
- (a) defects in materials, design and work supplied by the owner;
 - (b) secondary damage caused by defects, such as property damage and personal injury;
 - (c) normal wear and tear;
 - (d) normal shrinkage of materials caused by drying after construction;
 - (e) damage caused by dampness or condensation due to failure by the owner to maintain adequate ventilation;
 - (f) damage resulting from improper maintenance;
 - (g) alterations, deletions or additions made by the owner;
 - (h) subsidence of the land around the building or along utility lines, other than subsidence beneath the footings of the building;
 - (i) damage resulting from an act of God;
 - (j) damage caused by insects and rodents, except where construction is in contravention of the Ontario Building Code;
 - (k) damage caused by municipal services or other utilities;
 - (l) surface defects in work and materials specified and accepted in writing by the owner at the date of possession.
- (3) The vendor of a home shall deliver to the owner a certificate specifying the date upon which the home is completed for the owner's possession and the warranties take effect from the date specified in the certificate.
- (4) A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed.
- (5) A warranty is enforceable even though there is no privity of contract between the owner and the vendor.

(6) The warranties set out in subsection (1) apply despite any agreement or waiver to the contrary and are in addition to any other rights the owner may have and to any other warranty agreed upon.

Regulation 892, Section 4, *Ontario New Home Warranties Plan Act*:

(1) Each person with a claim under the Plan shall give written notice of the claim to the Corporation.

Regulation 892, Section 17. (Delayed Closing), *Ontario New Home Warranties Plan Act*:

17 (1) Every vendor of a new home of a type referred to in clause (a) or (b) of the definition of "home" in section 1 of the Act warrants to the owner that in the event of a delay in closing that is more than five days beyond,

- (a) the date originally fixed for closing the purchase agreement; or
- (b) an extension referred to in clause 3 (a) or (b),

the vendor shall compensate the owner for all direct costs caused by the delay in an amount that does not exceed \$100 a day for living expenses and \$5,000 in total.

- (2) Subsection (1) does not apply to the period of delay in closing caused by a strike, fire, flood, act of God or civil insurrection.
- (3) Subject to paragraph 5 of the Addendum referred to in paragraph 12 of section 1 of Regulation 894 of the Revised Regulations of Ontario, 1990, subsection (1) does not apply where,
 - (a) the vendor extends the closing beyond the original closing date after giving written notice to the purchaser at least sixty-five days before the original closing date; or
 - (b) the vendor extends the closing for not more than fifteen days beyond the original closing date or beyond the extended closing date referred to in clause (a), after giving written notice to the purchaser at least thirty-five days before the original closing date or the extended closing date referred to in clause (a).

CASELAW

SID (Re) [1998] O.C.R.A.T. No. 84

In this case the vendor and purchasers entered into the agreement of purchase and sale with a closing date of November 28, 1996. The agreement was amended in writing and a new closing date of December 30, 1996 was inserted. The transaction did not close on that date and the vendor gave proper notice extending the date to January 14, 1997. When the transaction finally closed on January 24, 1997 the Applicants were given a statement of adjustments showing a credit of \$3,037.78 for moving expenses,

accommodation, and storage expenses as agreed to in the Agreement of Purchase and Sale. The Applicants' solicitor filed a claim for \$2,754.00 made up of \$800 for moving expenses and \$1,935.35 for meals. The Tribunal found that the total period of the delay covered by the warranty was 10 days and the limit of \$100 per day was applicable. As a result the only damages under the breach of warranty was \$1,000.00 and when the funds received by the Applicants in the Statement of Adjustments were taken into account, no further compensation was due, so the claim was dismissed.

APPLICATION OF LAW TO FACTS

There was no dispute that there was a breach of warranty by the vendor in this matter due to the delay in closing. Further it is agreed by both parties that a total of \$5000.00 compensation was paid by the vendor to the Applicants pursuant to the agreement signed by the Applicants on July 28. The Act and Regulations provide a Warranty which renders the vendor liable for delays of the closing date in excess of five days and provides a structure for the vendor to extend the closing dates without a breach of warranty. In this case one extension created a breach of warranty. However, the Applicants were already compensated in the amount of \$5000.00 for the delayed closing. The Act does not set up a structure for individual delays to be compensated individually and sets an over all maximum liability of \$5000 for a delayed closure. In this case the vendor had already compensated the Applicants in the maximum amount for the delay and the Applicants therefore had no further cause of action under the Warranty in the Act.

DECISION

Therefore, by virtue of the authority vested in it under s. 16(3) of the *New Home Warranties Plan Act* the Tribunal directs the Registrar of the Ontario New Home Warranty Program to disallow the claim.

LICENCE APPEAL TRIBUNAL

David J. Hunt,
Vice Chair, Presiding.

Released: August 22, 2002

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
RAYMOND AND MARGUERITE MARTIN

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

RAYMOND AND MARGUERITE MARTIN

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

PETER MAXWELL

Added Party

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter
on September 19 and 20, 2002;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing
peremptory against all parties to commence at the Tribunal's Chambers, 1 St. Clair
Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Monday, October 28, 2002
and to continue Tuesday, October 29, 2002, if necessary.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: August 23, 2002

1210-ADLS-PAND

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding Member

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles

Agent for Applicant

DATE OF
HEARING: August 16, 2002 Toronto

DECISION

A hearing was held on August 16, 2002 at Toronto, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: August 20, 2002

1210-ADLS-PAND

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding Member

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles

Agent for Applicant

DATE OF
HEARING: August 16, 2002

DECISION
RELEASED: August 20, 2002 Toronto

REASONS FOR DECISION

A hearing was held on August 16, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on August 20, 2002, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated July 29, 2002, and was received by the Tribunal on July 29, 2002, together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

The Tribunal asked the Applicant if he had asked his physician to complete the Notice of Appeal. The Applicant replied that he had but the physician completed only the bottom part and opted instead to submit a letter to the Tribunal.

A ten-minute recess was granted in order to allow the Applicant to photocopy the Notice of Appeal, showing Physician #1's signature.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice to the Registrar, dated July 26, 2002, issued by the Registrar of Motor Vehicles
- b) Exhibit # 2 Notice of Appeal Form received by the Tribunal July 29, 2002, includes 4 pages and two pictures
- c) Exhibit # 4 Copy of Notice of Appeal completed at the bottom and showing Physician #1's signature, received August 16, 2002

By the Respondent:

- a) Exhibit # 3 Ministry of Transportation submissions received August 13, 2002

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

- 50.1(1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
 - (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
 - (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

- 15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
 - (a) the name, telephone number and address, with the postal code, of the medical practitioner;
 - (b) the name, date of birth and address of the person who is the subject of the report;
 - (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;

- (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
- (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

Applicant's Driver's Licence was suspended "*July 26, 2002*" as per Notice of Appeal (Exhibit # 2)

Applicant's Evidence

Page two of Notice of Appeal is blank, except for the last question requesting details of the Applicant's last visit to his physician. Physician #1 writes: "*July 26/02 – severe stress, anxiety & panic ...due to incident at police station...*"

The Applicant submitted a handwritten note under the letterhead of Physician #1 dated "*31/07/02*". Physician #1 has been the Applicant's physician for "*...15 years or so...*".

In his letter Physician #1 states that the Applicant "*...has been treated for Panic Disorder, Anxiety & Depression ...most recently he has been seen on July 26/02...*" and concludes that "*...it is entirely possible that he could not do the breathalyzer test at the police station due to a panic attack brought on by the stress of the incident...*".

Attached to the Notice of Appeal is a photocopy of two prescriptions; one dated "*26/7/02*" for paxil, the other dated 31/7/02 for Tylenol #2 and Ventolin.

Also introduced in evidence are two pictures showing bruises and abrasions on the Applicant's body.

At the hearing the Applicant's agent made an opening statement, setting forth position of the Applicant.

It is the Applicant's Agent's intent to introduce evidence to demonstrate: the Applicant was unable to provide a breath sample due to medical reasons; circumstances surrounding the arrest aggravated the Applicant's condition and made it difficult for him to provide the

sample; the Applicant complied with the request; the Applicant is a responsible person.

The Applicant's Agent questioned his client, with respect to the events leading up to the demand for the breath sample.

The Applicant testified that there were three officers in total, and that he was feeling "...*anxiety ...pretty nervous...*" but co-operated fully when asked to provide a breath sample. It took three attempts to provide an adequate sample.

The Applicant is an anxiety sufferer and has been on medication for the condition for sixteen years. Anxiety is brought on by stress and manifests in "...*shortness of breath ...severe breathing difficulties ...panicky ...disorientation...*".

The Applicant testified that he was standing when he took the test, then totally unexpectedly two officers "...*tackled me head first into the pavement ...did not resist...*". At this time the Applicant was "...*feeling very anxious...*" and finding it "...*a lot harder to breathe ...very difficulty to breathe...*".

The Applicant was transported to the police station where he was escorted inside. The Applicant described as follows the scuffle that ensued: "...*the arresting officer, for I don't know what reason, grabbed my throat, and he wouldn't let go, starting choking me, I had to tell him to stop choking me, he threw me against the metal bench, against the concrete wall ...I was handcuffed ...I was devastated, my anxiety got a lot worse, I was feeling anxious, a lot panicky, disoriented...*".

The Applicant was then taken to holding room to speak on the telephone to duty counsel. Because the room was very small and the door was locked, the Applicant began to feel claustrophobic. His request to have the door open was rudely denied, and as a result the Applicant developed a full-blown anxiety attack.

Approximately forty minutes after arriving at the station the Applicant was taken to the breathalyzer room and demanded a second breath sample. The Applicant was cooperative but due to his condition was unable to provide an adequate sample.

The Applicant concluded his evidence in chief by testifying that he visited his physician on July 26th, and was advised to continue taking the Paxil.

The Applicant attested that he had never been charged with a criminal offence, has no demerit points, that he needs his licence for work and to drive his elderly parents and grandfather.

The Respondent's Representative, Mr. Kyle Biel began his cross-examination by asking the Applicant to state the medical reason he attributed to his inability to provide a breath sample. The Applicant explained that that he was having an anxiety attack and that the symptoms resemble asthma.

The Applicant described his symptoms, while in the breathalyzer testing room with Police Officer #1: "...*severe difficulty breathing, shortness of breath, disoriented, panicky, tightness of chest, sweaty...*". The Applicant elaborated on his feeling of disorientation as follows: "...*not*

thinking clearly...".

In reply to Mr. Biel's question as to why he did not request medical assistance, the Applicant replied that while still in the parking lot of "Whiskey a Go-Go", his anxiety was not "...full blown..." and that he was trying to cooperate with the police. Later, when in the breathalyzer testing room, with Police Officer #1, the Applicant "...felt uncomfortable ...needed medical...", nonetheless, he felt there was no point in asking as "...they would not let me anyway ...by that time they would not let me do anything...".

After being released by the police the Applicant went home rather than seeking immediate medical assistance, because "...after five hours in a cell..." he had "...calmed down, was more relaxed ...could breathe a little bit better...".

The Applicant visited his physician the same day and explained to him the incident of early morning while the Applicant was in police custody.

The last time the Applicant saw a psychiatrist for his panic attacks was ten or fifteen years ago.

On the night he was stopped the Applicant did not have either the Paxil or the Ventolin with him.

The Applicant's agent re-examined the Applicant regarding his level of anxiety at the time of the incident. the Applicant's Agent, asked the Applicant to clarify: "Were you disoriented because you were drunk or were you disoriented because you were having a panic attack?". The Applicant replied: "...I was drunk...".

The Applicant's wife, proffered testimony as to the Applicant's appearance when she picked him up from the police station and regarding his panic disorder and general good character.

After the Applicant's wife's testimony permission was granted to the Applicant's Agent to re-examine his client. the Applicant's Agent asked the Applicant to clarify his answer to the question regarding the reason for his disorientation. The Applicant contradicted his previous answer replying "...panic attack ...severe anxiety...". By way of explanation the Applicant suggested that he "...was confused..." when first asked the question by the Applicant's Agent.

In his closing remarks, the Applicant's agent commented that it is difficult to believe "...that all the officers were talking about the same person..."

the Applicant's Agent felt confident that the evidence introduced by the Applicant, demonstrates the Applicant could not provide a sample due his medical condition.

On the night in question his treatment at the hands of the officers aggravated his condition and rendered him unable to breathe adequately and provide a breath sample.

Respondent's Evidence

The Respondent provided the following Documents:

1. Certified Copy of Notice to the Registrar, sealed August 1, 2002
2. Certified Copy of Driving Record of the Applicant, sealed July 31 2002.
3. Affidavit of Police Officer #2, York Regional Police Service, sworn August 9, 2002.

The Applicant's driving record since "1979/08/02" shows no infractions.

In his Affidavit Police Officer #2 attests to the events that led up to the demand for the breath sample as well as the results of the roadside breathalyzer test.

During the time he spent with the Applicant "*...never requested medical assistance...*"

Although, the Applicant told Police Officer #2 that he suffered from "*...asthma ...*" Police Officer #2 "*...never observed any breathing problems...*".

The Respondent called Police Officer #3, as a witness. Police Officer #3 has been with York Regional Police Service since "*December 8th 2001*".

In examination-in-chief and in cross-examination, Police Officer #3, testified as to the events that led up to the demand for a breath sample, the Applicant's subsequent arrest, transportation to the police station and the second demand for a breath sample.

Police Officer #3, described the Applicant's behaviour as agitated, abusive and resistant. At no time did Police Officer #3 observe the Applicant having "*...shortness of breath or anything that would lead ...to believe there was a health concern...*". Through her own experience with asthma Police Officer #3 would be capable of detecting if someone was exhibiting any of the symptoms commonly associated with asthma.

In reply to the Applicant's Agent's questions, Police Officer #3 confirmed that the Applicant did not request medical assistance.

The Tribunal heard from Police Officer #1 employed by York Regional Police Service, since November 1999, and previously with the Ontario Provincial Police. Police Officer #1 has been a Qualified Intoxilyzer Technician since 2001.

Police Officer #1 was asked to take the Tribunal through her dealings with the Applicant on the morning of July 26th, 2002, by the Respondent's Representative.

Police Officer #1, testified that the Applicant appeared to understand the instructions. During the Applicant's first attempt to provide a breath sample into the Intoxilyzer device, Police Officer #1 heard the sound of air escaping from the mouthpiece and formulated the opinion that the Applicant had not properly formed a seal around the mouthpiece. The Applicant was again instructed on how to provide a proper breath sample, but the display did not change after his second attempt, indicating that there was not enough breath to activate the instrument. The Applicant's "*...cheeks puffed out...*" during his last attempt. Insufficient air entered the instrument for the machine to register.

After his second attempt the Applicant informed Police Officer #1 that he had asthma. As for

his demeanor Police Officer #1 saw no signs of respiratory distress, such as shortness of breath, disorientation, or even signs of impairment.

The Applicant behaved in a quite pleasant and cooperative manner with Police Officer #1, but seemed to have an issue with Police Officer #2. There were no signs of injury and no indication that the Applicant was in pain.

the Applicant's Agent questioned Police Officer #1 as to her experience with the Intoxilyzer device and as to how the determination of the number of opportunities given to an individual is made. More to the point, the Applicant's Agent asked the Police Officer #1 why if she did not feel the Applicant was inebriated did she "*flunk*" him after only two cards.

Police Officer #1 answered that she was "*...under the impression that this subject was willfully not providing a breath sample...*".

At the stipulation of the Tribunal Police Officer #1 explained that the roadside device does not give a numeric reading of the individual's breath sample. Thus, everyone who registers a FAIL is asked to provide an Intoxilyzer breath sample, to determine the actual amount of alcohol in the breath.

In his closing remarks, the Ministry's Representative indicated that the Registrar is not denying that the Applicant suffers from a "*...some sort of panic attack...*". The contention is that the Applicant had no intention of providing a breath sample, not that his condition is severe enough to prevent him from doing so.

Mr. Biel pointed out that it is hard to accept that someone going through a medical problem would have been able to resist arrest and scuffle with three police officers.

At no time during the ride to the detachment nor at the detachment did the Applicant request medical assistance.

The Respondent's Representative also pointed out the discrepancy between the Applicant's evidence and that of Police Officer #1. The Applicant stated that he was visibly showing the signs of a panic attack. Police Officer #1 noticed nothing. In fact the Applicant was able to ask Police Officer #1 quite logical questions regarding the Intoxilyzer device.

The Ministry's Representative, Mr. Biel suggested that Physician #1's report is inappropriate because Physician #1 "*...was not there...*", and also because his report does not contain enough information. Physician #1 did not provide a history of the Applicant's condition nor the Applicant's behavioural pattern.

The Ministry's Representative urges the Tribunal confirm the Registrar's decision to suspend the Applicant's driver's licence, as there was no visible indication, that the Applicant was unable to provide a breath sample for any other reason, that he was not cooperating with the police officer's demand.

APPLICATION OF THE LAW TO FACTS:

Although the totality of the evidence presented was considered, the preceding notes reflect a summary of the proceedings.

An appeal was brought by the Applicant under Section 50.1 (2) (b) of the *Highway Traffic Act*, which prescribes:

“...person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason...”

The Respondent's Representative conceded that the Applicant suffers from a panic disorder. The Tribunal concurs and so finds a fact. Nonetheless, at issue is: was the Applicant's condition at the time of the breathalyzer test, severe enough, to cause the Applicant to fail or not comply with the breath demand.

The Applicant, albeit inadvertently, unmistakably shattered his grounds for a medical appeal by confirming that he was disoriented because he was “drunk”. The Tribunal accepts the Applicant's explanation that he was “*confused*” when first asked the question by his agent, and will proceed to examine the evidence.

Physician #1 suggests, “...*it is entirely possible that he could not do the breathalyzer test at the police station due to a panic attack brought on by the stress of the incident...*”. The Tribunal finds Physician #1's premise quite plausible. It is conceivable that the Applicant would have been feeling somewhat anxious about the unusual circumstances that he found himself in. Nonetheless, as the Mr. Biel asserted Physician #1 “...*was not there...*”.

As pointed out by the Respondent's Representative corroborated by the evidence of Police Officer #2, Police Officer #3 and Police Officer #1, also confirmed by the Applicant, at no time did the Applicant request medical attention.

Police Officer #3 described the Applicant as agitated, but neither of the three officers observed the Applicant in any state of respiratory distress.

For the events that transpired during the breathalyzer testing session the Tribunal must rely on the eyewitness observations of the two individual's involved: the Applicant and Police Officer #1.

As Mr. Biel emphasized there were several discrepancies between the Applicant's evidence and that of the Police Officer #1,

The Applicant testified that while he was in the breathalyzer testing room with Police Officer #1, he was undergoing a full-blown panic attack. The Applicant testified that he was experiencing: “...*severe difficulty breathing, shortness of breath ...tightness of chest...*” and that he was feeling “...*disoriented, panicky, sweaty...*”. There is no doubt, that Police Officer #1, due to her first hand knowledge of asthma, and her close proximity to the Applicant would have been able to detect and signs described the Applicant. Police Officer #1 noticed nothing.

Police Officer #1's recollection of the Applicant being "...quite pleasant..." is consistent with the Applicant's evidence that he was "...cooperative...". It is the fact the Applicant was cooperative and coherent in asking questions, that the Tribunal finds inconsistent with the usual characteristics of someone going through a panic attack.

The Applicant presented no detailed medical reports, no specialist reports. The Tribunal was told that the Applicant has learned to manage his condition and does not require medical attention each time he has a panic attack.

The Tribunal finds the evidence of the Applicant credible, but is not satisfied that the Applicant's condition at the time he was demanded a breath sample by Police Officer #1 was severe enough to prevent the Applicant from providing a breath sample.

The onus being on the Applicant to establish the merit of the appeal, the Tribunal finds that the Applicant's testimony failed to substantiate the basis for an appeal on medical grounds. Thus, the Tribunal finds that the Applicant does not meet the criteria of Section 50.1 (2) (b), in that he was not able to demonstrate that his medical condition, prevented him from providing a breath sample.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated July 27, 2002 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal **confirms** the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: August 23, 2002

JOHN BRICKER

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: CHARLES J. SANDIFORD
Presiding member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

JOHN BRICKER Applicant
unrepresented

DATE OF HEARING: August 19, 2002

DECISION RELEASED: August 22, 2002 *by teleconference*

REASONS FOR DECISION

A hearing was held on August 19, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	John Bricker (the "Applicant")
Motor Vehicle:	1982 Oldmobile Cutlass, plate AMWE 140 (the "vehicle")
Date of Appeal:	July 4, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on August 19, 2002 and proceeded as an electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

I bought the car for \$900.00. The Safety Check cost me \$1100.00 totalling \$2000.00. I was born in 1928 and live on old age pension. The cost of Safety Check in the vehicle. The receipt is in the car. I'm asking for more time for this appeal.

The Applicant's testimony elaborated on his limited income and the severe strain on his savings in order to redeem his car. His daughter recovered the car from the garage where a mechanical certification had been performed in order to transfer the car into the Applicant's name from the previous owner Debra Thomas. The Applicant lives just a mile and a half from town and his family looks after his transportation needs as required, as they all have cars. His focus during his testimony was the financial loss he has endured.

His daughter, Jamie Bricker, the suspended driver of his car, then testified that she was not aware of the three year suspension as the judge had sentenced her to just two years, however she was also advised in writing that as her charge was under the Criminal Code of Canada the minimum suspension would be three years. She claims she never received the notice nor the follow up notice from the Ministry that is sent by mail. It was determined that she had changed her address and not notified the Ministry.

It is significant to note that she has yet to apply for a new licence even though she testified that in her view the suspension was served as of March 2002. She was stopped June 10th, 2002.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Jamie J. Bricker;
2. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
3. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Blood/Alcohol Content in Excess of .08 under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until March 9, 2003.

After considerable review the Respondent found from the Applicant's testimony that more than

one vehicle was available to him should he need transport and indeed he had made use of his daughter's car during the impoundment period whenever necessary.

The Respondent detailed the requirements to support his Appeal and concluded that evidence presented in the Respondent's opinion did not meet the required test detailed in the Act.

As for the daughter's claim of non notification in respect to the 3 not 2 years suspension the Respondent explained how the proof of notice could be obtained even though it is not an issue for this Appeal. It was suggested she retain a lawyer for this process.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
 - (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
 - (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
 - (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant has appealed under 50.2(3)(d) of the Act on the basis that the impoundment of his vehicle will result and has resulted in exceptional hardship. Section 22 of the Regulation

632/98 is very specific and provides the Tribunal with clear criteria that must be met by the Applicant in order to establish exceptional hardship as a result of the impoundment. The Tribunal cannot consider any other factors arising from or directly related to the impoundment itself.

Under section 22(2) of Regulation 632/98 the Tribunal cannot consider financial or economic loss or loss of employment or employment opportunity unless the Applicant demonstrates that all criteria set out in section 22(3) apply. One of those criteria is that no alternative vehicle is available.

In this case more than one vehicle was available to the Applicant, as was revealed in his evidence. Any economic loss cannot be considered as it fails the test provided in Regulation 632/98 section 22 Sub 3 and 3a. that no alternative vehicle was available.

The issue in respect to the term of his daughter's suspension is not a matter for this Tribunal's consideration but rather some other venue.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Charles J. Sandiford,
Presiding Member

RELEASED: August 22, 2002

CYRUS LINDSAY WOODS

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE MOTOR VEHICLE DEALERS ACT

TO REFUSE REGISTRATION

TRIBUNAL: DAVID J. HUNT, Vice Chair

APPEARANCES: AVIVA HARARI, Counsel representing the Registrar under
the *Motor Vehicle Dealers Act*.

HARVEY DENNIS, Agent representing the Applicant.

DATE OF
HEARING: August 21, 2002 Toronto

REASONS FOR DECISION AND ORDER

This is a hearing before the Licence Appeal Tribunal (the "Tribunal") arising out of a Notice of Proposal issued by the Registrar under the *Motor Vehicle Dealers Act* ("the Registrar", and "the Act" respectively). The Notice of Proposal dated March 11, 2002 proposed to refuse the registration of Cyrus Lindsay Woods ("Woods") under the Act.

REASONS

The reasons for this proposal are:

The intention and objective of the Act is to protect the public interest. The requirements of the Act include that Registrants be financially responsible in the conduct of business and that Registrants carry on business in accordance with the law and with integrity and honesty. The Applicant's past conduct is inconsistent with the intention and objective of the Act, and therefore warrants disentitlement to registration under the Act. Therefore, the Registrar is unwilling to register Cyrus Lindsay Woods under the Motor Vehicle Dealers Act

PARTICULARS

The particulars in the Notice of Proposal are:

- 1) Cyrus Lindsay Woods applied for registration as a motor vehicle salesperson. The application was signed by Woods on February 6, 2002.
- 2) On the application for registration submitted to the Registrar, Woods disclosed impaired Driving dangerous Driving April 21, 2001- Pending.

- 3) A background check conducted by the Registrar revealed the following charges pending: Criminal negligence body harm; fail to remain; dangerous operation; impaired operation and criminal harassment. The background search also revealed that Woods drivers licence was suspended for unpaid fines. On the application submitted to the registrar Woods indicated that he had a current and valid drivers licence.
- 4) On February 21, 2002 Woods attempted to sell a motor vehicle to representatives of the Registrar. Woods was acting as an unregistered salesperson for Evans Ford.
- 5) Woods filed for bankruptcy on or about November 29, 2000.
- 6) On the application for registration submitted to the Registrar Woods failed to disclose that he had been registered as a salesperson for New Tecumseth (sic) Motor Products Inc.

The particulars in the Notice of Further and Other Particulars in are as follows:

1. On April 12th 2002 Cyrus Woods (hereinafter "Woods") was convicted of violating the Motor Vehicle Dealers Act.
2. On or about June 28, 2002, Woods was convicted of offences pursuant to the Criminal Code of Canada.
3. A search of Woods's driving record revealed that Woods had his driver's licence suspended for unpaid fines.

THE LAW

Section 3 of the *Motor Vehicle Dealers Act* (the "Act"), states as follows,

- (1) No person shall,
 - (a) carry on business as a motor vehicle dealer unless the person is registered under this Act; or
 - (b) act as a salesperson of or on behalf of a motor vehicle dealer unless the person is registered as a salesperson of such dealer and such dealer is registered as a motor vehicle dealer under this Act

Section 5 of the Act, states as follows;

- 5(1) An applicant is entitled to registration by the Registrar except where,
 - (a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
 - (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law, and with integrity and honesty; or
 - (c) the applicant is a corporation and
 - (i) having regard to its financial position, it cannot reasonable be expected to be financially responsible in the conduct of business, or
 - (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or
 - (d) the applicant is carrying on activities that are or will be, if the applicant is

registered, in contravention of this Act or the regulations.

(2) A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant, imposed by the Tribunal or prescribed by the regulations.

Section 6 of the Act states as follows;

(1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion, the applicant is disentitled to registration under section 5.

(2) Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5, if the registrant were an applicant, or where the registrant is in breach of a term or condition of the registration.

CASELAW

Brenner v Ontario (Registrar of Motor Vehicle Dealers and Salesman) 1983 O. J. No. 1017 Ontario Supreme Court-High Court of Justice Divisional Court

This was an appeal by the Registrar of Motor Vehicle Dealers and Salesmen from a decision of the Commercial Registration Appeal Tribunal in which the Tribunal directed the Registrar to grant a conditional registration to the Respondent. The Applicant had a very serious criminal record which he had disclosed in his application but he had not disclosed three further convictions which were considered by the Registrar to be minor offences. The Tribunal heard evidence from a potential employer and a criminal lawyer who testified that the Applicant had rehabilitated himself. The Court found that the Tribunal had not applied the proper test, and set out this test in paragraph nine of the judgment as follows:

"the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was the possibility that he, indeed, might have reformed himself."

Re: Nguyen [2001] O.L.A.T.D. No. 170

In this case the applicant has a significant criminal record with 23 prior revoke convictions and on his application form had admitted that he had a record but only if particulars of a minor Theft Under \$1000 charge and subsequently he sent further information concerning other more serious charges. He also admitted during the Tribunal hearing that he had been working as an unregistered motor vehicle

salesperson and that the dealership was aware of his convictions. The Tribunal found that he had initially failed to answer the question concerning his record fully, and deliberately attempted to cover up his record and found that the conduct of acting as an unregistered salesperson was also indicative that he would fail to act lawfully and with honesty and integrity in the future. At the time of the hearing this total record was too recent for it to be out weighed by his present efforts at reformation.

At page 7 of the decision the Tribunal stated:

"Nguyen's many convictions are too recent, and that some further time must be allowed to pass within which Nguyen does not renal sent. Only with the passage of time coupled with exemplary behaviour will is be possible to consider him for registration as a salesperson."

Registrar v Griese 1993 (Ontario Court of Appeal)

In this matter the Court of Appeal found that the Tribunal erred in relying on the Applicant's allegation that he did not knowingly breach trust requirements in relation to his earlier conviction. And failed to appreciate that the plea of guilty admits every element of the offence including knowledge.

ISSUES

The legal issue in this case is whether the Registrar was wrong in his decision to refuse the Applicant's application for registration under the Act on the basis of the Applicant's conduct respecting the allegations of criminal behaviour, a conviction under the Act, the Applicant's driving record, and the lack of appropriate disclosure on the Application form, as well as the issue of financial responsibility.

WITNESS FOR THE REGISTRAR

Ms. Laura Gordon testified on behalf of the Registrar. She explained that she has been the Director of Compliance at O.M.V.I.C. since 1997. Prior to that she spent eight years as the investigator and inspector with the Ministry of Consumer and Commercial Relations motor vehicles branch prior to the creation of O.M.V.I.C. Before that, she worked in various capacities for other Registrars within the Ontario government. She testified that O.M.V.I.C. was established in 1997 to administer the *Motor Vehicle Dealers Act* which is a public protection statute regulating motor vehicle dealers and salespersons within the province of Ontario. There are four areas of responsibility being: registration, complaint mediation, inspection, and the investigation of complaints. Pursuant to section 5 of the Act, a person is entitled to registration unless the Registrar had reasonable grounds to refuse based on concerns that they will not be financially responsible, or their past conduct raises concerns that they will not carry on business with honesty, integrity and in accordance with the law.

The witness stated that the Notice of Proposal set out the concerns for the Registrar that the Applicant had not adequately disclosed pending charges; had not disclosed the suspension of his driver's license for unpaid fines; had been convicted of the industry specific offence of acting as an unregistered salesperson; had failed to disclose an employer on his application form; and had been through bankruptcy twice. She explained that in the Notice of Further and Other Particulars the Registrar set out the other concerns once they learned that he had been convicted of *Criminal Code* charges, convicted of the charge under the Act, and also found that his driver's license was suspended for unpaid fines.

Ms. Gordon reviewed the application form and explained that in section D the applicant is supposed to fill in all of their work activities over the last three years and that if they do not do so they are warned that the form will be returned as deficient. In the Applicant's form only three employers were listed whereas the records at O.M.V.I.C. (Exhibit 7) showed that the Applicant had also worked at New Tecumseh Motor Products Inc. as well within the three-year period. On the application form filed by the Applicant on this occasion the supporting dealer was Evans Ford Lincoln Inc. In this form there were concerns over several answers. First, he failed to list New Tecumseh Motor Products Inc. as an employer. Also, in answer to question 4, he marked that he did have a valid Ontario driver's license, and when O.M.V.I.C. received a printout from the Ministry of Transportation records (Exhibit 3, tab 4), it showed that there were several license suspensions over the years and the license was suspended for a Court ordered unpaid fine.

The witness also had concerns over his answer to question 9 of the application form where he stated that there were charges of Impaired Driving Causing Bodily Harm and Dangerous Driving causing Bodily Harm still pending (Exhibit 3 Tab 3). When the criminal record search (Exhibit 3 Tab 5) came back, the Registrar found that there were other charges pending as well and it was discovered that the charges pending were actually Criminal Negligence Causing Bodily Harm, Fail to Remain, Dangerous Operation, Impaired Operation Causing Bodily Harm, and Criminal Harassment. When the copy of the Information was received it showed that the Dangerous Driving Bodily Harm, Impaired Driving Bodily Harm and Criminal Harassment charges were all on the same information and were completed on June 20, 2002 and were with regard to the same person. There had been a guilty plea on the Dangerous Driving Causing Bodily Harm and Criminal Harassment charges on January 14, 2002 and a pre-sentence report was ordered. On June 28, 2002 sentence was passed and the Applicant received nine months imprisonment on the Dangerous Driving Bodily Harm charge, and with three years probation; and three months imprisonment concurrent and three years probation concurrent on the Criminal Harassment charge. The Applicant was also prohibited from driving for three years; was ordered to pay restitution to the victim in the amount of \$1000.00; and was ordered not to possess weapons or ammunition for five years. He was ordered to provide a D.N.A. sample. The charge of Impaired Driving was withdrawn by the Crown.

In answer to question 6 in the application form, Mr. Woods advised that he had been bankrupt and provided a copy of the some supporting documentation from his trustees regarding his current bankruptcy.

Further checks revealed that he had been convicted of an industry related offence under the Act for acting as a salesperson for a motor vehicle dealer on February 21, 2002 while not registered. In April 2002 he entered a guilty plea, and was given a fine of \$150.

Ms. Gordon explained that the Registrar had serious concerns as there appeared to be a pattern of behaviour given the totality of problems including the criminal charges, the charge under the Act, the unpaid fines and the lack of disclosure in the application form. She explained that the application form is particularly important because it is relied upon as accurate by the Registrar and is seen as the first test of honesty for the Applicant. On the signature page of the application the Applicant is asked to sign certifying that the facts contained are true. The document was signed by the Applicant, and also by an authorized representative from the dealership.

In cross examination, Ms Gordon explained that O.M.V.I.C. records as to customer complaints do not go back for 20 years. As individuals generally renew their registrations every two years O.M.V.I.C. did not do a search in this case to determine if there had been any customer complaints. When she was asked if the policy at O.M.V.I.C was that a bankrupt person could not be registered, she explained that there is no absolute rule, as each case depends on its individual circumstances and the Registrar looks at the totality of the situation for each Applicant. When it was pointed out to her that on the application form there was a box at the top with initials beside the words "approved by" she explained that this does not mean that the application had been formally approved but was just initialled by the receptionist when the application was submitted. She explained that the approval process went further than examination by the receptionist, and the problems for the Applicant started when the criminal record search was done and O.M.V.I.C. received the information that there was a record or charges pending. The witness stated that she had no information on the criminal charges beyond what was shown on the C.P.I.C. printout and the Information. However she did state that she had spoken to the police officer, and was advised that the car had turned over.

Ms. Gordon stated that if the only problem had been that the Applicant had failed to disclose New Tecumseh as a prior employer on the Application form, it is unlikely that it would have been sufficient grounds for a refusal. The problems with the application initially started when O.M.V.I.C. became aware of the criminal charges.

When she was again questioned about the record of customer complaints she repeated that she was not aware of any record of customer complaints being kept for a great length of time.

Ms. Gordon was asked why they would be a concerned over the bankruptcy if the Applicant was a salesperson who did not handle money, and she explained that in the industry, there have been problems that things happen, deposits are taken or figures and paperwork are manipulated. On the bankruptcy itself she was more concerned that there were arrears owing to Revenue Canada, a loan owing to a dealer, and a family court order for support that was in arrears. In a regulated industry such a pattern can give a concern for the protection of the public.

She was asked how Mr. Woods would know if he had been ever been suspended if he never got a notice, and she explained that he would have known something about suspensions, as he had been called in for interviews on November 3, 1994, March 28, 1988 and November 16, 1987 according to the Ministry of Transportation records produced (Exhibit 3, Tab 4). She also noted that the last suspension August 31, 2001 was as a result of the Court ordered fine, so he would have known of the fine and been advised of the consequences of non-payment. The information showed that he appeared in Court on January 14, 2002 on the criminal charges and should have known by that time that his license was suspended in August for the unpaid fine. On this basis, the witness believed that by February 6, 2002 when the Application was dated he would certainly have known of the suspension.

Ms. Gordon was asked about the Applicant's industry related record and pointed out that Mr. Woods had pleaded guilty to acting as a salesman while he was unregistered. She explained that this charge would have been of concern to the committee considering the problems with the registration. The issue of whether this one item would have caused the refusal of the registration was raised and she again explained that the decision would be made based on the totality of the conduct to determine if the conduct as a whole gave reasonable grounds for the refusal.

She was asked about what consideration would be given to his sales record, and she said that the Registrar was not concerned with how quickly he could move cars off the lot. Ms. Gordon stated the decision was based on the past conduct which is a combination of his criminal charges, his industry related charge, his license suspensions, his bankruptcies, and his nondisclosure of information in the application form.

WITNESSES FOR THE APPLICANT

Mr. Edward Sullivan

Mr. Edward Sullivan testified on behalf of the Applicant that he was a salesman at Evans Lincoln Mercury and had known the Applicant since July 1996. They had met when both were working at Erinwood Ford as salespersons. He explained that presently he is an inventory supervisor and the Applicant is his assistant and does not actually sell cars. Mr. Sullivan explained the when they worked at Erinwood Ford the dealership sold over 3000 called cars per year including new used and fleet sales and the

Applicant had sold over 1000 cars while he was there without any customer complaints. At this point three letters were produced from Erinwood Ford, Rose City Ford, and Auto Park Superstore indicating that Mr. Woods had worked and each place, he was a good producer and took care of customer satisfaction. One letter made specific reference to his honesty. Mr. Sullivan explained that the Applicant had specialized in selling used vehicles and had never sold new ones. At Evans Lincoln Mercury, Mr. Sullivan had constant contact with the Applicant as Mr. Woods worked directly for him. He knew that Mr. Woods' registration had lapsed as he was there when the new application was filled in. The witness was also aware of the criminal charges of Dangerous Operation, Impaired Operation and Criminal Negligence. He explained that Mr. Woods does not drive vehicles off the lot as part of his employment at Evans Lincoln Mercury. As to Mr. Woods' state of mind after the accident, Mr. Sullivan said that he was nervous and unsure of himself. The applicant had been off work for over a year as a result of the accident.

When Mr. Woods filled out the form he did not ask for any help going over it, and Mr. Sullivan did not review it for him. Mr. Sullivan testified that he was aware of Mr. Woods' bankruptcies as Mr. Woods had told him about them. He also knew that Mr. Woods had been charged with selling cars at Evans without being registered, and knew that Mr. Woods had pleaded guilty and the penalty was a fine of \$150..

Mr. Sullivan testified that Mr. Woods knew that he could not drive as Mr. Woods had told him he could not drive as a result of the accident and had not mentioned unpaid fines. He stated that he drives Mr. Woods to and from work. The witness stated that he knew that the Applicant had worked at Auto Park Superstore which was a high volume dealership but didn't know why Mr. Woods left. He also knew that Mr. Woods had worked at Chevalier Chrysler but did not know why he had left. When he first met Mr. Woods, he had already heard of him and explained that they had now both been selling cars for about 30 years. At the present time he stated that the Applicant is not dealing with other dealers and is now just involved with inventory at Evans. He explained that any sales transactions have to go through a manager and any deposits taken in must be given directly to a manager. There are three managers at Evans.

In cross-examination the witness stated that he is a salesperson and not a manager so he must take any of his deals for approval by a manager and could not approve a deal for the Applicant if the Applicant were able to continue as a salesperson. When they were at Erinwood Mr. Sullivan stated that he was management for some time.

Mr. Sullivan explained that when the Applicant was applying for registration, the witness thought that he had a valid license, and was just applying for a transfer.

Mr. Cyrus Lindsay Woods

The Applicant testified that he had been a motor vehicle salesperson since 1973. He stated that there is the same license for selling new and used cars. Mr. Woods

explained that there is now a renewal form for the registration every two years. Mr. Woods testified that he is 50 years of age and has two children. He stated that he had been selling cars all of his working life and it is the only occupation he knows. From 1997 he estimates that he has sold 500 cars, and would have sold more but he was injured in the accident and was away from work for a year. Finally he found that he had to make another application and when he filled it in, he thought he had understood it.

Mr. Woods stated that when he filled out the application form, he listed three dealers and does not know why New Tecumseh was left out. He stated that he finally spoke to Julia at O.M.V.I.C. when he rushed over after having telephoned and left messages many times without a reply. The Applicant complained that O.M.V.I.C. was taking pictures of him and "stalking" him. He found this out when the investigators came into the dealership and said "you guys are in big trouble now" and showed photos of him talking to customers at the dealership. As result of this, he was given a *Provincial Offences Act* summons under the Act. Mr. Woods testified that he thought that it was "ridiculous" that he would be charged for selling a used car.

The Applicant was upset that he had not received any notification advising him that his license had lapsed and he thought it was "redundant" to have to fill out the form as O.M.V.I.C. already knew his work history and had the information already. Mr. Woods further stated that any person who wouldn't have realized that he worked at New Tecumseh is "retarded" as they already had the records. He also explained that it was redundant because he had probably sold more cars than anyone in Canada. In his opinion he stated that what was important was that he did his job well and his customers were satisfied.

Mr. Woods stated that he did not know that his driver's license was under suspension and said that there has been a court order that he could drive if he was in the presence of his wife, but he did not give particulars of when that occurred. At the time of his suspensions for unpaid fines he stated that he was not living at his own address and the letter had not reached him.

On the issue of the most recent bankruptcy he explained that the \$30,000 owing to his prior employer New Tecumseh was a loan and did not involve any dishonest behaviour. To his knowledge, the dealership was now closed in any event.

The Applicant explained that his lawyer had told him that some charges would be dropped on a plea bargain, so he did not think it was necessary to include them in the application form. He then said that Julia at O.M.V.I.C. misled him as she told him it wasn't really necessary as they would do a C.P.I.C. record search in any event. Since they would get the information anyway he thought it was silly, however he did not specify which of these reasons was supposed to have been the determining one.

Mr. Woods explained that his conviction and sentence for the Dangerous Driving Causing Bodily Harm and Criminal Harassment charges were under appeal, despite the fact he pleaded guilty. Initially he said he had "bail pending appeal" but on further

inquiry by the Tribunal it became apparent that there has simply been an application for "bail pending appeal" but it had yet to be heard. On the issue of this appeal, he stated that representatives of Transport Canada had attended at Evans Lincoln Mercury to do an investigation concerning the vehicle in the accident, and that someone else would come to justice for it.

Mr. Woods again stated that he was able to sell a lot of vehicle and estimated that over his career he had sold 12,000. He took issue with the concept of anyone determining the probability of future conduct by looking at past conduct and wrote it off as pure speculation. He stated that if we want to do a "witch hunt" like that;

"everyone in this room should go home and lock themselves up because they could be hit by a car tomorrow"

He also stated that O.M.V.I.C wouldn't be around long and attacked the application form which warned that if the part in which former employers were to be listed was incomplete, it would result in the application being returned as deficient. On this basis he felt that the form should have been returned to him so that he could try again and that O.M.V.I.C. had a record of all his employers anyway so it didn't matter.

He explained that in his opinion Evans Lincoln Mercury has sold about 55,000 cars, so if Evans says he is okay, then he is okay. In addition, he claimed that his prior business conduct was impeccable.

Mr. Woods stated that he does not own a home and he lives rent free. His wife is self employed and employs 19 other persons.

He could not understand why the Tribunal was concerned about his bankruptcy as there are 45,000 other people in Toronto who have filed for bankruptcy but they are not at the Tribunal being told they cannot work. In his opinion, personal finances are totally irrelevant. It is however more important in his opinion that there is a 98% customer satisfaction rate in the industry. While he was working selling used cars he was able to earn between \$50,000.00 and \$250,000 per year, and had been given a car to drive by the dealers.

Since the accident he has been seeing a counsellor and doing "damage control" with counselling for "life adjustment" and "life management"

The witness explained that he did not see a financial risk as most dealers do not handle money and a cash deposits are taken by a manager so there is complete supervision.

Mr. Woods again went into the issue of customer satisfaction and said that Evans Lincoln Mercury is now a "Blue Oval dealership" with Ford and must maintain a 100% customer satisfaction ranking, an implied that this should make a difference.

He explained that when Mr. Don McAndrew came in from O.M.V.I.C. and he found that his license was not in good standing he stopped selling cars immediately and notified O.M.V.I.C.

In cross examination, Mr. Woods stated that he did not know that he would get a certificate in the mail upon renewal, and initially did not remember there being a certificate. He explained that when the O.M.V.I.C. representative came to the dealership and told him that he was not registered, he went in the same day. When he was asked about the February 6, 2002 signature date on the application form (Exhibit 3 Tab 3) he said that he was not sure if he dated it the same day that he signed it, and that he may have back dated it. He agreed that Mr. Mike Rietta the dealer representative signed the document and dated it February 6, 2002 and there was warning that the dealer was not to sign the application until it has been completed and signed by the Applicant. When he was asked if he remembered someone attending at the dealership to discuss cars and receiving a card from him dated February 21, 2002, he stated that he was not sure of the date, but did identify his card and the information written on it (Exhibit 3 Tab 7). He also agreed that he was found guilty of the offence under the Act of selling motor vehicles without registration. He stated that he was fined \$150, and proceeded to comment that it was not a big deal as someone else in court was told the fine was \$250 for failing to clean up after their dog. He testified that in his opinion:

"It is not relevant. If your dog crapping on a lawn is worth \$250 and this is worth half of that, it is only half as important and is not a big deal"

When he was asked about why did not mention in the application form that he had been out of work for a year due to his injuries he stated that he went over it quickly before filling it in. When he was asked if he thought the form was important, he said no; that it was petty, silly, and that it was childish that so much should depend on pieces of paper.

Mr. Woods agreed that on the sale of a car it was important to make full disclosure and stated that in his opinion someone buying a car was more important than the application form for the license. He repeated that he knew that there would be a Criminal record check and O.M.V.I.C. would find out about the charges but again denied that his license had been suspended as often as the paperwork said. The Applicant further denied that his license was suspended as a result of the accident and claimed that he had a stroke on April 18, 2001, before the accident on April 21, 2001.

FACTS FOUND PROVEN

The facts found by the Tribunal are that:

The applicant was involved in accident of on April 21, 2001 and was charged with Dangerous Driving causing Bodily Harm, Impaired Driving, Causing Bodily Harm, and that between April 11, 2001 and April 21, 2001 he committed the offence of Criminal Harassment of the same person. He was also charged on April 21 2001 with the offences of Criminal Negligence Causing Bodily Harm and Fail to Remain.

The charges were resolved by way of a guilty plea to Dangerous Driving Causing Bodily Harm and Criminal Harassment on Jan. 14, 2002 with sentence being passed on June 28, 2002 at which time he received a total of nine months in custody with three years probation, a three-year driving prohibition and a five-year firearms prohibition. The other charges were withdrawn by the Crown. The conviction and sentence are currently under appeal.

The Applicant was charged that on February 21, 2002 he acted as a salesperson when he was not registered contrary to the *Motor Vehicle Dealers Act*. On April 12, 2002 he pleaded guilty and was fined \$150.

On February 6, 2002 he filled in the application for his motor vehicle sales person's license and only listed the pending criminal charges of Impaired Driving and Dangerous Driving. He also failed to list New Tecumseh Motor Products Inc. when he listed his place of employment within the last three years. The Applicant failed to correctly state that his license was suspended at the time of the application, and has had a history of repeated license suspensions and has been called in for interviews by the Ministry of Transportation.

The Applicant has been bankrupt twice but did correctly report this on his application form and provided supporting documentation which showed that he had owed \$100,000 to Revenue Canada, \$30,000 to a former employer, and \$3500 in arrears of child support, together with debts to commercial lenders.

The Applicant is welcome to return to Evans Ford Lincoln Inc. to take a position as a salesperson if he receives registration

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APPLICATION OF LAW TO FACTS

The Act provides that the Registrar may revoke or refuse the registration of the Applicant where the Applicant's past conduct affords reasonable grounds for belief that the Applicant will not carry on business in accordance with the law, and with integrity and honesty. The Tribunal finds the following facts to be relevant past conduct

In this case the Applicant blaming someone else for each deficiency, in filling in the application form. Leaving out some of the pending charges was alternatively either the fault of the O.M.V.I.C. receptionist who misled him by saying it wasn't important and they would get a C.P.I.C printout, or the fault of his lawyer for telling him that some charges would be dropped.

Aside from the normal concerns raised when there is a criminal record there is an additional question in this case, as the individual who suffered the bodily harm in the accident was also the same person who was the complainant in the harassment charge.

There was no evidence around this issue and this Tribunal draws no conclusions from it, and in the absence of any such evidence treats these facts as unrelated and neutral.

In his evidence, he also claimed that the accident was someone else's fault as Transport Canada is investigating something to do with the vehicle and someone else will be brought to justice for it. In addition the lawyer must be at fault for the guilty plea as he is now appealing conviction and sentence. This means that he is claiming to have pleaded guilty when he should never have done so. When a defendant has a lawyer acting for him and there has been a guilty plea, he must prove that he was misled by bad legal advice and was pressured into pleading guilty and did not do so voluntarily.

The Applicant did not think the *Motor Vehicle Dealers Act* charge was significant, and said it was less important at the Provincial Offences Court than a charge involving "letting a dog crap on someone's property". He failed to appreciate the significance of an offence under the governing legislation, and completely trivialized his behaviour.

He was contemptuous of O.M.V.I.C. and said they wouldn't be around very long and clearly did not think the application form was of any real significance.

Mr. Woods repeatedly dismissed the Tribunal hearing as simply being about pieces of paper as if it was not relevant. This was completely consistent with his repeatedly expressed belief that the real test was the ability of a person to sell cars and that the only real determination would be made by the motor vehicle dealers.

The Applicant denied receiving any notices of license suspensions. According to the record obtained from the Ministry, the last unpaid fine was from a Court Ordered. It is interesting to note however that when he was charged with the on April 21, 2001 driving offences and there is no indication of a charge of driving while suspended under the *Highway Traffic Act*.

Mr. Woods implied that the real test of honesty and integrity was customer satisfaction and dealers satisfaction implying that the dealers should individually monitor themselves and their salespersons. He said that there was there was a 99% customer satisfaction rate in the industry thereby implying that regulation was not necessary in the industry. The Applicant also attacked the idea of whether any form of process was appropriate to determine risks of future behaviour, and said that on the basis of speculation, everyone in the room could lock themselves in their room and be afraid of being hit by a car tomorrow. Given his opinion of the process and the entire concept of industry regulation, the Applicant did not present at this time as someone who would be controllable by any rules imposed if he did not agree with them. He appeared totally focused on simply moving product.

Whether or not the Applicant provided correct information in the application document is a crucial matter in assessing the honesty of an Applicant, as this information is clearly intended to be relied upon by the Registrar. If any information is intentionally concealed, or if false information is given, the Registrar has good reason to have

serious concerns that the Applicant will withhold information or provide false information in the future in his dealings with the public or with the Registrar. A motor vehicle dealer or salesperson deals with members of the public who are purchasing or selling products of substantial value, and are depended upon not to misrepresent to value or quality of the vehicles. By withholding or falsifying information they are in a position to take advantage of a vulnerable consumer, and the public must have confidence that the dealer or salesperson will not put their own personal interests ahead of their responsibility to conduct business with honesty and integrity. The Tribunal finds that in this case relevant information was concealed, false information was intentionally provided, and the Tribunal draws an inference that this very recent dishonest behaviour demonstrates a continuation of a pattern of behaviour, which in addition to the past conduct that was concealed, provides reasonable grounds to believe that there would be future behaviour which does not meet the statutory standard of acting with honesty, and integrity and specifically the test of acting in accordance with the law.

The other legal issue in this case is whether having regard to the financial position of the Applicant's it can reasonably be expected that the applicant will be financially responsible in the conduct of the business. The Tribunal finds the applicant's two bankruptcies in combination with the previously mentioned conduct raises serious concern that the Applicant could be can reasonably be expected to be financially responsible in the conduct of the business.

The legal test to be used by the Tribunal is whether the Registrar was in error in deciding that the past conduct of the Applicant provided reasonable grounds to believe that the Applicant would not carry on business with integrity honesty and in accordance with the law. On the basis of the facts as found, and the application of the law to those facts, the Tribunal finds that the decision by the Registrar was not in error.

DECISION

Therefore, by virtue of the authority vested in it under s. 7(4) of the *Motor Vehicle Dealers Act* the Licence Registration Appeal Tribunal directs the Registrar to carry out his proposal to revoke the registration of the Applicant.

LICENCE APPEAL TRIBUNAL

David J. Hunt, Vice Chair

Released: August 30, 2002

KRIKOR SAMULIAN

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
MOTOR VEHICLE DEALERS ACT

TO REFUSE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

MILTON BERNSTEIN, Counsel, representing Krikor Samulian
A. MICHAEL ROTHE, Counsel, representing the Registrar, *Motor Vehicle Dealers Act*

DATES OF
HEARING:

August 20, 2002

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") from a Notice of Proposal (the "Proposal") by the Registrar of the *Motor Vehicle Dealers Act* (the "Registrar") pursuant to Section 7 of the *Motor Vehicle Dealers Act* (the "Act"). The Proposal, dated May 8, 2002, seeks to refuse the registration of Krikor Samulian (the "Applicant") as a motor vehicle salesperson.

The Proposal sets out the Registrar's reasons for the Registrar seeking an order for the refusal of the Applicant's registration. The reasons stated are as follows:

The intention and objective of the Act is to protect the public interest. The requirements of the Act include that Registrants be financially responsible in the conduct of business and that Registrants carry on business in accordance with the law and with integrity and honesty. The Applicant's past conduct is inconsistent with the intention and objective of the Act, and therefore warrants disentitlement to registration under the Act. Therefore, the Registrar is unwilling to register Krikor Samulian under the Motor Vehicle Dealers Act.

(Exhibit 3, Tab 1)

The particulars upon which the Registrar relies are stated in the Proposal as follows:

1. Krikor Samulian applied for registration as a salesperson on or about April 22, 2002.

2. On the application for registration submitted to the Registrar the applicant disclosed that there were no charges pending and that he had the following convictions:
 - Suspension of fines - unpaid on time
 - Threatening
 - Violation of prob. Undertaking
 - Assault.
3. The applicant further disclosed that his driver's licence was suspended for unpaid fines and that his salesperson registration was revoked.
4. A criminal record check of the applicant was conducted by the Registrar which revealed the following convictions:
 - March 5, 1974 - Threatening
 - May 9, 1984 - Fail to Appear
 - Drive while ability impaired
 - Refuse to provide breath sample
 - June 21, 1984 -Threatening
 - September 22, 1993 - Fail to comply with recognizance
 - Watch and beset
 - June 29, 2000 - Assault (spousal)
 - November 2, 2000 - Fail to comply with undertaking.
5. The criminal record check revealed the following pending charges:
 - Assault and breach of probation.
6. The applicant failed to provide full disclosure on applications submitted to the Registrar.
7. The applicant acted as a salesperson without being registered pursuant to the Motor Vehicle Dealers Act.

(Exhibit 3, Tab 1)

By written Notice of Appeal dated May 21, 2002 the Applicant delivered notice to the Tribunal in terms of Section 7.(2) of the Act that he required a hearing regarding the Proposal.

(Exhibit 3, Tab 2)

THE EVIDENCE:

The evidence presented to the Tribunal by the Registrar consisted of documentary evidence as well as the oral testimony of Louise Gingras and Gordana Radiskovic. The evidence of the Applicant consisted of the oral testimony of the Applicant himself.

LOUISE GINGRAS' TESTIMONY

Louise Gingras ("Gingras") testified that she is an inspector with the Ontario Motor Vehicle Industry Council ("OMVIC") with whom she has been employed for the past 5 years. Her duties include the inspection of dealers to ensure they are in compliance with the Act and its regulations and she also trains new inspectors employed by OMVIC. OMVIC, as she explained, is a non-profit organization mandated to administer the Act and its regulations. The Act is a public protection statute enacted to ensure, among other aspects, compliance by motor vehicle dealers and salespersons with the Act and its regulations.

Gingras explained that Section 5 of the Act entitles applicants to registration except where an applicant's past conduct affords the Registrar reasonable grounds for belief that such applicant will not carry on business in accordance with law and with integrity and honesty. Gingras stated that she has knowledge of the Applicant's file and the background to this matter.

Currently the Applicant is not registered although he was previously registered as a motor vehicle salesperson in January 1983.

On November 3, 1997 the Applicant applied to the Registrar for a renewal of his registration as a motor vehicle salesperson. When applying for renewal the Applicant completed and signed an application form. In that application the Applicant was asked in question 10.

Have you ever been found guilty or convicted of an offence under any law or are there any charges pending? This includes where a conditional discharge or an absolute discharge has been ordered.

If yes, attach full particulars on a separate signed and dated statement.

Note: Where the applicant has been previously registered, list only those convictions, conditional discharges, absolute discharges or charges which have not been previously disclosed.

The Applicant answered "No" to this question.

(Exhibit 3, tab 4)

The Registrar caused a criminal search to be made concerning the Applicant and called for and obtained a C.P.I.C. report from the police. This C.P.I.C. report revealed that the Applicant did have a criminal record. The Registrar, however, decided to renew the Applicant's registration subject to terms and conditions. Gingras then spoke with the Applicant about his criminal record and the fact that it had not been disclosed by him and advised the Applicant that his registration would be renewed for a further two years subject to terms and conditions. Accordingly, on September 2, 1998 the Applicant signed a document agreeing to the renewal of his registration subject to terms and conditions. Certain of such terms and conditions stated as follows:

- 1) I acknowledge that these terms and conditions will be in effect for two years from the date of my registration as a motor vehicle Salesperson
- 2) I agree, if I am criminally charged in the future, to immediately notify the Registrar, Motor Vehicle Dealer's Act, in writing of the charges against me.
- 3) I agree, if I am criminally charged in the future to immediately notify my employer of the charges against me...
- 7) I acknowledge that my registration is subject to be revoked if I, in the opinion of the Registrar, breach any of the terms and conditions set out in this document...

Signed this 2 day of September, 1998

(Exhibit 3, tab 5)

On September 18, 1998 the Applicant's registration as a salesperson was renewed for two years terminating on September 17, 2000. Prior to that termination date of September 17, 2000 a renewal application was sent to the Applicant for his completion and signature. On November 6, 2000, an application form signed by the Applicant and bearing the date of signing as September 30, 2000 was received by OMVIC.

Question 1.(a) in Section A of the above application form read:

Are there currently any charges pending or has the applicant ever been found guilty of convicted under any law?

(Exhibit 3, tab 6)

To this question the Applicant answered "yes" but attached no particulars to supplement his answer.

Pursuant to receipt of this renewal application the Registrar issued a Notice of Proposal to Revoke the Applicant's registration as a salesperson. This Proposal was dated March 23, 2001 and alleged that a criminal record search had found the Applicant did have the following convictions:

Threatening, March 5, 1974
Fail to Appear, May 9, 1984
Drive While Ability Impaired, May 9, 1984
Refuse to Provide Breath Sample, May 9, 1984
Threatening, June 21, 1984
Fail to Comply with Recognizance, September 22, 1993
Watch & Beset, September 22, 1993
Fail to Comply with Undertaking, November 2, 2000
Assault, June 29, 2000.

(Exhibit 3 Tab 7)

The Proposal went on to state that the Applicant did answer "Yes" when asked in the application whether there were pending charges or whether the Applicant had ever been found guilty or convicted under any law. However, the Applicant when asked for particulars of pending charges and convictions failed to give such particulars to the Registrar.

The Applicant filed a Notice of Appeal to the Proposal but did not further prosecute the appeal. The Registrar accordingly revoked the Applicant's registration as a salesperson.

Gingras went on to state that despite the Applicant having signed the terms and conditions to which his registration became subject, he failed to disclose an assault conviction registered against him on June 29, 2000 when he was placed upon probation. He also failed to disclose that on November 2, 2000 he was convicted of failing to comply with conditions of undertaking given and was fined \$500.00 and put on probation for two years. The non-disclosure to the Registrar of these two convictions was a violation of the terms and conditions signed by the Applicant and was, according to Gingras, evidence of further criminal activity by the Applicant.

Gingras further testified that subsequent to the revocation of the Applicant's registration he once again applied for registration as a motor vehicle salesperson. This application was signed by the Applicant and dated March 14, 2002. and was received by OMVIC on April 22, 2002. Yorkdale Ford Lincoln Sales Limited's office manager Gordana Radiskovic had signed Section G of the application form. The date of the office manager's signing was March 18, 2002.

(Exhibit 3, tab 9)

Question 9 in the March 14, 2002 application reads:

Have you ever been found guilty or convicted of an offence under any law or are any charges pending?

The Applicant had answered "Yes" and the following handwritten notation appeared under question 9:

NO CHARGES PENDING
SUSPENSION OF FINES. UNPAID ON TIME.
TREATNING
VIOLATION OF PROB. UNDERTAKING
ASULT.
A SEPARATE LETTER WILL FOLLOW ON ALL ABOVE CONDITIONS.

(sic)

A letter dated April 25, 2002 from the Applicant did follow in which he stated that all his problems were of a domestic nature which lead to his numerous criminal convictions; that he had, in all his years as a salesperson, no complaints registered against him concerning his conduct, that his reputation is "very good" and that he "would like to continue serving the public" as he has done in the past.

(Exhibit 3, tab 10)

Gingras also stated that the Applicant had a conviction for Battery which conviction took place on October 9, 1996 in the Circuit Court, Pinellas County, Florida. The sentence, following a plea of guilty, was one of probation for five years. This conviction has, according to Gingras, never been disclosed to the Registrar in any of the Applicant's applications.

Under cross-examination Gingras stated that the Registrar initially became aware of the Applicant's criminal conviction when OMVIC obtained a C.P.I.C. report containing all convictions up to November 1997. Gingras confirmed that no complaints had been made to OMVIC regarding the Applicant in connection with his business activities or conduct since 1997.

GORDANA RADISKOVIC'S TESTIMONY

Gordana Radiskovic ("Radiskovic") stated in her testimony that she has been employed by Yorkdale Ford Lincoln Sales Limited ("Yorkdale") for the past three and a half years. Her position is that of Office Manager which includes acting as human resource manager. She knows the Applicant who works for Yorkdale.

She recalls that in April 2002 she was requested by the Applicant to sign the "Certificate of Dealer" being Section G to the Applicant's application dated March 14, 2002. The Application had been completed and signed by the Applicant before she obtained the application from the Applicant.

The only handwriting that appeared on the application form under question 9 when she received that form from the Applicant were the handwritten words "No charges pending". There was no other handwriting under these three words when she received the signed and completed form from the Applicant.

Radiskovic went on to state that the normal procedure of Yorkdale is to send to OMVIC all salespersons' completed and signed application forms together with Yorkdale's cheque in favour of OMVIC for the registration fee. This fee is subsequently debited to the salesperson's account.

However, in this instance, Radiskovic stated, this normal procedure was not followed as the Applicant had requested that she give the form and cheque to him after she had completed and signed Section G, being the Certificate of Dealer. The Applicant told Radiskovic that he would personally deliver the form and accompanying cheque to OMVIC. Radiskovic agreed to this request and accordingly handed the completed form and cheque to the Applicant.

Some two or three weeks later Radiskovic called OMVIC to enquire when the Applicant's registration would be received by Yorkdale. She was then informed that there were some criminal charges or convictions against the Applicant and that this was the reason that no registration had been forwarded from OMVIC. She stated that the Applicant had not disclosed his criminal convictions to Yorkdale.

KRIKOR SAMULIAN'S TESTIMONY

The Applicant testified that until 1997 he had experienced no difficulty regarding his renewal of registration applications. He also stated that he has not had a consumer complaint registered against him.

In November 1997 he applied to OMVIC for renewal of his registration. He conceded that in the 1997 application form he did not disclose his prior criminal convictions or pending charges. He also conceded that on September 2, 1998 he signed terms and conditions to which his renewed application became subject.

(Exhibit 3, tab 5)

His application for registration was then renewed for two years subject to the terms and conditions he had signed. When on September 17, 2000 he had not applied for renewal of registration, his registration lapsed.

By written application dated September 30, 2000 he applied for reinstatement of his registration as a salesperson and in answering the question in that application as to whether or not he had ever been found guilty or convicted under any law or had any charges pending he answered "Yes" but did not give any further particulars.

(Exhibit 3, tab 6)

This application was refused by the Registrar who on March 23, 2001 issued a Notice of Proposal to Revoke the Applicant's registration. The Applicant filed a Notice of Appeal to the Proposal but upon learning the Notice had been filed and served beyond the permissible time for filing he did not proceed with his appeal and the Registrar revoked his registration.

By further written application dated March 14, 2002 he applied for registration as a salesperson which application was refused by the Registrar. He was then working for Yorkdale Ford Lincoln Limited ("Yorkdale") and it was the latter who forwarded his application for registration to OMVIC together with Yorkdale's cheque for the registration fee. He also stated that when he signed that application he had already completed question 9 and that in addition to having written in the words "no charges pending" he had also written in the words

"Suspension of Fines. Unpaid on time
Threatening
Violation of Prob. undertaking Assault (sic)

A separate letter will follow on all above conditions"

This letter dated April 25, 2002 did follow and was faxed to OMVIC. The Applicant contended that all his convictions related to domestic disputes and were not industry related.

(Exhibit 3, tab 10)

Under cross examination the Applicant confirmed the correctness of the C.P.I.C. report of April 25, 2002 as to his criminal convictions from March 1974 to November 2, 2002 as well as pending criminal charges. He also confirmed that he had been convicted on October 9, 1996 in the Circuit Court, Pinellas County, Florida on a charge of Battery and had a restitution order in the sum of \$62,000 (U.S.) made against him by that court when he was placed on probation for five years. He conceded that he had failed to comply with the terms and conditions he had signed in that he had not notified the Registrar of criminal charges laid against him subsequent to the signing of terms and conditions. The Applicant went on to state that he has not been working as a salesperson since his registration lapsed. Although he was and still is working at Yorkdale, he is employed there as a trainer of salespersons. Prior to working for Yorkdale he worked for Venture Ford and when it ceased operations in October 2001 he continued there in an administrative capacity.

Shown four separate bills of sale entered in between Venture Ford and four purchasers of motor vehicles, all dated during January and February 2001, the Applicant denied that the signature that appeared on those documents under "Vendor's Acceptance" was his signature.

He testified further under cross examination that while employed not in a sales person position but in the position as a trainer of salespersons, all salespersons come to him with proposed sales transactions as he has to confirm all such transactions. He stated that he is paid "a percentage of salesperson's commissions" which statement, under later questioning, he changed to "I get a flat fee for every transaction of \$30.00 or \$40.00 or \$70.00 depending on the transaction." He conceded under cross examination that he "never disclosed his 2002 pending charges" to the Registrar as required by the terms and conditions signed by him. He also conceded that he never disclosed the 1996 Florida conviction as it was "an out of country conviction and not related to business". The restitution order made against him for payment of \$62,000.00 (U.S.) was for damages he caused to furniture that belonged to the victim in connection with the Florida Battery charge.

FACTS FOUND PROVEN:

The Tribunal finds the following facts to have been proven:

1. The Applicant was first registered as a motor vehicle salesperson under the Act on January 22, 1983.
2. The Applicant made written application for renewal of his registration, which application was received by OMVIC on September 17, 1998.
3. The Applicant denied in the aforesaid application that he had ever been found guilty or convicted of an offence under any law or that there were any charges pending.
4. As at September 17, 1998 the Applicant had the following convictions registered against him:

(a) Failed to appear	May 1984
(b) Drive while ability impaired	May 1984
(c) Refuse to provide breath sample	May 1984
(d) Threatening, Section 331(1)(A) C.C.	June 1984
(e) Failed to comply with recognizance	September 1993
(f) Watch and beset	September 1993
(g) Battery	October 1996

5. The Applicant signed terms and conditions on September 2, 1998 undertaking to immediately notify the Registrar if the Applicant was criminally charged in the future.
6. The Applicant's registration was renewed by the Registrar for a period of two years from September 18, 1998, subject to the terms and conditions of September 2, 1998.
7. The Applicant's registration lapsed on September 17, 2000 and on November 6, 2000 the Registrar received an application for the renewal of the Applicant's registration as a motor vehicle salesperson.
8. In the aforesaid application received by the Registrar on November 6, 2000 the Applicant disclosed that he had previous convictions but despite being asked gave no details to the Registrar of his past convictions. The Applicant did not disclose further additional convictions against him for assault and failing to comply with conditions of undertaking on June 29, 2000 and November 2, 2000 respectively.
9. The Applicant's application for renewal of his registration was refused by the Registrar and his registration was revoked pursuant to a Notice of Proposal to Revoke issued by the Registrar.
10. The Applicant by written application dated March 14, 2002 and received by the Registrar on April 22, 2002 applied for registration as a motor vehicle salesperson.
11. The Applicant failed to disclose in his March 14, 2002 application, his 1996 Florida conviction for Battery.
12. At the time the Applicant submitted his signed and completed March 14, 2002 application form to his employer for his employer's signature and the completion of "Section G: Certificate of Dealer" he had only disclosed in answer to question 9 of that application the words "No charges pending."
13. The aforesaid March 14, 2002 application form, after signature by his employer's representative of Section G therein, was given by the Applicant's employer to the Applicant together with his employer's cheque for the Applicant's registration fee. Subsequent to the return of the application form to the Applicant by his employer, the Applicant attended to the delivery of that form and cheque to OMVIC.

14. The Applicant after the lapsing on September 17, 2000 of his registration as a motor vehicle salesperson, did act as a salesperson of motor vehicles.

THE LAW

Section 3 of the *Motor Vehicle Dealers Act* (the "Act"), states as follows,

(1) No person shall,

- (a) carry on business as a motor vehicle dealer unless the person is registered under this Act; or
- (b) act as a salesperson of or on behalf of a motor vehicle dealer unless the person is registered as a salesperson of such dealer and such dealer is registered as a motor vehicle dealer under this Act

Section 5 of the Act, states as follows;

5(1) An applicant is entitled to registration by the Registrar except where,

- (a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
- (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law, and with integrity and honesty; or
- (c) the applicant is a corporation and
 - (i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of business, or
 - (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or
- (d) the applicant is carrying on activities that are or will be, if the applicant is registered, in contravention of this Act or the regulations.

(2) A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant, imposed by the Tribunal or prescribed by the regulations.

Section 6 of the Act states as follows;

(1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion, the applicant is disentitled to registration under section 5.

(2) Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5, if the registrant were an applicant, or where the registrant is in breach of a term or condition of the registration.

APPLICATION OF LAW TO FACTS:

There are the following issues for consideration by the Tribunal.

1. Do the various criminal convictions registered against the Applicant afford reasonable grounds for the Registrar's belief that the Applicant will not carry on business in accordance with law and with integrity and honesty?
2. Has the Applicant failed to make disclosure of material facts in his various applications and if so does such non disclosure afford reasonable grounds for the Registrar's belief that the Applicant will not carry on business in accordance with law and with integrity and honesty?
3. Has the Applicant acted as an unregistered salesperson of motor vehicles contrary to the Act and if so does that afford reasonable grounds for the Registrar's belief that the Applicant will not carry on business in accordance with law and with integrity and honesty?

The Registrar's belief is at issue in these proceedings, not the belief of this Tribunal. In the leading case of *Brenner 19 CRAT SCO Decisions and Orders (1971-1989)* Southey J. held that the Tribunal should only refuse to direct the Registrar to carry out his proposal if the Tribunal thinks the Registrar was in error in concluding the past conduct of an applicant afforded reasonable grounds for belief that such applicant would not carry on business in accordance with law and with integrity and honesty. In the *Brenner* decision, Southey J. stated that:

"... To overrule the decision of the Registrar, the Tribunal must conclude that he was wrong in his decision and that the conduct of an Applicant does not afford reasonable grounds for the Registrar's belief that the Applicant will in the future carry on business in contravention of the Act and its Regulations. This was confirmed by Divisional Court in the matter of Albert Fascenda (1994) 26 CRAT Part II 1050 where that court on appeal quashed the Tribunal's decision to direct a Registrar not to carry out his proposal and in sending the matter back for re-hearing stated at page 1051.

It follows that the Tribunal should have refused to direct the Registrar to carry out his proposal only if it thought the Registrar was in error in his belief.

The function of this Tribunal is therefore to review the Registrar's decision and in so doing to determine whether or not he was in error in coming to his decision. This, therefore, is a review of the Registrar's decision on the pertinent issues in this matter.

Issue 1 - The Applicant's Criminal Convictions

The Tribunal finds that the Applicant has many criminal convictions that have been noted in this decision. Such convictions span the period May 1974 to November 2000. While the convictions are not industry related they do relate to the Applicant's ongoing inability to behave in a lawful manner and to conduct himself within the parameters of a lawful and ordered

society. The Applicant has consistently thumbed his nose at the laws in place so as to ensure a safe and conducive environment for all. He has been found guilty and convicted of making threats not only once but twice. He has failed to appear before court, failed and refused to provide a breath sample, failed to comply with recognizance and failed to comply with conditions of undertaking given. All these convictions indicate a person who refuses to comply with and live with the norms of a law abiding society. In short a person who is prepared to act outside of the law. His assault convictions, both here and in the United States, coupled with convictions for threatening, and watch and beset, show that he easily resorts to violence and intimidation. Even though the convictions are not industry related this Tribunal believes that the Applicant's past conduct does afford the Registrar with reasonable grounds for his belief that the Applicant will not carry on business in accordance with law.

Issue 2 - Failure to make disclosure

The Tribunal finds that there are repeated incidents of non-disclosure or partial disclosure by the Applicant in his various applications. An examination of these non or partial disclosures reveals the following:

(a) Non disclosure on Applicant's November 1997 application

The Applicant admitted, as did his Counsel, that in answering "no" to question 10 in this application there was non-disclosure of his past criminal conduct. Not only was this non-disclosure, but the non disclosure was dishonest, and of a material nature. The Registrar, as he was entitled to do, relied on the Applicant's presumed basic integrity and honesty in truthfully and fully answering this question. The Applicant's conduct in falsely answering this question indicates that the Registrar's presumptions as to honesty and integrity of the Applicant were misplaced and the Tribunal finds that the Applicant's failure to disclose his convictions was done in order to mislead the Registrar. The Registrar had no C.P.I.C. report at that time. When the Registrar did obtain the C.P.I.C. report, after reviewing the Applicant's answers, he noted that between 1974 and 1993 there were some seven criminal convictions against the Applicant all of which the Applicant had not disclosed to the Registrar.

(b) Non or partial disclosure in September 2000 application

Despite the Registrar registering the Applicant on terms and conditions after the Applicant's failure to disclose in his 1997 application, the Applicant again in his September 2000 application fails to make full and true disclosure. The Applicant does not reveal his 1996 Florida conviction and only when confronted with this disclosure offers the spurious excuse that it was not disclosed because it was an "out of the country" conviction. In addition the Applicant failed in this 2000 application to disclose his June 19, 2000 conviction for assault and failed to disclose the pending charge of failing to comply with an undertaking. Not only did the Applicant fail to disclose these facts and thereby show his lack of honesty and integrity but he added insult to injury by failing to comply with the then signed terms and conditions to advise the Registrar.

(c) Non disclosure in Applicant's March 2002 application

The Tribunal finds that the Applicant once again attempted to mislead the Registrar and the Applicant's employer. The Tribunal finds that in the answer to question 9 on the application the only words that were handwritten under that question when the Applicant signed and handed the application to Radiskovic for her signature, were the words 'no charges pending'. The Tribunal further finds that after Radiskovic handed back the application duly signed by her, the Applicant added in the additional handwritten information in question 9 under the words "no charges pending".

The Tribunal accepts the testimony of Radiskovic and finds it to be more credible than that of the Applicant. The Applicant, in not disclosing to his employer the fact of his convictions was done so as to protect his continued employment with Yorkdale. This non disclosure was contrary to the terms of the signed terms and conditions which required the Applicant to inform his employer of his convictions. The Applicant's conduct reflects a lack of honesty and integrity and is supportive of the Registrar's decision.

Issue 3 - Acting as an unregistered salesperson

The Tribunal finds the Applicant, after his salesperson's licence lapsed, did act as an unregistered motor vehicle sales person. Section 3.1)(b) required the Applicant to be registered to a motor vehicle dealer and the Tribunal would have imagined that the Applicant knew of this requirement having regard to the length of time he was a registered salesperson under the Act. The Applicant's own evidence indicates he was more than a trainer of salespersons at both Venture Fort Lincoln Limited and Yorkdale. His evidence was salespersons came to him for confirmation of sales transactions and that he was paid a percentage of the salesperson's sales commission. He then changed his evidence and contended he was paid a fixed amount depending on the type of sale transaction that was concluded with a purchaser. The above is, although not conclusive evidence of the Applicant being a salesperson, certainly indicative of a relationship of salesperson and dealer being in existence. In addition to the foregoing, exhibits 8, 9, 10 and 11 being 4 copies of signed bills of sale between Venture Ford Sales Ltd. and various purchasers during January and February 2001 (after the Applicant's registration had lapsed) show signatures purporting to be that of the Applicant and immediately above such signature the printed words "Sam Samulian MGR". "Sam" is the forename also used by the Applicant and by which forename he goes.

The Applicant when presented with the above four bills of sale by the Registrar's Counsel denied that the signatures appearing under his name were in fact his. On balance, the Tribunal finds that, while it is by no means certain that the signatures appearing on the bills of sale are in fact his, the Tribunal is not able to say that the Registrar was incorrect in concluding that the Applicant did act as a salesperson while not registered.

DECISION:

Accordingly, pursuant to the authority vested in it by Section 7.(4) of the *Motor Vehicle Dealers Act*, the Tribunal directs the Registrar to carry out his Proposal dated May 8, 2002, to refuse the registration of Krikor Samulian as a motor vehicle salesperson under the Act.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice Chair

Released: August 30, 2002

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice or Divisional Court is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

PREHEARING

TRAVIS AND SHERRY HILTS

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: SIMON DANN, MEMBER

APPEARANCES:

SHERRY HILTS, Applicant, attending the hearing in person on her own behalf and on behalf of Travis Hilts

KEN ROSENBERG, Counsel for the Ontario New Home Warranty Program

BOYNE RIVER HOLDINGS INC., the Added Party, did not attend

DATE OF
PREHEARING: August 15, 2002

Toronto

ORDER

FOLLOWING attendances on August 15, 2002 at a prehearing before the Tribunal of Sherry Hilts, appearing on her own behalf and on behalf of Travis Hilts, (the "Applicants"), and Ken Rosenberg, Counsel on behalf of the Ontario New Home Warranty Program (the "Program") and Rob Rossett and Bob Thoburn, Warranty Representatives; the Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Wednesday, October 9, 2002 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario;

1. The Parties to the hearing are the Applicants, the Program and the Added Party.

2. The Applicant, representing herself and Travis Hilts, who was unable to attend, and who was accompanied by her father, Bruce Parker, specified that the issues at the Hearing shall be:
 - a) changes to the floor plan;
 - b) 'bubble' in the kitchen floor; and,
 - c) water penetration in specific areas of basement and at specified windows and doors
3. The Respondent specified the issue to be denial of access.
4. Counsel for the Program expressed an interest in arriving at a settlement prior to the continuation of the Hearing and expressed readiness to receive and examine any contractor estimates which the Respondent might wish to submit.
5. The Respondent indicated an intention to obtain professional estimates in support of their claims and to submit that information to the Program's Counsel.
6. The Tribunal advised the parties that they are required by the Rules of Practice of the Tribunal to make disclosure of documents and things in terms of Rule 6.3 and to make disclosure under Rule 6.4 where a party intends to rely on or refer to the evidence of an expert witness at the hearing. The Tribunal informed the Applicant that where he or any other party intends to rely on the evidence of an expert witness at the hearing that party shall provide to every other party the information set forth under Rule 6.4 (a)(b)(c) and (d) within at least 30 days before the scheduled hearing date of October 9, 2002.

LICENCE APPEAL TRIBUNAL

Simon Dann, Member

Released: August 27, 2002

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
ROBERT J. VALLERIANI AND 1145082 ONTARIO LIMITED
C.O.B. BRIDLEWOOD AUTO BROKERS

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATIONS
- Proposal dated: April 22, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

ROBERT J. VALLERIANI AND 1145082 ONTARIO LIMITED
C.O.B. BRIDLEWOOD AUTO BROKERS

Applicants

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on September 25, 2002;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against all parties* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Friday, October 4, 2002.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: August 29, 2002

PREHEARING

BRIAN HAYWOOD

APPEAL FROM A PROPOSAL OF THE
REGISTRAR UNDER THE *REAL ESTATE AND BUSINESS
BROKERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: MICHAEL H. TURK, Vice-Chair

APPEARANCES:

JERALD W. MACKENZIE, Counsel, representing Brian Haywood

WILLIAM W.B. WEISSGLAS and GEORGE P. DRAMETU, Counsel, representing the Registrar, *Real Estate and Business Brokers Act*

BRIAN SCHLOTZHAUER, Assistant Registrar, Real Estate and Business Brokers Act

DATE OF

PREHEARING: August 27, 2002

Toronto

ORDER

FOLLOWING attendances on August 27, 2002 at a pre-hearing before this Tribunal of Jerald W. MacKenzie, Counsel, appearing on behalf of Brian Haywood, (the "Applicant") William W.B. Weissglas and George Drametu, Counsel appearing on behalf of the Registrar, *Real Estate and Business Brokers Act* (the "Registrar" and the "Act" respectively) and Brian Schlotzhauer, Assistant Registrar;

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Wednesday, October 16, 2002 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario;

1. This Prehearing is adjourned on consent to September 27, 2002 at 9:30 a.m.

2. The Applicant shall pay to the Registrar its costs thrown away fixed at \$150.00, which sum shall be paid within two weeks of the date of this Order.
3. The Applicant is content and accepts the disclosure provided by the Registrar and does not seek any further disclosure.
4. In the event that this matter does not settle at the next Prehearing, the Applicant shall deliver all documents that he relies upon no later than October 1, 2002.

LICENCE APPEAL TRIBUNAL

Michael H. Turk, Vice-Chair,
Presiding

RELEASED: August 28 , 2002

PREHEARING

MARY SCHMIDT

APPEAL FROM A DECISION OF THE BOARD OF
DIRECTORS OF THE ONTARIO TRAVEL
INDUSTRY COMPENSATION FUND CORPORATION
UNDER THE *TRAVEL INDUSTRY ACT*

TO DISALLOW A CLAIM

TRIBUNAL: DAVID HUNT, Vice-Chair, presiding
VICTOR DREVNIG, Vice-Chair

APPEARANCES: ANGELA ALAIMO, Counsel representing Mary Schmidt
TREVOR BRANION, Counsel, representing the Travel Industry
Council of Ontario

DATE OF
PREHEARING: August 20, 2002 by teleconference

ORDER

Following attendances by teleconference on August 20, 2002 at a prehearing before this Tribunal of Angela Alaimo, Counsel on behalf of Mary Schmidt (the "Applicant"), and Trevor Branion, Counsel on behalf of the Travel Industry Council of Ontario (the "Council");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Friday, September 13, 2002 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto, Ontario;

- 1) The Parties to the hearing are the Applicant and the Travel Industry Council of Ontario;
- 2) The Parties agreed that by August 28, 2002 they would jointly produce an Agreed Statement of Facts and make it available to this Tribunal;
- 3) The Parties also agreed that by August 28, 2002 they would make available to each other, and this Tribunal, all relevant case law they intend to rely upon at the hearing;
- 4) The Parties agreed that each side would call one witness, and that the half-day scheduled for the hearing would be sufficient to hear the matter in its entirety.

LICENCE APPEAL TRIBUNAL

David J. Hunt, Vice-Chair,
Presiding

Victor Drevnig, Q.C.,
Vice-Chair

Released: August 27, 2002

1200-MED-SEIZ

**Appeal under Section 50(1) of the Highway Traffic Act,
R.S.O. 1990, Chap. H.8 as amended, from a Decision of the
Registrar of Motor Vehicles pursuant to Section 47(1) of
that Act.**

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ROSS C. BENNETT, M.D., Presiding Member

APPEARANCES: LUBA NEUWIRTH
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF
HEARING: August 19, 2002 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

EXHIBITS:

1. Notice of Suspension of the Applicant's licence dated February 28, 2002-08.
2. Notice of Appeal from the Applicant, received at the Ministry July 22, 2002-08.
3. Medical Advisory Committee report dated July 16, 2002.
4. Respondent's File Summary received at the Hearing

FACTS:

The Applicant is a 61 year-old truck driver who had his Class A driver's licence suspended on February 28, 2002, after the Ministry received a letter on January 4, 2002 from Physician #1, the Applicant's family physician. Physician #1 informed the Ministry that the Applicant had suffered an episode of confusion, twitching of fingers and memory loss for approximately 1/2 hour and that he was not fit to drive. Physician #1 had made an appointment for the Applicant to see Physician #2, a neurologist.

The above noted episode occurred on December 22, 2001 and was observed by the Applicant's wife. The episode settled down and then recurred. His wife called 911 and the Paramedics wanted to take the Applicant to a hospital, but he refused. His son arrived home and he agreed to go with him.

The Applicant was given a thorough examination, had extensive blood work taken, a CT scan, an EEG and all were reported normal.

The Applicant related two other episodes. One occurred August 7, 2001 while driving to work. He was involved in a minor accident and taken to a hospital. He has no recollection of what happened, but was told his car crossed back and forth over two lanes and then side swiped another car.

The other one was six years ago when the Applicant woke up disorientated. This episode was quite prolonged and he was eventually taken to a hospital, but no other details are available.

The only neurological problem really diagnosed is sleep apnea, based on snoring, poor sleep and daytime somnolence. He had a sleep evaluation on January 9, 2002 by Physician #3. Obstructive sleep apnea was confirmed by polysomnography. This disorder was responsive to positive airway pressure and so he was started on a CPAP machine. This eliminated the apnea symptoms and he no longer experiences problems with excessive daytime sleepiness. His quality of sleep is also much better.

Physician #2 did a neurological assessment on the Applicant, January 23, 2002. He noted that the Applicant has been hypertensive for eight to ten years and takes Zestrin daily. Other than obesity he could not find any neurological problems.

The most likely diagnosis is recurrent partial seizures with one possible episode of secondary generalization, but there was no absolute evidence of it. He ordered a MRI.

On receipt of Physician #2's report the Ministry suspended the Applicant's drivers licence.

Physician #2 reassessed the Applicant on April 18, 2002 and determined there had been no more neurological episodes, his neurological examination was again negative and his MRI was normal. He noted the Applicant's sleep apnea was much improved with the CPAC

machine. He was unsure whether there was any association between the sleep apnea and his unusual spells.

The MAC Case Study on June 12, 2002, stated-

"Remain suspended, downgrade to Class G, reconsider with a detailed neuro.assessment, which confirms he has remained free of any episodes of seizures for a period of one year."

MAC agreed with Physician #2's diagnosis, but believed his sleep apnea diagnosis is independent of his seizure diagnosis.

Physician #2 examined the Applicant again on July 10, 2002 and found him perfectly stable from a neurological point of view.

MAC did another case study on August 18, 2002 and stated the following-

"Remain suspended. As previously indicated will consider for a Class G licence with a detailed neurological assessment confirming that he has remained seizure / episode free for one year".

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or

- (c) a CVOR certificate,
- on the grounds of,
- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

When the Deputy Registrar of Motor Vehicles received the letter from Physician #1 on January 4, 2002, advising her that the Applicant had an episode of confusion, twitching of fingers and memory loss for ½ hour, she had no option, but to suspend his licence under Reg.340/94 Section 14(a) and Section 47(1)(f).

The Applicant has a chronic problem that has recurred 4 times in a 6-year period. It appears to be a type of unusual seizure, but a definite diagnosis has not yet been made. The Applicant has had several neurological examinations and every neurological test available and all have been reported normal.

Since starting on the CPAP machine the Applicant's sleep apnea has been reduced, his blood pressure is normal, his energy level is better and he has no complaints at all.

Physician #2 is not sure whether or not there is an association between the sleep apnea and these unusual spells and does not want to do anything else with him.

The Tribunal's main concern is that a definite diagnosis has not been made. The Applicant has been experiencing seizures of some type that render him helpless for a significant period of

time. The MVA he was involved in, a year ago, was most likely a result of one of these episodes. The Tribunal agrees with the MAC that it is a little early to return his licence considering he had two back to back "seizures" in December, 2001. If he remains seizure free for another 4 months he should be given strong consideration, since the recommended period of suspension is 12 months, in The National Code for Motor Carriers.

DECISION:

Upon the application by the Applicant to appeal the decision dated March 10, 2002 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

Ross C. Bennett, M.D.,
Presiding Member

RELEASED: August 28, 2002

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

1201-MED-NOMC

Appeal under Section 50(1) of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 47(1) of that Act.

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ROSS C. BENNETT, M.D., Presiding Member

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles

Applicant, unrepresented

DATE OF
HEARING: August 21, 2002

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

EXHIBITS:

1. Notice of suspension of the Applicant's driver's licence dated May 23, 2001.
2. Notice of Appeal from the Applicant received at the Tribunal July 27, 2002.
3. Consultation Report from Physician #1 dated 06/05/2002.
4. Respondent's File Summary received at the Hearing.

FACTS:

The Applicant is an 82 year-old retired construction worker, who had his driver's licence suspended on May 23, 2001, after the Ministry received a Medical Condition Report from Physician #2, an intern or resident at St. Joseph's Healthcare Centre. The letter stated he had assessed the Applicant on May 3, 2001 at the Centre's "Health for Older Adult's" program.

Physician #2 had diagnosed the Applicant to have psychotic symptoms and physical symptoms that may impair his judgement and put him at risk while driving. He recommended that the Applicant have his driving status re-evaluated.

On June 4, 2001 the Ministry received a letter from Physician #3, co-medical Director of the Health for Older Adults Program. Physician #3 relates that the Applicant was seen because of a request for consultation on an urgent basis. The Applicant was apparently exhibiting increasingly agitated and volatile behaviour. She states that at the initial consultation it was clear he was suffering from paranoid delusions and in addition, some defects in frontal lobe function were noted. These were marked lack of insight, impairment of judgement, poor impulse control and from history, a history of personality change. He had some difficulty with tasks related to frontal lobe function such as word generation. There were further examples of history of significant lapses in judgement that were uncharacteristic. She went on to say it was this clinical picture associated with the fact that he had been involved in two MVAs in the past two years and his extremely volatile impulsive behaviour, which leads to concerns about driving. She states that, as physicians are required to do by law, she is notifying the Ministry of their concerns.

Physician #3 states that the Applicant's volatile agitated behaviour has improved on Olanzapine and he has been co-operative and compliant taking his medicine and attending appointments. She recommends several more weeks of treatment before being reassessed and a formal driving assessment at Chedoke Hospital.

This is very damaging evidence from Physician #3, but must be questioned. The Applicant, in a Request for Personal Information to the Driver Improvement Office, received June 28, 2001, states Physician #3 has yet to talk to him or give him any type of test related to his health. In evidence in the Appeal, his daughter, who was with him at both examinations by Physician #2, verified Physician #3 had never examined her father. If this is true, Physician #3 obtained all of her information from an intern or resident, who apparently did not have a licence to practice at the time. The Applicant said that Physician #2 told him he was writing a test the following week to become a psychologist and receive his licence.

Physician #2 also told the Applicant that he had early Parkinson's Disease. The Applicant informed Physician #2 that he had been seeing Physician #4, a neurologist for over a year and she had never mentioned Parkinson's. He said that Physician #2 had apologized to him twice after that discussion.

In a letter dated July 4, 2001, the Applicant's chiropractor provided information regarding the MVA on December 3, 2000. While driving on the New York Thruway a deer ran into the side of the Applicant's car, up on the hood and into the windshield. The Applicant maintained control of the car and came to a stop.

On June 18, 2001, Physician #3 wrote a letter to the Applicant's family physician, Physician #5, which was apparently forwarded to the Ministry. This letter reiterates what was in her letter of June 4, 2001, but also includes a lot of additional information. The Applicant has refused

follow-up at the clinic, so is being de-enrolled. She states that at the first assessment, they noted he was on a host of psychotropic medications including 3 antidepressants and 2 benzodiazepines. She states that he had stopped taking the Olanzapine and has become volatile and belligerent to their staff and had threatened to beat up Physician #2. The Applicant and his wife and daughter denied these accusations.

Physician #4 wrote to the Ministry on December 12, 2001 with details of his treatment of chronic complaints of pain affecting the neck, head and thoraco lumbar spine as a result of his MVA. She indicated the Applicant had some features of agitation and anxiety in part associated with his pain and other causes especially at losing his driver's licence. She recommends a formal driving assessment in order to properly validate his driving capabilities.

At the outset of the Appeal the Applicant introduced a Psychiatric Consultation Report (Exhibit #3), dated May 6, 2002, from Physician #1 and Physician #6. These doctors state— in terms of mental status examination the Applicant appeared well groomed and made good eye contact. He was occasionally irritated by some of the questions pertaining to the relationship between he and his wife. However he exhibited no other or inappropriate anger. His affect was full range. His thought process appeared normal. His thought content showed no evidence of delusion.

The Applicant is orientated to date, has an excellent grasp of current events and can recall good detail around these as well.

There was no evidence of frontal lobe disease during the interview and the Applicant indicates there are no problems or concerns at this time.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

The Deputy Registrar of Motor Vehicles was obligated to suspend the Applicant's driver's licence under Section 47(1) of the *Highway Traffic Act*, after receiving Physician #2's Medical Condition Report dated May 3, 2001. After the suspension the Ministry received a letter from Physician #3, which contained much more information regarding the Applicant's mental and medical status that she had apparently detected in her examination. This letter was signed by Physician #3 and there is no mention that Physician #2 recorded these findings in his examination of the Applicant. The Applicant states in two letters and in evidence that he never met Physician #3 and she certainly did not examine him. Physician #2 was an intern or resident at St. Joseph's.

The Applicant was totally in control at the Hearing and did not display any signs of agitation or volatile behaviour. The Respondent repeatedly asked him some difficult questions to test him, but he answered them without any display of emotion. He admitted he was very upset about

losing his licence, especially when a doctor whom he had never met, played such a big role.

The Applicant denied being abusive with any of the staff at St. Joseph's or anyone else. His daughter said that he was a "hotheaded" Italian and could get upset, but not violent. He admitted he was very agitated about his wife having a possible affair with a friend of his, but this matter was not discussed at any length, because it did not have anything to do with his driving abilities.

Physician #3 made mention in her two letters that the Applicant had two MVAs in the previous two years. The first accident occurred when a deer ran into the side of his car on the New York Thruway. He could hardly be blamed for that accident. He had some responsibility in the second accident, but apparently the other driver could have changed lanes or braked before he "T boned" the Applicant's car.

The Tribunal's observations with regard to the Applicant's demeanour and actions are in total agreement with those of Physician #1 in his letter of May 6, 2002 (Exhibit#3). There was no evidence of any psychiatric or neurological problems including Parkinson's Disease.

The Tribunal did not find sufficient evidence to justify continued suspension of the Applicant's driver's licence under Section 47(1), however considering the length of time the Applicant's driver's licence has been suspended and the circumstances, the Tribunal believes a formal driving examination should be arranged.

DECISION:

Upon the application by the Applicant to appeal the decision dated June 2, 2001 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that, contingent on the Applicant successfully completing a formal driving examination, but not including a medical assessment, the decision of the Registrar be set aside.

LICENCE APPEAL TRIBUNAL

Ross C. Bennett, Presiding Member

RELEASED: August 28, 2002

LEOPOLD RESURRECCION

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: MALCOLM FEALING, Presiding Member
TERRENCE LORETTE, Member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

LEOPOLD RESURRECCION, Applicant
TONY CIRONE, Interpreter

DATE OF HEARING: August 16, 2002

DECISION RELEASED: August 27, 2002 Toronto

REASONS FOR DECISION

A hearing was held on August 16 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act

to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Leopoldo Resurreccion (the "Applicant")
Motor Vehicle: 2002 Chrysler Neon, plate AMWL 969 (the "vehicle")
Date of Appeal: July 30, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on August 16, 2002 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

The hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

Date:07/30/20002

To Whom It May Concern:

Regretting my decision to drive without a license I am writing to express my concerns. I was foolishly driving without a license as I was under duress to care for my seriously ill mother.

On reflecting my situation I realize I need to rely on my brother-in-laws offer to drive me to the appointments I need to attend and maintain my mothers hospital and clinical care. I would like to retrieve my vehicle from impoundment so that my brother-in-law can use it for our transportation needs. I have a letter from our Doctor confirming the need to have a vehicle. I hope this request is sufficient, thanking you in advance.

Leopold Resurreccion
" Leopold Resurreccion"

(On prescription pad)

Dr. GORDAN TANG
M.B., B.S., (H.K.), CCFP Family Physician
GREYSTONE MEDICAL CLINIC
8 Greystone Walk Drive, Unit C1D, Scarborough, ON M1K 5J2

Patient needs a reliable car ready for emergency situation.
She has a heart condition on pacemaker now.

(initials) S.M.

The Applicant testified that his mother had recently had a pace-maker put in and that he was using the car to get her medication when he was stopped. He knew that he should not be driving.

He wanted to get his car back so that it would be available in the event of an emergency. His place of employment was only fifteen minutes away from his home, and he was able to get there quite easily by public transit. The Doctor's Office was also only fifteen minutes away.

Mr. Resurreccion further stated that he owned another automobile, which was presently being used by his nephew. There was also another vehicle on the premises. This one was owned by his father-in law, and although he would not borrow it in normal circumstances, he was certain that he would get it in an emergency. He also had the assistance of friends such as Mr. Cirone.

He would not be the person driving in any event. His sister and brother-in-law were visiting his sick mother, and his brother-in-law would drive the vehicle in an emergency.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Leopoldo V. Resurreccion;
2. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
3. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until November 5, 2002.

The Respondent pointed out that the applicant had based his appeal of Exceptional Hardship, on Ontario Regulation 632/98. Not having access to his automobile in the event of an emergency would pose an immediate threat to anyone ordinarily transported by the motor vehicle. In this case, his sick mother. However he had testified that there were alternative vehicles available.

He could have his nephew return the car he was using. He had access to his father-in law's automobile, and his friends had expressed their willingness to help. Lastly, he could do what any person in the community without access to a car would do. Call 911.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

- (4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).

- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

As to issue filed, the evidence established that the appellant had access to more than one alternative vehicle.

Ontario Regulation 632/98 Amending Reg.574 of R.R.O. 1990, Section 22(1) (a), states that "in determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in... a threat to the health or safety of any person ordinarily transported by the motor vehicle..."

In considering this appeal the Tribunal notes that Mr. Resurreccion's mother has a heart condition and that she should have immediate access to an automobile in an emergency. Although her son has more confidence in the new 2002 Neon than the car being used by his nephew, he has not demonstrated that the alternate vehicle is not dependable. The Tribunal finds that there are other automobiles available, and that an ambulance can be called if there is no car available.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Malcolm Fealing,
Presiding Member

Terrence Lorrette,
Member

RELEASED: August 27, 2002

WAYNE MORGAN

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: MALCOLM FEALING, Presiding Member
TERRENCE LORETTE, Member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

KANE SOUSA
Agent for the Applicant

DATE OF HEARING: August 16, 2002

DECISION RELEASED: August 27, 2002 Toronto

REASONS FOR DECISION

A hearing was held on August 16, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Dwayne Morgan o/a Prestegous Millenium Rentals of Toronto
(the "Applicant")
Motor Vehicle: 1988 BMW 735, plate no. ANEB 823 (the "vehicle")
Date of Appeal: July 31, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence (i.e. all reasonable efforts) to determine that the driver's licence was not suspended and the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(c) and (d) of the Act.

This matter came before this Tribunal on August 16, 2002 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties, but the Tribunal noted that the applicant had misinterpreted the law in his written submission.

He stated that, "due to exceptional financial hardship the Driver's License of the Driver was under suspension which resulted in the impoundment of the motor vehicle for 45 days. But the owner of the motor vehicle was not the driver with the suspended license.

The law states that the impoundment of the vehicle for 45 days only relates to the owner of the vehicle if his or her license is under suspension, which means the Impoundment of the vehicle for 45 days does not apply in this case."

The Tribunal referred to Section 55.1 (2) of the *Highway Traffic Act*, and read it to the Applicant.

"Driving while under suspension, Registrar notified: Where a police officer or officer appointed for carrying out the provisions of this act is satisfied that a person was driving a motor vehicle on a highway while his or her driver's license is under suspension under section 41, 42, or 43, even if it under suspension for any other reason, the officer shall,

- (a) notify the Registrar of the fact or cause the Registrar to be notified: and
- (b) detain the motor vehicle that was being driven by the person whose driver's license is under suspension until the Registrar issues an order under subsection (3)."

The Applicant was asked if it was now clear to him why the automobile had been impounded, and he replied in the affirmative.

After conferring with the Respondent it was decided that the Applicant would to be given the opportunity to proceed with the appeal.

The hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

REASONS FOR APPEAL - DUE TO EXCEPTIONAL FINANCIAL HARDSHIP. THE DRIVER'S LICENCE OF THE DRIVER WAS UNDER SUSPENSION WHICH RESULTED IN IMPOUNDMENT OF THE MOTOR VEHICLE FOR 45 DAYS. BUT THE OWNER OF THE MOTOR VEHICLE WAS NOT THE DRIVER WITH THE SUSPENDED LICENCE. THE LAW STATES THAT THE IMPOUNDMENT OF THE MOTOR VEHICLE FOR 45 ONLY RELATES TO THE OWNER OF THE VEHICLE IF HIS OR HER LICENCE IS UNDER SUSPENSION. WHICH MEANS. THE IMPOUNDMENT OF THE VEHICLE FOR 45 DAYS DOES NOT APPLY IN THIS CASE.

- KANE SOUSA

In his testimony, the applicant began by stating that he did not know that his license was under suspension when he was pulled over. He had committed a misdemeanour in Edmonton, had served time, and had paid a fee in February, 2000. On his return to Ontario, he had applied for and obtained a G2 license in April 2001.

He did not have this license with him when he was pulled over, and in fact did not know where it was.

Regarding due diligence. Dwayne Morgan the owner of the vehicle did not ask whether his license was valid before he loaned him the car.

Regarding exceptional hardship. Dwayne Morgan was the sole proprietor of Prestegious Millenium Rentals, but even though he was Dwayne's agent he had no idea how many cars Dwayne Morgan owned. He had no information whatever about either the Company's or Mr. Morgan's finances, and could not provide an explanation as to how the impoundment of the 1988 BMW would cause hardship.

He stated that his relationship with Morgan was a partnership in the music business. Apparently they supplied equipment and canned music to nightclubs. The loss of the automobile made it very difficult to move around the city to attend meetings. He was not able to say why another of Mr. Morgan's cars could not be used, or why one could not be rented.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Kane Sousa;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving While Disqualified or Prohibited under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until May 4, 2003.

The Respondent reaffirmed that the impoundment was proper. Any conversation that Mr. Sousa may have had with the Officer when the automobile was impounded was moot, because it was hearsay.

Mr. Sousa was not able to explain how Mr. Morgan had exercised due diligence. He claimed that he had discussed the subject of the appeal with his client, and that he understood the meaning of the words.

Mr. Sousa had presented no evidence of financial losses. Where was the evidence of exceptional hardship?

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(c) and (d).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. *Law.* The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using

another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

As to the first issue filed the evidence established the agent for the applicant was not able to establish due diligence.

Section 50.2 (3) (c) of the *Highway Traffic Act* states that "the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's license of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension."

Mr. Sousa testified that Mr. Morgan never questioned him about his license.

As to second issue filed, the evidence established the agent for the applicant had no knowledge of his client's finances and could therefore not even begin to address the issue of exceptional hardship.

Section 50.2 (3) (d) of the *Highway Traffic Act* states that "the order will result in exceptional hardship.

Mr. Sousa was not able to address this issue.

The Tribunal finds that Mr. Dwayne Morgan was ill served in this matter. It may have been best if he had attended the hearing himself. It was difficult to understand how he could have discussed the subject of his appeal with his agent, but it is not the Tribunal's responsibility to concern itself with such matters.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Malcolm Fealing,
Presiding Member

Terrence Lorrette,
Member

RELEASED: August 27, 2002

1233-ADLS-ADJ

IN THE MATTER of the *Highway Traffic Act*,
R.S.O. 1990, Chap. H.8 as amended, section
50.1;

AND IN THE MATTER of a motion by the
Counsel for the Applicant seeking an Order
adjourning the hearing of this appeal under section
21 of the *Statutory Powers and Procedures Act*,
R.S.O. 1990;

AND IN THE MATTER of

APPLICANT

APPLICANT
(Moving Party on Motion)

-and-

REGISTRAR OF MOTOR VEHICLES

RESPONDENT
(Responding Party on Motion)

TRIBUNAL: ANTOINE AOUAD, M.D., Presiding Member

APPEARANCES:

Counsel representing the Applicant
KIM BEINTEMA, Agent, representing the Registrar of Motor Vehicles

DATE OF
MOTION:

August 27, 2002

By teleconference

ORDER

Pursuant to the provisions of the *Highway Traffic Act*, Section 50(1), the Applicant appealed the Registrar's decision dated August 6, 2002, to suspend the driver's licence of the Applicant,

WHEREAS the appeal was set down for hearing before the Tribunal on August 28, 2002 at the Oshawa City Hall, Boardroom 4A, 50 Centre Street South, Oshawa, Ontario, and both parties

were duly notified;

AND WHEREAS the Applicant filed a motion dated August 23rd, 2002 seeking an Order adjourning the hearing of this appeal under section 21 of the *Statutory Powers Procedure Act*, R.S.O. 1990;

AND WHEREAS the Tribunal was Advised that the Parties, on consent, have agreed to adjourn the scheduled hearing;

NOW THEREFORE, upon consent of the Parties the Tribunal orders that:

1. The hearing in this matter is adjourned, *peremptory against both parties*;
2. A hearing in this matter shall be held at the Tribunal's own Chambers, 1 St. Clair Avenue West, 12th floor, Toronto, Ontario commencing at 9:30 a.m. on Thursday, September 5, 2002.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.
Presiding Member

Released: August 28, 2002

COLLECTION AGENCIES ACT
Revised Statutes of Ontario, 1990, Chapter C.14

IN THE MATTER of the REGISTRATION of
SHAUN ROOTENBERG
as a collector

AND IN THE MATTER OF the PROPOSAL of the
Registrar under the *Collection Agencies Act*
made pursuant to section 8 of the *Collection Agencies Act*

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

SHAUN ROOTENBERG

Applicant

-and-

REGISTRAR, *COLLECTION AGENCIES ACT*

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Collection Agencies Act*, R.S.O. 1990, Chapter C.14 as amended (the "Act"), Shaun Rootenberg (the "Applicant") initiated an appeal under section 8(4) of the proposal of the Registrar under the Act, dated June 27, 2002 in terms of which the Registrar proposed to revoke the registration of the Applicant as a collector;

AND WHEREAS, the Applicant has failed to pay the filing fee for this proceeding before the Tribunal, required pursuant to section 9 of the *Licence Appeal Tribunal Act*, 1999;

AND WHEREAS, the Applicant has not responded to the Tribunal's Notice of Intent to Dismiss Proceedings sent to the Applicant pursuant to section 4.6 of the *Statutory Powers Procedure Act*, R.S.O. 1990, Chapter S. 22 as amended, and Rule 2.10 of the Rules of Practice of the Licence Appeal Tribunal, whereby a proceeding before this Tribunal may be dismissed without a hearing for failure to pay the required filing fee;

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers Procedure Act*, as amended, this proceeding, initiated by the Applicant's request for a hearing before this Tribunal, is dismissed;

2. Pursuant to the authority vested in it under section 8 of the *Collection Agencies Act*, this Tribunal directs the Registrar, *Collection Agencies Act* to carry out his proposal dated June 27, 2002 to revoke the registration of Shaun Rootenberg.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek, Chair

Released: August 28, 2002

1269791 ONTARIO INC. O/A K & K AUTO SALES AND KENNETH MABEE

**APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT***

TO REVOKE REGISTRATION

TRIBUNAL: ANTOINE AOUAD, M.D., Presiding Member

APPEARANCES:

GREGORY LAFONTAINE, Counsel, representing 1269791 Ontario Inc. o/a K & K Auto Sales and Kenneth Mabee

MICHAEL ROTHE, Counsel, representing the Registrar under the *Motor Vehicle Dealers Act*

**DATES OF
HEARING:**

August 26, 2002

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") from a notice of Proposal issued by the Registrar under the Motor Vehicle Dealers Act (the "Registrar"), pursuant to section 7 of the Motor Vehicle Dealers Act (the "Act"). The Proposal dated November 5th 2001, seeks to Revoke the registration 1269791 Ontario Inc. O/A K & K Auto Sales, as a dealer and Kenneth Mabee, as a salesman.

The Proposal sets out the Registrar's reasons for seeking an order for the revocation of the registrations. The reasons are stated as follows:

The intention and objective of the Act is to protect the public interest. The requirements of the Act include that Registrants be financially responsible in the conduct of business and that Registrants carry on business in accordance with the law and with integrity and honesty. The Registrant's past conduct is inconsistent with the intention and objective of the Act, and therefore warrants disentitlement to registration under the Act. Therefore, the Registrar is

unwilling to continue to register 1269791 Ontario Inc. o/a K & K Auto Sales and Kenneth Mabee under the Motor Vehicle Dealers Act.

The particulars in the Notice of Proposal dated November 5th, 2001, are:

- 1) 1269791 Ontario Inc. o/a K & K Auto Sales is currently registered as a motor vehicle dealer under the Act. The dealer has been registered since June 3, 1999.
- 2) Kenneth Mabee (sic) has been registered as a sales person since July 21, 1997. He is an officer and director of 1269791 Ontario Inc. o/a K & K Auto Sales.
- 3) Mabee engaged in conduct which resulted in charges being laid against him for possession of stolen property, uttering forged document, falsification of books and documents and failing to maintain a garage register. The conduct related to the motor vehicle industry. (Exhibit # 1)

By Notice of Further and Other Particulars dated June 7th, 2002, the Registrar stated as follows:

- 1) Kenneth Mabee (sic) engaged in conduct which resulted in further charges being laid against him for fraud over \$5000 (X2), falsifying a federal certification (X2) and making a false statement. (Exhibit # 3)

By written Notice of Appeal Mr. Mabee informed the Tribunal in term of section 7 (2) of the Act that a hearing was requested regarding an appeal to the proposal.

THE EVIDENCE:

The evidence presented to the Tribunal by the Registrar consisted of documentary evidence as well as the oral testimony of Constable Kevin Belford and Laura Gordon.

The evidence presented by 1269791 Ontario Inc. o/a K & K Auto Sales and Kenneth Mabee consisted of his statement in the Notice of Appeal dated December 03, 2001 and the oral testimony of Kimberly Mabee and Kenneth Mabee.

A summary of the evidence follows:

WITNESSES FOR THE REGISTRAR:

Testimony of Ms Laura Gordon

Ms. Laura Gordon, testified that she is currently the Director of Compliance for the Ontario Motor Vehicle Industry Council ("OMVIC"). Ms Gordon has been employed by OMVIC since April 1997 and held the position of Director of Compliance since September 1997. As Director of Compliance, Ms. Gordon has the duty of overseeing the Complaint and Mediation Team and also the Inspection Team. Prior to 1997, Ms Gordon was an investigator for the

Ministry of Consumer and Commercial Relations and prior to that held various administrative positions within the Registrar's Office.

Ms. Laura Gordon explained that OMVIC is a non-profit corporation which has been delegated the responsibility to administer the *Motor Vehicle Dealers Act* which is a public protection statute to ensure compliance, by dealers and salespersons, with Section 5 of the Act. Section 5 requires that individuals and corporations registered under the Act meet standards of honesty, integrity, compliance with law, and financial responsibility.

The decision to revoke the licences of 1269791 Ontario Inc. o/a K & K Auto Sales and Kenneth Mabee, was based on the grounds that Kenneth Mabee, who is a Director and officer of the corporation "*...engaged in conduct which resulted in charges being laid against him for possession of stolen property, uttering forged documents, falsification of books and documents and failing to maintain a garage register.*". Ms Gordon continued by stating the Applicant's "*...conduct is industry specific...*"

Ms Gordon established the status of K & K Auto Sales and Kenneth Mabee by referring to exhibit # 4, Tabs 3 and 4. K & K Auto Sales was registered as a dealership on June 11, 1999 and Kenneth Mabee was originally registered with OMVIC as a salesperson on July 21 1997.

Ms Gordon is aware that the charges against Mr. Mabee are pending, but the Registrar has "*...really valid concerns based on the evidence ...the Tribunal heard ...based on Mr. Magee's involvement with these particular transactions that have in turn led to the charges ...concerned about the federal certification labels ...concern that the dealership is not operating according to the law of honesty and integrity, and that Mr. Mabee isn't and that puts the public at risk...*" OMVIC tries to be pro-active but also reacted to a complaint received with respect to the "Mitchell vehicle".

Based on her knowledge and experience, Ms Gordon described the sequence of events that take place when a vehicle is transferred. The Highway Traffic Act specifies that a transfer of a vehicle must be registered within six days of the date of transaction. Nonetheless, Ms Gordon is aware that it is quite common to have two registrations go through on the same day, particularly in transactions involving auction houses.

The current registered address for K & K Auto Sales is 40 Hugill Road, in Coboconk, Ontario

Mr. Lafontaine asked Ms Gordon whether Mr. Mabee has a criminal record, to which Ms. Gordon "*...No, not that I am aware of...*"

Ms Gordon agreed with Mr. Lafontaine's statement that OMVIC is proceeding against the Applicant based on charges not yet proven in a Court of Law. Ms Gordon explained that in the event no conviction is registered against the Applicant, he is then free to re-apply for registration. She testified that it is not customary to wait until a conviction is registered, when the conduct is "*serious*".

Testimony of Constable Kevin Belford

Constable Kevin Belford (Belford) testified that he is presently a Detective Constable with the OPP and has been for approximately 18 years. He was assigned to the Provincial Auto Theft Unit in October 1999.

Belford described to the Tribunal how a vehicle in the name on Mark Mitchell was stopped and found to be on the list of “*salvage*” or irreparable vehicles. This vehicle was a 1998 Dodge Ram. Further investigation revealed that the same vehicle had an engine change and a colour change.

Mr. Sorrel was interviewed by Belford and informed him that a Dodge Ram Dodge Ram had been purchased by Mr. Mabee for a \$1,000.00, and that Mr. Mabee was quite upset when he found out that the vehicle record showed the vehicle transferred to him instead of directly to Mark Mitchell. Mr. Mabee did not want his name to appear on the documents.

Belford examined the 1998 Dodge Ram owned by Mark Mitchell. Belford found that the Dodge Ram driven by Mr. Mitchell was not the “burnt out” vehicle, but a vehicle stolen in Barrie in August 2000. The vehicle was determined to be have been stolen as the “*secondary numbers*” revealed the true identity of the vehicle.

Mr. Mitchell told the police that the vehicle had been sold to him by Mr. Mabee. No records of a transaction for the Dodge Ram were found among K & K Auto Sales company records.

Mr. Lawrence Finley indicated that he had bought a vehicle from Mr. Ken Mabee, yet, during the search executed at Mr. Mabee’s premises, no record of the vehicle owned by Mr. Finley was found.

Mr. Finley’s vehicle had a loose label on the door suggesting that the vehicle had been rebuilt by GMC in 1999. Belford contacted GMC, and was told that GM does not rebuild vehicles. (Exhibit # 5)

Belford checked into the VIN number appearing on Mr. Finley’s vehicle and found the vehicle had not been rebuilt at all. Further, the secondary VIN number traced the vehicle back to Minnesota. Records in Minnesota, indicated that the person owning the vehicle had disappeared and so had the vehicle.

A search with the Ministry of Transportation records showed the history of the vehicle as being owned by K & K Auto, transferred to Calvin Mabee Auctions and then transferred to Lawrence Finley.

A vehicle, owned by Mr. Luke Simmes, a 1996 Chevrolet Pick up Truck was also found to have a federal certification label purporting it had been rebuilt by General Motors Canada.

Belford referred to one of the documents seized as a company ledger. Counsel for the Applicant showed Belford a photocopy of one the documents seized from the K & K Auto Sales, and suggested that the cover of the item being referred to as a company ledger was in fact a register to facilitate GST compliance. Belford acknowledged the copy of the register he was looking at, was in fact a copy of the document referred to as the *"company ledger"*.

"Mr. Lafontaine recounted and Belford concurred that in early August of the year 2000 a grey 1998 Dodge Pick Up Truck was stolen from *"...somebody named Bell Chambers..."* in Barrie. Given the information received from Terri Sorrel that the Applicant had purchased a *"...burnt vehicle ..."* from him, Belford deduced that the Applicant transposed the *"...burnt vehicle..."* VIN to the stolen vehicle and then sold the vehicle to Mr. Mitchell."

Continuing his cross-examination with respect to the *"Mitchell vehicle"*. Mr. Lafontaine asked Belford: *"Has anybody ever seen this truck on Ken Mabee's yard?"* Belford replied: *"There was another, where Mr. Mitchell works, employee there, saw Mr. Mabee bring that truck to Mark Mitchell."* In reply to Mr. Lafontaine's comment, as to whether the preceding information was obtained from Mark Mitchell, Belford declared: *"No, sir ... I spoke to Steve"*. Belford could neither recall the last name for "Steve", nor find the reference in his notes. Belford explained: *"I believe I deleted it, black marked it out. He was afraid ... he did not want to be identified."*

Mr. Lafontaine repeated the question to Belford: *"Anybody ever seen this stolen truck on Mr. Mabee's yard?"* Belford replied: *"No, sir. Not that I am aware of."*

Mr. Mitchell purchased the truck sight unseen for a value of \$20,000.00, after phoning around to try to sell it for Mr. Mabee.

Another vehicle was involved referred to as the *"Simmes vehicle"* With respect to this vehicle, there is one charge alleging that a counterfeit federal certification label was placed on the vehicle by Mr. Mabee.

Belford confirmed that it is the practice of the Ministry of Transportation to issue a VIN number that starts with the letters RBT, to indicate that the vehicle has been rebuilt.

It is obvious that the sticker inside the door of Luke Simmes' truck is very similar to the original but the GM logo has been scanned. The new sticker gives all the necessary statistics of the vehicle but includes the words: *"Manufactured by General Motors Corporation"*. Belford is quite adamant, that in his opinion, this statement implies that General Motors did the rebuilding of the vehicle.

The Finley vehicle, according to Belford was not rebuilt, even though that it has an RBT VIN. Belford speculated that Ministry of Transportation personnel sometimes issue RBT VIN numbers without the proper documentation.

With respect to the absence of a record for the transfer of the Finley vehicle, Belford insisted

that Mr. Lafontaine was "...getting mixed up..." with respect to the GST ledger vs. the company ledger. Belford pointed out that: "...there is one book that says GST, another one that says K & K Auto ...the GST book says it 's a Moving Company and K & K Auto Sales, the second book ...has a business card inside that was taped to it, says and K & K Auto Sales..."

WITNESSES FOR THE APPLICANT:

Testimony of Kenneth Robert Blain Mabee

Mr. Mabee currently lives and operates his business from 40 Hugill, a property that he purchased some time ago.

Ms Mabee was the bookkeeper for the business, but it is no longer viable for her to do so, as she is also the Manager for IGA.

Mr. Mabee testified that he tries to deal only with reputable businesses and for that reason refrains from "*buying off the street*". All transactions are paid by cheque and a record of all transactions is kept.

The first time that Mr. Mabee heard about the 1998 Dodge Ram was during a PST audit of K & K Auto Sales. Mr. Mabee thought a mistake had been made and pursued the information provided by the PST auditor. Mr. Mabee was very upset when he found out that the 1998 Dodge Ram had been transferred from PS Auto to K & K Auto to Mark Mitchell. Mr. Mabee contacted PS Auto but was not able to obtain a satisfactory reply from the owners of PS Auto. Mr. Mabee testified that he never paid PS Auto cash for any purchase and that the signature on the Bill of Sale is a forgery.

Mr. Mabee testified that he keeps a file on "...every vehicle ..." bought and sold. There was a file for the Simmes vehicle. There was a file regarding the Finley vehicle, but no record of the sale to Finley as that sale was affected through Calvin Mabee Auction, after the Applicant gave the vehicle to his brother. There is no file for the Mitchell vehicle, because the Applicant never owned the vehicle.

The Finley vehicle was bought from the Applicant's neighbour, with the understanding that the vehicle had been branded "US salvage" due to extensive water damage. The vehicle required considerable repairs before it could be put on the road. The Applicant's brother assisted with the repairs.

Mr. Mabee explained that the stickers on the door and in the glove compartment verify the specs of the vehicle, and tell a mechanic how to service the vehicle. Because the door of the Finley vehicle had been replaced the Applicant replaced the federal sticker with a computer made stickers that provided the same information. The RBT VIN showed 2000, because the Ministry of Transportation issued the label in the year 2000.

Mr. Mabee did meet Mr. Finley and inform him that the vehicle had been rebuilt.

The Simmes vehicle was purchased from an auto auction house in London, and was branded "US salvage". When the truck was sold Mr. Mabee informed the purchaser, Mr. Simmes, that the vehicle had been involved in an accident. The Simmes vehicle also required a door replacement; therefore the Applicant placed one of his stickers on the door.

Replacement of door stickers was not done with the intent to defraud but rather to provide necessary information about the vehicle.

Mr. Mabee confirmed that he had previously purchased three vehicles from PS Auto. Each vehicle was paid by cheque and there is a signed Bill of Sale on file.

Mr. Mabee reiterated his previous testimony regarding the purchase and sale of the Simmes and Finley vehicles, the repairs effected, and the placement of the new labels on the doors.

Testimony of Kimberly Mabee

Ms Mabee's asserted that it was her practice and the business practice to always go "...above and beyond..." in complying with the requirements.

Ms Mabee recalled obtaining the records for the officers, but remembers that the boxes were not taken, only certain records were seized. Ms Mabee did not try to hide files from the officers.

Ms Mabee reiterated her role in the family business was strictly as bookkeeper; she is not involved in the sale of the vehicles.

Two separate sales records were kept, one for GST and the other records of transactions. The Finley vehicle does not appear either register.

Ms Mabee concluded her cross-examination by confirming that most transactions are paid by cheque, and she gave the officers all the documentation available for the year 2000.

Ms Mabee did not feel there was an obligation to include the Finley vehicle in the register because the vehicle was purchased before K & K Auto Sales existed, and the sale did not require GST.

Submissions by Mr. Michael Rothe

Mr. Rothe, for the Registrar, introduced pertinent case law: Brenner v Ontario (Registrar of Motor Vehicle Dealers and Salesman) 1983 O. J. No. 1017 Ontario Supreme Court-High Court of Justice Divisional Court; and Antonio de Biunno Appeal from a proposal of the Registrar under the Motor Vehicles Dealers Act to Refuse Registration, heard on June 27 2000, by Vice-Chairs David J. Hunt and I. Andre.

Mr. Rothe posits that a Registrant under the Act must meet the criteria set by Section 5 of the Act requiring honesty and integrity of conduct. It is the Applicant's conduct, which led to charges, is of concern.

With respect to the "Mitchell vehicle" Mr. Rothe argues that the historical records at the Ministry of Transportation indicate that the vehicle was transferred from the PS Auto to K & K Auto, and then to Mr. Mitchell. It is known that the vehicle was stolen and that it had been re-VINed. The contention is, whether Mr. Mabee sold the vehicle to Mr. Mitchell. The Applicant says he did not, however, P S Auto, the consumer, Mr. Mitchell, say he did. There is here say evidence from a witness named "Steve" who stated that he saw Mr. Mabee deliver the truck to Mr. Mitchell. .

With respect to the "Finley vehicle", records show the vehicle in the Applicant's name and ultimately ending up in the consumer's. There are inconsistencies with the VIN as attested to by Constable Belford. A self-made label had replaced the original federal certification label. Mr. Mabee admits to replacing it, but claims it was done to help the consumer, not deceive.

Finally the "Simmes vehicle", again the vehicle has been re-VINed, and relabeled. There is evidence from Mr. Simmes that he was told that the vehicle was rebuilt by General Motors. This is not the case.

Mr. Rothe emphasized that that this Motor Vehicle Dealers Act is a statute for the protection of the public. Mr. Rothe contends there are "...*two diametrically opposing views* ..." it is up to the Tribunal to determine which is the more credible. There are four individuals that point to Mr. Mabee. The evidence of these individuals, albeit, hearsay, is credible. Whether the charges are still pending or not is not the issue, the issue is the conduct behind the charges. The Tribunal must decide "...*on the balance of probabilities ...if the Registrar meets the test ...is the Registrar being extra tough or is the Registrar wrong...*" Mr. Rothe suggests that the Registrar is not wrong and that the Registrar is being reasonable.

In conclusion, Mr. Rothe suggests that if the Tribunal does not agree with the Registrar's decision to revoke the licence of the Applicant it should at least consider a conditional order, wherein upon conviction the Applicant's licence will be immediately revoked.

Submissions by the Applicant

Mr. Lafontaine claims that the Registrar based the decision to revoke on one side of the story founded in hearsay evidence, The Tribunal now has heard other evidence.

In regards to credibility, Belford presented two different stories regarding the Finley vehicle. Sorrel and Mitchell have everything to gain by implicating the Applicant. "Steve" is not even identified properly. The evidence of these people cannot be considered credible, and it is unreliable and contradictory.

With respect to the door stickers, if there had been any "...*sinister*..." intent, Mr. Lafontaine questions why would Mr. Mabee use any labels at all. There was no intent to deceive rather Mr. Mabee was simply trying to assist people.

FACTS FOUND PROVEN:

The following are the facts found by the Tribunal to have been proven.

1. Kenneth Robert Blain Mabee was first registered as a salesperson under the Motor Vehicles Dealers Act, on July 21, 1997.
2. 1269791 Ontario Inc. o/a K & K Auto Sales, 40 Hugill Road, Coboconk, Ontario, was registered on June 11 1999,
3. Kenneth Robert Blain Mabee became a registered salesman for 1269791 Ontario Inc. o/a K & K Auto Sales on June 11 1999.
4. The Applicant has been charged with a number of criminal charges that are still before the Court.
5. To date the Applicant has no Criminal Record

THE LAW:

Section 5. (1) of the *Motor Vehicle Dealers Act* states:

An applicant is entitled to registration or renewal of registration by the Registrar except where,

- (a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
- (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law, and with integrity and honesty; or

APPLICATION OF LAW TO FACTS:

The issue for consideration by this Tribunal is, whether the Applicant's past conduct affords reasonable risk to revoke his licence as per Section 5 b of the Act.

The Applicant has been charged with a series of offences that have not been heard. A priori, it would appear that the Registrar is attempting to exact punishment before the Applicant has had his day in court. Nonetheless, the Respondent's Counsel expounds that it is not the

charges against the Applicant that are at issue but rather the conduct that led to the charges. Mr. Lafontaine put forward that the Applicant's conduct cannot be separated from the charges, if the charges are unfounded, the conduct never happened. The Tribunal concurs with Mr. Lafontaine's contention.

The Tribunal considered whether there was sufficient evidence to allow the Tribunal to extricate the conduct of the Applicant not only from the charges but also from his individual right to be presumed innocent. The evidence of the Registrar is weak, incomplete and fragmented. The Applicant was able to offer a credible, satisfactorily acceptable response to the allegations against him. To date the Applicant has no criminal record.

The Registrar proposed an alternative to the immediate revocation of the Applicant's licence that appeared agreeable to the Applicant and is acceptable to this Tribunal. Thus, this Tribunal finds the Registrar was premature in revoking the Applicant's licence, prior to the charges against the Applicant being dealt with by a Judicial Court. This Tribunal further orders that in the event of any conviction registered against the Applicant arising out any of the charges currently against him, both the licence of the dealership, and the Applicant's salesman's licence shall be revoked forthwith, without further notice or recourse for appeal.

DECISION:

Therefore by virtue of the authority vested in it under section 7(4) of the Motor Vehicle Dealers Act, the Licence Appeal Tribunal directs the Registrar to not to carry out his proposal to revoke the registrations of 1269791 Ontario Inc. o/a K & K Auto Sales, and of Kenneth Robert Blain Mabee until the completion of all criminal proceedings with respect to the current charges now laid against the Applicant.

LICENCE APPEAL TRIBUNAL

ANTOINE AOUAD, M.D.
Presiding Member

Released: September 18, 2002

1030017 ONTARIO INC. o/a BANK STREET METRO SALES
AND PETER KOSCH

IN THE MATTER OF the *Motor Vehicle Dealers Act*, R.S.O. 1990,
C. M.42 and Regulations, as amended;

AND IN THE MATTER OF the Registration of 1030017 Ontario Inc.
o/a Bank Street Metro Sales;

AND IN THE MATTER OF the Registration of Peter Kosch;

AND IN THE MATTER OF an Application by. 1030017 Ontario Inc.
o/a Bank Street Metro Sales and Peter Kosch dated January 21,
2002, for a hearing before the Licence Appeal Tribunal pursuant to
Section 7 of the *Motor Vehicle Dealers Act* appealing the Notice of
Proposal to Revoke Registration of the Deputy Registrar of Motor
Vehicles dated January 8, 2002.

TRIBUNAL: JOHN ORT, Member

APPEARANCES: G. TODD BARNEY, Counsel, representing the Applicants 1030017
Ontario Inc. o/a Bank Street Metro Sales and Peter Kosch

A. MICHAEL ROTHE, Counsel, representing the Registrar, *Motor
Vehicle Dealers Act*

DATE OF
HEARING: August 27, 2002

Ottawa

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") by 1030017 Ontario Inc. o/a Bank Street Metro Sales and Peter Kosch (the "Applicants") respecting a Notice of Proposal to Revoke Registration of the Deputy Registrar of Motor Vehicles (the "Respondent" and the "Registrar") dated January 8, 2002.

EXHIBITS:

Exhibit #1 - Notice of Proposal to Revoke Registration dated January 8, 2002, issued by the Deputy Registrar, *Motor Vehicle Dealers Act*.

Exhibit #2 - Notice of Appeal, received at the Tribunal January 22, 2002, filed by the Applicants.

Exhibit #3 - Respondent's Book of Disclosure, received at the Tribunal May 23, 2002.

PRELIMINARY MATTER:

At the start of the hearing on August 27, 2002, all parties advised the Tribunal that they had settled all of the issues as set out in the document signed by all parties, filed, reviewed by the Tribunal, and attached as Schedule "A".

ORDER:

Accordingly, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and settled as set out in Schedule "A".

LICENCE APPEAL TRIBUNAL

John Ort
Presiding Member

Released: September 4, 2002

JAMES A. AND SYLVIA E. NORMAN

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSE OF THE ONTARIO NEW
HOME WARRANTIES PLAN ACT DISALLOWING A CLAIM BY
THE APPLICANTS

TRIBUNAL: TERENCE A. WARDROP Q.C., VICE CHAIR

APPEARANCES: JAMES A. NORMAN, on behalf of himself and SYLVIA E. NORMAN
KAREN SPECTOR, Counsel, for the Ontario New Home Warranty Program
AARON SALEM, for John Boddy Developments Ltd.

DATES OF
HEARING: August 7, 2002 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an Appeal by the Applicants, James A. and Sylvia E. Norman (the "Applicants") pursuant to their Request for a Hearing dated April 15, 2002, to the Licence Appeal Tribunal (the "Tribunal"), from a decision of the Respondent, Ontario New Home Warranty Program (the "Program"). The Applicants' claim was denied by the Program in its Decision Letter dated April 2, 2002, (the "Program's Decision"). The Applicants are appealing the Program's Decision pursuant to section 16 of the Ontario New Home Warranties Plan Act R.S.O. 1990, Ch. 0.31 (the "Act"). The Applicants base their claim on the provisions of section 13 and section 14(1)(b) of the Act.

John Boddy Developments Ltd. (the "Builder") was joined in this Appeal as the Added Party by the Order of the Chairman of the Tribunal and the appropriate notice of application and notice of the Order were served upon the Parties.

ISSUES:

The Applicants have complained to the Program that the Builder is in breach of several of its warranties to construct the new home which it contracted to build for the Applicants in a workmanlike manner and free from defects in material, as part of the

Agreement of Purchase and Sale entered into between the Applicants and the Builder and accepted by the Builder on February 16, 1999. The new home is located on Lot 9, of Plan 40M - 1766 in the Town of Ajax, Province of Ontario, and is municipally known as 157 Elizabeth Street, Ajax (the "residential dwelling"). Completion of the residential dwelling and closing of the transaction of purchase and sale was achieved on August 11, 1999, (the "Date of Possession").

On October 15, 2001, the Applicants requested conciliation services from the Program respecting two remaining items of defective work and materials related to ceramic tile on the main floor of the residential dwelling, and in response the Program provided such conciliation services between the Applicants and the Builder on February 5, 2002. The Program thence issued the Conciliation Inspection Report dated February 20, 2002 (the "Conciliation Report") and subsequently issued the Program's Decision respecting the said two remaining items in almost identical language as follows:

" The observed condition does not represent a defect in either material or workmanship. It is minor in nature and not readily visible. Your claim is denied."

EVIDENCE:

The evidence for the Applicants was limited to the Applicants themselves as no expert testimony was submitted on their behalf and no other witnesses were called by the Applicants.

The Respondent called two witnesses: Wendy Skyba, a Warranty Representative of the Program who testified as to the conciliation services respecting the residential dwelling carried out by her; and Dennis Edissi, an expert with respect to the installation of ceramic tiles who had inspected the residential dwelling on July 18, 2002 in the presence of the Applicants.

The evidence given by the Applicants in-chief examination was clear on each of the two items, but tended to be obsessive when dealing with their expectations during cross-examination by the Program's Counsel. Particularly in the case of the evidence given by James Norman, it became confrontational and even evasive to the extent of his responses being given in the manner he wished to rather than answering the question put to him by Counsel. Mr. Norman also provided photographs taken by him to illustrate the defective materials and workmanship alleged by the Applicants. The evidence given by Wendy Skyba was straightforward and, in the few cases of conflicting evidence, is preferred by the Tribunal. The evidence given by Dennis Edissi was likewise straightforward and included a letter written by Terrazzo, Tile and Marble Association of Canada over his signature as President, which was conclusive in dealing with the ceramic tile workmanship and material at the residential dwelling.

It is to be noted that included in the documentation provided by the Applicants is a letter dated "4/13/2002" written by a Mr. Brandon Hunt on behalf of Pickering Tile Center Ltd. which tends to support the evidence of the Applicants on the question of the ceramic tile

workmanship and materials "at the floor in question, located in they're (sic) home at 157 Elizabeth Dr. in Ajax", but which is otherwise silent on the qualifications of the writer except "my long experience in this industry". Mr. Hunt was not made available at the hearing to support the views stated in the letter nor was he, of course, subjected to cross-examination by Counsel for the Respondent and the agent of the Added Party. In light of the evidence given by Mr. Edissi, it is not possible for this Tribunal to give any weight to the statements contained within the said letter.

ISSUES OF LAW:

The Applicants are appealing the Program's Decision to the Tribunal under Section 16(2) of the Act and this hearing and this decision of the Tribunal is issued pursuant to Section 16(3) of the Act:

- 16(2) A notice under subsection (1) shall state that the person or owner served is entitled to a hearing by the Tribunal if the person or owner mails or delivers, within fifteen days after service of the notice under subsection (1), notice in writing requiring a hearing to the Corporation and the Tribunal.
- (3) Where a person or owner gives notice in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and may by order direct the Corporation to take such action as the tribunal considers the Corporation ought to take in accordance with this Act and the regulations, and for such purpose the Tribunal may substitute its opinion for that of the Corporation."

Section 13(1) of the Act specifies certain warranties:

- 13(1) Every vendor of a home warrants to the owner,
 - (a) that the home,
 - (i) is constructed in a workmanlike manner and is free from defects in material,
 - (ii) is fit for habitation, and
 - (iii) is constructed in accordance with the Ontario Building Code;
 - (b) that the home is free of major structural defects as defined by the regulations; and
 - (c) such other warranties as are prescribed by the regulations."

Section 13(6) of the Act not only provides that all such specified statutory warranties and specified regulatory warranties apply despite any agreement or waiver to the contrary, but also recognizes that the owner may have other rights and other agreed warranties in addition to the warranties specified in Section 13(1) of the Act:

- 13. (6) The warranties set out in subsection (1) apply despite any agreement or waiver to the contrary and are in addition to any other rights the owner may have and to any other warranty agreed upon."

Under Section 14(1)(b), where an owner has a cause of action against a vendor for damages resulting from a breach of warranty, such an owner is entitled to be paid out of the guarantee fund the amount of such damage. The right to make a claim is set out in Section 14(1) in the Act.

14. (1) Where,
 - (a)... ;
 - (b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty;
 - (c) ... ;
 - the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by regulations."

A warranty is a defined term under the Act. Section 1 provides:

"1. In this Act, "warranty" means a warranty set out on section 13."

The Applicants, as stated above, are owners as defined by the Act and the Tribunal finds them so to be as a fact. As such, they are entitled to compensation or remedies from the assets of the guarantee fund for any and all breaches of warranties by virtue of Section 14(1)(b) thereof, subject only to the limitation of amount as set out in the regulations thereto.

PROVEN FACTS:

As hereinbefore stated, all witnesses testified respecting the two items claimed by the Applicants and there appears to be wide differences of opinion.

The Tribunal finds, pursuant to the evidence given in these proceedings, the following as proven facts:

- (1) the Agreement of Purchase and Sale was reached on February 16, 1999;
- (2) the pre-delivery inspection report was made on August 10, 1999, and the Date of Possession of the residential dwelling was August 11th, 1999;
- (3) In their request for conciliation dated October 15, 2001, the Applicants listed two items of complaint;
- (4) the Program issued its Conciliation Report on February 20, 2002;
- (5) the Program's Decision was issued by the Program on April 2, 2002;
- (6) the request by the Applicants for a hearing before the Tribunal was made on April 15, 2002.

DECISION AND ORDER:

As explained to and acknowledged by the Applicants at the commencement of the hearing, the onus of proof is upon them to show unacceptable workmanship or materials as the basis for a breach of warranty by the Builder. Without further evidence, expert or otherwise, they have failed to establish any claim against the Builder in the two items noted in the Program's Decision. Based upon the evidence given at the hearing, this Tribunal is in accord with the Observation/Comment and Reason expressed by the Program in the Conciliation Report and in the Program's Decision. The Applicants' appeal is therefore dismissed.

LICENCE APPEAL TRIBUNAL

Terence A. Wardrop, Vice Chair

Released: September 9, 2002.

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice or Divisional Court is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

MARIAN AND IRENA KRZYK

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JOHN ORT, Member

APPEARANCES: MARIAN AND IRENA KRZYK, Applicants, representing
themselves,
MARCUS KNAPP, Counsel, representing the Ontario New Home
Warranty Program,
JOHN VANBROEKHOVEN, Agent, representing the Added Party,
JVB Construction Ltd.

DATES OF
HEARING: August 12 and 13, 2002 London

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") by Marian Krzyk and Irena Krzyk (the "Applicants") under section 16(3) of the *Ontario New Home Warranties Plan Act* (the "Act") respecting a decision by the Ontario New Home Warranty Program (the "Respondent" and the "Program") dated April 4, 2002, (the "Decision"). The Decision denied the Applicants' claim under section 14 of the Act for damages resulting from the vendor's failure to substantially perform the construction contract. The reason given by the Decision was that the Applicants failed to prove that the money that they paid to the builder exceeded the value of work and materials provided by the builder.

EXHIBITS:

Exhibit #1 - Decision letter from the Program dated April 4, 2002, denying the Applicants' claim;

Exhibit #2 - Notice of Appeal form received at the Tribunal April 25, 2002, filed by the Applicants;

Exhibit #3 - Pre-hearing Order released July 8, 2002, issued by the Tribunal;

Exhibit #4 - Respondent's book of documents;

Exhibit #5 - Letter dated October 12, 2002, from Bruce Curran to Robert Chamberlain;

Exhibit #6 - Letter dated November 3, 2000, from Bruce Curran to Mr. & Mrs. Krzyk;

Exhibit #7 - Receipt from The Home Depot dated May 27, 2001, for \$591.04;

Exhibit #8 - The Home Depot Merchandise and Service Summary for Marian and Irene Krzyk dated April 11, 2002; and

Exhibit #9 - Financial Loss Calculation, filed by the Respondent.

FACTS:

The Applicants' witnesses were Marian Krzyk and Irena Krzyk. their evidence is as follows:

The Applicants testified that they agreed to purchase a house to be built by the Added Party. The purchase price was to be \$133,000.00 for the house plus \$52,000.00 for the lot, totaling \$185,000.00.

The Added Party failed to complete the house. The Applicants notified the Program by letter dated March 14, 2000, set out at tab 3 of exhibit 4. The letter was stamped "Warranty Program, March 16 200, SWRO" by the Program upon receipt. On August 15, 2000, the Applicants purchased the partially-completed house in accordance with the Statement of Adjustments set out at tab 5 of exhibit 4. The deposit was \$11,000.00 and the balance paid on closing was \$103,344.42. Later the Applicants paid an additional \$6,500.00 to discharge a construction lien.

The Applicants did not obtain any written estimates for the cost of completion of the house. They proceeded to complete the house themselves.

The Applicants submitted evidence in exhibits 7, 8, and tab 22 of exhibit 4 of amounts paid to complete the house. Further, the Applicants testified that they paid additional amounts in cash without obtaining receipts.

During closing arguments, Counsel for the Program submitted a calculation by the Program of \$62,058.72 as the amount paid by the Applicants to complete the house based on the evidence presented at the hearing, as shown in exhibit 9.

ISSUE:

Should the Tribunal set aside, confirm, or modify the decision of the Program to disallow the Applicants' claim for compensation under section 14 of the *Ontario New Home Warranties Plan Act*?

LAW:

Section 14 (1) of the *Ontario New Home Warranties Plan Act* then read as follows:

Where,

(a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;...

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

Section 16(3) of the act states the following:

Where a person or owner gives notice in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and may by order direct the Corporation to take such action as the Tribunal considers the Corporation ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Corporation.

APPLICATION OF LAW TO FACTS:

The Tribunal reviewed the calculation in exhibit 9 and agrees that the amount paid by the Applicants to complete the house is \$62,058.72. Unsubstantiated testimony of the Applicants of additional amounts paid in cash is not accepted by the Tribunal.

The total paid by the Applicants is thus \$182,903.14, being the sum of \$11,000.00, the deposit, \$103,344.42, the balance due on house purchase closing, \$6,5000 paid to discharge construction lien, and \$62,058.72 paid to complete the house. Since the total paid by the Applicants is less than \$185,000.00, the contractual purchase price of the house and land, the Tribunal finds that the Applicants have suffered no financial loss from the vendor's failure to perform the contract. The Applicants' claim under section 14 (1) (a) of the Act fails.

DECISION:

Accordingly, by virtue of the authority vested in it under section 16(3) of the *Ontario New Home Warranties Plan Act*, the Tribunal directs the Ontario New Home Warranty Program to disallow the Applicants' claim.

LICENCE APPEAL TRIBUNAL

John Ort, Member

RELEASED: September 10, 2002

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice or Divisional Court is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

ROBERT JANISSE

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *REAL ESTATE AND BUSINESS BROKERS*
ACT TO REFUSE REGISTRATION

TRIBUNAL: MICHAEL H. TURK, Vice-Chair

APPEARANCES:

ROBERT JANISSE
KEVIN G. FANICK, Counsel, representing Robert Janisse
TIM SNELL, Counsel, representing the Registrar, *Real Estate
and Business Brokers Act*
BRIAN SCHLOTZHAUER, Assistant Registrar, Registrar
(Acting) Real Estate and Business Brokers Act

DATE OF
HEARING: SEPTEMBER 4, 2002 Windsor

ORDER

FOLLOWING attendances on September 4, 2002 at a hearing before this Tribunal of Robert Janisse, Applicant, Counsel, appearing on behalf of Robert Janisse, Kevin G. Fanick, Tim Snell, Counsel appearing on behalf of the Registrar, *Real Estate and Business Brokers Act* (the "Registrar" and the "Act" respectively) and Brian Schlotzhauer, Assistant Registrar, Registrar (Acting),

WHEREAS the hearing commenced as scheduled on September 4, 2002,

AND WHEREAS during the hearing the parties agreed to settle this hearing on terms and conditions. The terms and conditions were attached to Minutes of Settlement filed with the Tribunal and marked collectively as Exhibit No. 8,

NOW THEREFORE the Tribunal makes the following Order in accordance with the Minutes of Settlement filed,

1. Pursuant to subsection 6(2) of the Real Estate and Business Brokers Act (hereafter the "Act") Robert Janisse undertakes to abide by the following terms and conditions to his registration as a real estate broker:

- (a) Robert Janisse shall not be the manager of or have controlling interest in a real estate broker for six months from the date he becomes registered under the Act.
- (b) Robert Janisse shall not be a signatory of a real estate trust account as defined in Section 20 of the Act for a period of six months from the date he becomes registered under the Act.
- (c) Robert Janisse shall not operate as a sole proprietor real estate broker for six months from the date he becomes registered under the act.
2. The terms "manager" and "controlling interest" as set out above, includes having effective control over the general business affairs of a real estate broker regardless of formal position in, or the share structure of, that real estate broker.
3. The Registrar may take further administrative action, including a Proposal to Revoke Robert Janisse's registration, arising from any matters that have occurred or may occur relating to Robert Janisse's honesty and integrity, compliance with law or his financial position.

LICENCE APPEAL TRIBUNAL

Michael H. Turk, Vice-Chair,

Presiding

RELEASED: September 26 , 2002

TAGHI VAHID SHAHIDI o/a GTA AUTO

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE MOTOR VEHICLE DEALERS ACT

TO REVOKE REGISTRATION

TRIBUNAL: DAVID J. HUNT, Vice Chair, Presiding
NIVES MONTANO, Member

APPEARANCES:

AVIVA HARARI, Counsel representing the Registrar under
the *Motor Vehicle Dealers Act*

ANTHONY BAK, Counsel representing the Applicant.

DATE OF HEARING: August 23, 2002 Toronto

REASONS FOR DECISION AND ORDER

This is a hearing before the Licence Appeal Tribunal (the "Tribunal") arising out of a Notice of Proposal issued by the Registrar under the *Motor Vehicle Dealers Act* ("the Registrar", and "the Act" respectively). The Notice of Proposal dated May 7, 2002 proposed to revoke the registration of Taghi Vahid Shahidi ("Mr. Shahidi") o/a GTA Auto ("GTA") under the Act. For the purposes of this decision, the Tribunal would like to point out that Taghi Vahid Shahidi was also referred to by his clientele as "Tony" Shahidi.

REASONS

The reasons for this proposal are:

The intention and objective of the Act is to protect the public interest. The requirements of the Act include that Registrants be financially responsible in the conduct of business and that Registrants carry on business in accordance with the law and with integrity and honesty. The Registrant's past conduct is inconsistent with the intention and objective of the Act, and therefore warrants disentanglement to registration under the Act. Therefore, the Registrar is unwilling to continue to register Vahid Shahidi Taghi o/a GTA Auto under the Motor Vehicle Dealers Act.

PARTICULARS

1. Taghi Vahid Shahidi o/a GTA Auto is currently registered as a motor vehicle dealer. The dealer is currently registered on terms and conditions imposed by the Licence Appeal Tribunal.
2. The terms and conditions were imposed subsequent to a hearing before the Tribunal. The dealer was represented by counsel at the hearing. Attached hereto as schedule A is a copy of the Tribunal's decision released July 24, 2001. The terms and conditions of registration are set out at page 7 of the decision.
3. The grounds for the proposal included non disclosure of material fact to consumers and misrepresentation of true distance traveled.
4. The dealer has breached the terms and conditions of registration.
5. The entries journal kept by the dealer differed from the garage register that the dealer is required to maintain.
6. The dealer represented vehicles as being one owner vehicles when that was not accurate.
7. On or about July 12, 2001 the dealer purchased a 1998 Nissan Sentra 3n1ab41d6wl060581 with the disclosure of accident and repaired and structural damage. The dealer subsequently sold the vehicle on or about July 14, 2001 without full disclosure. The dealer misrepresented to the consumer the extent of the damage on the vehicle. In the garage register the dealer indicated that the vehicle was "OK".
8. On or about July 18, 2001 the dealer purchased a 1995 Golf, 3vwff01h3sm076029 with disclosure that the odometer was defective. The dealer subsequently sold the vehicle to a consumer on or about August 15, 2001 without disclosing that the odometer was defective.
9. On or about July 19, 2001 the dealer purchased a 1997 Honda Civic 2hgej32vh913791 with disclosure that the vehicle was accidented and repaired and had structural damage. The dealer subsequently sold the vehicle to a consumer on or about August 16, 2001, misrepresenting the extent of the damage.
10. On October 3, 2001, a representative of the registrar attended at the dealership. It was noted by the registrar's representative that a 1991 Nissan Sentra, 1n4eb31s9mc791608, was advertised as having had one owner. A review of the Ministry of Transportation records revealed that the vehicle had had more than 1 owner.
11. On October 3, 2001, a representative of the registrar attended at the dealership. It was noted by the registrar's representative that a 1998 Ford Windstar, 2fza54u1wbc79545, was advertised as having had one owner. A review of the Ministry of Transportation records revealed that the vehicle had had more than 1 owner.
12. The dealer is representing that it a corporation operating as GTA Auto Inc. GTA Auto Inc. is not a registered motor vehicle dealer.

THE LAW

Section 3 of the *Motor Vehicle Dealers Act* (the "Act"), states as follows,

- (1) No person shall,
 - (a) carry on business as a motor vehicle dealer unless the person is registered under this Act; or
 - (b) act as a salesperson of or on behalf of a motor vehicle dealer unless the person is registered as a salesperson of such dealer and such dealer is registered as a motor vehicle dealer under this Act

Section 5 of the Act, states as follows;

- 5(1) An applicant is entitled to registration by the Registrar except where,
 - (a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
 - b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law, and with integrity and honesty; or
 - (c) the applicant is a corporation and
 - (i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of business, or
 - (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or
 - (d) the applicant is carrying on activities that are or will be, if the applicant is registered, in contravention of this Act or the regulations.
- (2) A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant, imposed by the Tribunal or prescribed by the regulations.

Section 6 of the Act states as follows;

- (1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion, the applicant is disentitled to registration under section 5.
- (2) Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5, if the registrant were an applicant, or where the registrant is in breach of a term or condition of the registration.

SHAHIDI 9 (c.o.b.) GTA Auto (Re:) [2001] O.L.A.T.D. No. 278

A July 24, 2001 decision of the Licence Appeal Tribunal was made regarding the same Applicant. The Applicant was to be permitted as a registrant under the Act under the following conditions:

- 1) In addition to the obligation to maintain books and records in accordance with the Act, the Applicant will maintain a separate journal of all vehicle purchase and sale transactions which will be kept available for ready inspection by a representative of the Registrar. Each entry will be identified by the Vehicle Identification number (VIN) and the make and model;
- 2) Beside the record of each transaction there will be kept a record of all pertinent details of each vehicle's history including all entries from the Bill of Sale or other document through which the Applicant became the owner;
- 3) The Applicant will forward to the Registrar at the end of each month a copy of that month's journal entries until the Registrar informs the Applicant that the Registrar no longer requires this to be done.
- 4) Before the execution of every retail Bill of Sale with a customer the Applicant will show and include on that Bill of Sale any statements as to that vehicle's odometer status appearing on the document by which the Applicant obtained the vehicle and the Applicant shall explain such information to the customer. The Applicant will in writing on the face of the Bill of Sale in the presence of the customer attest to having done this.
- 5) Any default in any of these conditions shall result in the immediate forfeiture of the Applicant's registration under the Act.

CASELAW

Brenner v Ontario (Registrar of Motor Vehicle Dealers and Salesperson) 1983 O. J. No. 1017 Ontario Supreme Court-High Court of Justice Divisional Court

This was an appeal by the Registrar of Motor Vehicle Dealers and Salesmen from a decision of the Commercial Registration Appeal Tribunal in which the Tribunal directed the Registrar to grant a conditional registration to the Respondent. The Applicant had a very serious criminal record which he had disclosed in his application but he had not disclosed three further convictions, which were considered by the Registrar to be minor offences. The Tribunal heard evidence from a potential employer and a criminal lawyer who testified that the Applicant had rehabilitated himself. The Court found that the Tribunal had not applied the proper test, and set out this test in paragraph nine of the judgment as follows:

"the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was the possibility that he, indeed, might have reformed himself."

ISSUES

The legal issue in this case is whether the Registrar was wrong in his decision to revoke the Applicant's licence under the Act on the basis of prior conduct.

WITNESSES FOR THE REGISTRAR

MR. GIANCARLO LEMBO

Giancarlo Lembo was the first witness to testify on behalf of the Registrar. He stated that he and his father Rosario attended at "GTA" and bought the 1995 VW Golf, serial number 3VWFF01H33M076029. Although the vehicle was purchased in the name of Rosario Lembo, it was purchased for the use of the witness. Rosario Lembo is currently out of the country and unable to testify at today's hearing.

Most of the discussions were with the witness as his father's English was not very good. The witness saw the vehicle advertised in the Auto Trader as he was looking for a diesel vehicle with low km. They went to the dealership on two occasions and on August 15, 2001 purchased the vehicle. The witness remembered that the salesperson, Tony, told them that the vehicle was in excellent working condition. There was nothing wrong with it and there was no mention of any problems with the odometer. He agreed that the salesperson he referred to as "Tony" was a younger person and certainly not the Applicant. His first knowledge that there was anything wrong with the odometer was acquired when he was advised by an independent mechanic that something was wrong with it. He understood that the distance travelled was 160,000 km on the odometer. On the Bill of Sale (Exhibit 3, Tab 6) the distance shown was 160,485 km, and was initialled by his father. The vehicle was sold as fully certified, omissions tested and with a free one-year warranty.

On the Bill of Sale there was a notation that \$100.00 had been paid by the Registrant as compensation for the problem with the tires. The witness stated that he would not have purchased the vehicle if he knew that there was a problem with the odometer. Between August and December 2001, the witness purchased parts for the vehicle with the help of a mechanic.

On March 18, 2002, Rosario Lembo signed an agreement with the dealer (Exhibit 4, Tab 10) in which the parties agreed to equally divide the cost of repairs, and GTA would pay the purchaser \$1825.00. A copy of the cheque in payment of this amount was received by Mr. Lembo. In addition, it was stated that the defective odometer in the vehicle is more than 160,000 km, and that this was fully explained to the customer, and the customer could not apply the warranty. The witness testified that he was a witness to the signature of this Agreement. The Agreement was signed by his mother on his father's behalf. The witness stated that he was advised of the defective odometer by a letter from the Ministry of Transport early in 2002.

In cross-examination, the witness was asked about whether his father went to GTA after the initial meeting on his own. Although uncertain, the witness did not believe his father would have returned to GTA, as his English is quite poor.

He explained that the Consumer Questionnaire (Exhibit 3 Tab 7) was completed and the attached page typed by him, and it was signed by his father. The witness explained that he had spoken with an independent mechanic, received information, but did not receive a written report. The mechanic in question was not present for the hearing to give evidence. When the witness received the information from the Ministry concerning the odometer, he returned to GTA with his mother and spoke to the Applicant. When he met with the Applicant after receiving a letter concerning the odometer, the Applicant was cooperative and willing to negotiate a settlement with him. By the time the witness went back to GTA to settle the problem, he did not see "Tony" the original salesperson there any more.

The witness stated that he drove the vehicle an additional 20,000 km during the first eight months he owned the vehicle. He confirmed that he still owns the vehicle, which currently has 193,000 km on it.

MS. JENNIFER VICENTE

Jennifer Vicente testified that she purchased a 1997 Honda Civic LX (serial number 2HGEJ6632VH913791) from the Applicant on August 16, 2001. She had seen the vehicle advertised in the Auto Trader and went to GTA twice. She explained that the information she received about the vehicle was that it was a good deal and she could not buy another one like it for less money. In addition, she was told that the door had a dent and had been replaced however, the salesperson, Tony, did not know how the dent occurred and specifically told her that the vehicle had not been in an accident. When she took the vehicle for a test drive, she was concerned because a wheel shook quite noticeably. She was suspicious that the vehicle had been seriously damaged in an accident, but was told that it had certainly not been. GTA performed an alignment on the vehicle, which rectified the problem.

In the Bill of Sale (exhibit 3, Tab 9) there was a notation that the door had a dent and the quarter panel was repainted and replaced by GTA. She did not learn any further information about the vehicle until she received a letter from Ralph Bailey at O.M.V.I.C. He advised the witness that the vehicle had been in an accident and asked her whether GTA had told her about it. She advised Mr. Bailey that GTA had not informed her of the accident. She stated that she would not have purchased the vehicle knowing it had structural damage.

The witness testified that she no longer owns the vehicle as she had traded it in at GTA, where she originally purchased it. She had tried to sell it at other dealerships, but the estimates she received were not as high as GTA. When she traded in her vehicle to GTA, new wording had been added to the Bill of Sale (exhibit 4, Tab 12) on July 29,

2002. In the area referring to the dent in the quarter panel, the words "structural damage" was added at the bottom. To the left of this, in an area for the name address lien amount and certification as to encumbrances, a paragraph was written by the Applicant, which stated:

"the customer came back to the dealer and they did negotiated regarding this auto - and the customer is happy with the deal and there is no complaint regarding this deal and everything is o k."

In cross-examination she agreed that the salesperson "Tony" she spoke to when she was making her initial purchase was not the Applicant. In her note to O.M.V.I.C. included in the questionnaire (Exhibit 3, Tab 10) she confirmed that the description of the salesperson was Indian, 30s, beard, and moustache and it was definitely not the Applicant.

The witness agreed that in the original Bill of Sale (Exhibit 3, Tab 9) it did say "accident repair by dealer", but stated that she was not verbally told that the vehicle was in an accident. She repeated that she would not have purchased the vehicle if she thought there was structural damage. In her opinion, if a vehicle had been in an accident, she would expect there to be structural damage. The witness repeated she did not know anything about any accident the vehicle may have been involved in. She confirmed that when she spoke to Ralph Bailey from O.M.V.I.C., he showed her the Bill of Sale from Adesa Auto Auction ("Adesa") to GTA (Exhibit 3, Tab 9). It was on that document that she saw a reference to "structural damage", however under those words something was scratched out and there were the words "Dent on door". She was never shown any accident reports or repair invoices. She relied on this document as her source of information that there had been an accident.

When she returned the vehicle to GTA to be traded in for the next purchase of another used vehicle, the original salesperson "Tony" was no longer there. She heard that he had been fired. During this transaction, she dealt with the Applicant. The first deal she negotiated to trade in her vehicle was not completed, as there were financing problems. She did, however, end up purchasing another vehicle from GTA using her first vehicle as a trade in.

MR. GERMAN MACZ

Mr. Macz testified that he purchased a 1998 Nissan Sentra serial number 3N1AB41D6WL060581 on July 14, 2001 from GTA. He, his wife and 4 children attended at GTA and he participated in approximately half of the discussions. He discussed the purchase of the vehicle with his wife. Mrs. Macz is currently in Montreal and unable to testify at today's hearing.

The witness stated that he is unsure, but believes he dealt with the owner of GTA. The witness was advised that the vehicle was in a minor accident and there was a visible dent in the side, which GTA promised to fix. When the vehicle was picked up, it had, in

fact, been repaired. If he had been told that the vehicle had suffered structural damage, he would not have purchased it. In his opinion, "structural damage" means there is a crack in the chassis so the vehicle would be unsafe to drive. The vehicle is primarily used by his wife to go to and from work.

In cross-examination, the witness stated that he did not originally deal with the Applicant. He agreed that his wife had discussions with the salesperson which he may not have heard or been a party to. The salesperson advised the witness that it was a minor accident. To date, the witness has not seen any insurance reports, police reports, information from a mechanic or anything else to prove that there was structural damage. Therefore, he does not know whether the vehicle was in anything but a minor accident. He was made aware of the structural damage through a letter he received from O.M.V.I.C. When he later spoke to Ralph Bailey from O.M.V.I.C., the witness filled out the questionnaire (Exhibit 3, Tab 4), and discussed the issue of the structural damage with Mr. Bailey.

Mr. Macz stated that he still owns the vehicle, which is still being driven, and gets his auto serviced at Canadian Tire.

MS. JENNIFER ANDREW

Ms. Jennifer Andrew testified that she is employed at O.M.V.I.C as the "team leader" for inspections and has been with O.M.V.I.C. for a total of five years. Prior to her current employment, she took a law enforcement course at Seneca College.

On October 3, 2001, she and Inspector Ralph Bailey of O.M.V.I.C., visited GTA's premises unannounced. The witness made notes of their inspection during and shortly after leaving the premises. The purpose of the inspection was to ensure compliance with the requirements of the Act, as well as the Order of the Tribunal under which registration was given. The witness attempted to get access to the books and records, but was advised that the Applicant was away and the required material was locked in a cabinet. The sales staff contacted the Applicant by cell phone. He was out of town at a car auction. He arranged to meet with the witness and Mr. Bailey on October 9, 2001.

When the witness and Mr. Bailey were on the premises, they decided to note the VIN numbers and odometer readings of some of the vehicles on the lot. The first vehicle they looked at was a white Nissan #1N4EB3159MC791608. The words "one owner" was written on the windshield.

The second vehicle was a white Ford VIN. # 2FTZA54U1WB679545. The words "one owner" was also written on the windshield. When they later did a check on the vehicles, they found that the white Nissan had 4 prior owners (Exhibit 3, Tab 13) before GTA. The white Ford had 2 owners (Exhibit 3, Tab 14) prior to GTA.

When they returned for re-inspection on October 9, 2001, the witness and Mr. Bailey reviewed some wholesale and retail bills of sale. These bills of sale were removed from

the premises to be copied and the originals were then returned to GTA. All documents were made available as required.

In cross-examination, the witness agreed that on the Journal that was to be kept, there was a reference to Aftab Ali who had been a salesperson at GTA. At this time, Mr. Ali was trying to become registered as a salesperson. The witness agreed that the Garage Register and the special Journal were important documents and it was normal for them to be kept in a secure place. However, she repeated that it was also necessary for them to be made available for inspection.

When the witness and Mr. Bailey were making notes of the VIN numbers, she explained that Mr. Bailey read them out the numbers and she noted them down. She did concede that it could be possible that Mr. Bailey made a mistake reading them out to her or, she could have made a mistake writing them down, however she thought it unlikely. There were approximately 40 vehicles on the lot and the two vehicles for which the numbers were taken down were chosen at random. When she was asked if they took photographs of the words "one owner" on the windshield of the two vehicles, she said that they did not, but made notes of what they saw. She agreed that they had no proof that there were any misrepresentations in the Auto Trader as to the number of owners. The witness also conceded that she was unable to say who wrote the words "one owner" on the windshields. The words appeared to have been written with a smudge pencil. She also stated that they did not have copies of bills of sale for those vehicles showing any representation to a customer that there was only one previous owner. The witness also agreed that she did not conduct any searches of the previous owners, which were companies, to see if any of them were related and, for practical purposes, one owner. So far she was concerned the owners were listed separately and even if there had been related companies involved, the searches showed more than one owner.

Ms. Andrew testified that she found the Bill of Sale for the Macz vehicle. This vehicle was purchased at Adesa Ottawa and on the Bill of Sale (Exhibit 3, Tab 3) it gave disclosure that the vehicle was "accidented, repaired and structural damage". She does not know who wrote the Bill of Sale; who did the inspection of the vehicle; anything about the accident, or what was the nature of the structural damage.

On the Bill of Sale to Jennifer Vicente (Exhibit 3, Tab 9), the witness stated that there was disclosure of a dent on the quarter panel, which was repaired by the dealer. The witness did not obtained any information from Adesa about the accident and her only information was the notation on the Bill of Sale to GTA that the motor vehicle was "accidented, repaired and structural damage". In Ms. Andrew's opinion, "structural damage" means that there is damage to the internal structure of the vehicle. However, she agreed that beside the words "structural damage" on the Bill of Sale to GTA, someone had written that there was a dent. When the witness was asked if all of the bills from Adesa which say "accidented and repaired" also say "structural damage", she said that she did not know the code or references used at the auction.

RALPH BAILEY

Ralph Bailey testified that he has been an inspector for O.M.V.I.C for 1 year. Prior to that, he was a member of the Metropolitan Toronto Police force for 32 years and since 1985, was a constable in traffic services. He also had experience in warrants, identity thefts and hit and run cases.

On October 3, 2001, the witness attended at the premises of GTA with Ms. Andrew. On October 9, 2001, they re-attended and seized documents for inspection. After copies were made, the originals were returned to the Applicant. The witness had concerns over the Bill of Sale between GTA and Mr. Macz as there was a statement on it indicating that the vehicle had been in an accident, and the customer knew about it (Exhibit 3, Tab 3). On the Bill of Sale from Adesa, there is a notation that the vehicle was "accidented, repaired and structural damage". Therefore there was a concern over the disclosure that was given to the purchaser.

There was also further concern about the Journal and Garage Register prepared by the Applicant and sent to O.M.V.I.C. as required by the Order of the Tribunal (Exhibit 3, Tab 15). Vehicle No. 12 in the Journal is a Honda Civic, which is shown as "accidented and repaired", and on the Bill of Sale from the Adesa, there is the notation of "accidented, repaired and structural damage". This was the vehicle which was eventually sold to Jennifer Vicente and there was no reference to structural damage on the original Bill of Sale to her.

The 17th vehicle in the Journal is a 1997 Volkswagen diesel Jetta which is shown as "OK". Whereas on the Bill of Sale from Adesa (Exhibit 3, Tab 9), there is a notation that the vehicle is "accidented, repaired and structural damage". On the Garage Register, it is listed as "unibody damage" (Exhibit 3 Tab 16).

Vehicle # 32 on the Journal is a Suzuki which is shown as "OK", but in the Garage Register, there is notation that the "odometer has been changed".

In cross examination, Mr. Bailey stated that he did not follow with further investigation on any of the vehicles as to the accidents and extent of the damage. He said that he did not know that with a VIN number he could contact the Ministry of Transport and obtain information. He did not obtain police reports or contact prior owners of these vehicles. Although he knew that both vehicles were purchased from Adesa, he did not contact them or the previous owners. He stated that this was not a requirement for the purposes of the inspection. In the witness' opinion, even though he did not know the particulars or the extent of the damage, if it was on the bill from Adesa it should have been disclosed on the sale to the customers. He did not discuss the matter with the Applicant or anyone from GTA.

Mr. Bailey stated that he did not discuss the issue of the appeal with Jennifer Andrew. The witness reiterated that when he and Ms. Andrew arrived at GTA on October 3, 2001

and the documents they needed were not available, they merely noted down VIN numbers and made other observations.

On the issue of the salesperson AFTAB ALI, the witness stated that he did not make any efforts to find him or interview him, although he had seen him some time later at another dealership located at Keele and Finch. He knew that the salesperson was no longer working for GTA.

Mr. Bailey confirmed that he met with Jennifer Vicente and filled in the questionnaire based on what she told him. The witness sent the questionnaire to Mr. Macz. The witness communicated with Mr. Macz who, in turn, completed the questionnaire and returned it to O.M.V.I.C.

LAURA GORDON

The final witness for the Registrar was Laura Gordon. As a representative of the Registrar, Ms. Gordon was entitled to be in the hearing room for the testimony of the other witness, despite the ruling excluding witnesses and she was so present. Ms. Gordon stated that she has been employed by O.M.V.I.C since January 1997 as the Director of Compliance. Prior to that, she was an investigator with the Ministry of Consumer and Commercial Relations. Before that she was inspector for different registrars within the Ontario government. She explained that the duties of O.M.V.I.C. are divided into registration of dealers and salespersons, complaint mediation, inspection and investigation. Under the terms of the Act, a person is entitled to registration unless they do not meet the requirements of section 5 the Act due to their past conduct or lack of financial responsibility. The issues as to conduct are whether they will carry on business with honesty, integrity and in accordance with the law. Ms. Gordon stated that this is the second Proposal for the Applicant. At the first hearing, there were concerns over the disclosure and there was an Order for his registration, subject to terms and conditions. In this case, the Registrar expected compliance with the law with the specific terms and conditions imposed. In the opinion of the Registrar, GTA was not adhering to the terms and conditions and there were further instances of non-compliance. There was concern over the replacement of an odometer, the advertisement of vehicles as having only one owner, and the use of the name "GTA Auto Inc." on Bills of Sale by GTA even though the name of the company was GTA Auto. The primary concerns were again issues of disclosure and allegations that important information was not being passed onto the customers. There was again the problem with an odometer, which was not disclosed to a customer. O.M.V.I.C. had serious concerns that despite the previous Order by the Tribunal, GTA was following the same pattern of conduct in failing to disclose important information and was thereby not acting with honesty, integrity and accordance with the law.

In cross-examination, the witness said that there were concerns over the issue of the business name. As to the issue of the Bills of Sale with "GTA Auto Inc." on them she assumed that he obtained them through the Used Vehicle Dealers Association, as they

were a standard pre-printed form. There was no allegation that he had tried to move the business, or hide behind the wrong corporate entity. She stated that it was important that he use the right name so that GTA could be properly identified by a customer. The witness stated that her main concern was that the Applicant should provide the customers with full, frank and honest disclosure. She confirmed that she did not want customers being given incorrect or faulty information and agreed that she did not want him telling clients that a vehicle had structural damage when it did not. The witness further stated that if GTA was given disclosure of structural damage, then GTA should pass that same information onto the customers. With that information, she stated that the customer would be able to take the appropriate steps to have a proper examination of the vehicle to assure themselves that there was no structural damage. In the witness' opinion, the customer should have received the disclosure of structural damage when that notation was made on the Bill of Sale from Adesa to GTA. Without that, the witness did not consider that there was full disclosure even if there was a reference to an accident. As to the notation of "structural damage" on the Bills of Sale from Adesa, the witness agreed that she did not know who inserted the notations on the Bills of Sale or what standard codes are used at Adesa.

WITNESS FOR THE APPLICANT

Mr. Shahidi testified on his own behalf, and stated that he came to Canada from Iran in July 1999. Prior to his arrival in Canada, he did not speak English. He stated that he has been married for 22 years and has two children, ages 14 and 16. His wife does not work and he is the sole source of income for the family and has no business interests aside from his vehicle dealership.

For two years prior to coming to Canada, Mr. Shahidi was in the used automobile business in Iran. Prior to that, he was involved in large-scale agriculture as his family grew melons and watermelons, and had been in the agricultural business for three generations. Once he came to Canada he applied for a dealer's license and received the license very rapidly. He did not take any courses and there was no real training offered. The witness admitted that he received his license too quickly and did not have the time to learn the business or research the Canadian industry. He blamed himself for his lack of knowledge.

In April 2001, Mr. Shahidi was before the Tribunal with a Notice of Proposal and in July 2001 received the decision which permitted him to be registered, subject to terms and conditions. Based on this Order, he is to keep a Journal with information about all of the vehicles purchased and sold by GTA with the particulars and important facts, together with a Garage Register. Copies of these two documents are to be sent to O.M.V.I.C. on a periodic basis. Copies of documents relevant to the motor vehicles purchased or sold are to be kept in the GTA office and available for salespersons and O.M.V.I.C. inspectors to see. Mr. Shahidi explained that he is out of Toronto three days a week as he attends the car auctions in Montreal, Ottawa and Milton.

During the time period in question, he explained that he had four or five salespersons including Miram Behodra (Cyrus), Aftab Ali (Tony) and Hossein Isan Bhakani. Mr. Shahidi stated that Mr. Ali commenced employed with GTA in October 2000 and was terminated October 2001. He had been hired on commission plus salary. Mr. Ali promised customers too many things without authority. Three or four customers complained about various promises that Mr. Ali made that were not being fulfilled (i.e., fixing scratches on vehicles).

Mr. Shahidi stated that he personally dealt with Mr. Macz from the start and explained that the customer had seen the vehicle with the dent on it. Mr. Shahidi had spoken with Mrs. Macz frequently. He testified that he showed Mrs. Macz the Bill of Sale from Adesa Ottawa before her husband signed the Bill of Sale from GTA. He gave them a higher trade in than normal and repaired the vehicle for them. On the Bill of Sale from GTA, there was a reference that the vehicle had been in an accident. The customer was aware of it, and GTA was to do the repair. When Mr. Shahidi purchased the vehicle at auction, he looked at it and saw that it had dents, but did not see any structural damage. To date, Mr. Shahidi has not seen any proof of structural damage to the vehicle. He agreed that it was his signature at the bottom right and left corners of the Bill of Sale (exhibit 3, Tab 3).

With regard to the Macz vehicle on cross examination, Mr. Shahidi explained that he had made the original purchase, saw the notation of "accidented, repaired and structural damage" and actually conducted the transaction with the customers. He repeated that he had shown the original Bill of Sale from Adesa Ottawa to Mrs. Macz so she would have been able to see the reference to "structural damage". Mr. Shahidi explained that he had conversations with her that did not include Mr. Macz.

Mr. Shahidi stated that he did not deal with Mr. Lembo on the sale of that vehicle and that the entire sale was conducted by Mr. Ali. The witness did confirm that he was the one who purchased the vehicle at Adesa Montreal and identified the Bill of Sale (Exhibit 3, Tab 6, p. 2). On this Bill of Sale there was a notation "defective odometer". Mr. Ali wrote the Bill of Sale to the purchaser, but Mr. Shahidi agreed that he signed it on behalf of GTA.

When the witness was shown the Bills of Sale for the Vicente vehicle (Exhibit 3, Tab 9) he stated that Mr. Ali also sold that vehicle to the customer. When he looked at the Bill of Sale from Adesa Ottawa, he agreed that the disclosure stated that the vehicle was "accidented, repaired and structural damage". However on the Bill of Sale from GTA to the customer, it only noted that the door had a dent from an accident and was repaired by GTA. Mr. Shahidi stated that when he purchased the vehicle at the auction, he inspected it and saw no evidence of structural damage.

Mr. Shahidi stated that after he sold the vehicle to Mr. Macz, there were continuing discussions about the vehicle and the customer called him on several occasions. They discussed the issue of the warranty, which didn't cover the mechanical problems. Generally, there were no complaints.

Regarding the Lembo vehicle, Mr. Shahidi stated that when the purchaser complained about the defective odometer, GTA was willing to fix it. Mr. Shahidi said that he offered to pay for the repairs and spoke to the customer several times. Eventually he paid the customer \$1800. On March 18, 2002, the parties signed an Agreement (Exhibit 4, Tab 10) for the payment of the funds. The parties agreed that the defective odometer in the vehicle has more than 160,000 km. This was explained fully to the purchaser and the purchaser acknowledged that on that basis he could not apply the Warranty. To date, there have been no problems.

With regard to the vehicle sold to Lembo, on cross examination Mr. Shahidi agreed that the Bill of Sale from Adesa showed that there was the defective odometer when GTA purchased the vehicle, but that on the Bill of Sale to the customer, there was no mention of a defective odometer. Mr. Shahidi did not know why Mr. Ali did not check the Bill of Sale and write this disclosure on it. When Mr. Shahidi was asked what steps were taken to ensure that there was no real structural damage, he said that there is a mechanic who has been employed at GTA for the last six or seven months.

With regard to the Vicente vehicle, Mr. Shahidi testified that Mr. Ali dealt with and sold the vehicle to the customer. When the customer came back to GTA she did speak to Mr. Shahidi. Ms. Vicente requested compensation of \$1000. She returned to GTA, found a vehicle she wanted, and arranged a trade in. They attempted to make the first deal but she was not approved for financing. Finally, she found another vehicle that she could afford and the parties made mutually acceptable arrangements. The Applicant paid off her loan on the initial vehicle and the deal was finally worked out.

With regard to the Vicente transaction on cross-examination, Mr. Shahidi stated that Mr. Ali prepared the paperwork and he did not review the Bill of Sale himself. He stated that the customer saw the dent, and that the disclosure on the Bill of Sale was not the same as on the original purchase, as Mr. Ali didn't write "structural damage" on the Bill of Sale to the customer.

Mr. Shahidi stated that on the Garage Register he wrote some of the entries and another salesperson wrote other parts on a Garage Register (Exhibit 3, Tab 16) he agreed that the vehicle five from the bottom, (the Suzuki) had a notation that the odometer had been changed but in the special Journal kept as required by the Tribunal, at line 17 (Exhibit 3, Tab 15) there is a notation for the same vehicle that is OK.

With regard to the Bills of Sale bearing the corporate name "GTA Auto Inc.", Mr. Shahidi explained that he got the Bills of Sale when he moved to the premises and a clerk from the former business assisted him in ordering them. There was also a problem relating to his GST number, so in many cases he had to strike out the pre-printed number and insert the correct number. He also had to strike out the incorrect pre-printed dealer's number, and fill in his own. These incorrect numbers were from the prior business which had left. Similarly he thought that "Inc." at the end of the business name was again leftover from the set up of the form from the prior tenant of the space. When he saw the

forms he did not immediately see the problem with the inclusion of "Inc" in the company name.

Mr. Shahidi explained that he sells approximately 300 vehicles per year. He has told his sales staff not to mark the windshield, but has advised them to tell the customers everything about the vehicle. If a salesperson doesn't follow instructions he would terminate their employment. They are paid on commission. Therefore, Mr. Shahidi is of the opinion that his sales staff would deliberately ignore protocol to make a sale.

Mr. Shahidi testified that he did not write on any windshields, but possibly his son might have. When Mr. Shahidi was made aware of the words "one owner" on certain vehicles, Mr. Shahidi removed the writing from the windshields. He explained that he did not try to mislead anyone and has tried to follow the terms and conditions as set out in the Tribunal's Order.

In cross-examination, the witness stated that all of his problems were due to his sales staff. When he was asked what steps he had taken to ensure compliance since the last hearing, Mr. Shahidi stated that he did have problems with his salespersons but that his dealership provided good service. Mr. Shahidi stated that when he travels out of town to purchase vehicles at auction, he has instructed his son or his sister to fax the necessary Journal and Garage Register to O.M.V.I.C. After July 2001, Mr. Shahidi instructed his staff that they could find original Bills of Sale in his desk. He did not understand why the salespeople could not find the documents required for the inspection on October 3, 2001. He was disappointed that O.M.V.I.C. did not call him in advance to ensure that they would be available for inspection. He confirmed that he was the only buyer for GTA and would have been aware of disclosures or declarations on Bills of Sale but confirmed that he might not have reviewed all Bills of Sale.

He stated that he trusted his salespeople and didn't always check on their work. He should have reviewed all of the Bills of Sale and sometimes made the decision not to check.

On the sale of the Vicente vehicle, Mr. Shahidi stated that the salesperson forgot to write "structural damage" on the Bill of Sale and he was not informed. When the vehicles were sold to GTA at the auction, he said that he is only able to carry out a brief visual inspection of the vehicles for only one or two minutes. Although some vehicles may have been in an accident, of those vehicles that have been, not all of them may have incurred "structural damage" even though this notation was put on the Bills of Sale. The vehicles are sold to him "as is". When he obtains a safety certificate, the mechanic is not looking at the vehicle for structural damage. Mr. Shahidi confirmed that he did not take any further steps to verify there was, in fact, structural damage but, in his opinion, it did not look as if there was. Mr. Shahidi has five years experience in the industry and is neither a trained mechanic nor auto body person.

Mr. Shahidi confirmed that he has never incorporated the company under the name "GTA Auto Inc." but confirmed that his brother did open a numbered company, 1790829

o/a GTA Auto, with Mr. Shahidi and his brother as directors. His brother has now left the country and no longer part of the company. He went on to explain how he did receive the plaintiff's Bills of Sale, but he didn't notice the "Inc." at the end of the name. There were also problems with the GST and the Dealer's number on it. This form had been set up for the prior tenant.

FACTS FOUND PROVEN

The facts found by the Tribunal are that Mr. Shahidi is the owner, and the sole controlling mind of GTA. He is the sole purchaser of vehicles for GTA, and attends the auctions to acquire vehicles. He has five years experience in the industry, and no special training as a mechanic, or in the auto body field. When vehicles are purchased, he is in a position to see the paperwork, and has taken no steps beyond a swift and basic visual inspection, and eventual certification to determine if there are structural problems with the vehicles.

Someone at GTA, or with access to the lot, wrote "one owner" on the windshields of the white Nissan VIN # 1N4EB3159MC791608 and the white Ford truck VIN # 2FTZA54U1WB679545. The white Nissan had 4 previous owners and the white Ford had 2 previous owners. The Tribunal rejects the idea that the numbers were recorded incorrectly, as both of the searches produced a match as to the type and colour of vehicle and both searches showed GTA as the present owner. The chance of this happening with an error on the VIN numbers for two vehicles is too small to consider realistically possible when there are two matches out of two attempts. In the absence of proof from either party, that the previous owners of either vehicle were closely related corporations to the extent that they would constitute one entity, the Tribunal will not speculate that this was the case, in the absence of cogent evidence, and finds that the vehicles had more than just one previous owner each. The Tribunal accepts the evidence of the two inspectors that they saw the representations about the vehicles having only one owner written with a smudge pencil on the windshields. No finding is made as to who wrote this on the vehicles, but the Tribunal accepts Mr. Shahidi's evidence that it may have been done by his son, or one of the salespersons. It does, however, appear to be someone related to GTA, and there were no proper steps taken to remove it before it was visible to potential customers.

On the issue of checking for structural damage, Mr. Shahidi stated that he has had a mechanic working for him for six or seven months. However the purchase and sale of the vehicles in the Notice of Proposal was dated in the summer of 2001 and appeared to be prior to the mechanic commencing work at GTA. There is no evidence that Mr. Shahidi had any structural inspection of the vehicle performed by a properly authorized mechanic or body shop. Mr. Shahidi was not a trained mechanic or trained in examining for structural defects, and even on his own evidence, made only the most cursory visual examination of the vehicles given the way that the auctions are conducted. It was suggested that the words "structural damage" may be written on the Bills of Sale by the vendor every time there is a vehicle which has been in an accident, but there was no

evidence to support this theory. This leave the Tribunal with the only conclusion that the vehicle may or may not have had structural damage, but the Applicant chose not to investigate that possibility, or to be sure. He also chose not to give this option to the customers so that they could have a proper inspection done for their own peace of mind.

The Tribunal does not accept the evidence of the Applicant that he showed Mrs. Macz the invoice from Adesa, as Mr. Macz knew nothing about it. It seemed inconceivable that Mrs. Macz would have seen it and not mentioned it to her husband, as it would certainly affect the potential price of the vehicle and the safety and security of the family if the notation was accurate.

The Tribunal finds that the Applicant did not mention "structural damage" to Jennifer Vicente, as she stated that she would not have purchased the vehicle if she had been told it had structural damage. Once she realized the vehicle had a problem and did not drive properly during the test drive she began to ask questions about whether the vehicle was in an accident. When she was assured that it was not in an accident, she purchased it anyway. Once she received information from O.M.V.I.C. that the vehicle was in an accident and had structural damage she attempted to sell it, but she found that other dealers would not given her a very good price for it, and chose to sell it back to GTA as he would give her the most money for it. Logically, this suggests that other dealers saw there were problems with the vehicle affecting its value, whereas GTA was willing to take it back at a higher price to make a further sale and then resell the vehicle.

It is also of concern that in the revised Bill of Sale when the Vicente vehicle was traded in, the words "structural damage" are added in the "description" area when they were not in the original version. In the box to the left of the description, the Applicant wrote in a paragraph which still referred to a dent, and simply stated how happy the purchaser was with the transaction. On its face, this would appear to be a rather crude attempt to recreate paperwork, and does not assist the cause of GTA at this hearing.

The Tribunal finds that Mr. Shahidi allowed many of the salespersons to conduct the sales on their own. He may have made the original purchase invoices available for his staff to their review, but there did not seem to be any system in place to ensure that the disclosure from the purchase Bills of Sale was put on the Bills of Sale to the customers. Even when Mr. Shahidi prepared or signed the paperwork himself, he did not check back with the original Bills of Sale to ensure that all of the disclosure information from the purchase Bill of Sale was on the Bill of Sale when the vehicles were sold. He clearly had the policy that he did not put the notation "structural damage" as disclosure on the Bills of Sale, so it was not simply the case of a lack of supervision of his sales people.

When he conducted a sale himself, he did not ensure that the disclosure concerning the defective odometer was on the Bill of Sale for Mr. Lembo. In that case it appears that there was later proof that the odometer was, in fact, a problem as evidenced in the handwritten Agreement between the parties.

There were also errors in the Journal and Garage Register in which defects on vehicles were not mentioned.

The Tribunal finds that the Applicant made an effort to keep the Journal and Garage Register as required, however these were not as accurate. He did at least send them to O.M.V.I.C. as required. He also kept the paperwork surrounding the acquisition of the vehicles as required but did not make the proper arrangements for it to be available on demand, so again he did not meet the terms and conditions of the Order.

On a strict reading of the Tribunal's Order paragraph 36, there are no specific requirements that the Applicant include on the Bill of Sale any statements as to the odometer status of vehicles which appeared on the document by which the applicant obtained vehicle. This information was to be explained to the purchaser. The Order did not include a requirement for the Applicant to write on a customer's Bill of Sale the disclosure statements from the purchase Bill of Sale with regard to other matters such as structural damage. However this is part of GTA's general obligations of full and complete disclosure. If Mr. Shahidi disagreed with the notation on the purchase Bill of Sale, he did have the option of obtaining a proper independent inspection of the vehicle and providing the results of that to the potential customer. He was required to make complete notes of this on his separate journal; however he failed to do that as well.

In the sale of the vehicle to Mr. Lembo he clearly failed to meet the requirements of the Order as set out above, since the disclosure provided on the purchase Bill of Sale related to an odometer. In this case the distance travelled was of a particular importance to purchaser. As in the Vicente transaction; in the Lembo transaction; the Applicant used a subsequent written document to try to imply that the appropriate information had been given and did not make it clear that it was done only after the initial sale.

The Tribunal finds that GTA did use Bills of Sale in which his company was described as GTA Auto Inc. but he provided an innocent explanation. He may have been careless in not noticing it when he received the reprinted forms; however, there was no intent to mislead or deceive the customers.

APPLICATION OF LAW TO FACTS

The Act provides that the Registrar may revoke the registration of the Applicant where the Applicant's past conduct affords reasonable grounds for belief that the Applicant will not carry on business in accordance with the law, and with integrity and honesty. The Tribunal finds the following facts to be relevant to past conduct:

In this case, the Applicant showed a consistent pattern of failing to disclose information provided as disclosure on the initial purchase of vehicles. He may have thought that the disclosure was not accurate but he took no steps to find out. He did not leave the

customer the option of making their own inquiry, and satisfying themselves that the vehicles were structurally sound.

The salespeople did not provide proper disclosure and were not properly supervised; however the Applicant himself did not provide full disclosure when he dealt with the customers himself.

Of further concern is the fact that when he found that there was a problem with the sale of a vehicle and he had not given adequate disclosure, he attempted to create paperwork to give the impression that full disclosure was given, and the client was happy.

In the case of the Lembo's vehicle, the odometer was in fact defective as indicated on the purchase Bill of Sale.

In the Vicente transaction, when she attempted to sell the vehicle to other dealers, she could not get a good price for it so she ended up selling it back to GTA who took it for resale. This leads to the inescapable conclusion that the other dealers all realized that there was a problem with the vehicle which affected its price, but this was of no concern to GTA. Even though GTA was given a second chance by being put on terms and conditions, it did not implement the necessary procedures for its sales staff or in its own dealings to prevent a repeat of the same problems. The result is that the same pattern of behaviour appears to be continuing and as a result, GTA does not appear to be a good candidate for Terms and Conditions again at this time.

A motor vehicle dealer or salesperson deals with members of the public who are purchasing or selling products of substantial value, and are depended upon not to misrepresent the value or quality of the vehicles. By withholding or falsifying information, they are in a position to take advantage of a vulnerable consumer, and the public must have confidence that the dealer or salesperson will not put their own personal interests ahead of their responsibility and to conduct business with honesty and integrity. The Tribunal finds that in this case the Applicant did not meet the required standard.

Cumulatively all of the above behaviour provides reasonable grounds to believe that there will be future behaviour which does not meet the statutory standard of acting with honesty, integrity and in accordance with the law.

On the issue of whether the Applicant will carry on business in accordance with the law, the Tribunal finds the following facts to be relevant to past conduct.

The legal test to be used by the Tribunal is whether the Registrar was in error in deciding that the past conduct of the Applicant provided reasonable grounds to believe that the Applicant would not carry on business with integrity, honesty and in accordance with the law. On the basis of the facts as found, and the application of the law to those facts, the Tribunal finds that the decision by the Registrar was not in error.

DECISION

Therefore, by virtue of the authority vested in it under s. 7(4) of the *Motor Vehicle Dealers Act* the Licence Registration Appeal Tribunal directs the Registrar to carry out his proposal to revoke the registration of the Applicant.

LICENCE APPEAL TRIBUNAL

David J. Hunt, Vice Chair,
Presiding

Nives Montano, Member

Released: September 19, 2002

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
PIETRO AMERATO, PIETRO WHOLESALE AUTO LTD. AND
NORTH YORK AUTO AUCTIONS INC.

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATIONS AND TO REFUSE REGISTRATION
- Proposal dated: May 7, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

PIETRO AMERATO, PIETRO WHOLESALE AUTO LTD. AND
NORTH YORK AUTO AUCTIONS INC.

Applicants

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Pietro Amerato, Pietro Wholesale Auto Ltd. and North York Auto Auctions Inc., Applicants, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicants and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl Dombek
Chair

Released: September 5, 2002

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
789 Don Mills Road, Suite 800
Toronto, Ontario M3C 1T5

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Pietro Amerato
6856 Darcel Ave.
Mississauga, On L4T 2W5

AND FROM: North York Auto Auctions Inc.
79 Milvan Drive
North York, ON M9L 1Y8

AND FROM: Pietro Wholesale Auto Ltd.
79 Milvan Drive
North York, ON M9L 1Y8

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereinafter the "Act") the parties to the proceeding, Pietro Amerato, Pietro Wholesale Auto Ltd. and North York Auto Auctions Inc. (hereinafter referred to as "the Applicants"), and the Registrar, *Motor Vehicle Dealers Act* (hereinafter the "Registrar") waive the requirement of a hearing and hereby consent to an Order of the Licence Appeal Tribunal based on the following terms and conditions:

1. Pietro Amerato acknowledges and understands that within nine (9) months from the date of this order he will no relinquish all interest, legal or otherwise, in Pietro Wholesale Auto Ltd.
2. Pietro Amerato further acknowledges that should he transfer his interest in Pietro Wholesale Auto Ltd. to a third party, the Registrar has the right to refuse the transfer if, in the opinion of the Registrar, said individual does not meet the test set out in section 5 of the Act.
3. Pietro Amerato agrees that even after he no longer has an interest in Pietro Wholesale Auto Ltd., he will remain personally responsible for all liabilities and obligations arising from Pietro Wholesale Auto Ltd. while he was the controlling mind of same.
4. The Applicants acknowledge and understand that they will not retain the services of a salesperson unless the salesperson is registered as a salesperson to the Applicants.
5. The Applicants further acknowledge that the restrictions concerning the activities of a salesperson referred to in these terms and conditions apply to buying, selling and leasing on behalf of a dealer. "Buying, selling and leasing" refers to showing a vehicle to a prospective purchaser or any form of negotiation concerning the purchase, sale or lease of a motor vehicle and is not limited to the signing of contracts. This further includes attendance at auctions on behalf of the Applicants.
6. The Applicants agree to maintain a sign at the Applicants' registered premise that will be visible to the public stating the name and toll free telephone number for The Ontario Motor Vehicle Industry Council ("OMVIC") informing the public that they have the right to forward their complaints to OMVIC.

7. The Applicants agree to operate exclusively from the location approved by the Registrar. The Applicants agree to apply for the Registrar's approval, by way of prior written notice, of any change in location in the form required by the Registrar.
8. The Applicants agree not to invite the public to deal at a place other than their approved location.
9. The Applicants will not conduct any purchases with anyone who is in the business of buying and selling motor vehicles without confirming that they are registered as a Dealer under the Motor Vehicle Dealers Act.
10. The Applicants will ensure that all advertisements placed by or on behalf of the Applicants will identify their registered name and the address of the location approved by the Registrar and are in compliance with the Ontario Motor Vehicle Industry Council's Code of Ethics and Standards of Business Practice.
11. The Applicants will ensure that any vehicles sold are registered in the name of the purchaser before releasing the vehicle to the purchaser.
12. The Applicants will not purchase vehicles without ensuring that the vehicle is registered to the seller.
13. The Applicants agree to register all vehicles purchased within 6 days in accordance with the Highway Traffic Act.
14. The Applicants acknowledge and understand that their registration will not be used to buy or sell motor vehicles where the Applicants know or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
15. The Applicants agree to provide full and accurate disclosure on any applications, documents, statements or other form of communication/information provided to the Registrar or her authorized representatives regardless of previous disclosure.
16. The Applicants agree that they are under a positive obligation to disclose all material facts in writing about the vehicles they sell to their customers. Material facts include but are not limited to salvage, previous salvage, frame and unibody damage, rebuilt, accident repair, theft recovery, prior use as a police cruiser or taxicab and branded vehicles. The Applicants agree to make reasonable efforts to research the history of all their vehicles prior to sale to ensure all material facts are disclosed. The Applicants agree that should any information come to light, which the Registrar deems to be a material fact concerning a vehicle the Applicants have sold, the Applicants will comply with all reasonable requests made by the Registrar to provide compensation to the purchaser.
17. The Applicants agree that where a vehicle's odometer reading is unknown the Applicant's are under a positive obligation to disclose in writing the last known mileage and that the true mileage is unknown. The Applicant's further agree that if they exchange or repair an odometer they will do so in accordance with the Motor Vehicle Dealers Act and ensure that the identical reading appears on the new odometer.
18. The Applicants will comply with the Ontario Motor Vehicle Industry Council's Code of Ethics and Standards of Business Practice.

19. The Applicants agree to maintain a garage register in accordance with the Highway Traffic Act and will maintain all books and records as required by the Motor Vehicle Dealers Act. The Applicants agree that all books and records relating to motor vehicles sold or leased by or on behalf of the Applicant before and after registration shall be kept at the Dealer's registered premises and be readily available for inspection. The Applicants further agree to provide free access to his books and records to any authorized representative of the Registrar without any prior notice being given.
20. The Applicants agree that they will not be involved with the buying and selling of motor vehicles without the benefit of registration.
21. Pietro Amerato agrees to immediately enrol in the Ontario Motor Vehicle Industry Council's Automotive Certification Course and to be responsible for all fees in relation to enrolment. The Applicant further acknowledges that he will pass the certification course within one hundred and twenty (120) days of this Order.
22. The Applicants acknowledge that the Registrar may take administrative action, including a proposal to revoke their registration as a motor vehicle salesperson arising from any matters that have occurred in the past or that may occur in the future related to their financial circumstances and their honesty and integrity.
23. The Applicants acknowledge that the Registrar may take legal action, including a Provincial Offences prosecution, arising from their actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.
24. The Applicants agree and acknowledge that should they breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
25. The Applicants hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
26. The Applicants hereby withdraw their appeal to the Licence Appeal Tribunal.
27. The Applicants hereby acknowledge that they have obtained or have had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____ this _____ day of _____, 2002.

Pietro Amerato (signature)

Officer/Director of North York Auto Auctions (signature)

Officer/Director of Pietro Wholesale Auto Ltd. (signature)

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton
Registrar

YOUNIS SABAH YOUNIS o/a EAGLE CAR SALES

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF THE
MOTOR VEHICLE DEALERS ACT

TO REFUSE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: GARY JOHNSTON, Counsel, representing Younis Sabah Younis o/a
Eagle Car Sales
AVIVA HARARI, Counsel, representing the Registrar, *Motor Vehicle
Dealers Act*

DATE OF
HEARING: September 3, 2002 Toronto

ORDER

WHEREAS the Registrar under the *Motor Vehicle Dealers Act* (the "Respondent") issued a Proposal dated May 9, 2002 to refuse the registration of Younis Sabah Younis o/a Eagle Car Sales (the "Applicant") under the *Motor Vehicle Dealers Act*;

AND WHEREAS the Applicant has delivered to the Registrar and the Tribunal a notice in writing appealing the Proposal and requiring a hearing;

AND WHEREAS the Tribunal, by written notice dated June 12, 2002 addressed to the Applicant's Counsel of record and the Registrar's Counsel of record, appointed September 3, 2002 as the date for the hearing of the Applicant's appeal;

AND WHEREAS when the hearing of the appeal commenced before the Tribunal on September 3, 2002, the Respondent's Counsel moved that the hearing be adjourned to November 6 and 7, 2002 at 9:30 a.m.;

AND WHEREAS Counsel for the Applicant consented to the hearing being adjourned to November 6 and 7, 2002;

NOW THEREFORE, this Tribunal orders that:

The hearing of this matter shall, by consent of the parties' Counsel be adjourned peremptorily against both parties to commence at 9:30 a.m. on Wednesday and Thursday, November 6 and 7, 2002 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: September 3, 2002

JOHN FORSYTHE

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
MOTOR VEHICLE DEALERS ACT

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

KENNETH M. WRIGHT, Counsel, representing John Forsythe

YOVANKA MCBEAN, Agent, representing the Registrar, *Motor Vehicle Dealers Act*

DATES OF

HEARING: September 12, 2002

Ottawa

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") from a Notice of Proposal (the "Proposal") by the Registrar of the *Motor Vehicle Dealers Act* (the "Registrar") pursuant to section 7 of the *Motor Vehicle Dealers Act* (the "Act"). The Proposal, dated January 22, 2002, seeks to revoke the registration of John Forsythe ("Forsythe") as a motor vehicle salesperson.

The Proposal sets out the Registrar's reasons for the Registrar seeking an order for the revocation of Forsythe's registration which reasons are stated as follows:

The intention and objective of the Act is to protect the public interest. The requirements of the Act include that Registrants be financially responsible in the conduct of business and that Registrants carry on business in accordance with the law and with integrity and honesty. The Registrant's conduct is inconsistent with the intention and objective of the Act, and therefore warrants disqualification to registration under the Act.

(Exhibit 4, Tab 1)

The particulars that the Registrar relies on are stated in the Proposal as follows:

The reasons for this proposal are:

1. John P. Forsythe (hereinafter referred to as "Forsythe") was first registered as a motor vehicle salesperson since on or before March 16, 1989 and is currently registered under the Act.
2. 1117238 Ontario Limited o/a Southern Automobiles Ltd. (hereinafter the "Dealer") is an Ontario corporation that was registered as a motor vehicle dealer from July 12, 1996 until July 12, 1998.
3. Forsythe is the sole officer/director of the Dealer.
4. The Dealer failed to comply with the requirements of the *Retail Sales Tax Act* as to the filing of returns, remitting of tax due and paying assessments when due.
5. As a result of failure to comply with the *Retail Sales Tax Act*, the Dealer is indebted to the Ministry of Finance in the amount of \$57,534.65 as of September 13, 2001.
6. On or about the 15th day of July 1998, Forsythe entered into terms and conditions, which were attached to his registration as a motor vehicle sales person. Clause 1) of the conditions states:
 - 1) I agree to assume full responsibility of any monies currently owing or those that may be assessed in the future as owing to Revenue Canada or the Ministry of Finance arising from business transactions while I was the director/owner of 1117238 Ontario Ltd. o/a Southern Automobiles.
7. Forsythe has failed to comply with the *Motor Vehicle Dealers Act*, in particular with section 5.

(Exhibit 4, Tab 1)

Subsequent to the Proposal the Registrar filed a Notice of Further and Other Particulars (the "further particulars") dated August 28, 2002 and which further particulars stated as follows:

It is further alleged as follows:

1. The Bank of Nova Scotia has an outstanding judgement against John P. Forsythe.
2. The judgement is in the amount of \$34,959.39.

(Exhibit 4, Tab 2)

By written Notice of Appeal Forsythe informed the Tribunal that he required a hearing regarding his appeal to the Registrar's Proposal. Attached to the Notice of Appeal was the "Applicant's Position" which stated as follows:

APPELLANT'S POSITION:

1. In 1996, the Appellant, John P. Forsythe, purchased the dealership known as Southern Automobiles from Mr. James Harris for the nominal sum of \$1.00 in exchange for the right to allow Mr. Harris to continue to sell automobiles on a wholesale basis from the said dealership.
2. That same year, the Appellant formed a new company, 1117238 Ontario Ltd., which later became Southern Automobiles (1996) Ltd. The Appellant also obtained a dealer's licence.
3. In 1998, Southern was audited by the Minister of Finance. In preparing for this audit, the Appellant obtained a RIN summary from the Licence Bureau and discovered that nearly 100 vehicles had been sold for which he had no record. The Appellant ultimately discovered that Mr. Harris had fraudulently used Southern's dealership licence number and had failed to remit provincial sales taxes.
4. During the course of the audit, the Appellant contacted the Ontario Motor Vehicle Industry Council ("OMVIC") seeking assistance to resolve the problem presented by Mr. Harris' unauthorized and fraudulent use of Southern's licence number. OMVIC suggested that the Appellant's wife apply for a licence to operate a dealership which she obtained and now operates under the name and style of Canada Car Depot. Contemporaneously, OMVIC also drafted an agreement ("the agreement") whereby the Appellant would assume "full responsibility for any monies currently owing or those that may be assessed in the future as owing to Revenue Canada or the Ministry of Finance arising from business transactions while [he] was the director/owner of 1117238 Ltd. o/a Southern Automobiles.
5. This agreement was drafted, in its entirety, by OMVIC. The agreement was presented to the Appellant with the heading "Without Prejudice" and was signed by the Appellant on July 17, 1998.
6. The Appellant submits that the July 17, 1998 agreement is not enforceable as it was entered into on a "without prejudice" basis. The agreement, as entered into by both parties, was not intended to be a binding legal document and does not create any legal obligations that must be met by the Appellant.
7. The Appellant further submits that, even if the agreement were deemed enforceable, the Appellant is not in breach of said agreement. The agreement simply provides that the Appellant assume "full responsibility" for monies owing to the Minister of Finance. At all material times, the Appellant has assumed full responsibility for the monies owing and has not attempted to avoid such responsibility.
8. The Appellant further pleads and relies upon the *contra proferentem* rule. The Appellant submits that the agreement, as drafted by OMVIC, is ambiguous as the terms "full responsibility" are capable of several reasonable interpretations. In fact, it is the Appellant's position that if OMVIC wished to compel him to pay the debts, it would have bound him to do so in clear, enforceable language.
9. The Appellant submits that pursuant to the doctrine of *contra proferentem*, any ambiguity in the terms of the agreement must be interpreted against the party that drafted the agreement and the interpretation most favourable to the non-drafting party must be adopted. Accordingly, the term "full responsibility" must be interpreted in a manner such that the Appellant simply agreed to be responsible for the monies and nothing more. As such, it is clear that the Appellant has not breached the agreement and continues to meet his obligations under the terms of the agreement. The Appellant submits that any other interpretation of the terms "full responsibility" would be manifestly unjust and would impose on the Appellant terms he did not understand nor did he

accept. Moreover, had OMVIC intended that the Appellant pay the monies owing to the Minister of Finance immediately upon such liabilities being assessed, OMVIC could have done so simply and effectively by including terms to that effect. OMVIC failed to include clear and unambiguous terms and, as such, the terms of the agreement must be interpreted in favour of the Applicant.

10. There is no evidence to support the allegation contained in paragraph 7 of the Notice of Proposal to Revoke Registration that the Appellant has failed to comply with the provisions of the *Motor Vehicle Dealers Act*, in particular with section 5.
11. The Appellant reserves the right to make such further submissions as he deems appropriate.
12. The Appellant requests that the Licence Appeals Tribunal reverse the Registrar's decision to revoke the Appellant's registration as a motor vehicle salesperson under the *Motor vehicle Dealers Act*.

THE EVIDENCE:

The evidence presented by the Registrar to the Tribunal at the hearing consisted of the testimony of Ms. Nicole Jordan ("Jordan") and Ms. Mary Jane South ("South") as well as documentary evidence. The evidence presented by Forsythe at the hearing consisted of his testimony as well as documentary evidence.

NICOLE JORDAN'S EVIDENCE

Jordan testified that she is employed by the Ministry of Finance (the "Ministry") in its Ottawa offices as Manager of collections. In her testimony she stated that during 1998 Southern Automobiles Ltd. ("Southern") was audited by the Ministry. Southern was then operated by Forsythe as a motor vehicle dealer and was registered with the Ministry on September 1, 1996. As a result of the audit the Ministry determined that Southern had an outstanding and unpaid balance due the Ministry in respect of Retail Sales Tax. The total amount due and owing by Southern for unpaid Retail Sales Tax together with interest and penalty covering the period September 1, 1996 to May 31, 1998 amounted to \$57,534.65.

In June 1998, the Ministry referred the unpaid account of Southern for collection and subsequent thereto Forsythe as Director of Southern contacted the Ministry and he personally entered into an arrangement for payment of the amount owing. No payments were received, despite demand, and the Ministry issued a garnishment which resulted in only \$105.03 being obtained.

No further or other payments were received. On December 21, 1998 Forsythe advised the Ministry that Southern had ceased to operate as of May 31, 1998. Forsythe when advising the Ministry that Southern was no longer operating, also advised the Ministry that he was working for a new motor vehicle dealer although he did not disclose that the new dealer was Forsythe's wife.

The Ministry, having failed to recover the outstanding tax, interest and penalty from Southern, then pursued Forsythe in terms of Section 43 of the *Retail Sales Tax Act* which makes the

Directors of a corporation in default jointly and severally liable together with the corporation for payment of the outstanding taxes, penalty and interest.

The Ministry advised the Ontario Motor Vehicle Industry Council of Forsythe's default and failure to make payments to the Ministry in terms of his arrangement.

Under cross-examination Jordan stated that all correspondence that was addressed by the Ministry to Forsythe was sent to 29, Chippewa Avenue, Nepean, Ontario. According to the records of the Ministry, Forsythe did call Ms. Larches, a collections officer at the Ministry on April 17, 2002 to enquire regarding arrangements he wished to make with the Ministry for "some kind of a settlement in order to reactivate his salespersons licence".

MARY JANE SOUTH'S EVIDENCE

South testified that she is the Deputy Registrar under the *Act* and in that capacity she oversees the registration of motor vehicle dealers and salespersons. South also testified that the Ontario Motor Vehicle Industry Council ("OMVIC") has, since 1997, been delegated with authority and responsibility to administer the *Act* and its regulations. She further testified that the *Act* is a public protection statute enacted with the purpose of ensuring the protection of the public in their dealings with motor vehicle dealers and salespersons. South also referred to section 5 of the *Act* and described for the Tribunal the import of that section which deals with registration of applicants for dealerships and salespersons.

South also stated that OMVIC had caused a print out to be obtained from Companies Branch. This print out, current to August 28, 2002, indicated that 1117238 Ontario Ltd. operating as Southern was initially incorporated on March 24, 1995 and that as of that date Forsythe was appointed its first and as sole director as well as its president and secretary.

South stated that Forsythe agreed to voluntarily surrender his salesperson's licence and on June 1, 1998 he confirmed in writing that he would so at such time as 1292162 Ontario Ltd. was granted a dealer's registration. This latter corporation was to be his wife's corporation and she would be its sole director and officer.

OMVIC subsequently received information that Southern owed Retail Sales Tax which was outstanding and she was concerned that this amount had not been paid. Forsythe agreed that he would assume responsibility for the outstanding tax and accordingly a document encompassing "terms and conditions" was drawn up by OMVIC for Forsythe's signature. This document was then sent by OMVIC to Forsythe for his perusal and signature. This document was then signed by Forsythe as "salesperson" and by his wife as "dealer" and was returned to OMVIC.

(Exhibit 4, Tab 7)

South testified that it was the intention of OMVIC when drafting the document for Forsythe's signature, that he was to be and remain liable for Southern's indebtedness for Retail Sales Tax and that the document would be "enforceable" against Forsythe. Despite signing the

document neither Forsythe nor Southern have made payment of the outstanding Retail Sales Tax. This is perturbing to South in that it indicates that Forsythe has failed to meet a liability imposed upon him.

South also testified that the Bank of Nova Scotia has a default judgement in its favour against Forsythe. This default judgement for the sum of \$34,536.39 plus interest and costs, was granted on April 23, 2001 in the Superior Court of Justice. The present status of this default judgement according to South is that it remains unsatisfied.

South concluded her testimony by stating that the non-payment of taxes to the Ministry and the judgement in favour of The Bank of Nova Scotia, indicates that Forsythe cannot reasonably be expected to be financially responsible in the conduct of business.

JOHN PATTON FORSYTHE

Forsythe testified that in the summer of 1996 one James Harris, for whom he was then working as sales manager in a motor vehicle dealership, approached him and offered to sell his dealership to him. A deal was struck between Forsythe and Harris in terms of which for the nominal amount of \$1.00 Forsythe purchased the dealership. Forsythe incorporated a new corporation to operate the dealership. This new corporation was 1117238 Ontario Ltd. which he operated as Southern. Harris, at the time of the transaction, had a number of vehicles which were owned by him and which were still on the dealership's lot. Forsythe agreed these vehicles could remain on the lot pending their sale by Harris who undertook thereafter to concentrate on "wholesaling vehicles which sales would not attract retail sales tax."

Some time later, Forsythe received a call from the Ministry that Forsythe's corporation was to be audited by the Ministry. In preparation for the expected audit, Forsythe obtained a RIN summary from the licencing bureau and when he went through this summary he was shocked to see that there were some 100 vehicles listed as having been sold by Southern which he had no record of as they were not in fact sold by him. He made enquiries and ascertained that these approximately 100 vehicles had been sold retail by Harris who, without Forsythe's authorization, was using Southern's dealership registration number to sell retail. Forsythe confronted Harris with this information who admitted selling retail using Southern's registration number, but he was not prepared to do anything about refunding the retail sales tax debited by the Ministry to Southern. He claimed he was judgement proof, with all assets in his wife's name.

Forsythe conceded he received a bill from the Ministry for approximately \$34,000.00 for Retail Sales Tax which he had failed to remit and for which he was liable. Harris at the same time was given a separate bill by the Ministry for Retail Sales Tax but failed to remit to the Ministry.

Forsythe stated further that he reported the situation to Ms. Laura Gordon ("Gordon") at OMVIC. Gordon wanted him to deal with the debt owing to the Ministry for unpaid Retail Sales Tax. He agreed to sign the "terms and conditions" which Gordon had faxed to him pursuant to his conversation with Gordon. He then obtained a new dealership licence from OMVIC which

it issued to his wife. After the audit undertaken by the Ministry he agreed to pay his portion of outstanding Retail Sales Tax to the Ministry at the rate of \$500.00 per month. This undertaking was made when he agreed to the terms and conditions arrived at with the Ministry.

Insofar as his liability due to The Bank of Nova Scotia is concerned, Forsythe stated he had spoken with the Bank's lawyers "yesterday" and he believes that "we are close to a settlement". Since the date of the judgement he has made no payments in reduction of this indebtedness. He also stated he has made no payment to the Ministry for the sum of approximately \$34,000.00 owing for Retail Sales Tax.

FACTS FOUND PROVEN:

The following are to the facts found to have been proven:

1. The Applicant was initially registered as a motor vehicle salesperson under the Act in March 1989 and is presently so registered.
2. 1117238 Ontario Ltd. operating as Southern was incorporated on March 24, 1995 and was registered as a motor vehicle dealer under the Act from July 1996 until July 1998.
3. The Applicant was appointed as the sole director, president and secretary of Southern commencing March 24, 1995 and presently remains so registered.
4. For the period September 1, 1996 to May 31, 1998 1117235 Ontario Ltd. became liable to the Ministry of Finance, Ontario, for Retail Sales Tax in terms of the Retail Sales Tax Act R.S.O.
5. The amount for which 1117238 Ontario Ltd. is liable to the Ministry of Finance for Retail Sales Tax together with penalty and interest, calculated as at September 18, 2001, is the sum of \$57,534.65 which sum remains presently outstanding and due and owing.
6. In terms of section 43 of the Retail Sales Tax Act, R.S.O. the Applicant is personally liable to the Ministry of Finance for the sum of \$57,534.65 in respect of unpaid Retail Sales Tax, interest and penalties and which sum he has failed to pay.
7. On or about July 15, 1998 the Applicant signed an undertaking addressed to the Registrar in which the Applicant agreed "to assume full responsibility for any monies currently owing or those monies that may be assessed in the future as owing to Revenue Canada or the Ministry of Finance arising from business transactions while I was the director/owner of 1117238 Ontario Ltd. o/a Southern Automobiles".
8. On or about April 23, 2001, The Bank of Nova Scotia obtained a default judgement against the Applicant in the Superior Court of Justice for the sum of \$34,536.39 plus costs and interest. The Applicant has, as of September 10, 2002, failed to in part or at

all reduce or liquidate the amount owing to The Bank of Nova Scotia under the above default judgement.

THE LAW:

Section 5.1 of the *Motor Vehicle Dealers Act* (the "Act"), states as follows,

5 (1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

- (a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
- (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or

Section 6.2 of the Act states;

6. (2) Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5, if the registrant were an applicant, or where the registrant is in breach of a term or condition of the registration.

Section 43.(1) of the Retail Sales Tax Act states:

Where a corporation has failed to collect tax or has collected tax and failed to remit the tax or has failed to pay any interest or penalty relating thereto, the directors of the corporation at the time the corporation was required to collect or remit the taxes or to pay the interest or penalty relating thereto, are jointly and severally liable, together with the corporation to pay such amounts.

APPLICATION OF LAW TO FACTS:

In these proceedings the Registrar proposes to revoke the Registration of the Applicant on the basis of Section 5.(1)(a) and (b) and section 6.(2) of the Act.

The following are the issues for consideration by the Tribunal.

1. Having regard to the financial position of the Applicant and his failure to pay the amounts presently due and owing to the Ministry of Finance and The Bank of Nova Scotia, can the Applicant be reasonably expected to be financially responsible in the conduct of business;

2. Does the past conduct of the Applicant afford the Registrar with reasonable grounds for belief that the Applicant will not carry on business in accordance with the law and with integrity and honesty.

It is necessary to note that it is the Registrar's belief that is at issue in these proceedings, not that of the Tribunal. The proper function of the Tribunal is to review the Registrar's decision in order to determine whether or not he was in error in coming to his decision to revoke the Applicant's registration. In the leading case of Brenner 19 CRAT SCO Decisions and Orders (1971 – 1989) page 95 Southey J. stated:

The effect of Section 7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself.

Amount owing to the Ministry of Finance

1117238 Ontario Ltd. operating as Southern collected Retail Sales Tax from purchasers of motor vehicles and failed to remit such taxes to the Ministry. In addition the company failed to collect Retail Sales Tax from certain purchasers. All these taxes, together with interest thereon plus penalties, were not remitted to the Ministry. The Applicant admitted that the taxes collected but not remitted to the Ministry were collected by Southern in respect of sales concluded by Southern. These taxes were in fact trust funds which Southern failed to remit.

On the Applicant's own testimony, as well as what he stated in his letter of explanation dated March 18, 2002 addressed to the Registrar, he conceded that his share of liability for unremitted taxes was "approximately \$34,000 which consisted of \$19,000.00 tax not remitted" and "\$15,000.00 in penalties".

The Tribunal accepts the evidence of Jordan that the Applicant acknowledged liability for payment but failed to make payment as he had undertaken to do. The Tribunal also accepts that the Applicant was, (and still is), the sole director and controlling mind of Southern and that he was at all stages aware of Southern's liability for outstanding tax. The Tribunal finds that the Applicant, by virtue of his directorship in Southern and the latter's failure to pay the Retail Sales Tax that remains due and owing to the Ministry, is personally liable to the Ministry in terms of Section 43 of the Retail Sales Tax Act, for that outstanding tax and further finds that he has failed to make payment thereof to the Ministry.

The fact that the Applicant did acknowledge his liability to the Ministry, undertook to liquidate same and the failed to implement his undertaking is evidence that supports the Registrar's

belief that in the future the Applicant cannot reasonably be expected to be financially responsible in the conduct of business.

The Applicant's contention that the July 15, 1998 agreement prepared by OMVIC is not enforceable as it was entered into on a "without prejudice" basis, is rejected by the Tribunal as it was clearly the intention of the parties, pursuant to negotiations, that the "terms and conditions" would be legally binding.

The Applicant's Counsel, in referring to the Terms and Conditions prepared by OMVIC and which were signed by the Applicant, submitted that there was ambiguity in that document in the use of the words "full responsibility". Counsel contended that pursuant to the doctrine of *contra proferentem* the agreement must be interpreted against OMVIC and the words "full responsibility" must be interpreted in a manner such that the Applicant "simply agreed to be responsible for the monies and nothing more". The Tribunal does not agree with the interpretation placed upon those words by Applicant's Counsel and sees no ambiguity in the words used, being "capable of several reasonable interpretations". The plain and normal meaning of the words "responsible" is that the person would be responsible for and pay the amount for which he undertook responsibility.

However, the Tribunal does not believe the issue in this matter turns on a finding of whether or not Applicant's Counsel is correct in his interpretation of the words "full responsibility" and whether such words are ambiguous. At issue in this matter is not the validity or interpretation of the Terms and Conditions but whether or not the Applicant's acts and omissions give reasonable cause for the Registrar to expect the Applicant not to be financially responsible in the conduct of business.

The Tribunal has not doubt that the conduct of the Applicant is not paying over to the Ministry what are essentially trust funds held by the Applicant on the Ministry's behalf, is in itself a display of financial irresponsibility in the conduct of business that bodes ill for the future conduct of the Applicant in business. Additionally, the conduct of the Applicant, that has persisted since 1998, in not making any payments to the Ministry of what is essentially trust monies, is not only dishonest and lacking in integrity, but is conduct contrary to law.

This conduct, which has persisted since 1998 and still persists, is clearly conduct that affords the Registrar reasonable grounds for belief that the Applicant will not in the future carry on business in accordance with the law and with integrity and honesty.

Amount owing to The Bank of Nova Scotia

The Bank of Nova Scotia has a default judgement in a substantial amount against the Applicant. No appeal has been filed in regard to that judgement. Applicant does not contest the judgement. The evidence before the Tribunal is that no portion of judgement has been liquidated since April 2001. Only in the days before the hearing did the Applicant contact the Bank's lawyers to try to commence "negotiations" regarding the amount owing. The

Applicant's failure or refusal to deal with this matter, does not imbue the Tribunal with confidence in the Applicant's ability to deal responsibly in business as well as with integrity. The Tribunal finds no error in the Registrar's decision to revoke the Applicant's registration.

DECISION:

Accordingly, pursuant to the authority vested in it by Section 7.(4) of the *Motor Vehicle Dealers Act*, the Tribunal directs the Registrar to carry out his Proposal dated January 22, 2002, to revoke the registration of John Forsythe as a motor vehicle salesperson under the Act.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice Chair

Released: September 25, 2002

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
LORENZO SOUSA

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: May 8, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

LORENZO SOUSA

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Lorenzo Sousa, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: September 9, 2002

TO: The Registrar
Motor Vehicle Dealer Act
Ontario Motor Vehicle Industry Council
789 Don Mills Road, Suite 800
Toronto, ON M3C 1T5

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Lorenzo Sousa
1502 Rosebella Avenue South
Ottawa, ON K1T 1E8

Pursuant to subsection 5(2) of the *Motor Vehicle Dealers Act* Lorenzo Sousa (hereinafter referred to as "the Applicant") and the Registrar, *Motor Vehicle Dealers Act*, (hereinafter referred to as "the Registrar"), in accordance with section 4.1 of the *Statutory Powers Procedure Act*, do hereby waive the requirements of a hearing and consent to an Order of the Licence Appeal Tribunal based upon the following Terms and Conditions:

1. The Applicant agrees, if he is charged in the future, to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.
2. The Applicant agrees if he is convicted under any law of an industry specific offence or if he is convicted under the Criminal Code, the Registrar is directed to and shall carry out the proposal.
3. The Applicant agrees not to transfer his registration as a salesperson under the *Motor Vehicle Dealers Act* to another dealer without the prior written consent of the Registrar.
4. The Applicant agrees not to be involved in the process of buying, selling or leasing motor vehicles without the benefit of registration.
5. The Applicant shall not be an officer, director, owner or partner in a dealership.
6. The Applicant agrees to provide full and complete disclosure on all future applications and discussions with the Registrar, regardless of whether disclosure has been previously provided to the Registrar.
7. The Applicant will take reasonable steps to review his employer's books, records & information pertaining to prior use/condition of any motor vehicle that he sells on behalf of his employer and ensure that the information is disclosed to the purchaser in writing on the bill of sale.
8. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.
9. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.
10. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out

herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.

11. The Applicant will provide a copy of this order to his employer forthwith.
12. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
13. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
14. The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____ this _____ day of _____ 2002.

Lorenzo Sousa (signature)

These Terms and Conditions are accepted by the Registrar, *Motor Vehicle Dealers Act*.

Date:

Carl Compton
Registrar
Motor Vehicle Dealers Act

DEAN ARTENOSI

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: VICTOR DREVNIG, VICE CHAIR

APPEARANCES:

LEN MARSELLO, Counsel, representing the Applicant
ANITA JOHN, Counsel, representing the Registrar, *Real Estate and Business Brokers Act*

DATE OF

PRE-HEARING: September 16, 2002,

Toronto

ORDER

Following attendances on September 16, 2002 at a prehearing before this Tribunal of Len Marsello, Counsel on behalf of Dean Artenosi (the "Applicant"), and Anita John, Counsel appearing on behalf of the Registrar, *Real Estate and Business Brokers Act* (the "Registrar");

The Tribunal makes the following order respecting the hearing scheduled to commence at 9:30 a.m. on Tuesday, October 22, 2002 and Wednesday, October 23, 2002 at the Tribunal's own chambers at 1 St. Clair Avenue West, 12th floor, Toronto, Ontario;

1. The Parties to the hearing are the Applicant and the Registrar.
2. The Applicant's Counsel confirmed to the Tribunal at the prehearing that the Applicant admits none of the allegations made in the Registrar's Notice of Proposal dated May 27, 2002 to revoke the registration of the Applicant which dealt with complaints number 1 and number 2. Nor does he admit any of the allegations made in complaint number 3 (Blackwood) which arose after the Registrar's Notice of Proposal of May 27, 2002;
3. The Registrar is ordered to have all documents dealing with all three complaints served on the Applicant and Tribunal by Friday, September 27, 2002 and that Applicant's Counsel will reply on or before October 15, 2002 with all documentation and statements which may be used at the hearing, such

documentation and statements to be served on the Registrar and filed with the Tribunal by that date.

4. The Registrar shall serve the Applicant with any witness statements and file them with the Tribunal by 4:00 p.m., October the 8th, 2002. Any factums of law regarding the 3rd complaint (Blackwood) shall be served on the Applicant and filed with the Tribunal by 4:00 p.m. September the 27th, 2002.
5. All parties to the hearing shall fully comply with the requirements of disclosure of documents or things as set forth in Rule 6.3 of the Rules of Practice of the Tribunal. All parties shall also fully comply with the disclosure requirements set forth in Rule 6.4 of the Rules of Practice of the Tribunal dealing with expert witnesses and a brief outline of witness's statements shall also be provided..

LICENCE APPEAL TRIBUNAL

Victor Drevnig, Vice-Chair,

Released: September 24, 2002

GOMES AND SONS TRANSPORT INC.

IN THE MATTER OF an Application by Gomes and Sons Transport Inc. dated June 14, 2002 for a hearing before the Licence Appeal Tribunal pursuant to Section 50(1) of the Highway Traffic Act appealing the Suspension and Seizure Order of the Deputy Registrar dated May 23, 2002;

AND IN THE MATTER of the Highway Traffic Act R.S.O. 1990, Chapter H.8. as amended;

AND IN THE MATTER of the safety record of Gomes and Sons Transport Inc.;

AND IN THE MATTER of the Commercial Vehicle Operator's Registration (CVOR) certificate #124-881-797 issues to Gomes and Sons Transport Inc.;

AND IN THE MATTER of the plate portion of permits issued to Gomes and Sons Transport Inc.;

AND IN THE MATTER of outstanding fines;

TO APPEAL THE SUSPENSION AND SEIZURE ORDER

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

The Applicant, GOMES AND SONS TRANSPORT INC., was not represented

PATRICK MOORE, Counsel, representing the Registrar under the *Motor Vehicle Dealers Act*

DATES OF
HEARING:

September 10, 2002

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal by Gomes and Sons Transport Inc. (the "Applicant") respecting the decisions of the Deputy Registrar of Motor Vehicles (the "Registrar") dated May 23, 2002 to suspend CVOR Certificate #124-881-797 and plate portion of permits for all commercial motor vehicles and trailers issued to the Applicant until such time as payment is made for all unpaid fines.

PRELIMINARY MATTERS:

When the matter was called at 9:30 a.m. there was no appearance by either the agent on behalf of the Applicant or by the Applicant itself. The matter, accordingly, stood down for thirty minutes as is the Tribunal's usual practice. When at 10:10 a.m. the matter did proceed one Jackie Dennis appeared before the Tribunal and advised the Tribunal that her husband, Harvey Dennis of City Wide Paralegal Services, who had been retained by the Applicant, was not available and handed the Tribunal a letter dated September 13, 2002 which stated, in part, as follows:

Please be advised that I am unable to attend as I have a matter in another court that I was just advised about by my client about just recently.

I was going to contact Mr. Patrick Moore of my situation but I have been so busy that it slipped my mind to do so.

...

I have tried to contact Mr. Patrick Moore on September 9, 2002 and found out by a very helpful person at the Ministry of Transportation in St. Catharines that he was tied up in meetings till late in the afternoon.

It would be greatly appreciated if this matter could be adjourned to a new date so I can attend and bring this matter to an end.

Counsel for the Registrar objected to the granting of an adjournment on the basis that the present hearing date was arranged in June of 2002 when the date was agreed to by Registrar's Counsel so as to accommodate the Applicant's agent who had specifically requested September 13, 2002 as the date for the hearing of this matter. The Registrar's Counsel also objected on the basis that the Registrar's witness from the Ministry of Transportation was present having been obliged to travel from St. Catharines to give evidence.

Ms. Jackie Dennis declined to respond to the Registrar's Counsel's submissions. The Tribunal

denied the request for an adjournment and ordered that the hearing proceed in the absence of the Applicant or its agent.

EVIDENCE:

The only witness for the Registrar was Don Gillett ("Gillett") who testified that he is employed by the Ministry of Transportation as a Carrier Safety Rating Administrator. In his aforesaid capacity he reviews and analyses files of commercial vehicle operators for integrity of operation. If intervention is required pursuant to his review of an operator's file

Gillett submits his findings to the Deputy Registrar for the latter's approval. This was done in the matter of the Applicant and after completing his analysis of the Applicant he formulated the Suspension and Seizure Order and submitted it to the Deputy Registrar for approval. The Deputy Registrar approved the Suspension and Seizure Order (the "Order") and signed same on May 23, 2002.

(Exhibit 4, Tab 2, pages 3 and 4)

The reasons for the Order is based upon the failure of the Applicant to pay fines imposed by court. The Applicant was given until June 14, 2002 to provide proof of payment of outstanding fines failing which to show cause why the Order should not be effective as of June 17, 2002 and shall remain in force until payment of all outstanding fines are made. Attached to the Order was a computer print out of the outstanding fines then due and owing by the Applicant. The fines together with penalties imposed for non payment of such fines as well as accrued interest as at May 23, 2002 was the sum of \$4096.75. This sum represented the following unpaid fines:

OFFENCE DESCRIPTION	SENTENCE DATE	AMT OWING
FAIL TO KEEP ALL DAILY	20 07 99	398.75
FL. INSP/REPAIR/MAIN.	14 01 02	412.50
DRIVE MOTOR VEHICLE, NO	22 05 98	128.75
DRIVE MOTOR VEHICLE, NO	06 10 97	128.75
PERMIT/OPERATE UNSAFE V	05 04 01	1895.00
DRIVE MOTOR VEHICLE, NO	20 07 98	128.75
FAIL TO ENSURE STANDARD	28 07 97	398.75
AXLE OVERLOADING	21 05 98	191.75
CONVERSION STATUTE	15 08 00	413.75

Gillett testified that the unpaid fines covered the period July 1997 through to and including April 2001. He also stated that the Order was sent to the Applicant by both fax and by courier. The faxed Order was received by the Applicant on May 24, 2002 and a copy of the Order sent by courier was delivered to the Applicant on May 27, 2002. Attached to and forming part of the Order was a computer print out of the outstanding fines.

(Exhibit 4, tab 2, pages 7, 8 and 9)

Gillett also testified as to each offence that resulted in the imposition of a fine and explained when the offences were committed, when the fines in respect of each offence were imposed, as well as the court which imposed each fine.

(Exhibit 4, tab 3, pages 10 to 49)

Gillett stated that he met and spoke with both Mr. and Mrs. Gomes of the Applicant in regard to the outstanding fines and gave them a computer print out of what fines were outstanding and in respect of what offences the fines were imposed and the dates of the commission of all offences.

He further stated that as far back as May 1999 he handed to Antonio Gomes, the Applicant's President, a copy of the Facility Audit Findings which at that date indicated outstanding fines of \$1,374.00. In the Facility Audit Findings the Applicant was urged, if necessary, to reconcile the fines then outstanding with the District Courts.

Again in January 2001 a warning letter from the Ministry of Transport was addressed to the Applicant regarding the outstanding and unpaid fines and on January 11, 2001 a letter to the Applicant stated:

Your record also indicates unpaid fines. Please take the attached listing, identified as the ICON Inquiry Subsystem Outstanding Payments Update listing, with you to any provincial court so they can relate to the appropriate case numbers. Please forward a copy of the court receipts to this office to confirm payment.

Gillett testified that as before the Registrar's demands for payment were ignored.

Gillett concluded his evidence by noting that subsequent to the Applicant receiving the Order, its Agent wrote to the Registrar as follows:

CITY WIDE
Paralegal Services
0/0 by 1078105 Ontario inc.

June 14, 2002

Ministry Of Transportation
Carrier Sanctions and Investigations Office
301 St. Paul Street 3rd floor
St. Catharines, Ontario
L2R 7R4

Our Client: Gomes And Sons Transport

Subject: Suspension And Seizure Order

Attn: Don Gillett

As per our conversation of June 13, 2002 with respect to the above noted client Gomes And Sons Transport.

I have now arranged and filed appeals with other courts with respect to other convictions separate from your list.

I am now currently preparing the motions for the five court locations for your list of outstanding convictions and fines owing.

It is the policy of the court to allow me a few options with respect to the fines that are owing.

I will try to get an extension of the fine payment and or have our client appear on a recognize for the fine.

If the above two applications for payment are not allowed we will have no choice but to pay the amount owing and if the appeal is granted a return of the fines will be returned to our client.

I am requesting on behalf of my client an extension with respect to your order of suspension and seizures order.

The motions and or extensions should take me about 14 days to arrange either by way of payment extensions or a recognize and or payment of the fine.

An extension until June 30, would be helpful to my client and would give myself the opportunity to clear up the outstanding fines that are in arrears.

It would be much appreciated if your office would grant this brief extension to June 30, 2002.

A copy of each motion, appeal, extension and or recognize will be sent to your office by June 24, 2002.

If you have any questions or concerns you may contact my office during regular business hours.

Yours truly
"H. Dennis"
H. Dennis

c.c. Gomes And Sons Transport Inc.

Despite that letter the Applicant's agent has not filed any motions nor filed any appeals relating to the outstanding and unpaid fines pursuant to the various court orders.

FACTS FOUND PROVEN:

The following are the facts found to have been proven.

1. The Suspension and Seizure Order dated May 23, 2002 issued by the Deputy Registrar in terms of sections 47 And 47.1 of the *Highway Traffic Act* R.S.O. 1990 as amended was duly served upon the Applicant during May 2002.
2. Attached to such Suspension and Seizure Order was a computer print out detailing the nature of offences committed by the Applicant under the *Highway Traffic Act* and Regulations, the date of such offences, and the date and amount of the courts' fines or sentences relative to such offences.
3. The amount of unpaid fines imposed by courts against the Applicant under the *Highway Traffic Act* and Regulations is the sum of \$4,096.75.
4. The Applicant fails and/or refuses to pay such fines totalling \$4,096.75 .
5. The Applicant has not appealed the sentences or fines imposed against the Applicant by various courts under the *Highway Traffic Act* and its Regulations.

THE LAW:

Section 47.(1) of the *Highway Traffic Act* states:

- 47(1) Subject to section 47.1, the Registrar may suspend or cancel,
- (a) the plate portion of a permit as defined in Part II;
 - (b) a driver's licence; or
 - (c) CVOR certificate, on the grounds of,
 - (d) misconduct for which the holder is responsible directly or indirectly, related to the operation or driving of a motor vehicle;
 - (e) conviction of the holder for an offence referred to in subsection 210(1) or (2); or
 - (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
 - (g) any other sufficient reason not referred to in clause (d) ,(e) or (f).

Section 50.1 of the aforesaid Act states:

- 50(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.
- (2) The [Tribunal] may confirm, modify or set aside the decision of the Minister or Registrar.

APPLICATION OF LAW TO FACTS:

The issue before the Tribunal is whether the evidence placed before it supports the Suspension and Seizure Order.

There was no appearance before the Tribunal by either the Applicant or its appointed agent. The evidence of the Registrar has not been contested or disputed. On a reading of the Applicant's agent's letter of June 14, 2002 (Exhibit 4, tab 9) it is quite apparent that the Applicant does not dispute that the fines imposed by court are in fact owing.

The evidence of Gillett, which the Tribunal accepts, is clear and unambiguous. Over a period of time commencing in July 1997 and continuing until January 2002 the Applicant has failed to comply with the *Highway Traffic Act* and its regulations. It has failed to keep all daily logs and has been fined in respect of that infraction. It has failed to inspect/ repair/ maintain a commercial vehicle contrary to section 107 the *Highway Traffic Act*. It has permitted commercial vehicles to be driven without the necessary permits. It has permitted the operation of unsafe commercial vehicles contrary to Section 84 of the *Highway Traffic Act*. It has failed to ensure that a commercial vehicle conforms to standards contrary to Regulation 575 (g) of the the *Highway Traffic Act*. It unlawfully permitted a commercial vehicle to be operated with a defective wheel brake contrary to section 5(5) of regulation 587 under the *Highway Traffic Act* and unlawfully permitted a commercial vehicle to have an axle overload contrary to section 122(1) of the Act.

All of the above violations of the *Highway Traffic Act* and/or its regulations resulted in the Applicant being fined by various courts at various times. The Registrar has clearly established an ongoing course of conduct by the Applicant not to pay its various fines in the amount of \$4,096.75. The Applicant established a course of conduct of non compliance with the law and repeatedly over a period of years since 1997 refused and failed to pay the fines levied against it. The Applicant had many occasions, when it was reminded of its unpaid fines, to pay such fines and yet it repeatedly did nothing to address the payment of outstanding fines. On the face of uncontested evidence placed before the Tribunal, the Applicant has demonstrated bad faith in not paying or attempting to pay its fines. Accordingly, the Registrar has demonstrated good and sufficient reason, in terms of Section 47.(1)(g) of the *Highway Traffic Act*, for the confirmation of the Order sought and the Tribunal finds no reason to modify or set aside the Registrar's order as the Registrar was not in error in his conclusions.

DECISION AND REASONS:

For the reasons stated above the Tribunal confirms the Suspension and Seizure Order of the Deputy Registrar dated May 23, 2002 and orders that CVOR certificate #124-881-797 and the plate portion of permits for all commercial motor vehicles and trailers issued to Gomes and Sons Transport Inc. be suspended until such time as payment is made to the Courts for all unpaid fines imposed upon the Applicant.

The Tribunal further orders that the plate portions of permits, or if issued by a jurisdiction other than Ontario, the permits and the number plates be seized.

And the Tribunal further orders that Gomes and Sons Transport Inc. shall not transfer any commercial vehicles or trailers for which a permit has been issued in Ontario without consent of the Registrar.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair, Presiding

Released: September 18, 2002

**PETERBOROUGH EQUIPMENT TRAILERS LTD. and
JOSEPH HOPPER**

IN THE MATTER OF the *Highway Traffic Act*, R.S.O. 1990 Chapter H.8 as amended

AND IN THE MATTER OF the Application for a Motor Vehicle Inspection Station Licence Number 49569 by Peterborough Equipment Trailers Ltd. dated February 6, 2002;

AND IN THE MATTER OF the application for registration as a Motor Vehicle Inspection Mechanic Number 49569 by Joseph Hopper holding Trade Certificate Number 310J-920804 dated February 6, 2002.

TRIBUNAL: DAVID J. HUNT, Vice-Chair

APPEARANCES: PATRICK MOORE
Counsel for the Director of Vehicle Inspection Standards

No one appearing for the Applicant

DATE OF HEARING: August 27, 2002 Toronto

DECISION AND REASONS

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal by the Applicant, Peterborough Equipment Trailers Ltd. for the issue of a Motor Vehicle Inspection Station licence, Application number 49569, and the application for registration as a Motor Vehicle Inspection Mechanic, Application number 49569 by Joseph Hopper, collectively referred to herein as (the "Applicant"), respecting a proposal by the Director of Vehicle Inspection Standards to refuse registration.

EXHIBITS:

Exhibit #1: Proposal to Refuse dated May 8, 2000, issued by the Registrar of Motor Vehicles.

Exhibit #2: Notice of Appeal Form received at the Tribunal June 17, 2000, filed by the Applicant.

PRELIMINARY MATTERS:

This appeal had been scheduled to be heard by the Tribunal on August 27, 2002 at 9:30 a.m. One or two days prior to the hearing, Jelle W. Bosch, a lawyer consulted by the Applicant contacted counsel for the Director of Vehicle Inspection Standards and advised that he was not retained, would not be appearing, and advised that Mr. Hopper was aware of the date and place of the hearing. Prior to commencing the hearing, at the scheduled time of 9:30 a.m., a call was placed by the Hearings Co-ordinator for the Tribunal to the Applicant's business phone number, and the number was answered by a female party using the company name of Peterborough Equipment Trailers Ltd. This person stated that Mr Hopper was not there, and she didn't know where he was. The hearing was adjourned for half an hour, and before commencing after 10:00 a.m. another call was placed to the Applicant's phone number, but there was no further news of Mr. Hopper.

FACTS:

The Director's Grounds for Revocation:

By Notice dated May 8, 2002, the Director of Vehicle Inspection Standards refused the application pursuant to subsection 91(8)(a) and (e) and section 93(a) and (c) of the *Highway Traffic Act* R.S.O. 1990, Chap. H8 as amended:

ON THE GROUNDS THAT the past conduct of the director of the applicant corporation, Joseph Hopper affords reasonable grounds for belief that the Motor Vehicle Inspection Station will not be operated in accordance with the law and with honesty and integrity in that the said Joseph Hopper has issued vehicle inspection stickers including Number E259989 in May, 2001 and Number E260004 dated August, 2001 not being a registered Motor Vehicle Inspection Mechanic or having inspected the vehicles in a licensed motor vehicle inspection station.

AND FURTHER ON THE GROUNDS THAT Joseph Hopper failed to comply with the requirements of Regulation 601 upon closing the operation at his prior Motor Vehicle Inspection Station.

The Respondent called one inspector for the Ministry of Transportation who was involved in the investigation of the Applicant.

DON LAWRENCE

Mr. Lawrence testified that he is an officer for the Ministry of Transport, and has been employed here for seven years. He is based in the eastern region, and works in the Peterborough, Victoria county and Northumberland area. In September 1999, Mr. Hopper's previous inspection station at 113 Park St. Peterborough, Ontario, had

ordered 25 books of annual stickers, but they were returned as the Applicant had moved and had not notified the Ministry. In May, June and July 1999, he had ordered and received 48 books of stickers although in the past, he had only ordered five or six books. Accordingly, there were previous concerns with Mr. Joseph Hopper.

An attempt was made to contact him at his residence, but his wife advised that he wasn't there, and a message was left for him to contact the Ministry but he never did. The station and Mr. Hopper were 'red flagged' on the computer so that they would be investigated if there was a contact. It was confirmed that the business had been moved, and when an audit was done it was found that the building had been bulldozed as set out in the Audit Report (Exhibit 3, Tab 6, p. 24). The station was terminated by the Ministry in October 1999.

On December 21, 2001, Mr. Hopper called the Ministry to request more books of safety inspection stickers. The status of the station was run on the computer, and it was found that the licence had expired in October 1999 when Mr. Hopper was advised that he could not be issued more stickers, as the station no longer existed. He made a request to open a new station at 2655 Lakeshore Road, Port Hope, Ontario.

When Mr. Lawrence inspected the station on January 10, 2002, as a result of this, he found that the application seemed to be in order. Joseph Hopper provided him with his Trade Certificate Number 310J920804, which he knew to be a designation for trailers due to the "J" and the Application form showed that the station was for the inspection of trailers (Exhibit 3, tab 2). Mr. Hopper provided letters of incorporation, but he could not produce a lease agreement. When the witness checked on his Trade number he found that it had expired in 1993. There was also an application form for three books of 10 Safety Standard Inspection stickers. When Mr. Hopper found that his licence had expired, he applied to have it re-instated, but had been working for a period of time without a valid licence.

On January 17, 2002, the witness attended at Mr. Hopper's place of business and found an annual inspection sticker number E259989 stamped May 2001 attached on a truck, and found inspection sticker number E260004 attached to the two axles of a trailer. Both stickers were registered to Trailcom Industries, which was the expired Motor Vehicle Inspection Station registered to Mr. Hopper. Mr. Hopper had therefore been issuing stickers without a valid licence. A charge was laid, and Mr. Hopper was convicted of issuing inspection stickers without a licence.

When the witness spoke to Mr. Hopper on the same day, he asked to see the annual inspection books, but he was told that Mr. Hopper could not find them. He produced no records, and had no unused stickers to return.

FACTS:

The following are the facts found to have been proven:

The Applicant in this matter, Mr. Joseph Hopper had previously been licenced to inspect trailers, and been an owner of a Motor Vehicle Inspection Station. He let his licence

lapse in 1993. In 1999, he obtained approximately 480 stickers, while his station was still operating, and continued to work at the Station. He closed the station without sending back the unused stickers as required, and did not notify the Ministry that the station was closed. He issued the stickers when his licence had expired, and applied stickers to the power units of two vehicles, although he had been only certified for trailers.

He was also not keeping proper records, as he could not produce the annual inspection books.

ISSUES:

The issues in this case may be summarized as follows:

Should the decision of the Director of Vehicle Inspection Standards to refuse the Motor Vehicle Inspection Station licence be carried out?

LAW:

The *Highway Traffic Act*, R.S.O. 1990 Chap H.8 as amended, provides as follows:

Motor Vehicle Inspection Station Licence:

- 91(1) No person shall establish, operate or maintain a motor vehicle inspection station except under the authority of a licence issued by the Director under this Act and the Director may issue a licence for a motor vehicle inspection station subject to the conditions that the Director may specify in the licence.
- 91(2) Subject to subsection (3), any person who applies in accordance with this Act and the regulations for a licence to establish, operate or maintain a motor vehicle inspection station and who meets the requirements of this Act and the regulations and who pays the prescribed fee is entitled to be issued the licence
- 91 (3) Subject to section. 95 the Director may refuse to issue a motor vehicle inspection station licence where in his opinion or in her opinion.
 - (a) The past conduct of the applicant, or where the applicant is a corporation, of its officers or directors affords reasonable grounds for belief that the motor vehicle inspection station will not be operated in accordance with the law and with honesty and integrity.

Revocation of a Licence:

- 91(8) The Director may revoke or refuse to renew a motor vehicle inspection station licence where,
 - (a) any person has made a false statement in the application for the licence or a renewal thereof or in any safety standards certificate signed by the licensee or a person authorized in writing by the licensee or in any

report, document or other information required to be furnished by this Act or the regulations or any other Act or regulation that applies to the motor vehicle inspection station;

- (b) any inspection authorized by the licence is incompetently performed;
- (c) the licensee or any motor vehicle inspection mechanic employed in the motor vehicle inspection station has misrepresented the condition of a vehicle with respect to the standards of equipment and performance prescribed by the regulations upon an inspection of the vehicle in the station for the purpose of determining whether or not to issue a safety standards certificate, sign a vehicle inspection record or affix a vehicle inspection sticker;
- (d) there is a breach of condition of the licence;
- (e) the licensee does not comply with this Act or the regulations;
- (f) the inspections that can be performed by the motor vehicle inspection station are misrepresented; or
- (g) a change in the officers or directors of any corporation that is a licensee would afford grounds for refusing to issue a motor vehicle inspection station licence under clause (3)(a)

Motor Vehicle Inspection Mechanic:

- 92(1) No person shall sign a vehicle inspection record as mechanic or certify in a safety standards certificate that a vehicle complies with the standards of equipment and performance prescribed by the regulations unless the person is registered by the Director as a motor vehicle inspection mechanic in a motor vehicle inspection station and the Director may so register any person for whom application is made under subsection (2).
- (2) Where a licensee or an applicant for a motor vehicle inspection station applies for the registration as a motor vehicle inspection mechanic in the motor vehicle inspection station of the licensee or in the proposed motor vehicle inspection station of the applicant for a licence, as the case may be, of any person who meets the requirements of this Act and the regulations, the person is entitled to be registered as a motor vehicle inspection mechanic in the motor vehicle inspection station.
- 92 (4) Subject to section 95, the Director may refuse to register a motor vehicle inspection mechanic where in his or her opinion,
 - (a) the past conduct of the mechanic provides reasonable grounds for belief that the mechanic will not act as a motor vehicle inspection mechanic in accordance with the law, and with honesty and integrity.
- 93 The Director may revoke the registration of a motor vehicle inspection mechanic where,
 - (a) the registrant or the licensee has made a false statement in the application for registration of the registrant or in a safety standards certificate or in any report, document or other information required to be furnished by this Act or the regulations or any other Act or regulation that applies to the registrant;

- (b) any inspection performed under the authority of the mechanic's registration is incompetently performed by the registrant; or
- (c) the registrant does not comply with this Act or the regulation.

Appeal before the Licence Appeal Tribunal:

95(1) Where the Director proposes;

- (a) to refuse to issue or renew a licence;
- (b) to refuse to make a registration; or
- (c) to revoke a licence or registration,

the Director shall serve notice of his or her proposal, together with written reasons therefor,

- (d) in the case of a proposal to refuse to issue a licence, upon the applicant;
- (e) in the case of a proposal to revoke or to refuse to renew a licence, upon the licensee;
- (f) in the case of a proposal to refuse to make a registration, upon the applicant or licensee and upon the proposed registrant; and
- (h) in the case of a proposal to revoke a registration, upon the registrant and the licensee of the motor vehicle inspection station in which the registrant is employed.

(2) A notice under subsection (1) shall inform the person who is the applicant, licensee, registrant or proposed registrant, as the case may be, that the person is entitled to a hearing by the Tribunal if the person mails or delivers, within fifteen days after receiving service of the notice under subsection (1), notice in writing to the Director and the Tribunal requiring a hearing by the Tribunal and the person may so require the hearing.

(4) Where the applicant, licensee, registrant or proposed registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and shall hold the hearing and may by order direct the Director to carry out his or her proposal and to take the action that the Tribunal considers the Director ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Director.

APPLICATION OF THE LAW TO THE FACTS:

The Applicant in this matter let his certificate lapse, and carried on with the inspections while unlicensed. The number of stickers he ordered after the termination of his based station, he increased the number of stickers issued while he was unlicensed, and the station was terminated. He closed the station without properly advising the Ministry, and did not return the unused stickers. When he was finally located it was discovered that he had applied stickers to power units, when he was only licensed for trailer inspections. Mr. Hopper also had no record of the inspections, and was not keeping records as he was required to do.

The Tribunal finds that the Director has shown the Applicant to have acted in a manner that defeats the integrity of the MVIS system, and misled the public.

In this case the Director has shown that the Applicant, signed when he was not entitled, and for vehicles he was not entitled, In addition to the other breaches of the act, this gives the Director the necessary grounds for the refusal of the Appellants's MVIS Licence Applications under sections 91(3)(a) and 92(4) (a) of the *Highway Traffic Act*.

Furthermore, the Tribunal finds that the Director has demonstrated justification for his Order on the grounds that the actions of the Applicant have clearly shown that *"the past conduct of the applicant or, where the applicant is a corporation, is of its officers or directors affords reasonable grounds for belief that the motor vehicle inspection station will not be operated in accordance with the law and with honesty and integrity;"* as described by section 91(3)(a).

DECISION:

IT IS THE DECISION OF THE TRIBUNAL to confirm the Order of the Director to refuse the MVIS License of Joseph Hopper and Peterborough Equipment Trailers Ltd. and to refuse the registration of Joseph Hopper as a Motor Vehicle Inspection Mechanic.

LICENCE APPEAL TRIBUNAL

DAVID J. HUNT
Vice Chair

RELEASED: September 18, 2002

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
GILAD LEGERMAN

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATION
- Proposal dated: June 7, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

GILAD LEGERMAN

- and -

Applicant

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on September 17, 2002;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against all parties* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Tuesday, October 29, 2002.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: September 10, 2002

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
SUNBEAM TRAVEL LTD.
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: June 14, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal
SUNBEAM TRAVEL LTD.

- and -

Applicant

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by Sunbeam Travel Inc., the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek, Chair

Released: September 6, 2002

BETWEEN:

SUNBEAM TRAVEL LTD.

Applicant

- and -

REGISTRAR, TRAVEL INDUSTRY ACT

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

BACKGROUND

1. Sunbeam Travel Ltd. (hereinafter referred to as "the Registrant") is a company incorporated pursuant to the laws of Ontario and has been registered under the *Travel Industry Act*, R.S.O., c. T-19, as amended (hereinafter referred to as "the Act") as a travel agent (registration number 2120202/R) since May 1, 1984 and as a travel wholesaler (registration number 2396473/W) since August 15, 1985. The Registrant's fiscal year end is December 31st.

FINANCIAL STATEMENTS – GROUNDS FOR THE PROPOSAL

2. Subsection 24(2) of Ontario Regulation 806/93 made under the Act (hereinafter referred to as "the Regulation") states that if a registrant had sales of less than \$10 million during the previous fiscal year, the registrant shall file within three months of the end of the fiscal year annual financial statements with a review engagement report by a public accountant licensed under the *Public Accountancy Act*.
2. By letter dated November 23, 2001, the Registrant was requested by TICO to file financial statements for its fiscal year ended December 31, 2001 by March 31, 2002.
3. By letter dated April 11, 2002 the Registrant was issued a reminder letter by TICO that it had not filed its financial statements for the fiscal year ended December 31, 2001 which were due March 31, 2002, and was given a further due date of April 30, 2002.
4. By letter dated May 1, 2002 TICO issued a letter indicating a final due date of May 15, 2002, for submission of its financial statements, failing which administrative may be taken.
5. By June 14, 2002, the Registrant has failed to file its financial statements for the fiscal year ended December 31, 2001. Therefore, the Registrar issued a Proposal to Revoke the Registrant's registration.
6. On June 20, 2002, the Registrant filed its financial statements for its fiscal year ended December 31, 2001, which were due by March 31, 2002. The statements are incomplete, as they do not indicate the Registrant's gross sales for that period.
7. The Registrant has a history of late-filing. Its financial statements for its year ended December 31, 2000, were received on June 5, 2001. Its financial statements for its year ended December 31, 1999, were received on May 23, 2000. Its financial statements for its year ended December 31, 1998, were received

on July 9, 1999.

8. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsections 6 (4) and (5) of the *Travel Industry Act* directing that:

1. the Registrar refrain from carrying out the Proposal to Revoke Registration dated June 14, 2002
2. the Registrant's registration is to be subject to the following terms and conditions:
 - (a) The Registrant shall provide a copy of its gross sales for its fiscal year ended December 31, 2001 certified by a licensed public accountant by September 15, 2002;
 - (b) The Registrant shall file complete financial statements as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for its fiscal year ending December 31, 2002, no later than March 31, 2003;
 - (c) The Registrant shall file complete financial statements as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for its fiscal year ending December 31, 2003, no later than March 31, 2004;
3. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) to (c) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via facsimile transmission, courier or registered mail.
4. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by its signature below that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED this ____ day of August, 2002

Mr. Surjit Babra
Sunbeam Travel Ltd.
I have authority to bind the corporation

Mr. Michael Pepper
Registrar, *Travel Industry Act*

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
1195798 ONTARIO INC. O/A SONALI'S TRAVEL
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: June 14, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

1195798 ONTARIO INC. O/A SONALI'S TRAVEL

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by 1195798 Ontario Inc. o/a Sonali's Travel, the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek, Chair

Released: September 4, 2002

BETWEEN:

1195798 ONTARIO INC. O/A SONALIS TRAVEL

Applicant

- and -

REGISTRAR, TRAVEL INDUSTRY ACT

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

BACKGROUND

1. 1195798 Ontario Inc. o/a Sonalis Travel (hereinafter referred to as "the Registrant") is a company incorporated pursuant to the laws of Ontario and has been registered under the *Travel Industry Act*, R.S.O., c. T-19, as amended (hereinafter referred to as "the Act") as a travel agent (registration number 50006725/R) since September 17, 1999. The Registrant's fiscal year end is December 31st.

FINANCIAL STATEMENTS – GROUNDS FOR THE PROPOSAL

2. Subsection 24(2) of Ontario Regulation 806/93 made under the Act (hereinafter referred to as "the Regulation") states that if a registrant had sales of less than \$10 million during the previous fiscal year, the registrant shall file within three months of the end of the fiscal year annual financial statements with a review engagement report by a public accountant licensed under the *Public Accountancy Act*.
2. By letter dated November 23, 2001, the Registrant was requested by TICO to file financial statements for its fiscal year ended December 31, 2001 by March 31, 2002.
3. By letter dated April 11, 2002 the Registrant was issued a reminder letter by TICO that it had not filed its financial statements for the fiscal year ended December 31, 2001 which were due March 31, 2002, and was given a further due date of April 30, 2002.
4. By letter dated May 1, 2002 TICO issued a letter indicating a final due date of May 15, 2002, for submission of its financial statements, failing which administrative may be taken.
5. On May 21, 2002, "Donna" called on behalf of the registrant to advise that the company's financial statements would be submitted by May 31, 2002.
6. On June 7, 2002 the bookkeeper for the registrant telephoned TICO to advise that he had not yet given the books and records to the accountant, and was unable to give a submission date.
7. By June 14, 2002, the Registrant has failed to file its financial statements for the fiscal year ended December 31, 2001. Therefore, the Registrar issued a Proposal to Revoke the Registrant's registration.
8. On June 24, 2002, the Registrant filed its financial statements for its fiscal year ended December 31, 2001, which were due by March 31, 2002.

9. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsections 6 (4) and (5) of the *Travel Industry Act* directing that:

1. the Registrar refrain from carrying out the Proposal to Revoke Registration dated June 14, 2002
2. the Registrant's registration is to be subject to the following terms and conditions:
 - (a) The Registrant shall file complete financial statements as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for its fiscal year ending December 31, 2002, no later than March 31, 2003;
 - (b) The Registrant shall file complete financial statements as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for its fiscal year ending December 31, 2003, no later than March 31, 2004;
 - (c) The Registrant agrees that the Registrar may continue to hold the Registrant's letter of credit as security until the Registrant has submitted its financial statements for its fiscal year ending December 31, 2002 and demonstrated that it is meeting the financial requirements prescribed by the Regulation.
3. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) to (b) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via facsimile transmission, courier or registered mail.
4. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by its signature below that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED this ____ day of August, 2002

Ms Kim Tran
1195798 Ontario Inc.
o/a Sonalis Travel
I have authority to bind the corporation

Mr. Michael Pepper
Registrar, *Travel Industry Act*

LIH-WU (STEVE) WANG

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: TERENCE A. WARDROP, Q.C., Vice-Chair

APPEARANCES:

TERRY S. GUERRIERO, Counsel for the Applicant
YOVANKA MCBEAN, Agent representing the Respondent

DATE OF
HEARING:

August 27, 2002

London

DECISION AND ORDER

This hearing arises from a Notice of Proposal dated June 7, 2002, (the "Proposal"), issued by the Registrar of Motor Vehicles Dealers and Salespersons (the "Registrar"), to refuse the registration of Lih-Wu (Steve) Wang (the "Applicant"), as a salesperson under the provisions of Section 6(1) of the Motor Vehicles Dealers Act R.S.O. 1990. Ch. M.42 (the "Act"). The Registrar is appointed pursuant to Section 2 of the Act to exercise the powers and perform the duties conferred or imposed under the Act.

The Applicant by a Notice of Appeal (the "Appeal") dated June 20, 2002, requested a hearing before the Licence Appeal Tribunal (the "Tribunal") respecting the Proposal pursuant to the provisions of sections 7(2) and 7(4) of the Act.

The Registrar issued the Proposal under Section 7(1) of the Act based upon the Registrar's opinion that the Applicant is disentitled to registration as a salesperson pursuant to Section 5(1)(b) of the Act. It is the opinion of the Registrar, as stated in the Proposal, that the Applicant failed to make full disclosure on his application for registration submitted to the Registrar. The Applicant in his Appeal stated that he did not carefully read and understand the application.

At the commencement of the hearing, Counsel for the Applicant stated that as a result of discussions between the Parties, a settlement of the issues had been reached and a Settlement Document had been executed by or on behalf of both Parties. Subsequent to reviewing the Settlement Document and in light of the remarks made by Counsel, the Tribunal thence marked all documents received by the Tribunal prior to the hearing severally, as Exhibits. It was proposed on consent that no further evidence would be

produced or testimony given at the hearing save for the filing of the Settlement Document as a further Exhibit and attaching it to this Order as a schedule.

The Tribunal gave an oral decision subject to the release of this written order.

ORDER:

Accordingly, the Tribunal, pursuant to the authority vested in it by section 7(5) of the Act:

- (1) endorses the terms and conditions contained in the Settlement Document marked as Exhibit #5 and attached as a schedule hereto, and
- (2) orders the Applicant to comply fully therewith.

The Applicant having withdrawn his appeal to the Tribunal, this hearing is concluded and the Appeal dismissed.

LICENCE APPEAL TRIBUNAL

Terence A. Wardrop, Q.C.
Vice Chair, Presiding

RELEASED: September 13, 2002

JOHN AND PHYLLIS ZIMMER

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

JOHN AND PHYLLIS ZIMMER, appearing on their own behalf.

NETANUS RUTHERFORD, Counsel, representing the Ontario New Home Warranty Program.

STEVE MCQUADE, Agent, representing Salcor Construction Ltd., the Added Party.

DATE OF
PREHEARING: September 20, 2002

By teleconference

ORDER

Following attendance by teleconference on September 20, 2002 at a pre-hearing before this Tribunal of John and Phyllis Zimmer, appearing on their own behalf (the "Applicants"), and Netanus Rutherford, Counsel, on behalf of the Ontario New Home Warranty Program, (the "Program"), and Steve McQuade, Agent on behalf of Salcor Construction Ltd. (the "Added Party");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 am on October 28, 2002 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario and to continue, if necessary, on October 29, 2002 at 9:30 a.m. at the Tribunal's above chambers:

1. The Parties to the hearing are the Applicants, the Program and the Added Party.
2. The sole issue for the Tribunal to deal with at the hearing of this matter is the Applicant's claim for the water penetration as described in the Program's decision letter of June 12, 2002.

3. There were no facts or evidence that were agreed upon.
4. There was no settlement of the issue in this matter.
5. All parties to the hearing shall fully comply with the requirements of disclosure of documents or things as set forth in Rule 6.3 of the Rules of Practice of the Tribunal. All parties shall also fully comply with the disclosure requirements set forth in Rule 6.4 of the Rules of Practice of the Tribunal dealing with expert witnesses.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: September 24, 2002

1159-MED-MOTION

Appeal under Section 50(1) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 47(1) of that Act.

MOTION TO CONSIDER A REQUEST FOR AN ORDER OF THE LICENCE
APPEAL TRIBUNAL FOR COSTS

TRIBUNAL: CARL DOMBEK, Chair

APPEARANCES:

DAVID MILNER, Counsel for the Registrar of Motor Vehicles
Solicitor for the Applicant

DATE OF

HEARING: September 10, 2002

Written

ORDER

BACKGROUND:

The Applicant received her "G" licence in 1991. As early as 1993, she started experiencing mental health issues, for which she was hospitalized on several occasions between 1993 and 1999. Physician #1, a psychiatrist familiar with her medical history, indicated in March of 2001, that he had "no knowledge" that any of her mental health problems affected her driving abilities. In fact, she had been driving without incident.

When in March, 2000, she applied for the "A" class beginner's licence, the Applicant was requested to have a family doctor fill out a standard medical form issued by the Ministry of Transportation (hereinafter "MTO"). the Applicant received a letter from the MTO, dated March 16, 2000, requesting an "up to date assessment from a psychiatrist and a neurologist" to determine whether she could safely operate a Class "A" vehicle.

Physician #1 replied to the MTO in satisfaction of this request. However, the MTO threatened to suspend her licence if she was unable to return a detailed discharge summary by July 9, 2002. Her licence was subsequently suspended under section 32(12) of the Act, effective August 8, 2001, for failure to comply with this request.

Pursuant to this decision, the Applicant provided a discharge summary and the following letters to the MTO:

1. Letter from Physician #2, August 21, 2001,
2. Letter from Physician #1 dated August 13, 2001, and
3. Letter from Physician #3 dated August 16, 2001.

The letters all indicated that, while the Applicant did and still does suffer from some mental health problems, these problems have not involved motor vehicles and did not interfere with her ability to safely operate a motor vehicle.

The Applicant was sent a notice of suspension of her driver's licence, under section 47(1) of the Act, dated October 29, 2001, due to alleged "evidence of a medical condition that would affect [her] ability to safely operate a motor vehicle". In November of 2001, Doctors Physician #4, Physician #5, Physician #6 and Physician #7 all wrote to MTO again supporting the reinstatement of her driver's licence.

On December 21, 2001, she attended an administrative review of the decision to suspend her licence. Her submissions included the letters from various doctors, explaining the details of her condition. None of these letters indicated that her ability to safely operate a motor vehicle was impaired by her mental illness. The MTO decided to deny her request to have her licence reinstated. In a letter dated May 9, 2002, the Deputy Registrar of the MTO stated that they would be willing to reconsider her case upon receipt of a "detailed assessment that Name has achieved a one year period free from psychiatric symptoms".

On June 20, 2002, the Applicant retained legal counsel to represent her at the appeal. An appeal of the Registrar's decision to suspend her licence under section 47(1) of the Act was submitted on June 27, 2002. The Applicant forwarded additional correspondence from her doctors to the Registrar.

On July 17, 2002, the Applicant provided further correspondence and a discharge summary.

On July 18, 2002, after reviewing the updated file, the Registrar reinstated the class "G" driver's licence of the Applicant. This reinstatement occurred 6 days prior to the scheduled hearing before this Tribunal.

DECISION:

The authority to order costs stems from the *Statutory Powers Procedure Act*, R.S.O. 1990, c S-22 and the Tribunal's Rules of Practice. Specifically, Rule 14 provides:

14. COSTS

- 14.1 Where a party believes that another party in proceedings before the Tribunal has acted unreasonably, frivolously, vexatiously, or in bad faith, that party may make a request to the Tribunal for costs, which request shall be made with notice to all other parties to the proceedings and prior to the release by the Tribunal of its final order in the proceedings.

- 14.2 The Tribunal in determining whether a party has acted unreasonably, frivolously, vexatiously, or in bad faith shall consider all of the circumstances, including, without limiting the generality of the foregoing, circumstances such as a party:
- (a) failing to attend a hearing before the Tribunal or to send a representative when properly given notice, without contacting the Tribunal and other parties to the hearing;
 - (b) failing to comply in a timely manner with a procedural order or direction of the Tribunal where the result therefrom is undue prejudice or delay to another party or parties in the proceedings before the Tribunal;
 - (c) failure to comply in a timely manner with the disclosure requirements set out in the Tribunal's Rules of Practice, including, without limiting the generality of the foregoing, the disclosure requirements respecting documents, particulars, or constitutional issues; or
 - (d) knowingly presenting false or misleading evidence.
- 14.3 Where the Tribunal finds that a party has acted unreasonably, frivolously, vexatiously, or in bad faith, the Tribunal may order that party pay the costs of another party or parties to the proceedings subject to Rule 14.4 respecting the amount of costs that may be ordered by the Tribunal panel.
- 14.4 Where the Tribunal determines that an order for costs may be made under Rule 14.3,
- (1) the Tribunal when determining the appropriate award of costs shall consider all the circumstances, including without limiting the generality of the foregoing, factors such as the seriousness of the misconduct, the amount of costs incurred by the party requesting costs, or the conduct of the party requesting costs; and
 - (2) the amount of costs shall not exceed,
 - (a) where the Tribunal has not commenced a hearing, the sum of \$400.00; or
 - (b) where the Tribunal has commenced a hearing, the sum of \$800.00 multiplied by the number of days that the Tribunal conducts a hearing of the matter, with any part day being considered a full day for the purpose of this calculation of costs.

The effect of section 14 is that the conduct of a party had to be unreasonable, frivolous, vexatious or done in bad faith. The claim by the Applicant is that the Registrar's conduct was unreasonable due to the fact that she had all the relevant medical information before her when the licence suspension was ordered and there was no change in that information when the licence was reinstated. The Tribunal's understanding of the Submissions is that there is no claim that the Registrar's conduct was frivolous, vexatious or done in bad faith.

ISSUE:

Was the decision to suspend the licence unreasonable?

Black's Law Dictionary (6th Edition) notes that unreasonable has been defined as (amongst others) "irrational, foolish, silly, senseless, stupid; immoderate; capricious or arbitrary". While the Concise Oxford Dictionary (8th Edition) is more moderate in its definitions, "1. going beyond the limits of what is reasonable or equitable...2. not guided by or listening to reason". This Tribunal prefers the latter definitions.

It is this Tribunal's finding that the Registrar did not act reasonably in reviewing the seven medical reports submitted by the Applicant. The Tribunal finds that all of those reports state to some degree or another that the Applicant's mental state would not interfere with her driving. These reports were in the possession of the Registrar well before the scheduled hearing date. To act upon them 6 days before the hearing, after counsel had been retained and the appeal filed was unreasonable in this particular circumstance. Unfortunately for the Applicant it was only after she filed her appeal and shortly before the scheduled hearing date that the Registrar reinstated her licence.

QUANTUM:

Costs are by their nature compensatory rather than punitive. Therefore, if the extent of the loss can be determined, the extent to which costs ought to be allowed can be ascertained. the Applicant paid a filing fee of one hundred dollars (\$100.00) to commence this proceeding. Through most of the proceedings before the motion she was represented by a student-at-law and on the motion for costs by counsel. The Tribunal, cognisant of the four hundred dollars (\$400.00) maximum permitted by the Rules which should only be awarded in extreme situations finds that a further one hundred dollars (\$100.00) would be appropriate in this case.

ORDER:

The Tribunal orders that the Registrar of Motor Vehicles pay forthwith to the Applicant two hundred dollars (\$200.00) as costs of this proceeding.

LICENCE APPEAL TRIBUNAL

Carl Dombek, Chair

RELEASED: SEPTEMBER 18, 2002

METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 1244

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: VICTOR DREVNIG, VICE-CHAIR
STUART CORK, MEMBER

APPEARANCES:

JAMES HEPBURN, President of Metropolitan Toronto Condominium Corporation No. 1244 representing the corporation by a written authorization under the seal of the corporation
CAROL STREET, Counsel for the Ontario New Home Warranty Program
MARTIN KIENER, President of the Added Party, The Kingsway Regent Inc.

DATE OF

PREHEARING: September 16, 2002

Toronto

ORDER

The main and only apparent outstanding issue between the parties was the security equipment in the building.

No documentation was provided to the Licence Appeal Tribunal by the Applicant until after the prehearing was started when a number of affidavits, together with a document labelled "Technical Report", were presented to the Tribunal. No Agreements of Purchase and Sale were filed.

Mr. James Hepburn advised that he was not certain if the Condominium Corporation would be hiring a lawyer.

Mr. Hepburn, on behalf of the Condominium Corporation advised that at least 2 of the first 21 purchasers had Purchase and Sale Agreements that contained a clause indicating the standard of the security system that was to be installed in the building. The other 5 units in the 26 unit building were at the time of the original application to the Ontario New Home Warranty Program still owned by the Added Party and that he believed at least 2 of those units had

agreements for an enhanced security system. His argument was that the Added Party orally and in the written documents told everyone that they were to set a certain standard of security.

1. The Parties to the hearing are the owners of the condominiums in Metropolitan Toronto Condominium Corporation No. 1244, the Program and the Added Party.
2. The Parties agree to provide any and all documents, including all Agreements of Purchase and Sale, in their possession to each other and to the Tribunal. These are to be received at least 10 days prior to the start of the hearing on October 17, 2002. The Metropolitan Toronto Condominium Corporation No. 1244 was ordered to provide the material as soon as possible so that agreement could be reached on any issues which would reduce the number of witnesses and the days needed to conduct the hearing.
3. The Metropolitan Toronto Condominium Corporation No. 1244 was ordered to contact its lawyer, Audrey Loeb, for advice and was advised that affidavits are not suitable as evidence. An expert witness should be called to prove its contentions and a report or brief prepared and sent together with the expert's curriculum vitae to the other parties by the time limit set in paragraph 2.
4. Other witness reports and a witness list shall be served and filed with the Tribunal accordance with paragraph 2 above.

LICENCE APPEAL TRIBUNAL

Victor Drevnig, Vice-Chair

Stuart Cork, Member

Released: September 20, 2002

MARY SCHMIDT

APPEAL FROM A DECISION OF THE BOARD OF
DIRECTORS OF THE ONTARIO TRAVEL
INDUSTRY COMPENSATION FUND CORPORATION
UNDER THE *TRAVEL INDUSTRY ACT*

TO DISALLOW A CLAIM

TRIBUNAL: NIVES MONTANO, Member, Presiding
CARL DOMBEK, Chair, as member

APPEARANCES: ANGELA ALAIMO
Counsel for the Applicant

TREVOR BRANION
Counsel for the Travel Industry Council of Ontario ("TICO")

DATE OF HEARING: September 13, 2002 Toronto

DECISION RELEASED: September 13, 2002

REASONS FOR DECISION

At a hearing held on September 13, 2002 in Toronto, Ontario, to consider the Applicant's appeal, the Licence Appeal Tribunal directed the Board of Trustees of the Ontario Travel Industry Compensation Fund to allow the claim of Mary Schmidt, operating as Arthur Travel Services, with Reasons to follow.

BACKGROUND:

This is an appeal by Mary Schmidt (the "Applicant") to the Licence Appeal Tribunal from a written decision dated June 28, 2002 of the Board of Directors of the Ontario Travel Industry Compensation Fund Corporation (the "Fund") to deny the Applicant's claim for compensation in the amount of \$8,995.12.(U.S.) (\$13,919.95 Canadian).

The Applicant bases her claim on Section 51 of Regulation 806/93 (the "Regulation") made under the *Travel Industry Act* (the "Act").

ISSUES:

1. What is the date upon which the “event that gave rise to the claim” occurred?
2. Did the Applicant file its claim within six months of the above date?

FACTS:

1. The Applicant appealed a decision of the Board of Trustees of the Ontario Travel Industry Compensation Fund set out in its letter dated June 28, 2002 as Exhibit 1. The claim for compensation of \$8,995.12 U.S. (\$13,919.95 Canadian) was denied on the grounds that it was not made within the six-month filing deadline specified in Section 53 of Regulation 806 of the *Travel Industry Act*. An Agreed Statement of Facts was filed and entered as Exhibit 4 which is attached hereto as Schedule “A”.
2. The Applicant is a registered travel agent, owner of a small travel agency in Arthur, Ontario and a participant in the Ontario Travel Industry Compensation Fund. It employs 2½ persons.
3. The Applicant purchased a Renaissance Cruise package for 4 customers in June 18, 2001 for travel from October 19, 2001 to October 31, 2001. One of the four customers paid the Applicant by way of company cheque drawn from a Royal Bank of Canada account in the amount of \$16,492.22 dated June 18, 2001.
4. The Applicant forwarded payment to the Renaissance Cruises on June 20, 2001.
5. On September 20, 2001, the Applicant called Renaissance Cruises wherein she was advised that the tickets would be processed shortly.
6. Shortly thereafter, the Applicant was made aware on a news broadcast that Renaissance Cruises had ceased operating. There was no confirmation that Renaissance Cruises had gone bankrupt. The Applicant tried to contact Renaissance Cruises by phone wherein there was no answer. She tried to contact them by internet and a message was posted on their website “keep checking for more information”.
7. On November 16, 2001, the Applicant booked an alternative cruise for the 4 customers for travel from January 5, 2002 to January 19, 2002. The Applicant paid Holiday House Network for these alternative travel services.
8. At the end of November, 2001 the Applicant called TICO to obtain a claim form for the original cruise which was to sale from October 19, 2001 to October 31, 2001 on Renaissance Cruises, but she was advised that no forms were available.

9. Clauses 1(a) and (b) of section 51 of Regulation 806/93 to the *Travel Industry Act* were amended and took effect January 1, 2002 by Regulation 428/01 in order to permit a travel agent to make a claim against the fund for the failure of an end supplier that is an airline or a cruise line.
10. On February 1, 2002 the Applicant refunded its 4 customers the difference in price between the original Renaissance Cruise package and the alternative cruise.
11. The Applicant called TICO on February 12, 2002 (Exhibit 3, Tab 1) to request a Compensation Fund Claim Form (Exhibit 3, Tab 2).
12. During the month of February, 2002, the customer that paid for the original Renaissance Cruise package died. The company cheque in which the customer used to pay the travel package was with his accountant. The cheque needed to be found and authenticated with the bank in which it was drawn from. Consequently, there was a delay in obtaining this information; however, the delay was not caused by the Applicant.
13. The Applicant filed the Compensation Fund Claim Form and supporting documentation which was received by TICO on April 24, 2002. The Board of Trustees found that the Applicant's claim was received beyond the 6 month filing period.
14. Counsel for the Board called Lori Furlan, Claims Coordinator for TICO. In her testimony, the date of event giving rise to the claim cannot be provided to any claimant. This date is determined by the Board of Trustees, which meets on a monthly basis, and is not allowed to be disclosed and is not printed on any claim form. There is no policy in place for the Board of Trustees to advise travel agents of dates of events determined by it which would give rise to claims for reimbursement. The Board of Trustees reviewed the Applicant's claim at their meeting on June 25, 2002 even though it was received in late April. In the witness' opinion, the delay for the review may have been a large amount of claims being processed during May, 2002. The witness further testified that "a few hundred thousand dollars" had already been paid out for Renaissance Cruise claims. The Applicant's claim therefore was not the first claim against Renaissance Cruises.
15. Mr. Branion, Counsel for the Respondent advised the Tribunal that the date of event giving rise to the claim was September 25, 2001. This was the date on which the cruise line ceased operations. Thus the filing deadline became March 26, 2002. He admitted on behalf of his client that the travel industry was not advised of either date. When the Tribunal asked Mr. Branion when the claim forms for Renaissance Cruises were made available for claimants, he advised they were released in January, 2002 after the amendments to clauses 1(1) and (b) of Section 51 of Regulation 806/93 to the *Travel Industry Act* were made. The fact that the Board of Trustees failed to advise the industry of the "cutoff" date for applications is

problematic. The Applicant should not be penalized by the Board's policy.

16. The Board of Trustees denied the claim simply upon the provision of Section 53, of Regulation 806 which states:

A customer or a registrant shall make a claim for reimbursement in writing to the Board of Directors within six months after the event that gave rise to the claim for reimbursement. (Exhibit 1)

Thus while the Board of Trustees is correct in its interpretation and application of the Regulation which is presently in place, it also has the power to extend the time for filing a claim and this would certainly appear to be the case in which this would be appropriate.

The claim forms for Renaissance Cruises were not available until some time in January, 2002. The Applicant requested a claim form on February 12, 2002 which claim form had Renaissance Cruises' particulars already pre-printed on it. Due to the death of the Applicant's customer who paid for the travel package, the Applicant was not able to compile and forward all materials to TICO prior to sending the claim which was finally received by TICO on April 24, 2002. Testimony was also given that in a short timeframe, "a few hundred thousand dollars" had already been paid out for claims against Renaissance Cruises which indicates that a number of claims were grandfathered prior to January 1, 2002.

DECISION:

This Tribunal finds that the date of event which gave rise to the claim for reimbursement is January 1, 2002, the date in which amendments to clauses 1(1) and (b) of Section 51 of Regulation 806/93 to the *Travel Industry Act* were made. The filing deadline is June 2, 2002.

For the above reasons, the Tribunal directs the Board of Trustees of the Ontario Travel Industry Compensation Fund to allow the claim of Mary Schmidt, operating as Arthur Travel Services in the amount of thirteen thousand nine hundred nineteen dollars and ninety-five cents (\$13,919.95).

There is no award for costs.

LICENCE APPEAL TRIBUNAL

Nives Montano, Member,
Presiding

Carl Dombek, Chair,
Member

RELEASED: September 24, 2002

**STAR VAN SYSTEMS INC.
VAN-ES, ANDRIES**

IN THE MATTER OF an application by Star Van Systems Inc, and Van-Es, Andries, dated July 11, 2002 for a hearing before the Licence Appeal Tribunal pursuant to section 50(1) of the *Highway Traffic Act*, to consider the appeal of the Suspension and Seizure Order for the Commercial Vehicle Operator's Registration Certificates by the Registrar of Motor Vehicles dated July 8th, 2002;

AND IN THE MATTER of the Commercial Vehicle Operator's Registration (CVOR) certificates 101-137-620 issued to Star Van Systems Inc., and 066-126-385 issued to Van-Es, Andries dated June 6th, 2002;

AND IN THE MATTER of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8 as amended;

AND IN THE MATTER of the safety record and record of unpaid fines of Star Van Systems Inc, and Van-Es, Andries.

TRIBUNAL: STUART CORK, Presiding Member

APPEARANCES: PATRICK MOORE, Counsel for the Respondent
ROBERT WARREN, Counsel for the Applicant
KEN SIMPSON, Vice President, Star Van Systems

DATE OF
PRE-HEARING: August 23, 2002 Toronto

ORDER

A Pre-hearing between the parties was held on August 23, 2002 in Toronto at 1 St. Clair Avenue West, 12th Floor as set forth in the Tribunal's Notice of Pre-hearing Conference dated July 24, 2002.

At the commencement of this pre hearing Mr. Warren, Counsel for the Applicant, raised an issue with the Tribunal regarding the disclosure of the reasons and evidence used by the Registrar in determining that a sanction against the Applicant was justified. Mr. Warren further argued that at the show cause hearing with the Registrar, the Applicant had presented material to the Registrar regarding their operation, yet the Registrar in issuing the sanction Order, apparently made no reference to any specific elements of the Applicant's operations, nor did the Registrar explicitly state what was the Applicant's violation.

Mr. Warren therefore argued, that the Applicant is entitled to know why the Registrar chose to impose the sanction, and that reasoning would have a significant effect of the case that the Applicant would have to meet.

Mr. Warren also presented case law and previous Tribunal decisions in support of his argument. Mr. Warren asked that the Tribunal consider issuing an Order dismissing the case on the grounds of inadequate disclosure on the part of the Registrar, or to order full disclosure of the reasons for the Registrar's decision.

The Tribunal, after hearing comments on this issue from Mr. Moore, Counsel for the Respondent, advised Mr. Warren that it would not be appropriate to consider such a request at this pre-hearing. The Tribunal suggested to Mr. Warren that he was entitled to bring his request before the Tribunal at a later date by way of a separate motion, and in such a timely manner as to allow the Registrar to present a proper response.

Mr. Warren undertook to submit a Notice of Motion within one-week, which was subsequently received by the Tribunal on September 4th, 2002.

At this Prehearing, all parties agreed upon a date to hear the Motion of the Applicant on September 25, 2002 at 9:30 a.m.

Notwithstanding the outcome of the Motion for setting aside the Order of the Registrar being brought forward by the Applicant, the hearing for this appeal, if necessary, will be heard by the Tribunal on October 29, 30 and 31; and November 1, 2002

It was determined that the filing dates with the Tribunal of submissions and documents to be used in the hearing by both parties would occur **on or before October 18, 2002.**

Both parties will file three copies with the Tribunal and deliver one copy to all parties. It was confirmed that the Tribunal requires full disclosure 10 days prior to the hearing.

The parties present at the prehearing recorded that there was no further resolution of the issues between the parties.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

RELEASED: September 10, 2002

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
1392045 ONTARIO INC. O/A ADVENTURES IN TRAVEL
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: July 2, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

1392045 ONTARIO INC. O/A ADVENTURES IN TRAVEL

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by 1392045 Ontario Inc. o/a Adventures in Travel, the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule 'A';

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule 'A'.

LICENCE APPEAL TRIBUNAL

Carl Dombek, Chair

Released: September 19, 2002

BETWEEN:

J.A.B. INTERNATIONAL LTD.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

1. The Registrant is registered as a travel agent and travel wholesaler (Registration Nos. 4258588/R & 50007109/W).
2. Maintenance of a "*Travel Industry Act Trust Account*" is one of the Terms and Conditions of registration, signed on April 7, 1994.
3. The registrant was visited by one of TICO's Inspectors on November 7, 2000. It was noted during the visit that the "*Travel Industry Act Trust Account*" was not handled properly in that the account had been consistently overdrawn on several occasions.
4. The registrant was requested by TICO, by letter dated March 23, 2001, to submit a customer deposit reconciliation for the month of February 28, 2001 due by April 6, 2001. The reconciliation was to be accompanied by a copy of the "*Travel Industry Act Trust Account*" bank statement for the same period.
5. By letter dated April 12, 2001, the Registrant was issued a final due date of April 30, 2001 by TICO, to file the required customer deposit reconciliation.
6. On May 1, 2001 the Registrant telephoned TICO and advised Pamela Stout, Financial Inspections Co-ordinator for TICO, that the information was with the accountant, but that the Registrant would have the reconciliation submitted by May 7, 2001.
7. By fax dated May 30, 2001, the Registrant was advised by TICO that the required trust account reconciliation, which was due by April 30, 2001 had not been received. The Registrant was also reminded in the fax dated May 30, 2001 that the financial statements, for the fiscal year ended March 31, 2001, which were due by June 30, 2001 must also disclose the customer deposit position, pursuant to section 24 (5) of the Act.
8. By letter dated July 20, 2001, the Registrant was advised by the Registrar that TICO was unable to determine its customer deposit position due to the absence of the requested trust account reconciliations, and given a further final due date of August 31, 2001 to submit the required customer deposit reconciliation certified by a Licensed Public Accountant, by August 31, 2001.
9. The Registrar's July 20, 2001 letter was re-sent to the Registrant on September 21, 2001.
10. By October 11, 2001, the Registrant had failed to provide the requested customer deposit reconciliations. On that date, the Registrar issued a Proposal to Revoke the Registrant's registration.

11. On November 30, 2001, the Registrant submitted customer deposit reconciliations for the months of September, October and November 2001. The reconciliations, as submitted, indicated that the Registrant had sufficient funds in its trust account to cover its customer obligations.
12. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsections 6 (4) and (5) of the *Travel Industry Act* directing that:

1. the Registrar refrain from carrying out the Proposal to Revoke Registration dated October 11, 2001;
2. the Registrant's registration is to be subject to the following terms and conditions:
 - a. The Registrant shall at all times maintain sufficient funds to cover its customer obligations. Such funds shall be maintained in a properly designated "Travel Industry Act Trust Account" and in accordance with the trust accounting requirements as stipulated in section 36 of the Regulation or such subsequent provision as may be in force from time to time; and
 - b. The Registrant shall submit a monthly trust account reconciliation with corresponding bank statements to the Registrar beginning with the month of December, 2001, no later than 30 days after the end of each calendar month, for so long as the Registrar shall so require.
3. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) and (b) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.
4. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by its signature below that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED at Mississauga this ____ day of December, 2001

Mr. Ponniah Jeenathan
J.A.B. International Ltd.
I have authority to bind the corporation

Mr. Michael Pepper
Registrar, *Travel Industry Act*

KELLY MCGINLEY

APPEAL FROM A DECISION OF THE COMPLAINTS
COMMITTEE OF THE BOARD OF FUNERAL SERVICES
RENDERED UNDER THE *FUNERAL DIRECTORS AND
ESTABLISHMENTS ACT*

TO REFUSE TO REFER THE MATTER TO THE
DISCIPLINE COMMITTEE

TRIBUNAL: DEREK ISRAEL, VICE-CHAIR

APPEARANCES:

JULIE MACIURA, Counsel, representing THE BOARD OF
FUNERAL SERVICES UNDER THE *FUNERAL
DIRECTORS AND ESTABLISHMENTS ACT*

ANDREW PINTO, Counsel, representing Kelly McGinley

LEAH PRICE, Counsel, representing Bruce Humphrey

DATE OF

PRE-HEARING: September 18, 2002,

Toronto

ORDER

Following attendances on September 18, 2002 at a prehearing before this Tribunal of Julie A. Maciura, Counsel, appearing on behalf of the Board of Funeral Services (the "Board"), Andrew Pinto, Counsel, appearing on behalf of Kelly McGinley ("McGinley") and Leah Price, Counsel, appearing on behalf of Bruce Humphrey ("Humphrey").

The Tribunal makes the following order respecting the hearing scheduled to commence at 9:30 a.m. on December 2, 3, 4 and 5, 2002 and to continue further, if necessary, on December 16, 17, 18 and 19, 2002 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

1. The Parties to the hearing are the Board, McGinley and Humphrey.
2. No facts or evidence were agreed upon by the parties.

3. The issues to be dealt with at the hearing are whether the Complaints Committee erred in not referring the matter to the Discipline Committee and in taking the action recommended by it in its decision.
4. All parties to the hearing shall fully comply with the requirements of disclosure of documents or things as set forth in Rule 6.3 of the Rules of Practice of the Tribunal. All parties shall also fully comply with the disclosure requirements set forth in Rule 6.4 of the Rules of Practice of the Tribunal dealing with expert witnesses.
5. Without derogating from what is contained in paragraph 4 above the Board shall disclose to the other parties and make available and deliver to the other parties, within the time constraints under Rule 6 of the Rules of Practice of the Tribunal, true copies of the following documents:

December 11, 2000	Written statement of Jennifer Peters
December 14 & 18, 2000	Complaint letter and letters to McGinley and Humphrey from Mr. Richer acknowledging receipt of the complaint.
January 23, 2001	Statement of Marcy Pyke
January 8, 2001	Submissions of Humphrey (bound volume with 14 tabs)
January 24, 2001	Additional submissions of Humphrey (bound volume with 7 tabs)
May 31, 2001	Submissions of McGinley (bound volume with 9 tabs)
August 20, 2001	Humphrey's response to McGinley's submissions (bound volume with 7 tabs)
April 11, 2002	Final Report of MG Forensic Accounting and Investigations Inc. (bound volume with 28 tabs)
August 20, 2002	"Disclosure" (handwritten notes, etc.) of MG Forensic Accounting & Investigations Inc. (bound volume with 26 tabs)

6. By no later than 10 days before the date of hearing, McGinley shall deliver to the other parties a "will say" of all witnesses who propose to testify at the hearing on McGinley's behalf.
7. Counsel for McGinley undertakes to search all documents or records in his possession or under his control that may form part of Humphrey's business books or records relating to McGinley's employment with Humphrey. Counsel further undertakes to ascertain from McGinley whether there are any such books or records in the possession or under the control of McGinley. Any such books and records that are in the possession or under the control of either McGinley or her Counsel shall be delivered to Humphrey's Counsel by McGinley's Counsel within 30 days of this order.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: September 20, 2002

1220-MED-ALCL

**Appeal under Section 50(1) of the Highway Traffic Act,
R.S.O. 1990, Chap. H.8 as amended, from a Decision of the
Registrar of Motor Vehicles pursuant to Section 47(1) of
that Act.**

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ROY MELVIN, M.D., Presiding Member

APPEARANCES: LUBA NEUWIRTH
Representative for the Registrar of Motor Vehicles

Applicant, unrepresented

DATE OF
HEARING: August 27, 2002 London

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

FACTS:

On January 8, 2002 the Applicant was brought to the emergency of St. Thomas Elgin Hospital by his wife and daughter, seeking help for his drinking bouts over the holiday season and threats of suicide. He was assessed by Physician #1 and found to have diabetes mellitus. A treatment plan was outlined and arrangements made for appropriate referrals to handle ongoing problems. He was advised to take some time off work and to stop driving. A copy of his report was sent to the Ministry of Transportation.

On January 28, 2002 the Ministry of Transportation advised the Applicant that his driver's licence was suspended on the basis of the *Highway Traffic Act*, section 47(1) and that reconsideration would be given on receipt of appropriate favourable medical and laboratory reports and evidence of compliance with a program of abstinence from alcohol.

On March 21, 2002 the Ministry of Transportation received a report from his family physician, Physician #2, indicating that the Applicant attended regularly for control of his diabetes. He had been started on medication for his depression. Blood tests showed an elevated G.G.T. on March 5, 2002, which reverted to normal on May 7, 2002. He was referred to a psychiatrist to review him for his fitness to drive as per Ministry of Transportation recommendations.

On April 3, 2002 he was assessed by Physician #3, a psychiatric specialist in London Ontario who concluded that the Applicant did not show evidence of clinical depression and suggested that the drug Paxil be tapered off and stopped. Physician #3 was not concerned about the Applicants' future use of alcohol and did not see sufficient cause for his driving privileges to be further suspended.

On June 13, 2002 he was assessed by the Alcohol & Drug Services of Thames Valley in London, Ontario. They reported that the Applicant demonstrates a high level of confidence in his ability to resist alcohol consumption. He has stable employment which he enjoys, a supportive home environment and a number of non drinking leisure activities. No further treatment from Alcohol & Drug Services was deemed necessary.

On June 21, 2002 an Administrative review was begun but not completed. The Applicant was upset with the many administrative delays he encountered.

On July 15, 2002 the Ministry of Transportation informed him that his driver's licence remained under suspension. On August 2, 2002 he submitted an appeal to the Licence Appeal Tribunal.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffer from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

The Ministry's suspension of the Applicants' driver's licence is based on the *Highway Traffic Act* Regulation 340/94 Section 14(b):

An applicant for or a holder of a driver's licence must not...

- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

The Determination of Medical Fitness to Drive is based on recommendations by the Canadian Medical Association (Sixth Edition 2000). The applicable section is item 3.3:

"A person with a diagnosis of alcohol dependence must complete a recognized rehabilitation program for substance dependence and remain alcohol free for 12 months before recommencing driving."

This is the basis for the Ministry's suspension of the Applicants' licence to date.

Item 3.3 of the guidelines also states:

"Where there is an opportunity to have a patient enrolled in a rehabilitation program and to monitor their alcohol use behaviour by an addiction medicine specialist, the restriction on driving may be reduced."

The Applicant appeared at the hearing supported by his wife. He gives a history of alcohol consumption for many years but excessive only on a few occasions. He was in the Canadian Army for over 30 years attaining the rank of Sergeant Major and obtained an early honourable discharge. Since then he holds down a steady job. He has never been in an auto accident or apprehended by the police. He has a good social history. The incident of January 8, 2002 brought to light his previously undiagnosed diabetes, which he brought under control by medication and diet to the point where he no longer requires medication. His depression is no longer a problem and he is off medication. The consultant, Physician #3 finds no evidence of clinical depression and feels the Applicant could have his driver's licence reinstated. The Applicant attends his family doctor regularly. Recent blood tests, July 23, 2002, are normal. He attends A.A. regularly, subject to restraints by not being able to drive.

He states that he has had nothing to drink since January 8, 2002 except for one beer during the hot weather in July. This is significant in that it was not followed by more drinking and puts in doubt the diagnosis of a true alcohol addiction.

This Tribunal finds that the Applicant is no longer at risk to himself or others from driving a motor vehicle because of a medical disability.

DECISION:

Upon the application by the Applicant to appeal the decision dated February 14, 2002 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be set aside.

LICENCE APPEAL TRIBUNAL

Roy Melvin, M.D., Presiding Member

RELEASED: September 4, 2002

1227-MED-NOMC

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: KYLE BIEL,
Representative for the Registrar of Motor Vehicles

Agent for the Applicant
Applicant

DATE OF
HEARING: SEPTEMBER 25, 2002

DECISION
RELEASED: SEPTEMBER 26, 2002

Toronto

REASONS FOR DECISION

A hearing was held on September 25, 2002 at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on September 26, 2002, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated August 6, 2002, and was received by the Tribunal on August 9, 2002 together with the prescribed fee of \$100.00, paid by certified cheque.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

On September 19th, 2002, the Applicant's agent appeared before the Tribunal to request an adjournment due to the Applicant's illness. There being no objection raised by the Respondent's representative, the hearing scheduled for September 19th, 2002 was adjourned on consent to September 25th, 2002 at 1:30 PM.

An Order confirming the adjournment, noting the adjournment date as peremptory to both parties and requiring the Applicant to provide the Tribunal with a medical certificate by end of day September 20th, 2002, was released on September 19th, 2002.

The hearing resumed on September 25th, 2002. The Applicant's agent was asked to provide the Tribunal with the original medical certificate confirming the Applicant's illness on September 19th, 2002. The Applicant stated that he had left it at home.

The representative of the Respondent provided the Tribunal with original certified copies of Ministry of Transportation documents on file.

There were no other preliminary matters in dispute between the parties and the hearing proceeded.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice to Registrar dated May 20, 2002, issued by the Registrar of Motor Vehicles.
- b) Exhibit # 2 Notice of Appeal Form – received August 09, 2002.
- c) Exhibit # 4 Medical Note from Physician #1 – received September 20, 2002.

By the Respondent:

- a) Exhibit # 3 Ministry of Transportation submissions – received September 12, 2002.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* (“HTA”) states:

- 50.1(1) “A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
 - (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
 - (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason”.

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

- 15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
 - (a) the name, telephone number and address, with the postal code, of the medical practitioner;
 - (b) the name, date of birth and address of the person who is the subject of the report;
 - (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

The Applicant's Driver's Licence was suspended "2002 05 02" as per Notice of Appeal (Exhibit # 2)

Applicant's Evidence

Page 2 of the Notice of Appeal was prepared by the Applicant's physician of "1 1/2 years", Physician #2, on "24/7/02".

Physician #2 details under the heading:

- o “Details and Diagnosis of patient’s present condition: *keloid – left rib cage – laceration left ante chest wall*
- o History of Condition: See letter ...16/7/02
- o Type of Measurements or recent tests taken:
- o Relevant details of visit and when your patient was last seen? *10/07/02 Difficult to breathe because of pain chest wall...”*

In a letter, dated July 16, 2002, under the letterhead of MED CARE, Physician #2 reports that the Applicant: “...received a laceration of left rib cage ...September 17, 2001 ...became infected ...unsightly keloid ...off work for six weeks ...on going severe chest pain ...prevented ...taking part in sports...”

At the hearing, in examination in chief, in reply to the Applicants’ agents’ questions, the Applicant testified as to his whereabouts and activities prior to his being stopped by the RIDE programme unit.

The Applicant continued his testimony by recounting the events surrounding the demand for a breath sample and breathalyzer test session. This encounter being his first contact with police, the Applicant was visibly nervous.

The Applicant confirmed that at no time did he refuse to comply with the officer’s request to provide a breath sample. He was given several opportunities to blow into the instrument, but each time was told by the officer that it was “...not good enough...”.

In response to the Applicants’ agent’s question as to how he was feeling at the time, the Applicant first explained that: “...usually ...pain ...is on an off ...not a constant pain...”. Upon prodding by his agent, the Applicant clarified: “Yeah, I was feeling a little pain...”

In cross-examination, the Respondent’s representative, Mr. Biel, asked the Applicant to tell the Tribunal the exact medical condition that prevented him from complying with the officer’s demand for a breath sample. The Applicant attributed his inability to provide an adequate sample to the consequences of an accident he suffered at work in September 2001. Since the accident the Applicant has been limited to working as a courier.

The Applicant admitted that he was able to blow into the mouthpiece when it was not connected to the breathalyzer device, but emphasized that he did not blow as long as the actual breathalyzer instrument required.

Although, the Applicant told the officer of the accident and of his condition, he did not request medical assistance, and only told the officer he was experiencing physical pain after he was charged with failing to provide.

Between May 20th 2002 and July 16th 2002, the Applicant visited his physician “...for the flu and stuff like that...”. It was not until July 16th, that the Applicant discussed the breathalyzer demand with his physician.

Mr. Biel pursed his line of questioning by asking the Applicant how his inability to play sports relates to his ability to provide a breath sample. The Applicant referred to his difficulty breathing. Physician #2 has not prescribed any medication for the condition, but the Applicant takes Tylenol when he is in pain.

In re-direct the Applicant’s agent expressly asked the Applicant if he was in pain at the time of the breathalyzer, the Applicant replied: “Yes, sir”. The Applicant further testified that he did not specifically visit his physician as a result of the pain he experienced at the time of the breathalyzer, nor did he take medication for the pain.

In closing the Applicant’s agent relied on and quoted from the medical report of Physician #2, The Applicant’s agent contended that the medical report submitted by the Applicant verifies that the Applicant has an existing medical condition that prevented him from providing a breath sample. The Applicant suffers from: “...on going and severe chest pain...” which does not permit the Applicant to participate in sports. Mr. Bridgelall argues that in his understanding Physician #2’s statement means that the Applicant “...cannot do anything heavy, such as heavy breathing...”.

The Applicant’s agent emphasized that the Applicant was not under the influence of alcohol, and that if he provided a breath sample the reading would be under the required limit. The Applicant tried to provide a breath sample but was unsuccessful. The Applicant’s agent expressed the concern that the officer had the possibility of ordering a blood sample, but did not do so.

In conclusion the Applicant’s agent appealed to the Tribunal to rescind the Registrar’s decision, bearing in mind that the Applicant has a wife and two young children who depend on him. The Applicant needs his licence to continue working as a courier and be able to support his family.

Respondent’s Evidence

The Respondent provided the following Documents:

1. Certified Copy of Notice to Registrar, sealed August 14, 2002
2. Certified Copy of driving record of the Applicant, sealed August 14, 2002.
3. Certified Copy of Vehicle Search, sealed September 14, 2002.

The Respondent's representative, Mr. Kyle Biel called Constable #1, a member of the Ontario Provincial Police – Toronto Detachment as a witness. Constable #1 testified that he has been with the Ontario Provincial Police "...since February 2000..." and a member of the RIDE unit since "June 2000".

Constable #1 described the observations that led him to formulate the belief that there was a reasonable suspicion, which merited the demand for a breath sample.

The Applicant was given several opportunities to provide a breath sample, but failed to do so. Each time the Applicant blew into the machine the screen registered "E0" indicating that not enough air was going through the device. Constable #1 detected that while seeming to blow into the mouthpiece the Applicant was blowing through the left side of his mouth. Further, Constable #1 noted that the Applicant's chest was not expanding on inhalation except for the time the mouthpiece had been removed from the instrument.

Constable #1 characterized the Applicant's general behaviour and demeanour: "...*extreme lack of effort ...nonchalant ...carefree, total disregard for instructions...*". In his opinion the Applicant's efforts to blow into the Alcotest were "...*hardly existent ...very poor...*"

During Constable #1's dealings with the Applicant, it was not evident to Constable #1, that the Applicant was experiencing any sort of physical discomfort. The Applicant never requested medical assistance, nor informed Constable #1 that he was in any physical distress, at the time. There were no conversations regarding the Applicant's accident or a request for a blood sample.

The Applicant's agent cross-examined Constable #1 on his observations and conclusions and tried to ascertain why an alternative test was not requested. Constable #1 re-iterated his previous testimony and confirmed that there were no visible signs as to why the Applicant could not to provide a breath sample.

In his closing remarks, the Respondent's representative pointed out that the Applicant's agent submission with respect to the Applicant's possible level of intoxication were irrelevant. Mr. Biel maintains that the Applicant's actions are consistent with and corroborate the premise that the Applicant had no intention to provide a breath sample. The Applicant lied when approached by the Constable. According to Constable #1, he made no effort to provide a breath sample. Constable #1 is a trained observer, yet he did not notice any signs of physical suffering: "...*no wincing or grimacing during the attempts...*".

The Respondent's representative contends that there is in fact no medical reason for the Applicant's failure to provide a breath sample. The Applicant allowed fifty-seven and sixty-five days to elapse before consulting with his physician. Physician #2's report is neither explicit enough nor detailed enough to substantiate the medical grounds for appeal.

In conclusion the Respondent's representative asked that the Tribunal uphold the Registrar's decision.

APPLICATION OF THE LAW TO FACTS:

Although the totality of the evidence presented was considered, the preceding reflect a summary of the proceedings. Evidence introduced not directly germane to the issue was not transcribed.

Prior to setting out the reasons for the decision, the Tribunal will address the Applicant's issue as to why a blood sample was not taken. While subsection 48.3 (3) 1 of the Highway Traffic Act, R.S.O. 1990, Chapter H-8 as amended is clear in its provision, that the concentration of alcohol in the blood may be obtained "...by an analysis of the person's breath sample or blood taken..." the decision to request a blood sample remains at the discretion of the officers.

According to established policy, no blood samples are to be demanded unless there are obvious visible physical signs preventing the individual from providing a breath sample. As no such signs were present, the issue of a blood sample is inconsequential.

An appeal was brought by the Applicant under Section 50.1 (2) (b) of the Highway Traffic Act, which prescribes:

"... person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason..."

At issue, is not whether the Applicant was impaired, had been drinking, or expressed a vocal refusal to provide a breath sample. The subject of this appeal is whether the Applicant has a medical condition that at the time, could cause the Applicant to fail or not comply with the breath demand.

The Tribunal accepts Physician #2's diagnosis: "...Difficult to breathe because of pain chest wall ...unsightly keloid... on going severe chest pain..." The question for the Tribunal is, as stated above, whether the Applicant was in considerable pain at the time, such as that he would not have been able to provide a breath sample.

The Respondent's representative alleges that Physician #2's medical reports are scant and inconclusive. The Tribunal concurs with Mr. Biel. Physician #2 offers no rationalization as to how the Applicant's condition affects his breathing pattern, other than to say the Applicant cannot take "...part in sports...". The Tribunal fails to see how the ability to participate in sports correlates to the ability to provide a breath sample. The Applicant's agent expounds that this statement means the Applicant cannot do heavy work or "...heavy breathing...". By his own admission, the Applicant is able to exercise and has not been prescribed medication to assist his breathing difficulties.

The Applicant in his viva voce evidence explained to the Tribunal that he was "...nervous..." and "...feeling a little pain". Nonetheless, the fact remains that he did not tell Constable #1 he

was feeling any type of discomfort. Constable #1, who as the Respondent's representative noted is a trained observer, did not see the Applicants exhibiting any signs that might be associated with physical anguish.

In reference to the Applicant's agent's plea with respect to the Applicant's need for his licence, the Tribunal sympathizes and applauds the Applicant's desire and need to support his family, but the matter before the Tribunal does not permit a consideration of hardship.

The onus being on the Applicant to establish the merit of the appeal, the Tribunal finds that the Applicant's testimony although credible, was insufficient to substantiate the basis for an appeal on medical grounds. Thus, the Tribunal finds that the Applicant does not meet the criteria of Section 50.1 (2) (b), in that he was not able to demonstrate that he suffers from a medical condition, which would prevent him from complying with the demand for a breath sample.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated May 20, 2002 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal **confirms** the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: October 3, 2002

1229-MED-CARD

**Appeal under Section 50(1) of the Highway Traffic Act,
R.S.O. 1990, Chap. H.8 as amended, from a Decision of the
Registrar of Motor Vehicles pursuant to Section 47(1) of
that Act.**

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ROSS C. BENNETT, M.D., Presiding Member

APPEARANCES: LUBA NEUWIRTH
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF
HEARING: September 6, 2002 Hamilton

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

EXHIBITS:

1. Notice of Appeal from the Applicant dated August 7, 2002
2. Notice of driver's licence suspension dated June 2, 2002
3. File summary prepared by the Respondent.

FACTS:

The Applicant is an 82 year-old retired gentleman, who had his driver's licence suspended on June 2, 2002, after the Ministry received an unsolicited Medical Report from the Applicant's cardiologist, on April 17, 2002. The cardiologist, Physician #1 stated that the Applicant had an unexplained syncopal event and had been hospitalized for two days with no arrhythmias seen. The Applicant was to have more tests done and was told not to drive.

The event reported, occurred on April 15, 2002, when the Applicant was in his kitchen eating a peanut butter sandwich. His wife was in another room and heard him choking. She rushed into the kitchen and found him on the floor, conscious and alert. They assumed he had fainted and called 911. Two paramedics arrived and examined him, but could not find anything wrong. They transported him to the Brantford General Hospital, where he was examined by Physician #2. His physical examination was negative, with the exception of an ECG that showed an old myocardial infarction and arthritis of the spine.

The Applicant was also examined by Physician #3, Physician #4 and Physician #1, all internists. The only other abnormalities detected were aortic stenosis, gout and mild hypertension. A Holter monitor was normal and a 2D echocardiogram demonstrated early left ventricular hypertrophy and evidence of his old myocardial infarction.

Following the Applicant's infarction 15 years ago, he has had annual appointments with Physician #1 and has been symptom free. Although no medical cause for the syncopal attack could be found, the Applicant asserts that he simply choked on the peanut butter sandwich.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

The Registrar of Motor Vehicles had no option but to follow Section 47(1) when notified of the Applicant's syncopal event by his cardiologist.

The Applicant was examined by several medical specialists and given every conceivable test to determine the cause of the syncope, but none could be found. The Applicant had an EEG in the last week of August, but does not have the results at this time. He is also scheduled to have an MRI in October.

The Tribunal does not find any evidence to determine this was a seizure and very little to indicate it was cardiac in origin. The National Safety Code for Motor Carriers recommends a

one month waiting period after a single unexplained episode provided there is no obvious cardiac or neurological cause.

The Applicant has had an exhaustive investigation and the Tribunal can not find any justification for any further suspension of the Applicant's driver's licence under Section 47(1) or Regulation 340/94 Section 14(a).

DECISION:

Upon the application by the Applicant to appeal the decision dated June 13, 2002 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be set aside.

LICENCE APPEAL TRIBUNAL

Ross C. Bennett, M.D., Presiding Member

RELEASED: September 12, 2002

1233-ADLS-PULD

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: LUBA NEUWIRTH
Representative for the Registrar of Motor Vehicles

Counsel for Applicant
Applicant

DATE OF
HEARING: September 5, 2002

DECISION
RELEASED: September 6, 2002 Toronto

REASONS FOR DECISION

A hearing was held on September 05, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on September 06, 2002, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated August 13, 2002, and was received by the Tribunal on August 13, 2002, together with the prescribed fee of \$100.00, paid by cash.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

At the Applicant's request a Notice of Motion was heard, by way of teleconference, on August 27, 2002. The Respondent raising no objections, an adjournment was granted on consent.

Prior to the commencement of the hearing the Counsel for the Applicant requested the admission of evidence submitted in non-compliance with disclosure procedures. The Respondent's Representative, raised no objection, and the documents were entered as Exhibit # 4.

The videotape of the breathalyser test session, was entered as an exhibit, with the consent both parties. Since prior disclosure had not been made to the Applicant, a recess was afforded the Applicant and his solicitor to view the videotape.

The Respondent's Representative submitted certified copies of original documents on file.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice of the Registrar dated August 6, 2002, issued by the Ministry of Transportation .
- b) Exhibit # 2 Notice of Appeal Form dated August 13, 2002

- c) Exhibit # 4 Additional submissions by the Applicant – 7 pages – received September 05, 2002.

By the Respondent:

- a) Exhibit # 3 Ministry of Transportation submissions – received August 22, 2002
- b) Exhibit # 5 Video-tape of Breathalyzer Test session – received September 05, 2002.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

- 50.1(1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
 - (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
 - (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

- 15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
 - (a) the name, telephone number and address, with the postal code, of the medical practitioner;
 - (b) the name, date of birth and address of the person who is the subject of the report;
 - (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

The Applicant's Driver's Licence was suspended on "Aug 5/ 2002" as per Notice of Appeal (Exhibit # 2)

Applicant's Evidence

Page two of Notice of Appeal is blank.

A handwritten note on letterhead of Physician #1, dated "Oct 12/93" states: "*this patient cannot do a pulmonary function test because of inadequate inspiration & hence would have difficulty with a breathalyzer.*"

The Applicant's submissions, at the hearing included: a handwritten note purportedly signed by Physician #1, dated "Sept 3/02". Physician #1 specifies: *"This patient was referred to a respiratologist Physician #2 who has seen him previously. Physician #2 is out of the city until Nov 15/02. The Applicant cannot be tested until then or later..."* a letter under the letterhead of Lakeridge Health verifying the Applicant is a diabetic; and photocopies of an article on emphysema apparently from the Reader's Digest version of the Canadian Medical Home Encyclopaedia.

The Applicant testified as to his ongoing medical problems, and the medical challenges he was facing at the time of the breathalyser: *"...diagnosed as diabetic ...emphysema ...sore back, in car accident ...ankle broken..."*

The Applicant was diagnosed with emphysema around *"...1991/92..."*. Physician #1, provided the Applicant with a *"...note..."* in 1993, which the Applicant was told, he must carry with him at all times. As a result, the Applicant has a copy of this note in all his cars.

The Tribunal asked the Applicant why his physician had not completed page 2 of the Notice of Appeal. The Applicant replied that he had not noticed that the back of the form required completion.

The Applicant attempted to obtain a specialist's report, but his respiratologist was not available. The Applicant was told that it would be very difficult to get another specialist to see him.

The Applicant's condition is deteriorating. The Applicant explained the condition manifests in shortness of breath. An inhaler was prescribed at the beginning, but presently the Applicant no longer carries a *"...puffer..."*

In reply to The Applicant's Counsel's question as to why he longer uses the inhaler, the Applicant replied: *"...I lost a lot of weight, I find that it gags me, I have a mucus discharge, the puff sticks to the back of my throat, I can't get it out..."*. The Applicant explained that having *"...lost about forty pounds..."* he is able to breathe more easily, but still has difficulty walking, particular up hill, and he is unable to carry out any type of manual labour.

The Applicant stated the he *"...imagined..."* that the officers were able to find the 1993 medical note in his car, as they *"...found ...ownership ...found ...driver's licence ...the note was right there..."*

The Applicant emphasized that he needs his licence for work, also because he lives alone on a farm, and has no one to drive him around.

Under cross-examination the Applicant described the events that led to demand for a breath sample.

The Applicant did not show the note to the officers, nor did he tell them about his condition, as they were "...very rude...". The Applicant "...assumed..." that the officers saw the note, as it was in the car.

The Applicant confirmed that he does not take medication for the condition and does not need to see the respiratologist regularly.

The Applicant did not ask for medical attention, and saw his physician a "...week or so later".

Respondent's Evidence

The Respondent provided the following Documents:

1. Certified Copy of Notice to the Registrar, sealed August 15, 2002
2. Certified Copy of Driving Record of The Applicant, sealed August 14, 2002
3. Copy of Vehicle Record Search, sealed August 14, 2002

The Respondent called Officer #1, a police officer with the Durham Regional Police Service "...approaching fifteen years..." as a witness.

Officer #1 detailed the events that led to the Applicant's arrest and his being turned over to the breathalyser technician. Officer #1 did not see Physician #1's note, nor did he notice the Applicant exhibiting any signs of breathing impairment.

Officer #2 was also called as a witness for the Respondent. Officer #2 has been a police officer with the Durham Police services for "...approximately three years..." and qualified in "...January 01..." as breathalyser technician.

According to Officer #2, the Applicant was given a total of six attempts to provide a breath sample. Officer #2 expressed his opinion that: "...he was purposely filling his mouth full of air and just not blowing into the instrument at all..."

The Applicant told the officer he was diabetic but at no time mentioned that he had emphysema. During the breathalyzer test session, Officer #2 did not notice the Applicant showing any signs of discomfort, such as wheezing or coughing. When asked by Officer #2 why he was not providing a breath sample, the Applicant replied "...did what I could..."

The videotape of the Applicant's breathalyser session showed the Applicant puffing his cheeks, but the instrument does not register. None of the expected signs on breathing difficulties are perceptible, in the Applicant's appearance and demeanour. The Applicant refers to "lung" problems but does not tell Officer #2, specifically, that he has emphysema.

In his closing remarks the Applicant's Counsel emphasized that the Applicant has demonstrated a need to have his licence re-instated. Mr Hennessey contends that although the Applicant did not disclose his condition to the officers, there is medical evidence before the Tribunal that the Applicant suffers from emphysema, and that nine years ago he was given ten years.

The Applicant's Counsel suggests that the Tribunal must return the Applicant's licence as: it was not established that he was impaired; the Applicant was not able to provide a breath sample due his medical condition.

The Respondent's Representative stated that it is the Registrar's position that the Applicant does not suffer from a medical condition, which would have prevented him from providing an adequate breath sample. Neither officer noticed any signs of respiratory distress.

Further, Respondent's Representative maintains that the note provided by the Applicant's physician, does not comply with the requirements of Section 15 of Regulation 574, which is specific as to the information required in a medical report.

The Respondent's Representative concluded by asking the Tribunal to uphold the decision of the Registrar.

APPLICATION OF THE LAW TO FACTS:

Although the totality of the evidence presented was considered, the preceding notes reflect a summary of the proceedings. Evidence introduced not directly germane to the issue was not transcribed.

The Tribunal accepts The Applicant's Counsel's argument that the Applicant was not impaired and that he needs his licence. An appeal was brought by the Applicant under Section 50.1 (2) (b) of the Highway Traffic Act, which prescribes:

"... person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason..."

At issue, is not whether the Applicant was impaired or needs his licence. At issue, as the Respondent's Representative asserted, is, did the Applicant have a medical condition that could cause the Applicant to fail or not comply with the breath demand.

The Applicant opted to submit notes from his physician Physician #1 in lieu of having page 2 of the Notice of Appeal completed by his physician.

The Respondent claims that the information contained in this note, does not meet the criteria set out in Section 15 of Regulation 574, in that it provides none of the information required, such as the Applicant's address and date of birth. The Tribunal concurs.

Sections 15 (1) (a) (b) (c) (d) and 15 (2) of Regulation 574 prescribe as follows:

- 15 (1) A report of a legally qualified medical practitioner that is submitted in evidence shall clearly state:
 - a) the name, telephone number and address, with postal code, of the medical practitioner;
 - b) the name, date of birth and address of the person who is the subject of the report;
 - (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the Tribunal from the suspension of a driver's license under section 50.1 of the Act.
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
- 15 (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath sample including the results of any related tests.

Physician #1's notes comply with the requirement of Section 15 1(a) but not with Section 15 1 (b) which requires the Applicant's complete information, i.e. address and birth date.

As one of the notes is dated 1993, it cannot possibly reflect the requirements of section (c). Page 2 of the Notice of Appeal being blank, there is no evidence that the Applicant informed his physician that he had been asked to provide a breath sample. The Tribunal finds that Physician #1's handwritten notes fall short of the meeting the criteria set out in Section 15 (1) (c) of Regulation 574.

Physician #1's notes offer no information as to how long the Applicant has been his patient or any details of last visit. Thus, Section 15 (1)(d) of Regulation 574 is not met.

Section 15 (2) of Regulation 574 is, perhaps, the most relevant. The essence of this clause requires that the physician establish a link between the condition and the inability to provide a breath sample. This clause relates specifically to the detailed information required on page 2 of the Notice of Appeal, which serves as a valuable guideline to the Tribunal as it is designed to provide pertinent details of the Applicant's condition, such as:

- Details and diagnosis of the patient's present condition;
- History of condition;
- Type of Measurements or recent test taken with (date indicated): (Reference to any pathology test (e.g.: PTF represent important corroboration of your medication opinion).
- Relevant details of last visit and when ... patient was last seen

The Tribunal is left unsure as to why page 2 of the Notice of Appeal is blank, but the fact is, that Physician #1's notes fail to meet the test of establishing the grounds for appeal under section 50.1.

Physician #1 does not offer any rationalization of how the Applicant's condition affects the Applicant's breathing pattern. Nor, does Physician #1 provide any justification as to how this problem could have affected the Applicant's ability to provide a breath sample, other than to say "...*this patient cannot do a pulmonary function test because of inadequate inspiration & hence would have difficulty with a breathalyzer.*" Physician #1's note was written almost ten years ago. No up to date information has been provided with respect to the Applicant's present condition.

At the hearing the Applicant was unable to coherently explain why he was unable to provide a breath sample, other than to state that he has emphysema. Yet, nowhere in the scarce notes written by Physician #1 is there a diagnosis of emphysema. The Applicant is not under the regular care of a respiratory specialist nor is he taking any medication for the condition.

The Tribunal must rely on the testimony, of the eyewitnesses who were involved in the incident and the videotape of the breathalyzer test session. Officer #1 and Officer #2 were in direct contact with the Applicant. Neither officer noticed, at any time, the Applicant suffering from any type of respiratory distress.

There are certain unmistakable indicators of respiratory impairment that are visible even to an untrained person. After the viewing the videotape of the Applicant's breathalyzer test session, the Tribunal detected none of the symptoms commonly associated with a severe respiratory illness, such as wheezing, coughing or shortness of breath, on the part of the Applicant.

Also evident in the tape and incomprehensible to the Tribunal was the fact that the Applicant told Officer #2 that he was "diabetic" and that he had difficulties with his lungs, but failed to specifically identify the illness as emphysema.

The Applicant testified that he has a copy of Physician #1's notes in each of his three cars. Yet, the Tribunal was not told why the Applicant did not show Physician #1's note to either officer. The Applicant's only explanation was that he "*imagined*" or "*assumed*" that the officers had found the note.

It appears that the Applicant's condition was not severe enough to warrant seeking medical assistance immediately after the incident. The Applicant's first visit to his physician was a week or so after the incident.

The Tribunal finds that there is insufficient evidence, medical and viva voce from the Applicant, to satisfy the Tribunal that the Applicant has a medical condition, which would have prevented the Applicant from providing the demanded breath sample.

The onus being on the Applicant to establish the merit of the appeal, the Tribunal finds that the Applicant has failed to do so. Thus, the Tribunal finds that the Applicant does not meet the criteria of Section 50.1 (2) (b), in that he was not able to demonstrate that he suffers from a medical condition, which would prevent him from providing a breath sample.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated August 5, 2002 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal **confirms** the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: September 10, 2002

NORMAND J. HENRY

**Appeal under section 50.2 of the *Highway Traffic Act*,
R.S.O. 1990, Chap.H.8 as amended (the "Act"), from
the Order of the Registrar of Motor Vehicles
pursuant to section 55.1(3) of the Act.**

**TO APPEAL AN ORDER TO IMPOUND A MOTOR
VEHICLE ISSUED BY THE REGISTRAR OF MOTOR
VEHICLES**

TRIBUNAL: SIMON DANN,
Presiding member

APPEARANCES: LUBA NEUWIRTH
Representative for the Registrar of Motor Vehicles

NORMAND J. HENRY, Applicant
unrepresented

DATE OF HEARING: September 5, 2002

DECISION RELEASED: September 10, 2002 ***by teleconference***

REASONS FOR DECISION

A hearing was held on September 5, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Normand J. Henry (the "Applicant")
Motor Vehicle:	1990 Ford Aerostar, plate # ALDS 470 (the "vehicle")
Date of Appeal:	August 14, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence (i.e. all reasonable efforts) to determine that the driver's licence was not suspended and the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(c) and (d) of the Act.

This matter came before this Tribunal on September 5, 2002 and proceeded as an electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUES:

The Applicant's request for a hearing filed with this Tribunal (Notice of Appeal Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

I loan Andrew St. Pierre my van. I asked if he had his licences (drivers) and he said he did.

I need my van to work, to transport material to construction sites. I have no other means of transportation.

The Applicant confirmed the information provided with the Notice of Appeal and added the following:

- Mr. Henry, who contracts out as a carpenter, had previously seen Mr. St. Pierre driving and that Mr. St. Pierre had used Mr. Henry's vehicle on other occasions;
- The Applicant did not know that Mr. St. Pierre's licence was under suspension; he had always asked if Mr. St. Pierre, who was working for him as a contract helper on a renovation project, had his licence with him and had that day received a "Yes" in reply to the question about whether he had his licence;
- Mr. Henry testified that Mr. St. Pierre had told the police he had lied to his boss in telling him that he had a valid driver's licence;
- The Applicant advised that the renovation project he was on was now finished and he had not experienced any loss in concluding that job as his boss there had been able to loan him an alternate truck but he had to return it now because he would be starting a new job on Monday, September 9th at an Ontario Hydro facility in Courtright and he would need his own vehicle to be able to get to there with his tools.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Andrew St. Pierre;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until March 6, 2003.

Based on questions submitted by the Respondent, the Tribunal heard the Applicant had relied on having seen Mr. St. Pierre drive in the past and a verbal question about whether he had his licence with him on the day of the impoundment. The Applicant conformed that he had not previously been aware of how to do a valid driver's licence check but that he would be sure to do so in the future.

Mr. Henry also confirmed that he was unable to afford a rental vehicle to temporarily replace the impounded one and since he was starting a new job he did not know any of the people at the Courtright location which, while it was only about 10 km away, did not offer public transportation access.

Mr. Henry stated that even in the event of transit availability his problem centred around the facts that he would be working a night shift between the hours of 6:00 p.m. and 4:00 a.m. and that he needed to transport his own carpentry tools which consisted of large items such as various types of table saws that could not be carried in a small sedan or a taxi, which would cost about \$35.00 each way.

The Applicant confirmed he had not suffered any financial loss to this point as he had been provided with an alternate vehicle by the supervisor at the job which was just concluded. In addition, Mr. Henry confirmed he had no health issues but that he had no immediate family members from whom he could borrow a vehicle.

The Applicant advised that he obtained this job through the carpenters local union hall.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
 - (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(c) and (d).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to,

caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. *Law.* The attention and care due from a person in a given situation....

Also, “due diligence” in Black’s Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or

to the environment or property of a community in whose service the motor vehicle is ordinarily used.

- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

As to the Applicant's appeal to have the impounded vehicle returned under:

- (1) subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver,
and
- (2) on the basis of subsection 50.2(3)(d), that the loss of the vehicle will result in exceptional hardship.

The evidence presented was considered on whether or not it met the definitions of 'due diligence' and "exceptional hardship" and if it clearly established the Applicant did exercise due diligence and will experience an unusual circumstance and severe hardship based on the

following.

Whether “the owner of the motor vehicle exercised due diligence in attempting to determine that the driver’s licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension” ref S.50.2(3)(c);

The Applicant gave evidence that he had previously seen Mr. St. Pierre driving and when he asked whether he had a valid driver’s licence with him, Mr. St. Pierre had answered in the affirmative.

Whether “no alternative to the impounded motor vehicle is available” ref S.22(3)(a);

The Applicant gave evidence that he did not have friends or family to temporarily lend him an alternate vehicle and he could not afford a vehicle rental or use taxis. He stated that public transit was not available to the new job site. In addition, he stated he did not yet know anyone at the new site since he was only starting on September 9th. Mr. Henry stated the largest obstacle to alternate transportation was his tools and that a truck was needed to carry them daily.

Whether the “loss will be immediate, significant and lasting;” ref S.22 (3)(b)

The evidence established the initial immediacy of the loss had been mitigated by the fact the Applicant had been provided by an alternate vehicle by his previous place of employment but that his new job expected him to come with his own vehicle and he did not have alternate transportation which would accommodate his tools.

The Applicant testified that he needed the vehicle to be able to start his new job and carry his tools to that job but did not present the Tribunal with any substantive evidence to show immediate (being at the start of his new job on Sept. 9th) or significant or lasting impacts that would result from the loss of his vehicle, both immediately and over the remaining period of impoundment.

Whether “the impact of the loss will be upon a person ordinarily transported by the motor vehicle”; ref S.22.(3)(c)

The Applicant testified he was not able to arrange or afford alternate transportation for his new job and confirmed that he would be the impacted individual.

Whether the impact of the loss “will be upon a person other than the person whose driving while his or her driver’s licence was under suspension resulted in the order to impound the motor vehicle”; ref S.22.(3)(d)(i)

The evidence showed the loss would be to the Applicant who was not the driver at the time of the impoundment.

In summary, though the Applicant presented evidence to show he had exercised due diligence by asking Mr. St. Pierre if he had a valid driver's licence, he did not present the Tribunal with substantive evidence to confirm the Applicant had any kind of policy for an employee's use of Mr. Henry's vehicle (Mr. Henry testified that Mr. St. Pierre was working for him in a casual or contract employee situation) and thereby confirm that due diligence or all reasonable effort had been exercised to establish the validity of Mr. St. Pierre's licence.

The Tribunal was not provided with substantive evidence to confirm that Mr. Henry would lose the Ontario Hydro job or that the balance of the impoundment period would impact his ability to obtain other placements through his union job centre.

In addition, the Applicant did not present any evidence to confirm he had discussed his vehicle impoundment with either his union hall contact or the Ontario Hydro employment supervisor in an effort to find a solution to his temporary loss, as he was unable to arrange or afford alternate transportation, or to receive a statement advising him of the potential impact if he was unable to report for his start time on September 9th.

In conclusion, there was insufficient evidence to show due diligence had in fact been exercised and neither was any evidence presented to show the detail of possible financial impacts or present and future job loss to the Applicant. The Tribunal was not provided with sufficient facts by which to conclude the Applicant would experience "exceptional hardship" in terms of the loss being exceptional, unusual, and causing "hardness, severity, severe toil or suffering" or "extreme privation".

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Simon Dann, Presiding Member

RELEASED: September 10, 2002

1236-ADLS-ANX

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding Member

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF
HEARING: September 10, 2002

DECISION
RELEASED: September 11, 2002

Toronto

REASONS FOR DECISION

A hearing was held at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on September 11, 2002, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that her appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated August 5, 2002, and was received by the Tribunal on August 15, 2002, together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

The Respondent's Representative moved for an adjournment, as after the thirty minute grace period allowed, the Constable summoned by the Registrar failed to appear.

The Applicant objected to the adjournment on the grounds that the postponement of the hearing would seriously inconvenience the family. It would not only be difficult for the Applicant to take another day off work, but the children would need to stay home from school, again, as there would be no one to drive them to Brampton.

The request for adjournment was denied. The hearing proceeded.

The Respondent's Representative requested that Officer #1's notes be filed as an exhibit. No objection being raised by the Applicant, the notes were entered on consent as Exhibit # 5.

The Applicant petitioned the Tribunal to accept a note handwritten, purportedly by Officer #1, on a telephone pad slip, as an exhibit. The Respondent's Representative did not object the note containing a telephone number was entered on consent as Exhibit #6.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice to Registrar dated July 25, 2002, issued by the Registrar of Motor Vehicles.

- b) Exhibit # 2 Notice of Appeal Form – received August 15, 2002.
- c) Exhibit # 3 Additional submissions by the Applicant – 4 pages – received September 03, 2002.
- d) Exhibit # 6 Pad slip “telephone number” given by Officer #1 to the Applicant – received September 10, 2002.

By the Respondent:

- a) Exhibit # 4 Ministry of Transportation submissions – received September 04, 2002.
- b) Exhibit # 5 Copy of Officer #1’s note – 3 pages – received September 10, 2002.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* (“HTA”) states:

- 50.1(1) “A person whose driver’s licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
 - (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
 - (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason”.

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

- 15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
 - (a) the name, telephone number and address, with the postal code, of the medical practitioner;
 - (b) the name, date of birth and address of the person who is the subject of the report;
 - (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

The Applicant's Driver's Licence was suspended "July 25, 2002" as per Notice of Appeal (Exhibit # 2)

Applicant's Evidence

Page 2 of the Notice of Appeal was prepared by the Applicant's physician of "9 years", Physician #1, on "8/8/2002".

Physician #1 details under the heading:

- o “Details and Diagnosis of patient’s present condition: *Depressive Symptoms, Stress reaction/*
- o History of Condition: */ long standing stress & Depression reaction*
- o Type of Measurements or recent tests taken... : *Counselling and psychotherapy*
- o Relevant details of visit and when your patient was last seen? /

The Applicant in a letter dated August 9, 2002 states: “...*I did not refuse the breath sample ...simply could not blow into the alert for eight seconds continuously ...nervous ...panicked ...started to hyperventilate ...*”

Witness #1, a friend of the Applicant, wrote the Tribunal a letter on August 22nd, 2002, confirming the number of drinks consumed by the Applicant, on the night in question.

At the hearing the Applicant testified as to the events surrounding the breathalyzer test session. In her first attempt to provide a breath sample, the Applicant admitted that she “...*failed miserably...*”. The Applicant was not told she needed to fill her lungs and blew “...*seven seconds...*” instead of the “...*eight...*” required as the officer suggested was required.

The Applicant asserted she had not been drinking. She believes that she was not able to provide an adequate sample, because the situation and the officer made her feel “...*nervous and panicked...*”.

The Applicant stated that she appealed in order to have an opportunity to present her side of the events. The Applicant feels the officer was not understanding, and did not exercise proper judgement, in that he should have asked for a blood sample.

In cross-examination, the Respondent’s Representative, Mr. Biel, asked the Applicant to tell the Tribunal the exact medical condition that prevented her from providing a breath sample. The Applicant replied that she “...*had bronchitis in the past and several deaths in the family in the past four years...*”.

The Applicant stressed that she did not wish to fully disclose her medical history and neither did her physician. Physician #1 informed the Applicant that if further information was necessary, the Ministry should contact him directly, or ask for more detailed information.

According to the Applicant, Physician #1 told her that there could be a number of reasons why she was not able to provide an adequate breath sample: “*state of mind ...anxiety attack ...panic ...no experience in those things...*”.

The Applicant called her husband as a witness. The Applicant's husband testified as his conversation with the officers, as well as to his wife's mental state.

In closing the Applicant asked the Tribunal to reconsider the Registrar's decision and to reinstate her driver's licence. The Applicant emphasized that: she does not drink; she would never drink and drive; the loss of her licence has caused havoc in her family life; she did not provide a breath sample because of lack of experience in such matters; she was unable to sustain a long enough breath to provide an adequate sample.

Respondent's Evidence

The Respondent provided the following Documents:

1. Certified Copy of Notice to Registrar, sealed August 20, 2002.
2. Certified Copy of driving record of the Applicant, sealed August 20, 2002

The Respondent read Officer #1's notes into the record. Officer #1's notes detail that the Applicant was given several opportunities to provide a breath sample, and that each time the instrument registered an "E/O" or "Error" message.

In his closing remarks, the Respondent's Representative pointed out that the Applicant seemed more concerned with her level of intoxication, her dealings with Officer #1 and the hardship experienced by the family, than the medical reason she failed to provide a breath sample.

Respondent's Representative contends that there is in fact no medical reason for the Applicant's failure to provide a breath sample. The fact that the Applicant might have been nervous at the time is not a valid medical reason. Physician #1 has chosen for not to disclose details of the Applicant's condition nor does he offer a reason as to why the Applicant was not able to provide a breath sample.

In conclusion the Respondent's Representative asked that the Tribunal uphold the Registrar's decision.

APPLICATION OF THE LAW TO FACTS:

Although the totality of the evidence presented was considered, the preceding reflect a summary of the proceedings. Evidence introduced not directly germane to the issue was not transcribed.

Prior to setting out the reasons for the decision, the Tribunal will address the Applicant's issue as to why a blood sample was not taken. While subsection 48.3 (3) 1 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H-8 as amended is clear in its provision, that the concentration of

alcohol in the blood may be obtained “...by an analysis of the person’s breath sample or blood taken...” the decision to request a blood sample remains at the discretion of the officers. According to established policy, no blood samples are to be demanded unless there are obvious visible physical signs preventing the individual from providing a breath sample. As no such signs were present, the issue of a blood sample is inconsequential.

The Tribunal feels it is imperative to explain to the Applicant that this Tribunal has no jurisdiction to deal with issues concerning the behaviour of police officers. Further at issue, is not whether the Applicant was impaired or had been drinking at all.

An appeal was brought by the Applicant under Section 50.1 (2) (b) of the *Highway Traffic Act*, which prescribes:

“... person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason...”

The Tribunal concurs with the Respondent’s Representative; the bulk of the Applicant’s evidence focused on issues extraneous to the matter in question. The subject of this appeal is whether the Applicant has a medical condition that could cause, at the time of the breath sample demand, the Applicant to fail or not comply with the breath demand.

The Tribunal sympathizes with the Applicant, but does not quite understand why, while appealing her licence suspension on medical grounds, both herself and her physician would chose not to disclose possibly pertinent medical information. The fact is, that that the Tribunal is left with the very scant diagnosis from Physician #1: “...*Depressive Symptoms, Stress reaction...*”. Physician #1 offers no rationalization as to how this condition could have prevented the Applicant from providing a breath sample.

The Applicant in her viva voce evidence explained to the Tribunal that she was “...*nervous and panicked...*”. Nonetheless, she failed to describe to the Tribunal, any actual physical symptoms, she might have been experiencing at the time that would have precluded from proving a breath sample.

The onus being on the Applicant to establish the merit of the appeal, the Tribunal finds that the Applicant’s testimony although credible, was insufficient to substantiate the basis for an appeal on medical grounds. Thus, the Tribunal finds that the Applicant does not meet the criteria of Section 50.1 (2) (b), in that he was not able to demonstrate that she suffers from a medical condition, which would prevent her from complying with the demand for a breath sample.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated July 25, 2002 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* (“HTA”)

and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: September 19, 2002

JAMES DELANEY

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: WILLIAM WARBURTON
Presiding member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

JAMES DELANEY, Applicant

DATE OF HEARING: August 30, 2002 Toronto

DECISION

A hearing was held on August 30, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

LICENCE APPEAL TRIBUNAL

William Warburton,
Presiding Member

RELEASED: September 13, 2002

MARK NORTON AND BRANDIE MARACLE

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: WILLIAM WARBURTON
Presiding member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

MARK NORTON AND BRANDIE MARACLE, Applicants

DATE OF HEARING: August 30, 2002 Toronto
(By teleconference)

DECISION

A hearing was held on August 30, 2002, at Toronto, Ontario, to consider the Applicants' appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

LICENCE APPEAL TRIBUNAL

William Warburton,
Presiding Member

RELEASED: September 13, 2002

1241-ADLS-PAND

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: ANTOINE AOUAD, M.D., Presiding Member
ELAINE ARGUE, Member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

Solicitor for Applicant
Applicant

DATE OF
HEARING: September 06, 2002

DECISION
RELEASED: September 09, 2002

Ottawa

REASONS FOR DECISION

A hearing was held on September 06, 2002, at Ottawa, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on September 9, 2002, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that her appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated August 16, 2002, and was received by the Tribunal on August 19, 2002 together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

There were no Preliminary Matters and the hearing proceeded.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Suspension Reminder Notice dated July 31, 2002, issued by the Registrar of Motor Vehicle.
- b) Exhibit # 2 Notice of Appeal Form – received at the Tribunal August 19, 2002
- c) Exhibit # 4 Copy of letter from the Applicant's Counsel addressed to Ms. Kim Beintema – received September 5, 2002

By the Respondent:

- a) Exhibit # 3 Ministry of Transportation submissions – received September 3, 2002

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

- 50.1(1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
 - (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
 - (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1), (2) and (3) requires that a medical report must contain:

- 15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
 - (a) the name, telephone number and address, with the postal code, of the medical practitioner;
 - (b) the name, date of birth and address of the person who is the subject of the report;
 - (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon

the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;

- (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
- (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

The Applicant's Driver's Licence was suspended on "July 18, 2002 " as per Notice of Appeal (Exhibit # 2)

Appellant's Evidence

Page two of Notice of Appeal is blank.

Under the letterhead of Perth Medical Physician #1 reports on "August 02, 2002" that he: "*...has known and attended the Applicant for approximately 40 years and since September 2001 ...attended ... approximately eight times for anxiety and panic attacks...*"

At the hearing, the Applicant was represented by Counsel. In her viva voce evidence, the Applicant testified: to some of the reasons that have provoked her medical condition; to the events that led to the demand for a breath sample; to the particulars of her involvement with the officers prior to and during the attempts to provide the sample.

The Applicant explained that for approximately "*...a year and three quarters...*", she has suffered from panic attacks as a result of an on going marital dispute. The panic attacks generally manifest in a combination of symptoms: "*...anxiety ...trembling, sweating, shortness of breath, ...fragmented dialogue, heart palpitations ...numbness in the ...head ...incoherence...*". Panic attacks may last a few hours; the heart rate increases and decreases over a period of time, depending "*...on the outside stimuli...*". The Applicant has been prescribed Ativan for her condition.

As a result of an altercation with a pedestrian, the Applicant was in a panic mode, at the time she was approached by the police. She was sitting in her car, grasping the wheel tightly, her hands were trembling, and she was numb and sweating.

The Applicant had very little recollection of the events. She could not identify the officer who first approached her, nor recall making any attempts to provide a breath sample, while in the parking lot.

It was the Applicant's testimony that she was asked to provide a breath sample at the police station in Smith Falls, and that she did not refuse to provide a sample, she just could not do it.

The Applicant believes that she was able to provide an adequate sample the first time, not because she was more relaxed or more comfortable, but because she was able to blow "...longer..."

While at the police station in Smith Falls the Applicant asked for but was denied her medication. The Applicant did inform the arresting officers of her condition, and that she was on medication.

The Tribunal asked the Applicant why the physician had not completed page 2 of the Notice of Appeal. The Applicant replied that the physician provided her with a letter, which she attached to page 2 of the Notice of Appeal, thinking it would suffice.

Physician #1 testified as a witness for the Applicant, via electronic means. In examination-in-chief, Physician #1 confirmed that: he has been practicing medicine for some forty-five years; he has been the Applicant's physician since her birth; she is presently being treated and on medication for anxiety and panic attacks.

During her visits to Physician #1's office, while talking about her marital condition the Applicant sometimes becomes noticeably agitated. As described by Physician #1: "...her heart rate would accelerate, she would be shaking, trembling have some difficult breathing, although there is really no obstruction or anything, most of the other symptoms are probably symptomatic...".

Physician #1 stated that at the onset of a panic attack, an individual's breathing pattern changes without apparent reason. Further, although an acute panic attack lasts five to ten minutes, the sense of panic or a panic episode could last longer, and display varied symptoms depending on the external circumstances.

In cross-examination Physician #1 declared that he is not familiar with requirements of breathalyzer. He is able to attest to the fact that the Applicant panics easily and "...may not be able to breathe properly..." but cannot comment on whether or not she could have provide a breath sample.

The Applicant visited Physician #1 on August 2nd, at which time, she told Physician #1 “...*that something had happened in her marital situation...*” and asked for a report of her medical condition. It was not until August 30th, 2002 that Physician #1 was informed as to the actual reason the report was requested.

Respondent's Evidence

The Respondent provided the following Documents:

1. Notice to the Registrar, certified August 22nd, 2002
2. Driving Record of the Applicant, certified August 21st, 2002

The Respondent called Officer #1 as a witness. Officer #1 has been with the Perth Regional Police Service “...*approximately a year and half...*” and a police officer “...*alternately off and on, approximately three years with the regular force and ten years with the University...*”

From independent recollection and from periodic reference to his notes Officer #1 detailed: the events that led to the Applicant being taken to the Smith Falls Detachment; his observations, of the Applicant's interactions with other detainees while in the cells; her transportation to Perth; his dealings with the Applicant around six o'clock the following morning.

A breath sample was demanded of the Applicant, at the scene of the incident. Officer #1 observed Officer #2 administer a breathalyzer. The Applicant failed to provide an adequate breath sample. Rather than charging the Applicant immediately, the Applicant was transported to Smith Falls and turned over to a qualified breath technician.

At no time did Officer #1 observe the Applicant afflicted with any breathing difficulties or exhibiting the signs of an individual having a panic attack. The Applicant never asked for medical assistance, she did ask for her “...*vallium...*”. Apo cephalax cephalaxin was the only medication found in the Applicant's purse.

Officer #3, of the Smith Falls Police Services, was also called as a witness for the Respondent. Officer #3 has been a police officer since 1988 and qualified breathalyzer technician since 1995.

The Applicant provided a suitable first sample, but refused to provide the second sample required to complete the procedure. In reply to Officer #3's repeated explanation and request for a second sample the Applicant replied “...*No thank you...*”.

Officer #3 did not notice any symptoms of a panic attack; he testified that at no time did the Applicant request medical assistance.

In his closing remarks the Applicant's Counsel submitted an Ontario (ADLS-880-Hyperventillation) [2001] O.L.A.T.D. No. 470, Ontario Licence Appeal Tribunal, A. Aouad, Member, to substantiate his premise that a panic disorder is sufficient to warrant the dismissal of the suspension.

Applicant's Counsel asserted that the Applicant has shown on the balance of probabilities she was suffering from a panic attack at the time of the demand for a breath sample. Therefore she had a medical explanation for her refusal or not to comply with the breath demand.

There is sufficient evidence, according to Applicant's Counsel, that there are considerable triggers in the Applicant's life to set off panic attacks. Further, as the evening progressed there were certainly enough stressors to induce and sustain a panic attack. As such Applicant's Counsel suggests that the Tribunal set aside the decision of the Registrar to suspend the Applicant's driver's licence.

The Respondent's Representative stated that it is the Registrar's submission and position that the onus of a medical condition has not been met by the Applicant. Ms. Beintema, the Respondent's Representative, concedes that it is conceivable that given the circumstances of her life the Applicant suffers from a panic disorder. Nonetheless, there is no evidence that the Applicant was suffering from a panic attack at the time of the breath demand.

Physician #1 was not present at time and was unable to testify that the Applicant's condition would have precluded her from providing a breath sample. There were two eyewitnesses, neither of whom witnessed the Applicant suffering from a panic attack.

The Respondent's Representative concluded by asking the Tribunal to uphold the decision of the Registrar.

APPLICATION OF THE LAW TO FACTS:

Although the totality of the evidence presented was considered, the preceding notes reflect a summary of the proceedings. Evidence introduced not directly germane to the issue was not transcribed.

An appeal was brought by the Applicant under Section 50.1 (2) (b) of the Highway Traffic Act, which prescribes:

“... person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason...”

The Respondent's Representative acknowledged that the Applicant's diagnosed panic disorder is not in dispute. The Tribunal agrees and finds as fact that the Applicant suffers from an anxiety and panic disorder.

Applicant's Counsel submitted Ontario (ADLS-880-Hyperventillation) [2001] O.L.A.T.D. No. 470, Ontario Licence Appeal Tribunal, as a precedent to establish that the Tribunal has in the past accepted panic disorders as grounds for reversal of the Registrar's decision to suspend a driver's licence. The Tribunal points out, that a medical condition is only part of the requirements needed to set aside the Registrar's decision. The Tribunal must consider whether the Applicant's condition at the time of the breathalyzer test, was severe enough, to cause the Applicant to fail or not comply with the breath demand.

Physician #1 stated that in cases of panic disorders, the breathing pattern can change for no apparent reason, but his unfamiliarity with the breathalyzer apparatus rendered him unable to provide insight as to how the Applicant's panic disorder might have affected her ability to provide a breath sample.

There is conflicting evidence as to why the Applicant did not provide a breath sample as required. The Applicant testified that she blew "...longer..." the first time that she did not refuse to blow a second time, she was just not able to do it. Officer #3 testified after the Applicant provided a sufficient sample she refused to provide a second. Given the Applicant's scant recollection of events, the Tribunal accepts Officer #3's evidence that the Applicant refused to provide a breath a sample.

Is there enough evidence to suggest that the Applicant refused to provide a breath sample because of her medical condition?

The Tribunal must rely on the testimony, of the Applicant and the eyewitnesses who were involved in the incident, Officer #1 and Officer #3. Both Constables were in direct contact with the Applicant. Neither officer noticed, at any time, the Applicant suffering from any type of respiratory distress, or exhibiting the signs of a panic attack.

The Applicant's condition did not seem to prevent her from providing an adequate sample. The Tribunal finds that there is insufficient evidence, medical and viva voce from the Applicant, to satisfy the Tribunal that the Applicant's medical condition would have prevented the Applicant from providing the second breath sample demanded.

The onus being on the Applicant to establish the merit of the appeal, the Tribunal finds that the Applicant has failed to do so. Thus, the Tribunal finds that the Applicant does not meet the criteria of Section 50.1 (2) (b), in that she was not able to demonstrate that she suffers from a medical condition, which would prevent her from providing a breath sample.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated July 28, 2002, of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal **confirms** the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

Elaine Argue,
Member

RELEASED: September 17, 2002

1243-MED-NOMC

**Appeal under Section 50(1) of the Highway Traffic Act,
R.S.O. 1990, Chap. H.8 as amended, from a Decision of the
Registrar of Motor Vehicles pursuant to Section 47(1) of
that Act.**

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ROY MELVIN, M.D., Presiding Member

APPEARANCES: LUBA NEUWIRTH
Representative for the Registrar of Motor Vehicles

Solicitor for Applicant

DATE OF
HEARING: September 12, 2002 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the Highway Traffic Act (Ontario).

FACTS:

This 29-year-old female has been under the care of a psychiatrist since May 2002 for stress disorder and depression by the administration of appropriate drugs. On January 9, 2002, she went to the emergency room of the hospital after an episode of confusion, dizziness and disorientation and then to her family doctor Physician #1 on January 11, 2002 for follow-up. The story was that she lost count of her drug dosages and intervals and by mistake repeated taking indications, perhaps more than once on the evening of

January 9, 2002 resulting in symptoms of drug overdose which brought her to the hospital. On January 11, 2002, Physician #1 reported this incident to the Ministry of Transportation. It was

the doctor's intention that driving be limited temporarily until her psychiatrist stabilized her condition.

The ministry letter to The Applicant on January 15, 2002 requests an assessment from a neurologist in order to review her driving privileges for medical reasons. This was supplied by a report from Physician #2, Neurologist on January 29, 2002. Unfortunately this doctor referred the matter to The Applicant's family doctor and or psychiatrist.

On March 7, 2002, the Ministry of Transportation requested up to date assessments from the Applicant's family doctor and psychiatrist.

The report of April 25, 2002 from her family doctor, Physician #1 quotes, "The Applicant as saying that on January 11, 2002 while driving from Toronto to Mississauga for that visit "she lost her focus for a long period and almost hit a car". The Applicant later denies, she said those words, but admits she was not quite herself. Physician #1 decreased her drug dosage in consultation with her psychiatrist. The Applicant was seen again on January 14, 2002 following another visit to the hospital E.R. the day or so before because of a G.I. upset and general malaise. This time a complete investigation was done with negative physical and laboratory findings (blood EKG. Brain Scan and Abdominal Ultrasound).

She was referred to her psychiatrist for ongoing care with the assertion that the episode of drug over dosage on January 8, 2002 was in no way intentional or suicidal.

A report from her psychiatrist Physician #3 based on her visit of March 4, 2002 was received late (May 7, 2002) presumably due to the "CUPE" strike. In it, the doctor describes the accidental overdose of January 9, 2002. Unfortunately the wording in the letter/"this happened two or three times" leaves the impression that there were two or three different incidents of this happening, rather than what actually happened which is that the doses were repeated two or three times on the one occasion. This is significant in that it led the Medical Advisory Committee to erroneous assumptions.

Physician #3 prescribed a mood stabilizer and after this was controlled felt that The Applicant would be able to drive. A note dated April 19, 2002 to the Ministry of Transportation from Physician #3 indicates control by a report a therapeutic drug levels and states "no psychiatric reason for not reinstating her drivers licence".

On June 5, 2002, the Medical Advisory Committee recommended the suspension of the drivers licence and on June 10, 2002 The Applicant was so informed and that reconsideration would be given on receipt of a detailed psychiatric report that she remained free of psychiatric symptoms for a period of one year. Suspension was effective July 1, 2002. On July 22, 2002 Physician #1 submitted a letter to the Ministry of Transportation that the Applicant has had no recurrence of her health problems and that there were no medical reasons for her not to drive. On August 27, 2002, the Medical Advisory Committee

requested a follow-up psychiatric report because of insufficient information on which to base a

recommendation for reinstatement. They base this on the impression that The Applicant has overdosed three times and was non-compliant-facts, which were later, refuted by the applicant's testimony at the hearing.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50(1) Every person aggrieved by a decision of the Minister under sub clause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

The Applicant's licence to drive was suspended on the basis of Section 47(1) of the Highway Traffic Act ("HTA") and Regulation 340/94 Section 14. "The holder of a drivers licence must not suffer from any disability likely to significantly interfere with his/her ability to drive a motor vehicle safely".

Physician #1's letter of January 11, 2002 to the Ministry of Transportation reported the disabilities, which were sufficient to interfere with her ability to drive safely. The Ministry of Transportation requested medical reports to ascertain her condition and competence to hold a drivers licence. The Medical Advisory Committee reviewed these reports several times but they were not able to recommend competence to drive safely or reinstatement after suspension.

The C.M.A.'s Guide in Determining Medical Fitness to Drive deals with psychiatric disability in Section 13. The following is a summary of relevant issues.

It is very difficult to make specific recommendations because some psychiatric disorders are not severe enough to interfere with a person's ability to drive safely. The physician faces difficulty in assessing the patient's insights, emotional stability, judgement and responsibility. Long-term drug therapy introduces another hazard, which depends on the driver's conscientious use of prescribed medication in appropriate dosage. Therefore the Motor Vehicle Licensing authority may require detailed psychiatric reports before it is able to determine the patient's ability to drive safely.

The Applicant's problems stem from stress due to a broken home where parents have separated and a father who is verbally abusive. She also has had abusive interpersonal relationships with several suitors. She has been under the care of a psychiatrist for over a year. The incident of January 9, 2002 was a once only accidental overdose of prescribed medication. As of June 2002 she has stopped all medication and has no mood swings. At her latest visit on September 10, 2002, the psychiatrist reported no evidence of depression or hypomania.

There is no requirement in the guidelines for a one-year freedom from psychiatrist symptoms before consideration is given to allow a patient to drive safely.

This Tribunal finds that The Applicant does not suffer from a disability likely to significantly interfere with her ability to drive a motor vehicle safely.

DECISION:

Upon the application by the Applicant to appeal the decision dated July 1, 2002 of the Registrar of Motor Vehicles ("Registrar") to suspend her/his driver's licence pursuant to Section 47(1) of the Highway Traffic Act ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be set aside.

LICENCE APPEAL TRIBUNAL

Roy Melvin, M.D., Presiding Member

RELEASED: September 24, 2002

HAROON SAKHIZADAH

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: SIMON DANN
Presiding member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

HAROON SAKHIZADAH, Applicant
unrepresented

DATE OF HEARING: September 5, 2002

DECISION RELEASED: September 10, 2002 TORONTO

REASONS FOR DECISION

A hearing was held on September 5, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor

vehicle, and date of appeal are as follows:

Owner:	Haroon Sakhizadah (the "Applicant")
Motor Vehicle:	1998 Toyota Camry, plate 490 SZN (the "vehicle")
Date of Appeal:	August 21, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on September 5, 2002 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded

The hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

I need to use my car to get to work and it's about 50 km far from my home and there are no other transportation are running there, if I don't go to work I'll loose my job at the moment I'm on a leave of sick till Sept.01.02. I appreciate your cooperation in this matter. Thank you

The Applicant confirmed the details of his written submission and provided additional evidence including:

- The driver of the vehicle, Mohammad Idrees Sakhizadah (Mohammad), is the brother

of Haroon Sakhizadah (Haroon) and that Mohammad took the vehicle while Haroon was sleeping; Haroon, Mohammad and Haroon's cousin live in the same house and Haroon testified that his car keys are generally hung up on a peg near the front door;

- The Applicant testified he did not know why Mohammad took his vehicle as Mohammad has his own vehicle, which has been parked in the garage during Mohammad's licence suspension period;
- The Applicant works in Port Perry, which is 50 km from his home in Pickering or a \$60.00 taxi ride each way, and usually working the night shift between 8:00 p.m. and 4:30 a.m.;
- There was also no direct public transportation from Pickering to his place of employment in Port Perry
- The Applicant confirmed that he had just returned to work and been able to get rides from different individuals since September 1st but was convinced that he would lose his job if he missed more than several days work in the remaining impound period of 3 weeks.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mohammad Idrees Sakhizadah;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle (Exhibit 1);
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of driving with more than 80 mgs alcohol in blood under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until June 18, 2003.

The Respondent confirmed that Haroon's sole claim for hardship was on the basis of loss of transportation and through additional inquiry, the Tribunal also learned:

- there was no direct public transportation to Port Perry from Pickering and while there was one additional vehicle in the family home, it belonged to Haroon's cousin whose work hours and evening classes conflicted with his schedule and thereby made that vehicle unavailable; and, based on previous rental experience he was unable to afford a short-term car rental;
- that the Applicant had a net monthly income of about \$2,100 with almost the same level of expenses;
- that Haroon was unable to transfer his insurance coverage to Mohammad's vehicle and that he would have difficulty in coordinating his shift schedule with co-workers who all live at some distance and though he had been able to manage since September 1st, he expressed his belief that it would be difficult to arrange more rides home;
- that arranging rides to work might be easier than getting home at the conclusion of his

- shift at 4:30 a.m. since none of the Applicant's co-workers lived in his community;
- that Haroon had not discussed his vehicle loss problem with his supervisor and therefore could only rely on his concern that if he missed more than 2 or 3 days of work, he would lose his job; Haroon also advised it was very hard to contact the supervisor who had authority to allow time off as this supervisor was not regularly on site but traveled to other company locations;
- the Applicant advised that he was also hesitant to request vacation time since he had been on sick leave for 4 months due to a broken ankle and while receiving unemployment benefits he did need to get back to his regular income level.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a

community in whose service the motor vehicle is ordinarily used.

- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

As to the Applicant's appeal to have the impounded vehicle returned on the basis of subsection 50.2(3)(d), that the loss of the vehicle will result in exceptional hardship, the evidence presented was considered on whether or not it met the definition of "exceptional hardship" and if it clearly established the Applicant will experience/is experiencing an unusual circumstance and severe hardship based on the following.

Whether "no alternative to the impounded motor vehicle is available" ref S.22(3)(a);

The Applicant gave evidence that he could not afford a vehicle rental or use taxis and stated that public transit, if he could reach it, did not run at the time his night shift finished (4:30 a.m.) and that while he did not anticipate being able to get rides home from co-workers as none lived in his community, he was willing to inconvenience himself to suit the schedule of whoever would be able to

Whether the "loss will be immediate, significant and lasting;" ref S.22 (3)(b)

The evidence established the immediacy of the loss had been mitigated by the fact the

Applicant had been on sick leave until September 1st or for approximately the first half of the impound period (scheduled to expire September 26th).

As the Applicant confirmed that he had not advised his supervisor of his vehicle loss and the reason for the loss, the Tribunal was not provided with any clear evidence that the impact of the loss would result in the loss of the Applicant's employment.

Whether "the impact of the loss will be upon a person ordinarily transported by the motor vehicle"; ref S.22.(3)(c)

The Applicant testified he had been able to arrange transportation for his shifts from September 1st but expressed uncertainty about how he would be able to do so for the remainder of the impound period.

Whether the impact of the loss "will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle"; ref S.22.(3)(d)(i)

The evidence showed the loss would be to the Applicant who was not the driver at the time of the impoundment.

In summary, while the Applicant has presented evidence to show he will experience inconvenience as a result of the vehicle impoundment, the Tribunal was not provided with clear evidence to confirm the Applicant would lose his job. In fact, the Applicant confirmed he had not discussed his vehicle impoundment with his supervisor in an effort to find a solution to his temporary loss.

The evidence presented did not clearly show that there was "exceptional hardship" in terms of the loss being exceptional, unusual, and causing "hardness, severity, severe toil or suffering" or "extreme privation".

There was also no evidence to show that the Applicant, who testified he knew his brother's driver's licence had been suspended, had instituted conditions to prevent or discourage him from finding or taking the car keys and that they had actually been left in plain sight by the front door.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Simon Dann, Presiding Member

HIGHWAY TRAFFIC ACT
R.S.O. 1990, CHAP. H.8 AS AMENDED, SECTION 50(1)

IN THE MATTER of an application by Romeo R.
Laurin to appeal the decision of the Minister of
Transportation pursuant to section 32(12)(b)(i) of
the *Highway Traffic Act*;

AND IN THE MATTER of

APPLICANT

APPLICANT

and

MINISTER OF TRANSPORTATION

RESPONDENT

ADJOURNMENT

WHEREAS an oral hearing in the above matter was scheduled to be held on Wednesday,
October 2, 2002, at Toronto, Ontario;

AND WHEREAS the Applicant's Counsel requested an adjournment of the hearing to permit
his client to obtain a second opinion from another neurologist;

TAKE NOTICE, upon consent of all parties, the Tribunal Orders:

- (1) this matter is adjourned;
- (2) the appeal shall be heard at 1:30 p.m. on Tuesday, November 12, 2002 at the
Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

1258-ADLS-NOMC

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding Member

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF
HEARING: September 16, 2002

DECISION
RELEASED: September 17, 2002

Toronto

REASONS FOR DECISION

A hearing was held on September 16, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on September 17, 2002, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that her appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated August 22, 2002, and was received by the Tribunal on August 29, 2002, together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

There were no preliminary matters in dispute between the parties and the hearing proceeded.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice to the Registrar dated August 10, 2002, issued by the Registrar of Motor Vehicles.
- b) Exhibit # 2 Notice of Appeal Form – received August 22, 2002.

By the Respondent:

- a) Exhibit # 3 Ministry of Transportation submissions – received September 10, 2002

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

- 50.1(1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
 - (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
 - (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

- 15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
 - (a) the name, telephone number and address, with the postal code, of the medical practitioner;
 - (b) the name, date of birth and address of the person who is the subject of the report;
 - (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon

the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;

- (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

Applicant's Driver's Licence was suspended "August 10, 2002" as per Notice of Appeal (Exhibit # 2)

Applicant's Evidence

Page 2 of the Notice of Appeal was prepared by the Applicant's physician of "1 years", Physician #1, on "22/8/02".

Physician #1 details under the heading:

- o "Details and Diagnosis of patient's present condition: *Shortness of breath; Possibly Hyperactive airways*
- o History of Condition: *Visited ...office Dec 20/01 - Complaint ...shortness of breath difficulty breathing; Pulmonary function was normal; treated with inhaled Ventolin as needed...*
- o Type of Measurements or recent tests taken. : Pulmonary Function Test 20/12/01 – Normal
- o Relevant details of visit and when your patient was last seen? *No further complaints; Possibly hyperactive airways triggered by inhaled irritants*

At the hearing the Applicant, in her evidence-in-chief, testified as to how she felt about the

suspension of her licence, and the fact that she has learned her lesson.

In cross-examination the Respondent's Representative questioned the Applicant as to the medical reason she was not able to provide a breath sample. The Applicant explained that she had used a nasal spray that stuck to the back of her throat and rendered her unable to provide a sample. As this spray is not medicated she was unable to obtain a note from her physician.

The Respondent's Representative specifically asked the Applicant if she was having breathing problems at the time of the breathalyzer test, to which the Applicant replied: "...*No I was not having breathing problems...*". The Applicant visited her physician and had a pulmonary function test after the incident. The results of the PFT were normal.

In closing the Applicant challenged the fact that she is accused of refusing to provide a breath sample. The Applicant claims that she did not refuse, but that in fact she has a problem with her breathing and could not provide a longer lasting breath.

The Applicant stated that she does not know the accurate diagnosis of her condition.

Respondent's Evidence

The Respondent provided the following Documents:

1. Certified Copy of Notice to Registrar, sealed September 4, 2002.
2. Certified Copy of driving record of the Applicant, sealed September 3, 2002

The Respondent called Constable #1, a member of the York Police services as a witness. Constable #1 testified that he sworn as an officer on "...*May 20th 1997...*".

Constable #1 described the events that led to the Applicant being asked for a breath sample and surrounding the breath test.

Constable #2 performed the breath in Constable #1's presence. At the time the Applicant exhibited no signs of physical distress such as shortness of breath. The Applicant never asked for medical attention or told the officer that she needed any type of medication.

The Respondent's Representative also called Constable #2 of the York Regional Police Services. Constable #2 was sworn in as an officer in 1997, and became a breathalyzer technician in "...*October 2000...*".

Constable #2 testified that in her first attempt, the Applicant "...*took a deep breath in, put the mouthpiece in her mouth, and puffed her cheeks out making no attempt ...to provide a sample into the instrument...*". Constable #2 formed the opinion that the Applicant was refusing to provide a breath sample, in that there was no air going into the instrument.

Constable #2 proffered that during the Applicant's second attempt the instrument begun to begin to register. When Constable #2 encouraged her to 'keep going', the Applicant deliberately stopped providing a sample.

After the second attempt, the Applicant was allowed another couple of opportunities to provide a sample but was not successful. The Applicant's explanation to the officer was that she was trying but she could not do any better.

During the time that Constable #2 spent with the Applicant, she did not request medical assistance. Constable #2 did not observe any signs that would lead him to believe that the Applicant required medical attention.

In his closing remarks, Mr. Biel the Respondent's Representative argued that there is no medical condition that would have prevented the Applicant from providing a breath sample.

Mr Biel pointed out that both Constables are trained observers and neither noticed any symptoms of a medical condition. In referring Physician #1's report, Mr. Biel notes that Physician #1 confirms "...Shortness of breath...", however, the pulmonary function test taken the same day, was found to be normal. Further in "Relevant details of visit..." Physician #1 wrote "...No further complaints..."

The Respondent's Representative asked the Tribunal to uphold the Registrar's decision to suspend the Applicant's driver's licence.

APPLICATION OF THE LAW TO FACTS:

An appeal was brought by the Applicant under Section 50.1 (2) (b) of the *Highway Traffic Act*, which prescribes:

"...person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason..."

The Applicant's introduced a report from her physician that listed her condition as "...shortness of breath...". However, as the Respondent's Representative emphasized, the Applicant testified that her shortness of breath is sporadic, and that she was not afflicted at the time of the breathalyzer test session. By her own admission, the Applicant indicated that the pulmonary function tests, ordered by her physician were normal.

The onus being on the Applicant to establish the merit of the appeal, the Tribunal finds that the Applicant's written and viva voce submissions, failed to substantiate the basis for an appeal on medical grounds. Thus, the Tribunal finds that the Applicant does not meet the criteria of Section 50.1 (2) (b), in that she was not able to demonstrate that she suffers from a medical condition, which would prevent her from providing a breath sample.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated August 10, 2002 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal **confirms** the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: September 25, 2002

MARIANNA PAYTLER

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: CHARLES SANDIFORD
Presiding member
TERRENCE LORETTE
Member

APPEARANCES: LUBA NEUWIRTH
Representative for the Registrar of Motor Vehicles

PETER PAYTLER, agent for Applicant

DATE OF HEARING: September 23, 2002

DECISION RELEASED: September 27, 2002 Toronto

REASONS FOR DECISION

A hearing was held on September 23, 2002, at Toronto, Ontario, to consider the Applicant’s appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act

to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Mariana Paytler ("Applicant")
Motor Vehicle:	1991 Nissan, Plate No. AFNS899 (the "vehicle")
Date of Appeal:	September 3, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on September 23, 2002 and proceeded as oral hearing, after the Tribunal determined that there were no preliminary matters in dispute.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal:

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

EXHIBITS:

Exhibit 1	Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle.
Exhibit 2	Marianne Paytler's application.
Exhibit 3	Marianne Paytler's Authority for her Husband (Peter) to act on her behalf.

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence For The Applicant

The following is a summary of the Applicant's affirmed testimony.

Peter Paytler read his wife's letter authorizing him to act on her behalf. When the presiding member asked him to read his wife's position statement he did not have a copy so the presiding member read it from his copy.

When asked to relate the circumstances of the incident leading to the impoundment of his wife's vehicle, Peter testified that the afternoon before the incident he drove his wife's car to Gananoque to visit the Casino there. Early the next morning he decided to return home and it

was on the return trip that he was stopped by police. Questioned about the facts of his license suspension Peter admitted that he was aware that his license had been suspended for life and that his family knew this.

Asked where his wife was when he left for the casino he responded that she was at work and that a friend had taken her there and was going to pick her up when she was finished.

Peter also testified that his son was still living at home and that he also had a car although it was quite old and not very reliable. When asked how his wife was getting back and forth to work since the impoundment of her car, he testified that for the most part her son was driving her. When asked if his wife had missed any time at work due to the impoundment he replied no, that she had not missed a day yet but that she might due to the unreliability of her son's car. He also testified that she had not missed any medical appointments either.

Evidence for the Registrar

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Peter Paytler;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension for life.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
 - (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using

another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant's agent Mr. Peter Paytler testified that there is no possible threat to the health or safety of any person ordinarily transported by the motor vehicle. Nor has she missed any medical appointments or any time from work.

After considering the above requirements, the Tribunal finds that the Applicant, albeit inconvenienced to carry on her day-to-day operations, has alternatives to the impounded vehicle and that the impact of the loss is not significant and lasting as required by section 22(3) of Regulation 574 as amended by Regulation 632/98.

Accordingly, after considering the criteria set out in section 22(3) and (4) of Regulation 574 as amended by Ontario Regulation 632/98, the Tribunal finds the Applicant has not established exceptional hardship as set out in section 50.2(3)(d) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Charles Sandiford
Presiding Member

Terrence Lorette
Member

RELEASED: September 27, 2002

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
ROBERT C. SEABORN

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: August 15, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

ROBERT C. SEABORN

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Robert C. Seaborn, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: September 20, 2002

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
789 Don Mills Road, Suite 800
Toronto, Ontario M3C 1T5

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Robert C. Seaborn
111 Taggart Lake Road, P.O. Box 964
Mattawa, ON P0H 1V0

In accordance with section 4.1 of the *Statutory Powers Procedure Act* and pursuant to subsection 5(2) of the *Motor Vehicle Dealers Act*, Robert Seaborn (hereinafter referred to as "the Applicant") and the Registrar, *Motor Vehicle Dealers Act* (hereinafter referred to as "the Registrar"), do hereby waive the requirements of a hearing and consent to an Order of the Licence Appeal Tribunal based upon the following Terms and Conditions:

1. The Applicant agrees, if he is charged in the future, to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.
2. The Applicant agrees not to transfer his registration as a salesperson under the *Motor Vehicle Dealers Act* to another dealer without the prior written consent of the Registrar.
3. The Applicant shall not be an officer, director, owner or partner in a dealership.
4. The Applicant agrees to satisfy any outstanding debts not included in the bankruptcy of Robert Colin Seaborn.
5. The Applicant agrees to repay the Motor Vehicle Dealers Compensation Fund (MVDCF), within 10 days of receiving written notice from the MVDCF of any claims being paid out against his former dealership, Robert Colin Seaborn o/a Lakeshore Motors.
6. The Applicant agrees not to invite the public to deal at a place other than his employer's registered premises.
7. The Applicant agrees not to be involved in the process of buying, selling or leasing motor vehicles without the benefit of registration.
8. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.
9. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.
10. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, or if he is convicted under the Criminal Code or convicted under any law of an industry-specific offence, the Registrar is directed to and shall carry out the proposal.

11. The Applicant will provide a copy of this order to his employer forthwith.
12. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
13. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
14. The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____ this _____ day of _____ 2002.

Robert Seaborn (signature)

These Terms and Conditions are accepted by the Registrar, *Motor Vehicle Dealers Act*.

Date:

Carl Compton
Registrar

GOVIND SAMI

**Appeal under section 50.2 of the *Highway Traffic Act*,
R.S.O. 1990, Chap.H.8 as amended (the "Act"), from
the Order of the Registrar of Motor Vehicles
pursuant to section 55.1(3) of the Act.**

**TO APPEAL AN ORDER TO IMPOUND A MOTOR
VEHICLE ISSUED BY THE REGISTRAR OF MOTOR
VEHICLES**

TRIBUNAL: NIVES MONTANO
Presiding member

Terrence Lorette
Member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

SANJAY SAMI
Representing the Applicant

DATE OF HEARING: SEPTEMBER 19, 2002

DECISION RELEASED: SEPTEMBER 26, 2002 TORONTO

REASONS FOR DECISION

A hearing was held on September 19, 2002 at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Govind Sami (the "Applicant")
Motor Vehicle:	1994 Honda S1, plate # AJFR 009 (the "vehicle")
Date of Appeal:	September 3, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence to determine that the driver's licence was not suspended as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on September 19, 2002 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

I Sanjay Sami is on the same Insurance as my father Govind Sami. I was in the passenger side of the vehicle, when the incident occurred. I presumed Vini Segrán had his full drivers licence at the time of the incident, but when everything was all said and done, I found out his licence was under suspension. On this ground I would like to appeal the Impoundment of my vehicle to the tribunal.

The Applicant was present during this proceeding but did not give evidence or testimony. The following is a summary of Sanjay Sami's affirmed testimony.

Mr. Sami is the Applicant's son. For insurance purposes, the impounded vehicle is registered in the Applicant's name, but was purchased and is exclusively driven by Sanjay Sami.

Mr. Sami testified that Vini Segrán is his nephew and that they grew up together. He further testified that on the night in question both Messrs. Segrán and Sami attended a wedding and later went to the grooms house to open gifts. Mr. Sami went on to tell the Tribunal that because he was not feeling well after leaving the party at the groom's house, he allowed Mr. Segrán to have care and control of the impounded vehicle. Mr. Segrán was driving to his home in Brampton where Mr. Sami intended to spend the evening. Unfortunately, Mr. Segrán was cut-off by another vehicle on the highway causing him to rear-end the other vehicle.

Mr. Sami testified that while he had never actually seen Mr Segrán's driver's license, he believed that his nephew held a valid license because he drove his mother's car back and forth to school in downtown Toronto. Mr. Sami also admitted that he had no knowledge that Mr Segrán's license had been suspended on two different occasions within the last two years, the first being an ADLS suspension and the other being an impaired driving conviction relating to the ADLS suspension.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows (Exhibits 3 & 4):

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;

2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Vini Segran;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until April 10, 2003.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended

December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(c).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. Law. The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

APPLICATION OF LAW TO FACTS:

The issue to be considered in this appeal is whether the Applicant exercised due diligence in attempting to determine that Vini Segran's driver's license at the time in respect of which the order was made was not then under suspension.

The onus of proof is on the Applicant to establish that due diligence was performed which is required under Section 50.2(3)(c) of the Act.

In Mr. Sami's testimony, the Applicant merely insures the vehicle. He did not purchase it and rarely drove it. Technically, therefore, the Applicant does not qualify in providing due diligence. The onus lies with Mr. Sami who owns the vehicle.

The evidence before the Tribunal, in Mr. Sami's own testimony, was that he at no point in time asked for or saw Vini Segran's valid driver's licence. He was under the impression and merely assumed that his nephew had a valid driver's licence. The thought never crossed his mind to ensure he was a driver in good standing. Furthermore, there was no evidence heard that would confirm Mr. Sami's actions were anything but passive in nature.

The Tribunal therefore has no evidence that the Applicant or Mr. Sami exercised due diligence as required by section 50.2(3)(c) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Nives Montano, Presiding Member

Terrence Lorette, Member

RELEASED: SEPTEMBER 26, 2002

FILE NAME: 1262.mvia.Govind Sami

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
SAHAR AUTOMOTIVE INC. AND HASSAN SADEGHI

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATIONS
- Proposal dated: September 17, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

SAHAR AUTOMOTIVE INC. AND HASSAN SADEGHI

Applicants

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Sahar Automotive Inc. and Hassan Sadeghi, Applicants, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicants and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: September 19, 2002

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
789 Don Mills Road, Suite 800
Toronto, Ontario M3C 1T5

AND TO: Licence Appeal Tribunal
1 St. Clair Avenue West
12th Floor
Toronto, Ontario M4V 1K6

FROM: Sahar Automotive Inc.
12 Lepage Court, Unit 1
Toronto, ON M3J 1Z9

Hassan Seyed Sadeghi
578 Woburn Avenue
Toronto, ON M5M 1L9

In accordance with Section 4.1 of the *Statutory Powers Procedure Act*, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereinafter the "Act") the parties to the proceeding, Sahar Automotive Inc. (hereinafter referred to as "the Dealer") and Hassan Seyed Sadeghi (hereinafter referred to as the "Salesperson"), and the Registrar, *Motor Vehicle Dealers Act* (hereinafter the "Registrar") waive the requirement of a hearing and hereby consent to an Order of the Licence Appeal Tribunal (hereinafter the "Consent Order") based on the following terms and conditions to their registrations as a motor vehicle dealer and salesperson:

1. The Dealer and Salesperson agree, if they are charged in the future, to immediately notify the Registrar in writing.
2. The Dealer and Salesperson agree if they are convicted under any law of an industry specific offence or if he is convicted under the Criminal Code, the Registrar is directed to and shall carry out the proposal.
3. The Dealer and Salesperson agree to provide full and complete disclosure on all future applications and discussions with the Registrar, regardless of whether disclosure has been previously provided to the Registrar.
4. The Dealer and Salesperson acknowledge and understand that the Dealer will not retain the services of a salesperson unless the salesperson is registered as a salesperson to the Dealer.
5. The Dealer and Salesperson agree not to deal directly or indirectly with Mohsen Milani.
6. The Dealer and Salesperson agree that they will not be involved in the process of buying, selling and leasing motor vehicles without the benefit of registration.
7. The Dealer and Salesperson further acknowledge that the restrictions concerning the activities of a salesperson referred to in these terms and conditions applies to buying, selling and leasing on

behalf of a dealer. "Buying, selling and leasing" refers to showing a vehicle to a prospective purchaser or any form of negotiation concerning the purchase, sale or lease of a motor vehicle and is not limited to the signing of contracts. This further includes attendance at auctions on behalf of the Dealer.

8. The Dealer and Salesperson agree to maintain a garage register in accordance with the Highway Traffic Act and will maintain all books and records as required by the Motor Vehicle Dealers Act. The Dealer and Salesperson further agree to provide free access to the books and records of the Dealer to any authorized representative of the Registrar.
9. The Dealer and Salesperson agree that all books and records shall be kept at the Dealer's registered premise, and shall be available to an inspector or investigator appointed by the Registrar, at all reasonable times.
10. The Dealer agrees to maintain a sign at the Dealer's registered premise that will be visible to the public.
11. The Dealer agrees to operate exclusively from the location approved by the Registrar. The Dealer agrees to apply for the Registrar's approval, by way of prior written notice, of any change in location in the form required by the Registrar.
12. The Dealer and Salesperson agree not to invite the public to deal at a place other than his approved location.
13. The Dealer will not conduct any purchases with anyone who is in the business of buying, selling and leasing motor vehicles without confirming that the person is registered as a Dealer under the Motor Vehicle Dealers Act.
14. The Dealer will ensure that all advertisements placed by or on behalf of the Dealer will identify the registered name and the address of the location approved by the Registrar.
15. The Dealer will ensure that any vehicle sold is registered in the name of the purchaser in the records of the Ministry of Transportation before releasing the vehicle to the purchaser.
16. The Dealer will not purchase a vehicle without ensuring that the vehicle is registered to the seller in the records of the Ministry of Transportation.
17. The Dealer agrees to register all vehicles purchased within 6 days in accordance with the Highway Traffic Act.
18. The Dealer and Salesperson agree that they are under a positive obligation to disclose in writing, on the bill of sale, all material facts about the vehicles he sells to his purchasers. Purchasers include both retail and wholesale buyers. Material facts such as, but not limited to: salvage, previous salvage, accidented and repaired, theft recovery, previous taxi cab, previous police car, previous daily rental, write off, unibody damage, frame damage and any other material fact that may affect one's decision whether or not to purchase said vehicle. The Dealer and Salesperson agree to make reasonable efforts to research the history of all the Dealer's vehicles prior to sale to ensure all material facts are disclosed. The Dealer and Salesperson agree that should any information come to light, which the Registrar deems to be a material fact concerning a vehicle the Dealer has sold, the Dealer will comply with all reasonable requests made by the Registrar to provide compensation to the purchaser.

19. The Dealer and Salesperson agree that they will make full disclosure to all purchasers regarding the distance travelled of vehicles sold. The Dealer and Salesperson agree to make full disclosure with respect to the distance travelled of vehicles sold in accordance with the Standards of Business Practice.
20. The Dealer and Salesperson will not directly or indirectly cause the odometer reading on any vehicles, purchased or sold, to be altered in any way.
21. The Dealer and Salesperson acknowledge and understand that their registrations will not be used to buy or sell motor vehicles where the Dealer or Salesperson knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
22. The Dealer will comply with all aspects of the Retail Sales Tax Act with regards to filing, and ensuring all tax collections are accurately reported and remitted to the Minister of Finance when due.
23. The Dealer will comply with the Ontario Motor Vehicle Industry Council's Code of Ethics and Standards of Business Practice.
24. The Dealer and Salesperson understand that their registration will be conditional for 60 days and may be cancelled by the Registrar, in accordance with Section 13(3) of Regulation 801. For the purpose of Section 13(3) of Regulation 801, these Terms and Conditions are part of the Dealer and Salesperson's applications.
25. The Dealer and Salesperson acknowledge that the Registrar may take further administrative action in the form of a proposal to revoke his registration, arising from any matters that have occurred or may occur related to honesty, integrity, financial position and/or compliance with these terms and conditions.
26. The Dealer and Salesperson acknowledge that the Registrar may take legal action, including Provincial Offences prosecution arising from actions related to the purchase, sale or lease of motor vehicles that may have occurred in the past or that may occur in the future.
27. The Dealer and Salesperson agree and acknowledge that should they breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
28. The Dealer and Salesperson hereby consent to an Order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
29. The Dealer and Salesperson hereby withdraw their appeals to the Licence Appeal Tribunal.
30. The Dealer and Salesperson hereby acknowledge that they have obtained or have had the opportunity to obtain independent legal advice with respect to their consent to the terms and conditions set out in this document.

Signed in the City of

this

day of

2002.

Sahar Automotive Inc.
I have the Authority to bind the dealership.
(Signature)

Hassan Seyed Sadeghi (Signature)

These terms and conditions are acceptable to the Registrar, *Motor Vehicle Dealers Act*.

Date:

Carl Compton
Registrar

HIGHWAY TRAFFIC ACT
R.S.O. 1990, Chap. H.8 as amended

IN THE MATTER of the ORDER to IMPOUND a MOTOR VEHICLE Order # 2501058 OWNED BY: Lloyd Larmour of: 5845 Centre Street, Vars, Ontario, K0A 3H0 made pursuant to section 55.1 of the *Highway Traffic Act*, effective on: September 12, 2002.

AND IN THE MATTER of a requirement for a hearing respecting an appeal of the said Order to Impound, pursuant to section 50.2 of the *Highway Traffic Act*.

LLOYD LARMOUR

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

CONSENT ORDER

Upon the application to the Tribunal by the Lloyd Larmour, Applicant, and by the representative for the Registrar of Motor Vehicles, for the issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22, and having reviewed the written settlement signed by the Applicant and the Registrar of Motor Vehicles as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the facts and on the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: September 27, 2002

Schedule "A"

LICENCE APPEAL TRIBUNAL

Between:

LLOYD LARMOUR

Applicant

-and-

THE REGISTRAR OF MOTOR VEHICLES

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

1. On September 12, 2002, the motor vehicle described in **Order to Impound #2502001** was impounded in accordance with subsection 55.1(3) of the *Highway Traffic Act*, RSO 1990, c. H. 8 as amended.
2. The Applicant, Lloyd Larmour, whose name is shown on the vehicle portion and the plate portion of the permit for the impounded motor vehicle, is the owner of the said vehicle.
3. No other order to impound under section 55.1 of the Act has ever previously been made with respect to any motor vehicle then owned by the Applicant.
4. The Applicant filed an appeal to the impoundment order, in accordance with the grounds permitted under clause 50.2(3)(c) of the *Highway Traffic Act*, stating **that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension.**
5. Materials provided to the Registrar and investigations conducted indicate that the Applicant did exercise due diligence to determine that the driver's licence was not suspended.
6. The Applicant has had the opportunity to obtain independent legal advice with respect to consent to this Order.

7. The parties agree that this agreement does not bind the Ministry of Transportation or the Registrar of Motor Vehicles in any way, with respect to future hearings or consent orders.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsection 50.2(5) of the *Highway Traffic Act* that the Tribunal set aside the order to impound.

Lloyd Larmour

The Registrar of Motor Vehicles

(signature of Applicant)

(signature of Registrar)

(date)

(date)

ROBERT SALHANY AND MARY GARDINER

MOTION TO CONSIDER AN APPLICATION FOR
EXTENSION OF TIME

TRIBUNAL: JOHN ORT, Member

APPEARANCES: ROBERT SALHANY, representing himself and Mary
Gardiner, Applicants
NETANUS RUTHERFORD, Counsel, representing the
Ontario New Home Warranty Program, Respondent

DATE OF
HEARING: August 22, 2002 *Via Teleconference*

REASONS FOR RULING AND ORDER

This is an application to the Licence Appeal Tribunal (the "Tribunal") under section 7 of the *Licence Appeal Tribunal Act, 1999*, to extend the time for Robert Salhany and Mary Gardiner (the "Applicants") to file an appeal from a Decision Letter of the Ontario New Home Warranty Program (the "Respondent" and the "Program") dated May 21, 2002, (the "Decision") denying the Applicants' claim for compensation. The hearing of this matter proceeded by teleconference.

EXHIBITS:

- Exhibit #1 - Decision Letter from Paul Rochon of the Ontario New Home Warranty Program dated May 21, 2002;
- Exhibit #2 - Notice of Appeal dated June 10, 2002;
- Exhibit #3 - Notice of Motion dated June 28, 2002; and
- Exhibit #4 - Respondent's Motion Record

ISSUE:

Have the service requirements of the *Ontario New Home Warranties Plan Act* (the "Act") been met?

If such is the case and the Notice of Appeal was not filed within the time prescribed by the Act, should the Tribunal extend the time pursuant to section 7 of the *Licence Appeal Tribunal Act, 1999*?

FACTS:

The affidavit of Filomena Cece of the Program at tab 1 of exhibit 4 states that the Decision was delivered to the Applicants by Canada Post on May 23, 2002, and that the Notice of Appeal was received by the Tribunal on June 14, 2002, which is seven days late.

The Applicants' witness was Robert Salhany, whose evidence is as follows:

Mr. Salhany was directed and authorized by Mary Gardiner to represent both Applicants on this motion.

Robert Salhany signed for receipt of the Decision from Canada Post on about May 23, 2002. The Applicants decided to appeal within five days of receiving the Decision.

The Applicants reside in Ottawa. Mr. Salhany's mother died near Montreal on June 18, 2002. For about one month prior to her death, she was either ill or seriously ill. Mr. Salhany took time off from work to visit his mother several times during that month.

The Applicants are spouses. Mr. Salhany is the one who takes care of financial matters. Ms. Gardiner asked him to fill in the Notice of Appeal on behalf of both Applicants. Mr. Salhany completed the Notice of Appeal in spurts. He did not finish filling in the form on the same day that he started to do so.

Item 3 of the Decision states the following Applicants' complaint: "Bubbled seam along counter top. Kitchen. Located at the corner seam between the stove and wall to family room." Mr. Salhany was advised by two servicepeople that the item is defective because a silicone base was not put in. The Decision states that waves or bubbles are noticeable along the mitre joint in the kitchen countertop. Further, the Decision argues that this complaint represents a damaged item and does not represent a defect in either materials or workmanship nor a violation of the Ontario Building Code.

Counsel for the Respondent conceded that there is no overriding prejudice to the Program in allowing the motion for extension of time.

LAW:

Section 16 of the *Ontario New Home Warranties Plan Act* states the following:

- (1) Where the Corporation makes a decision..., it shall serve notice of the decision, together with written reasons therefor, on the person or owner affected.
- (2) A notice under subsection (1) shall state that the person or owner served is entitled to a hearing by the Tribunal if the person or owner mails or delivers, within fifteen days after service of the notice under subsection (1), notice in writing requiring a hearing to the Corporation and the Tribunal.
- (3) Where a person or owner gives notice in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and may by order directed the Corporation to take such action as the Tribunal considers the Corporation ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Corporation.

Section 7 of the *Licence Appeal Tribunal Act* reads as follows:

Despite any limitation of time fixed by or under any Act for the giving of any notice requiring a hearing by the Tribunal or an appeal from a decision or order of the Tribunal under section 11 or any other Act, if the Tribunal is satisfied that there are reasonable grounds for applying for the extension and for granting relief, it may,

- (a) extend the time for giving the notice either before or after the expiration of the limitation of time so limited; and
- (b) give the directions that it considers proper as a result of extending the time.

In *Vittorio Nicolini*, a decision of the Tribunal released February 20, 2001, the Tribunal sets out a four-fold test (the “Nicolini Test”) that the Applicant must satisfy as follows:

1. That she had an intention to appeal within the time limited.
2. That the reason the notice of appeal was not served on time is such that the Applicant should be excused for not doing so and allowed to do it later if she did [so] as soon as the true situation was apprehended.
3. That there is not some overriding prejudice to the Respondent in the allowing of the application.
4. That there is a substantial point in issue and the Applicant has some reasonable chance of success.

Of the case law presented by the Respondent, in *Vittorio Nicolini* the Applicant did not have an intention to appeal within the time limit. Likewise, in *Nizamuddeen, Sirmali, Safraz and Shabana Mohamed*, a decision of the Tribunal released August 19, 2002, the Applicants did not have the necessary intention to appeal within the time limit.

In *Glen and Ginette Sharp*, a decision of the Tribunal released August 10, 2001, the Applicant did not have a reasonable chance of success should the matter proceed to appeal.

Section 13(1) of the *Ontario New Home Warranties Plan Act* states the following:

- Every vendor of a home warrants to the owner,
- (a) that the home,
 - (i) is constructed in a workmanlike manner and is free from defects in material

APPLICATION OF LAW TO FACTS:

Based on the affidavit of Ms. Cece, the Tribunal finds that the service requirements of the *Ontario New Home Warranties Plan Act* were met on May 23, 2002.

The Tribunal finds that the Notice of Appeal was not filed within the prescribed time. Section 16(2) of the Act requires it to be filed within fifteen days of service of the Decision. The Applicants' Notice of Appeal was received by the Tribunal on June 14, 2002, which is more than fifteen days after receipt of the Decision on May 23, 2002.

The Tribunal finds that the first part of the Nicolini Test is satisfied. Mr. Salhany testified that he intended to appeal within the required fifteen day period.

Further, the Tribunal finds that the second part of the Nicolini Test is complied with. Mr. Salhany testified that his mother was ill during the prescribed fifteen-day filing period. The Applicants apprehended the true situation and filed only about seven days too late. Mr. Salhany's mother died shortly after. The Tribunal finds that the Applicants should be excused for not filing in time.

The third part of the Nicolini Test is conceded by Counsel. There is no overriding prejudice to the Program in allowing the motion.

Also, the Tribunal finds that there is a substantial point in issue and the Applicants have some reasonable chance of success. Two servicepeople advised Mr. Salhany that the bubbled seam along the kitchen countertop is defective, not constructed in a workmanlike manner and free from defects in material, as required by section 13 of the Act.

In summary, the Nicolini Test is fulfilled and the Tribunal is satisfied that there are reasonable grounds for applying for the extension of time and for granting relief pursuant to section 7 of the *Licence Appeal Tribunal Act*.

ORDER:

Accordingly, pursuant to the authority vested in it by the *Licence Appeal Tribunal Act, 1999*, the Tribunal orders that the application to extend the time for filing of the Notice of Appeal by the Applicant be granted and the Notice of Appeal filed by the Applicants be and is deemed to be timely filed.

LICENCE APPEAL TRIBUNAL

John Ort, Member

RELEASED: September 10, 2002

1211-MED-ADJ

**Appeal under Section 50(1) of the *Highway Traffic Act*,
R.S.O. 1990, Chap. H.8 as amended, from a Decision of
the Registrar of Motor Vehicles pursuant to Section
47(1) of that Act.**

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ROY MELVIN, M.D., Presiding Member

APPEARANCES:
KIM BEINTEMA, Representative for the Registrar of Motor Vehicles
Counsel for the Applicant

DATE OF
HEARING: August 29, 2002 *by teleconference*

ORDER

WHEREAS a hearing was scheduled to be heard, by teleconference, on August 29, 2002 in Toronto in the above matter;

AND WHEREAS at the onset of the hearing on August 29, 2002 before the Tribunal the Applicant's Counsel requested that the matter be adjourned to allow the Applicant to file further medical evidence in support of her appeal;

NOW THEREFORE, upon consent of both parties and peremptory against both parties, the Tribunal Orders that this matter is adjourned to be heard, by teleconference, on Wednesday, October 16, 2002, at 2:00 p.m. at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario;

LICENCE APPEAL TRIBUNAL

Roy Melvin, M.D., Presiding Member

RELEASED: September 20, 2002

AUTO MART SUDBURY LTD. AND RICK TOULOUSE

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATIONS

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

DONALD C. PLAUNT, Counsel, representing the Applicants
AVIVA HARARI, Counsel, representing the Registrar, *Motor Vehicle Dealers Act*

DATES OF

HEARING: June 26, 2002 and September 26, 2002

Toronto

ORDER

WHEREAS the Registrar under the *Motor Vehicle Dealers Act* (the "Respondent") issued a Proposal dated September 14, 2001 to revoke the registrations of Auto Mart Sudbury Ltd. and Rick Toulouse (the "Applicants") under the *Motor Vehicle Dealers Act*;

AND WHEREAS the hearing before this Tribunal of the Applicants' appeal to the Proposal commenced before the Tribunal on June 26, 2002 and continued on September 26, 2002, but was not completed;

AND WHEREAS the Parties' Counsel agreed that the hearing be adjourned to 9:30 a.m. on March 24, 2003 and to continue, if necessary, on March 25 and March 26, 2003;

NOW THEREFORE, this Tribunal orders that:

1. The hearing of this matter shall, by consent of the parties' Counsel be adjourned *peremptorily against both parties* to 9:30 a.m. on Monday, March 24, 2003 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, and to continue, if necessary, on March 25 and 26, 2003.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: October 2, 2002

ANTHONY LONGO AND SYLVIE LONGO

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE *ONTARIO NEW
HOME WARRANTIES PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL: SIMON DANN, Presiding Member

APPEARANCES:

BRIAN CAMPBELL, Counsel, representing Anthony and Sylvie Longo
ANDREW LEWIS, Counsel, representing the Ontario New Home Warranty
Program
JOE DILECCE, Agent, representing the Added Party, Ivy Green Homes
Inc.

DATE OF
HEARING: October 7, 2002 Toronto

ORDER

WHEREAS upon the commencement of the appeal to the Tribunal by Anthony Longo and Sylvie Longo (the "Applicants") on October 7, 2002, the Applicants' Counsel requested that the hearing be adjourned.

AND WHEREAS Counsel for the Ontario New Home Warranty Program (the "Respondent") consented to such adjournment and consented to the Applicants paying the Respondent's costs;

NOW THEREFORE, this Tribunal orders that:

1. The hearing of this matter shall, by consent of the parties be adjourned peremptorily against the Applicants to commence at 9:30 a.m. on Monday, January 27, 2003 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto and to continue January 28, 29, 30 and 31, 2003, if necessary;
2. As Counsel for the Respondent and Agent for the Added Party advised the Tribunal that they each intend to call an expert to testify, the Respondent and Added Party shall fully comply with Rule 6.4 (1) (a), (b), (c) and (d) of the Tribunal's Rules of Practice by no later than December 10, 2002.
3. The Applicants will provide the Respondent and the Added Party, together with their expert witnesses, reasonable access to the Applicants' home for the purpose of

inspection. The Respondent and the Added Party shall give the Applicants written notice prior to the inspection of the date and time of such inspection. The inspection shall not be scheduled to take place earlier than seven (7) days after the mailing of the notice which shall be sent by prepaid registered mail addressed to the Applicants at the home.

4. In terms of Section 14 of the Tribunal's Rules of Practice, the hearing having commenced, the Applicants shall, by consent of the parties, pay to:
 - a. the Respondent the sum of \$800.00 in respect of costs by no later than Thursday, October 17, 2002;
 - b. Ivy Green Homes Inc. (the "Added Party") the sum of \$400.00 in respect of costs by no later than Thursday, October 17, 2002;

LICENCE APPEAL TRIBUNAL

Simon Dann, Presiding Member

Released: October 9, 2002

JOSEPH TOROK and ROSE TOROK

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE *ONTARIO NEW
HOME WARRANTIES PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD C. DELANEY, Member

APPEARANCES:

KEVIN A. EGAN, representing the Applicants, Joseph Torok and
Rose Torok
KAREN JONES, Counsel, representing the Ontario New Home
Warranty Program
NO ONE APPEARING for the Added Party, Steve Cus
Construction Inc.

DATE OF
HEARING: July 22, 2002 London

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") from a written decision of the Ontario New Home Warranty Program (the "Program") dated November 19, 2001 which was amended by a later decision dated July 19, 2002, in which the claim of Joseph Torok and Rose Torok (the "Applicants") was denied and then, after some new information was accepted by the Program, allowed.

BACKGROUND:

This is an Appeal to the Licence Appeal Tribunal (the "Tribunal") by the Applicants from a written decision of the Ontario New Home Warranty Program (the "Program") set out in a decision letter dated November 19, 2001 (the "first decision letter"). A later letter was issued in the matter on July 19, 2002. The parties have agreed to a Consent Order on the repair aspects of the latter decision letter. However, the hearing proceeded as the Applicant and Respondent were unable to agree on costs and certain out-of-pocket expenses incurred by the Applicants.

THE EVIDENCE:

Evidence of the Applicants:

Joseph Torok

The witness lives at 31 Kara Lane, Tillsonburg, Ontario, which is the address of the new home that is the subject of this hearing.

The Applicants contracted to purchase a newly constructed home pursuant to an Agreement of Purchase and Sale executed by them on or about August 21, 1999. The original completion date was extended and they took possession on March 6, 2000.

The witness noticed leaking at the cold cellar area of the new home the day after possession. He notified the builder of the problem the next day. For the next three months, the builder sent his son to the Torok's residence on an occasional basis to review the leaking cold room.

On or about May 16, 2000, Mr. Torok attended upon the Program's London Office where it appears that a Leslie Danaskos took a statement from the Applicant. The relevant complaint is at item 10 of that letter wherein Mr. Torok complains:

“...main entrance underneath: water entry into home thru cold cellar wall.”

This was his first complaint made to the Program regarding the leaking issue.

As a result of this and other complaints, a conciliation inspection was conducted on July 18, 2000. The builder was ordered to take corrective action to stop all water entry. The Applicant recalled that some corrective measures were taken in August of 2000. However, these steps did not fix the problem.

Mr. Torok complained to the builder about the leak and was told the builder could do nothing more. He again went to the warranty program for assistance and resolution.

There was a further inspection by the Program in August 2000 that resulted in a Work Schedule dated October 6, 2000. Mr. Vern Nelligan of the Program observed in his report dated October 6, 2000 that “... the cold cellar was leaking date of claim inspection October 6, 2000, from overnight rain.” The required repair was to create a control joint and use a lastomeric type sealer.

The Program's contractor Custom Service Corporation did this repair work on November 15, 2000. The witness stated that control joint and sealant work was completed as suggested by the contractor. After the repairs were completed, Mr. Torok was presented with a Release, which he refused to sign, as the leakage had not stopped.

Mr. Torok was referred to Tab 12 of the Respondent's Book of Documents and stated that he did not feel Mr. Nelligan's observations were accurate. In the Applicant's view, the repair was not done and the joint was still leaking.

Mr. Torok estimated that Vern Nelligan of the Program was present at the house every two weeks during this period.

The witness continued to make complaints and started to take photos and videotapes. He made three videotapes in all that revealed leaking walls after rainfall at different points in time.

Mr. Torok could not specifically recall when he first advised the Program that he had videotapes of the leaking water. He recalled that Mr. Nelligan came on at least one occasion and took some photos during a rainstorm.

In February 2001, Mr. Torok continued to voice his complaints to the Program. He recalled making his complaints to a John Reid at the Program.

On February 6, 2001 the home was inspected by Simon Radley of Custom Service Corporation following a complaint by Mr. Torok. The witness did not have a specific recollection of this inspection. However, some melting snow was causing a problem that he attributed to the leaking problem. He recalled that the Program continued to insist that there was no leak.

He could not recall what had transpired between February 6, 2001 and June 2001 when some repair work was undertaken on the porch. He did state that the June 2001 repair was not effective and the leaking continued.

An inspection preceded the first decision letter which is dated November 19, 2001. As a result of this inspection, some repairs were suggested. Mr. Torok did not agree with these suggested repairs and wanted the removal of the entire slab of concrete.

On December 6, 2001, some repairs were effected. These were done in accordance with the November 19, 2001 decision letter. According to Mr. Torok, these repairs did not resolve the leakage problem.

As a result of the on-going water issues, the Applicant has not had much joy in the new home.

When asked why it became necessary to hire an expert to test for leakage, Mr. Torok replied to the effect that no one at the Program believed his contention that there was a leak. Mr. Torok was satisfied that there was a leak but he needed to convince the Program.

On February 15, 2002, Mike Hanas, Operation Manager for the Program in the Southwest Region, sent a letter to the Toroks. Mr. Hanas inherited the Torok's file after the retirement of Mr. Nelligan. In that letter, Mr. Hanas requested an opportunity to conduct a water test. Mr. Torok agreed to this and was present when Mr. Hanas conducted the test.

The test was conducted on March 12, 2002. Mr. Hanas attended with Mr. Simon Radley. The Applicant Mr. Torok was also present. Mr. Torok recalled that the test was brief. The water began to leak about fifteen minutes after Mr. Hanas departed. This was about one hour after the test was conducted.

Mr. Torok testified that he told Mr. Hanas that he had a video of the prior water penetration. Mr. Torok recalled being told that Mr. Hanas would not accept this video. Mr. Torok believed this presented him with no alternative but to seek out the opinion of a third party expert.

Mr. Torok thought he told Mike Hanas that he had an expert's report. He recalled being asked by Mr. Reid to provide the report. His response was to have the Program go through the lawyers. This occurred in early May 2002. It appears that Mr. Torok did not have the written report until sometime in July 2002.

The report's conclusions were consistent with the observations of Mr. Torok. There was a leak.

On cross-examination, Mr. Torok stated that he believed the porch slab should have been replaced to fix the problem. He had that opinion from the onset of the leaking until the date of the hearing.

Mr. Torok agreed that any water that was revealed in the photos to be on the ceiling was a condensation issue unrelated to the leaking issue.

He was shown one of the Engineer's photos that revealed the downspout at the front of the home. He stated that he has never removed the downspout. Sometimes the wind blows it off.

Mr. Torok agreed that at some point after the last set of repairs to the home were done, Mr. Hanas did take time to look at the videos with Mr. Torok. The witness recalled Mr. Hanas saying the videos would not help. He could not recall when this review occurred.

He did not agree that the March water test was conducted for nearly 45 minutes. He recalled Mr. Hanas leaving for a coffee to allow the water to seep. He did not recall how long Mr. Hanas was gone. He did recall that there was water leaking when Mr. Hanas came back and reviewed the test results.

Mr. Torok did not call Mr. Hanas about the leaking after this test. Instead, he called Mr. Reid who apparently yelled at him and told him he would not do anything for Mr. Torok.

Fred Stanley

The Program took no issues with the contents of Mr. Stanley's report, his expertise or findings.

Mr. Stanley is an engineer with Walters Forensic Engineering in Toronto, Ontario.

He attended upon the Applicant's home and did his usual look around the front of the building. He took a look at the joint and then observed the cold room itself. In the cold room, he removed some of the insulation that had been installed. He stated that water streaks were visually apparent on the wall. He looked at the plugs that had been installed from a prior repair job and observed small amounts of accumulated moisture. He also observed that there had been an attempt to seal the wall with a clear filling.

He then went back upstairs and turned the hose to the porch. He placed the nozzle two or three feet away from the front door and allowed the water to run away from the house towards the joint for about fifteen minutes. According to the witness, this is a very easy test to perform.

Mr. Stanley also watched some of the Applicant's videos which revealed leaking in the cold cellar (cantina). The leakage revealed on the video was consistent with rainwater penetration. The leakage observed seemed to correspond to rain events. The videos were taken on a variety of dates. Mr. Torok had a dating feature on the camera so the apparent date was revealed when the video was watched. Some of the dates were in November 2001. The last of the dates he observed with rain in the video was December 23, 2001.

EVIDENCE OF THE RESPONDENT: ONHWP

SIMON RADLEY

Mr. Radley has been in the construction business for more than 25 years, mostly in the area of new home construction. He has spent the last 13 years with Z Group in London, Ontario. Z Group is a large London and area builder. He holds a variety of positions with his employer. Mr. Radley is the Warranty Manager and Residential Rental Manager with Z Group. Prior to his employment at Z Group he was employed the London builder R.J. Daniels.

Mr. Radley confirmed that Custom Service Corporation is a sub-business of Z Group that performs repairs and renovations on pre-existing homes. Mr. Radley is also the manager of Custom Service Corporation.

Custom Service Corporation has done repair work and estimates for ONHWP over the last few years. This work amounts to 10-15% of Custom Service Corporation's overall workload.

Mr. Radley reviewed Tab 9 of Exhibit 4. He confirmed that the job at the Applicant's home required the creation of a control joint between pieces of concrete to allow for expansion. The line that appears across the Applicant's front porch between concrete slabs is called a control joint. This was the caulking job he did in October 2000.

After this repair was effected, Mr. Radley met with Vern Nelligan and the Applicant at the home in November 2000. They wanted to review the performance of the lastomeric-type sealant that was injected from the outside into the slab joint. At that time a water test was also done. He was satisfied the water problem was solved by the creation of the control joint. At this time nipples were installed every four or so inches along the joint and an epoxy was injected as a sealant of the joint.

The joint was sealed now from the outside and the inside. The water test conducted revealed no water penetration at the joint.

What Mr. Radley did observe was condensation in the cold cellar. This was occurring as the warm moist air in the home was making contact with the cooler concrete slab. He suggested that some of the "apparent" leaks might have been condensation areas.

Mr. Radley conducted a standard humidity test and observed a reading of 80%. The outside temperature was 5 degrees Celsius. Typical indoor humidity is nearer 40% and he characterized the Torok's home as very high in relative humidity.

The Torok's continued to experience problems and in December 2000, Custom Service Corporation attended to plug some cellar vents in an effort to eliminate the additional cold air to basement. The effort was an attempt to control the temperature in the basement. They were trying to ascertain if the venting system was the problem. The sealed vent will also eliminate migrating water.

Mr. Radley attended the subject home again on February 6, 2001. He could not specifically recall what precipitated his trip to the home. He did observe a water penetration problem. He could not recall if there had been rain but did observe a light dusting of snow. Moisture droplets on the ceiling and a wet wall were observed. He concluded that the problem continued to be condensation and that the water spots were caused by a collection of moisture running toward a single point or area on the ceiling grade.

In June 2001 Mr. Torok reported additional leaking. Mr. Radley thought he attended upon the home at this time to observe the situation. Either way, repairs were effected again in June 2001. They wanted to remove the front slab and see what was occurring at the control joint. This would also present an opportunity to see how the walls were actually constructed and to improve the detail of the venting system.

Mr. Radley observed at this time that there was not a proper water system in place to remove or re-direct water from the area of the cantilever. The area was not properly constructed and so the area was waterproofed, a new control joint was created and caulked, and a new slab was poured.

He recalled someone from Z Group attended the home in late October 2001. There was a problem with poor water removal caused by a lack of weep holes. In December 2001 the repair work on this problem was completed mostly by the application of caulking. They had to re-attend after some caulking has been removed. It was re-installed and at that time all seemed fine.

On March 12, 2002, he met with Mike Hanas of the Program at the Applicant's home to conduct a water test. They were very precise with the test. While one flooded the areas from above, another observed from below. He estimated they were there nearly 45-48 minutes conducting the test. They observed no water penetration. Mr. Radley then left the site for an out of town meeting.

Mr. Radley also attended on the subject home on July 17, 2002. A water test was conducted and within 21 minutes they were able to make it leak. They pulled out some of the caulking during the test and observed that that did not make it worse. He concluded that there was a control joint problem at the southwest corner.

On cross-examination, Mr. Radley indicated that four repairs had been attempted and, after standard tests were performed after each repair, no water leakage was observed. He characterized the process as one of elimination. Each repair built upon the previous to eliminate a cause of the problem.

He denied that the July 17 leak created by the engineer changed his mind. He stated there was no mind change in the process at all, just a response to conditions he observed.

Mike Hanas

Mike Hanas is an operations manager for the Program in the South West Regional Office (SWRO). He has an architectural technology background from Fanshawe College in London, Ontario. He has been with the Program for four years. He became involved in this case as a result of the retirement of Vern Nelligan.

On February 15, 2002, Mr. Hanas sent a letter to the Torok's to follow up on their claim the cellar was still leaking in January 2002 after the November & December 2001 repairs. He proposed a water test be done before March 15, 2002. This test occurred on March 12, 2002.

Mr. Hanas attended upon the March 12 water test that lasted 45 minutes. It was done in stages to test the various walls and slabs and then check the cold cellar. He did not

observe any evidence of water at that time. He left the home for approximately half an hour. Upon his return he re-inspected the area of the test and observed no leakage. Mr. Torok did not point out any leakage at that time.

On April 8, 2002, Mr. Hanas again attended upon the Torok home to inspect the site. There was a natural steady rain that day. He observed that the insulation on the ceiling had been partially removed. He observed some evidence of water but could not conclude whether it was condensation or leakage.

Mr. Hanas followed this inspection up with a letter on April 16, 2002 to the Toroks. In that letter he also reviewed the results of a February 21, 2002 visit to the home. On that visit, following a complaint of rain leaks, Mr. Hanas attended with Mr. Radley. They both observed water associated with high levels of condensation.

The April 8, 2002 inspection resulted in a proposal by the Plan to re-do the joint between the foundation and porch slab and re-insulate the cold cellar. The Plan did not feel that removal and replacement of the porch slab was required to correct the conditions observed. This work was not completed, as Mr. Torok did not want further damage done. Mr. Torok wanted to have his own contractor effect the repairs.

The witness stated that he did watch some videos taken by Mr. Torok during his April visit. He viewed portions of videos that he thought had been taken prior to December 2001. His observation was that the videos did not help to establish the state of the floor in April 2002.

FACTS FOUND PROVEN:

1. The Applicants took possession of the home on March 6, 2000;
2. The Applicant had several complaints about the home that triggered a conciliation report in July of 2000. As a result of that report, which included references to water penetration, the builder was ordered to effect repairs which were done in August of 2000;
3. The Program inspected the builder's repairs in August 2000 and concluded that they were unsuccessful. Simon Radley and Custom Service Corporation were retained by the Program to fix the leak problem. Through October and November 2000, a control joint was created and sealed. Also, the joint between the south wall of the cold cellar and the ceiling was filled with an epoxy;
4. In December 2000, the Applicant again complained of water penetration. Vern Nelligan attended and it was suggested that repairs to the venting system be effected. Other repairs, if needed, would have to wait until the spring;

5. The Applicant reported leakage again in February 2001. Simon Radley attended upon the home for the Program. He concluded that the problem seemed to be associated with high humidity. No further repair seemed warranted;
6. Some repairs to deal with the issue of condensation were completed in April 2001.
7. In response to a complaint by the Applicant, Custom Service Corporation was retained to make significant repairs the affected area including the removal, repair and replacement of the concrete slab in front of the porch concrete slab;
8. On October 26, 2001, the Toroks again complained of water penetration. There was some dispute over whether the Torok's would allow the proposed repairs at that time but in December 2001, the repairs were undertaken. These repairs were again effected by Custom Service Corporation;
9. In response to a complaint of water, in February 2001, Mike Hanas and Simon Radley attended upon the Torok home during a period of substantial rains. He observed no leakage but did see evidence of high condensation.
10. On March 12, the Program conducted an extensive water test and no water penetration was revealed;
11. On April 8, 2002, following a steady rain, Mike Hanas again attended on the Torok's home. He observed some water penetration but could not conclude if it was condensation or leakage. He suggested that the joint be re-done and that the cold cellar be re-insulated. The Applicant refused this course of action.
12. Fred Stanley of Walters Forensic Engineering was retained by the Applicant to test the area for leakage. A water test was conducted on April 29, 2002. The test revealed a water leakage;
13. The Program around July 4, 2002 received the report of Mr. Stanley. A further test was requested by the Program on July 18, 2002 in order to assess methodology and repair alternatives.
14. On July 17, 2002, a water test at the Torok's home was conducted and water leakage confirmed.
15. A second decision letter was issued on July 19, 2002 confirming warranty coverage and suggesting repair options.

THE LAW:

The *Ontario New Home Warranties Plan Act* states as follows:

13(1) Every vendor of a home warrants to the owner,

(a) that the home,

(i) is constructed in a workmanlike manner and is free from defects in material,

(ii) is fit for habitation, and

(iii) is constructed in accordance with the Ontario Building Code;

(b) that the home is free of major structural defects as defined by the regulations; and

(c) such other warranties as are prescribed by the regulations.

...

(2) A warranty under subsection (1) does not apply in respect of,

(a) defects in materials, design and work supplied by the owner;

(b) secondary damage caused by defects, such as property damage and personal injury;

(c) normal wear and tear;

...

(4) A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed.

...

14(3) Subject to the regulations, an owner of a home is entitled to receive payment out of the guarantee fund for the cost of the remedial work required to correct a breach of warranty if,

...

(b) the person has a cause of action against the vendor or the builder, as the case may be, for damages resulting from the breach of warranty.

The issue to be decided by the Tribunal was greatly narrowed by the parties prior to the hearing. In essence, the matter to be decided herein is:

1. Are the Applicants entitled to an Order for damages for engineering fees incurred prior to the hearing? and,
2. Are the Applicants entitled to costs for the hearing?

I propose to first deal with the issue of costs. The jurisdiction of the Tribunal to award costs is not inherent to the Tribunal. The authority must arise in the enabling statute. This Tribunal does have the authority to award costs by virtue of Rule 14.3 of the Rules of Practice of the Licence Appeal Tribunal. The Tribunal must make a finding that a

party has acted “unreasonably, frivolously, vexatiously, or in bad faith...” before such costs may be awarded.

Counsel for the parties each referred the Tribunal to the decision in *Re Ram* [2002] O.L.A.T.D. No. 93. In that case, it appears that the Applicants were not represented by counsel. They had made reference to alleged Charter violations without giving appropriate notice to the Attorney General and had failed to make timely disclosure of evidence as required by the Tribunal rules. It appears from the decision that the claim for costs was based on these complaints. That Tribunal stated that the cost sanctions were meant to deal with “extreme” cases.

Indeed, the Rules indicate some types of circumstances may be considered to determine whether an Order for costs is appropriate. It is clear that those circumstances indicate violations of Tribunal Rules and Orders are appropriate considerations for costs. The *Ram* decision adds that is violations of an “extreme” nature that must attract the sanction of costs.

The Tribunal sees no evidence in this case to warrant an order for costs against the Program. Both parties were well represented by their Counsel. Many issues were dealt with on Consent prior to the hearing. The conduct of the parties at the hearing was orderly and respectful. All parties presented their evidence in a succinct and helpful manner for the Tribunal. The cost sanctions in the Rules are intended to sanction those who use the Tribunal and it's procedure in an “unreasonable, frivolous, vexatious, or in bad faith...” manner. There is no evidence that the Respondent conducted themselves as such and, accordingly, the Applicant's claim for costs is dismissed.

Also, the program's resistance to the damage claim advanced by the Applicants was within the caselaw and statute. This Tribunal does not believe that opposing a claim within these parameters can be construed as being in any way “unreasonable, frivolous, vexatious, or in bad faith”.

The Applicant also seeks an Order for damages for the cost of the engineering report tendered at the hearing.

The Tribunal is authorized to award damages where a claim arises by virtue of section 14(1)(b) the Act. That section entitles a claimant to be paid out of the guarantee fund where an owner has a cause of action against a vendor for damages resulting from a breach of warranty. That entitlement is circumscribed by section 6(6) of Regulation 892 “Administration of the Plan”. That section states that liability in the case of this type of home is “...limited to damage to the home only...and there is no liability for any other damage, direct or indirect”.

The Act further limits the liability and scope of warranties under the Act by virtue of the exclusions section in section 13(2). Of particular note is section 13(2)(b) that makes it evident that damage that is consequential to a warrantable defect is not warranted. This

excluded “secondary damage caused by defects, such as property damage and personal injury”.

Counsel for the Program cited the decision in Fitch, [1998] O.C.R.A.D.T. No. 161. In that case, the applicants requested an amount for damages concerning various items, such as reimbursement for the purchase of various cleaning materials, the purchase of new furniture to replace the damaged furniture and the costs of various reports obtained for the purposes of the proceeding. In that case, the Tribunal agreed that those damages were properly excluded by section 13(2)(b) of the Act.

The engineer conducted his water test on April 29, 2002. The written report was not received until July 4, 2002. This hearing occurred a little over two weeks later. In the meantime, the results of the engineer’s report precipitated a subsequent test where it was determined that there was a leak.

DECISION:

The Tribunal is mindful of the fact that the Torok’s have been through quite a nightmare with their new home. The problems were undoubtedly exacerbated by the apparent lack of success in remedial efforts taken by the Plan. There also seemed to be a difference of opinion as to the root cause of the water penetration problem. However, while they appear to have been very patient with the Program, it is also apparent that the Program was very diligent with the Torok’s claims. Many repair jobs were conducted in response to the problem. Program representatives and contractors appeared to take the Torok’s claims seriously and respectfully. There were certainly points where the process was strained but it does not appear to the Tribunal that the Torok’s were being ignored.

Counsel for the Toroks suggested that the Program had “obstinately” stuck to a conclusion that there was no leak. With respect, it appears to the Tribunal that the Program responded properly to the Toroks water issues in each case. The many repairs undertaken by the Program were clearly intended to effect the needed repair. It seems, quite frustratingly for all parties, that they were wrong on the repair needed.

The Tribunal is in agreement with the position advanced by the Program with respect to damages. The authority of this Tribunal to make such an order must be clear from the legislation. The cases and the Act make it quite evident that the cost associated with the preparation of an engineer’s report are outside the scope of damages that can be awarded by this Tribunal.

The Applicant suggested that the Tribunal substitute the “decision” that the engineering costs be borne by the applicant. The Tribunal is not prepared to substitute its opinion for that of the Program’s with respect to the issue of reimbursement of the cost of the engineer’s report. The ability to do so in this case would appear to be a back door method of obtaining damages for the applicant. According to this argument the jurisdiction comes from Section 16 of the Act. That section specifically states that the

Tribunal, among other things, may substitute its opinion for that of the Corporation. The authority of the Tribunal arises by virtue of a decision made by the Corporation under Section 14. Section 14 states, in the relevant portion that a person is entitled to be paid out of the guarantee fund where "...an owner has a cause of action for damages resulting from a breach of warranty". Once again, we return to the issue of reimbursement for damages. It is the Tribunals' opinion that this applicant's costs are outside the limits for damages prescribed and intended by the Act.

Accordingly, pursuant to the authority vested in it by section 16(3) of the *Ontario New Home Warranties Act*, the Tribunal directs the Ontario New Home Warranty as follows:

1. To expose and investigate the south west corner of the porch at the junction of the porch and sidewalk slab;
2. If a defect is apparent, to repair the defect as required;
3. If a defect is not apparent and the Program requires expert assistance in identifying the sources of the leak and/or scope of repair, it will retain the services of an engineer qualified as a building sciences engineer to provide appropriate work schedule.
4. To advise the Applicant's engineer of the findings of its investigation before commencing any repair work on the Applicant's home and to pay the reasonable costs of the Applicant's engineer's review of the findings.

Items 1 – 4 in this order were submitted jointly by the Applicant and Respondent on Consent. The Applicant's request for an order that the costs of the engineer's report incurred by the Applicant be paid by the Respondent is rejected. The Applicant's claim for costs is also rejected.

LICENCE APPEAL TRIBUNAL

Richard C. Delaney,
Member

Released: October 4, 2002

DAN DIKS and MARY McALLISTER-DIKS

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE *ONTARIO NEW
HOME WARRANTIES PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL: MICHAEL H. TURK, vice-Chair

APPEARANCES:

DAN DIKS and MARY McALLISTER-DIKS, Applicants
SARA E. KARGES representing the Ontario New Home Warranty
Program, Respondent
DON CARDHILL, representing 561732 ONTARIO LTD., Added Party

DATE OF
HEARING: September 30, 2002 Ottawa

REASONS FOR DECISION AND ORDER

BACKGROUND:

The Applicants appeal to the Licence Appeal Tribunal from a decision of the Ontario New Home Warranty Program (the Program) set out in a decision letter dated January 17, 2002, and a supplementary decision letter dated April 3, 2002. These decision letters had the cumulative effect of denying the warranty claims made by the Applicants.

PRELIMINARY ISSUE:

The Program asks that the hearing be adjourned to dates to be agreed upon in November on the grounds that its warranty representative, Paul Picard, has recently taken ill and is unable to testify at this time.

The Program advised that Mr. Harkin will be taking over for Mr. Picard in this matter and that Mr. Harkin will require an opportunity to inspect the home and fully prepare for the hearing.

Whereas the added party consents to the adjournment, the Applicants do not.

The Tribunal notes that the illness of Mr. Picard was not foreseeable and that it notified the Applicants immediately thereafter of the circumstances and the need for an adjournment.

Prior to the Tribunal ruling on the adjournment request the parties embarked upon serious and meaningful settlement discussions and advised the Tribunal that the Program and the Applicants agreed to a resolution of the following complaints:

Notice of Appeal from the Decision Letter of January 17, 2002.

1. The Program shall pay to the Applicants the sum of \$354.00 for taps incorrectly installed;
3. The Complaint regarding the location of the showerhead has been remedied and is hereby dismissed;
4. The Program shall pay to the Applicants the sum of \$150.00 in respect of their claim for caulking of sinks.
5. The Program shall pay to the Applicants that sum of \$411.00 for their lighting complaint;
6. The Program shall pay to the Applicants the sum of \$60.00 in respect of the Applicants claim for receptacle outlet in the kitchen breakfast area;
7. The Program shall pay to the Applicants the sum of \$90.00 in respect of the Applicants claim for misalign closet doors;
8. The Program shall pay to the Applicants the sum of \$50.00 for the cracked window frame;
11. The Program shall pay to the Applicants the sum of \$25.00 for weather stripping;
13. The Program shall pay to the Applicants the sum of \$250.00 for their complaint of insulation of the outside light;
15. The Program shall pay to the Applicants the sum of \$300.00 for their complaint to relocate the sump pump exit;
16. This complaint has been settled and is hereby dismissed;
17. This complaint has been resolved and is hereby dismissed;
19. This complaint has been resolved and is hereby dismissed.

Notice of Appeal from the Decision Letter dated April 3, 2002.

1. This complaint has been remedied and is hereby dismissed;
2. This complaint has been remedied and is hereby dismissed;
4. The Program shall pay to the Applicants the sum of \$2,000.00 in respect of the Applicants complaint for the heat recovery ventilation system;
5. The Program shall pay to the Applicants the sum of \$100.00 in respect of their claim for high wall air returns;
8. This complaint has been settled and is hereby dismissed;
11. This complaint has been settled and is hereby dismissed;
13. This complaint has been settled and is hereby dismissed.
16. Whereas the complaint of water penetration remains unresolved, the Program has offered to effect the necessary repairs of this complaint.

On the basis of the foregoing, the parties acknowledge that the following complaints remain in dispute:

From the Notice of Appeal of the Decision Letter of January 17, 2002, complaint numbers 2, 9, 10, 12, 14 and 18.

From the Notice of Appeal of the Decision Letter of April 3, 2002, complaint numbers 3, 6, 7, 9, 10, 12, 14, 15 and 16.

As it relates to the balance of the complaints in dispute, the Tribunal grants the Program's request for an adjournment and does hereby Order that the hearing of the remaining complaints be adjourned to commence at the Gillespie Reporting Services, 130 Slater Street, Suite 200, Ottawa, Ontario at 11:30 a.m., on Monday, November 11, 2002 and to continue at 9:30 a.m. on November 12, 13, 14, 2002, if necessary.

The Tribunal does further Order that the Program shall pay the monetary compensation as herein before agreed upon to the Applicants no later than November 11, 2002.

LICENCE APPEAL TRIBUNAL

Michael H. Turk, Vice-Chair,

Released: October 15, 2002.

ROBERT GUY & JODI ARBOUR

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE *ONTARIO NEW
HOME WARRANTIES PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL: MICHAEL H. TURK, Vice Chair

APPEARANCES:

ROBERT GUY & JODI ARBOUR, Applicants, representing
themselves
CAROL STREET, Counsel representing the Ontario New Home
Warranty Program
BRIAN CAMPBELL, Counsel representing Rose Valley Homes Inc.,
Added Party

DATE OF
HEARING: August 12, 13, 14, 15 and 16 2002 Toronto

REASONS FOR DECISION AND ORDER

The Applicants, Robert Guy and Jodi Arbour, appeal to the Licence Appeal Tribunal from a decision of the Ontario New Home Warranty Program (the Program) set out in a decision letter dated 21 January 2002. This decision letter had the effect of denying the warranty claims made by the Applicants.

BACKGROUND:

In July, 1999, the Applicants entered into an agreement of purchase and sale with the added party, Rose Valley Homes Inc. (hereinafter "Rose Valley") for the purchase of a new home to be constructed on the lands known municipally as 197 Guildwood Drive, Bowmanville, Ontario. This home was completed for occupancy in or about the end of July, 2000. The Certificate of Completion and Possession was signed by the Applicants on August 3, 2000.

The Certificate of Completion and Possession as delivered to the Program by Rose Valley consists of two pages. The first page is the standard form Certificate of Completion and Possession signed by Rose Valley and the Applicants and a second page entitled Pre-

Delivery Inspection Report, signed by the Applicants. This second page does not list any deficiencies but makes reference on the bottom right corner to "See Attached 3 pages". The attached three pages were not forwarded to the Program. The Applicants refer to these three pages as a list of their deficiencies.

Whereas Rose Valley attended to many of the deficiencies contained in the Applicant's list, relations between the two became strained.

On January 9, 2001 the Applicants sent a letter to Rose Valley with a copy to the Program. This letter lists six (6) specific deficiencies and is treated by the Program as its first and only Notice of the Applicant's claim within the first year of the new home warranty.

On July 27, 2001 the Applicants issued a Statement of Claim in the Ontario Superior Court of Justice against Rose Valley, the Program and the Municipality of Clarington with respect to the construction and deficiencies in the home. The Statement of Claim was served on the Program on August 8, 2001, 4 days following the Applicant's first year in the home.

Notwithstanding that legal proceedings were ongoing in the Ontario Superior Court of Justice, the parties scheduled a conciliation for January 7, 2002. The conciliation took place as scheduled at which time the Applicants withdrew 1 complaint.

In its Decision Letter of January 21, 2002 the Program reviewed 19 complaints. The Program found 8 items to be warranted but denied these items on the basis that for 2 items the Applicants refused to permit Rose Valley to perform repairs and the remaining 6 warranted items were denied on the basis that the Program had not received notice of the Applicants' claims within the 1 year limitation period for first year warranty claims.

At the hearing the Applicants withdrew 5 complaints and as such, the hearing proceeded to review 13 complaints.

THE FACTS:

The Applicants appeared in person. In addition to Robert Guy, John W. Caverly of Building Litigation Consultants & Associates gave evidence for the Applicants.

The Program called Jim Fortune, a warranty representative.

Rose Valley called two witnesses, Sandro Soscia, an engineer and principal of Soscia Engineering Ltd. and Rob DeMarchis, supervisor of customer service.

With 6 items having been withdrawn by the Applicants 13 items remained to be determined. These items can be categorized in the following manner:

1) Uneven Floor Systems Throughout the Home

The most serious of all deficiency claims relates to the Applicants claim that the floors within the home are uneven, that there is deviation in the height of the floor joists, the joists and engineered beams have inconsistencies with respect to horizontal trueness and the joists are installed both crown up and crown down thereby creating undulations in the floors. The Applicants asks that the entire floor system be reviewed by a structural engineer and that the affected joists be replaced and/or repaired. This would entail the removal and re-installation of electrical and plumbing components.

The Program acknowledges that a downward deflection at the LVL beam is excessive and therefore warrants this area of the floor as a defect in workmanship and materials. The Program refuses the Applicant's claim on the basis that they refused Rose Valley access to the home to effect repairs.

Rose Valley states that the deviation is within acceptable standards and denies any defect in workmanship or material.

2) Separation of Joints and Trim

The Applicant claims defects in material and workmanship as trim has cracked and separated in areas throughout the home.

The Program and Rose Valley acknowledge the cracks but state that this claim was made beyond the 1 year limitation period and is therefore out of time. The Program and Rose Valley state that in any event, had these complaints been provided within the prescribed time, they would have been denied as being a result of normal shrinkage and therefore excluded from the warranty.

3) Installation of Hardwood and Ceramic Floor Systems

The Applicants claim that the hardwood strip floor has not been installed in accordance with the manufacturer's specifications and asks that once the floor system has been re-engineered that the hardwood floor be replaced and installed in accordance with manufacturer's specifications.

As it relates to the installation of ceramic tiles, the Applicants claim that the installation does not comply with the Ontario Building Code and therefore the ceramic tiles require removal and replacement.

The Program and Rose Valley found no problems with the hardwood floor other than a missing piece of trim. Although conceded that the ceramic tiles may have not been installed specifically to code, they note that no damage has occurred and therefore there is no defect in workmanship or materials.

4) Access to Jacuzzi Tub

The Applicants claim that there is no access to the Jacuzzi bathtub motor and is not in compliance with the Ontario Electrical Safety Code.

Although originally denied by the Program as being out of time, it was conceded that this notice was received within the proper time frame and that this is a warranted item. Rose Valley agrees with the Program as it relates to this item.

5) Lack of symmetry in the brick along the front of the home

The Applicants claim that the installation of brick at the front of the home is defective in that there are different courses of brick, variances in mortar and uneven ends to the brick lines.

The Program denies this claim as being received after the expiration of the one year warranty. At the hearing the Program conceded that had this claim been received in time, it would have been warranted. Rose Valley stated that this claim was out of time and denied a defect in workmanship.

6) Temperature variations throughout the home

The Applicants claim that there are substantial variations in temperature throughout the home.

The Program denied this claim as not being proven. Rose Valley concurs.

7) Improper and incomplete vapour barrier system

The Applicants claim a defect in workmanship in the installation of the vapour barrier throughout the home.

The Program found that the poly air/vapour barrier in the basement is installed in pieces and is not properly sealed. The Program denied coverage of this complaint on the basis of the Applicants' refusal to permit Rose Valley to perform the necessary repairs. Rose Valley agrees to perform the repairs.

8) Relocation of the attic hatch

The Applicants claim that the attic hatch is improperly installed in that it does not provide sufficient headroom to permit access.

The Program denied the claim on the basis that it was not warranted and received after the expiration of the one year warranty. Rose Valley has agreed to relocate the attic hatch as required.

9) Drywall taping separation

The Applicants claim that drywall taping on the second floor of the home has separated and/or cracked.

The Program states that this claim was made after the one year warranty period, and states in any event, that this complaint is excluded as being normal shrinkage under the Act. Rose Valley concurs with the Program on this issue.

10) Scratches to main shower stall

The Applicants claim that there are scratches to the main bathroom shower stall.

The Program denies the claim on the basis that it was not made within the one year period and that in any event, the scratches are minor in nature, not readily apparent and therefore not warrantable. Rose Valley concurs with the Program on this issue.

11) Gas and Fireproofing the man door between garage and home

The Applicants claim that the man door has not been properly gas and fireproofed.

The Program found a gap between the brick mould and the wall and that this is a warranted second year claim. The Program refused warranty coverage on the basis that the Applicants refused to permit Rose Valley an opportunity to perform the necessary remedial work. Rose Valley has agreed to remedy this item.

12) Wood extension windowsills are bowed out of shape

The Applicants claim that the some of the wood frames have cracked.

The Program denies this claim on the basis of the Applicants failure to give notice of the claim within the one year period. Rose Valley denies any defect in workmanship or materials.

THE EVIDENCE - PRELIMINARY ISSUES:

1) The Applicants raised an objection to the admission of a supplementary report and curriculum vitae of Sandro Soscia, P. Eng. of Soscia Engineering Ltd. submitted by Rose Valley on the basis that these documents were delivered beyond the time limit set at the prehearing.

When questioned by the Tribunal, the Applicants acknowledged that they were not in any way prejudiced by the late delivery of these documents and that their only objection related to the issue of time.

On the basis that no prejudice would result by the admission of these documents, the Tribunal permitted Rose Valley to rely on these documents.

- 2) The Applicants issued and served a subpoena on Bernard Finney, an engineer who was retained by the Program and conducted an inspection of the Applicants' home. Mr. Finney was retained well after the issuance and service of a Statement of Claim and after the prehearing. The Program advised that it would not be calling Mr. Finney as a witness and objected to the Applicants' subpoena on the grounds that Mr. Finney is not a compellable witness.

The Tribunal accepted the submissions of counsel for the Program and found that Mr. Finney, retained by the Program for the sole purpose of the litigation, was not compellable as a witness by the Applicants and therefore was not required to give evidence before this Tribunal.

THE EVIDENCE:

Robert Guy gave evidence on behalf of the Applicants. Mr. Guy actively followed the construction of this home and referred to photographs in Exhibit 9 to demonstrate the home throughout the construction process.

Whereas the Certificate of Completion and Possession (hereinafter "CCP") was signed on August 3, 2000, Mr. Guy attended in the home numerous times prior to August 3rd. Mr. Guy produced and the Tribunal marked as Exhibit 4C a typewritten letter to Rose Valley dated July 17, 2000, listing 21 problems with the home.

In Exhibit 4D, Mr. Guy produced a more detailed three page typewritten deficiency list dated July 31, 2000. This deficiency list is produced again as Exhibit 4E save & except that in this version, the majority of deficiency items had been ruled off.

As it relates to the CCP, Mr. Guy testified that the inspection commenced on August 3rd but was not completed until August 4th, that Exhibit 4E was his deficiency list and that this list, without the deletions, was attached to the CCP.

Mr. Guy testified that he had no knowledge as to whether Rose Valley submitted the CCP to the Program and that he had not.

On cross examination Mr. Guy stated that due to the difficulties that he has encountered with Rose Valley, his preference was for another contractor to perform the repairs and/or monetary compensation. As it relates to whether access had been denied to Rose Valley for the purpose of effecting repairs, Mr. Guy testified that whereas Rose Valley had remedied many deficiencies, the method of repair for the remaining items was paramount and therefore the Applicants would not have permitted Rose Valley to do the remaining repairs unless the method of repair was approved by Mr. Caverly.

Mr. Guy concluded by stating that the balance of the Applicants claim is based upon the inspection, deficiencies and quotations contained in the report of Building Litigation Consultants and Associates (hereinafter "BLCA").

The Applicants' second and final witness was John W. Caverly from BLCA.

John Caverly has been involved in the construction business since 1968, and has achieved the following designations: BCQ building code qualified, CEI certified environmental inspector, CES certified environmental specialist and RHI, registered home inspector. Mr. Caverly was accepted by the Tribunal as an expert with a specialty in Ontario Building Code issues.

Mr. Caverly authored a 45 page report dated March 14, 2001 which report was filed at the hearing and marked as Exhibit No. 8.

While the report details 18 areas of deficiency, the Tribunal was advised that 5 items were settled thereby resulting in 13 areas of deficiency. In Mr. Caverly's opinion the home had deficiencies which can be summarized as follows:

The exterior brick cladding was out of alignment, different heights and cut of brick and in violation of the standard for brick installation CSA A371-94 Masonry Construction for Buildings. The remedy is to remove and replace the brick at a cost of \$7,500.00.

The floor joists have been installed & engineered incorrectly and that the entire floor systems require further investigation. Mr. Caverly found a variation of 3/8" in the floor joists and that the floor joists have been improperly installed crown up and crown down when the proper method of installation is crown up. Mr. Caverly recommends an engineer's report be obtained and budgets \$15,000.00 for corrections.

Mr. Caverly testified that he found temperature variations in the home and suggests that the heating system be balanced and that a blower test be performed to determine the areas of the building that are not sealed properly. Remedial costs are quoted at \$3,500.00.

Mr. Caverly testified that the installation of the attic hatch is a violation of Ontario Building Code 9.19.2.1 and the attic hatch must be relocated at a cost of \$850.00. As it relates to vapour barrier Mr. Caverly testified that there has been no vapour barrier system installed at the perimeter building openings and recommends that a blower test should be undertaken to determine areas of high leakage and the home should be air sealed. Remedial costs are estimated at \$3,500.00.

Mr. Caverly testified that there were areas where drywall taping had separated and that substantial separation had occurred at the ceiling wall on the second floor. While truss uplift could be suspected, Mr. Caverly indicated that the drywall should be repaired at a cost of \$500.00 and continue to be monitored.

Mr. Caverly continued by testifying that he observed a crack in the main shower bathroom shower although previously repaired, was not repaired properly and that he viewed scratches to the unit. In the absence of being able to properly repair these deficiencies, remedial costs are estimated at \$2,500.00.

As it relates to the Installation of the jacuzzi motor access, Mr. Caverly testified that this was in breach of the Ontario Electrical Safety Code and that the entire tub must be removed in order to remedy the problem and quotes remedial costs at \$2,500.00.

With regard to the issue of trueness of the floors throughout the home, Mr. Caverly testified that the floors throughout the home have extreme deviations in the floor plane which causes undulations in breach of 9.30.1.4 of the Ontario Building Code. Mr. Caverly stated that further investigation is required by his engineer in order to determine the extent and corrective method of leveling the floor system. \$2,500 for engineering fees and \$15,000.00 is budgeted for corrective undertakings.

Mr. Caverly testified that the installation of the hardwood flooring was not in accordance with manufacturers specifications in that there was no felt underlay, floor staples were not installed in the proper lengths between each staple, numerous joints are less 6" offset and the subfloor is 5/8" plywood not 3/4" Orient Strand Board. Mr. Caverly states that once the floor system has been engineered, that the entire hardwood strip floor be removed and reinstalled at a cost of \$9,000.00.

As it relates to the ceramic floor systems, Mr. Caverly testified that the base mortar and lack of vapour retarder was in breach Articles 9.30.6.4 and 9.30.1.4. of the Ontario Building Code. The only remedy is to remove and replace the ceramic flooring at a cost of \$9,000.00.

Mr. Caverly testified that the interior garage door was not properly gas and fire proofed in violation of Article 9.10.9.16 of the Ontario Building code. Remedial costs are quoted at \$750.00

Mr. Caverly's evidence in chief concluded with the issue of interior trim and door installations. Mr. Caverly testified that the trim and door installations are substandard and should be repaired at a cost of \$2,500.00.

Mr. Caverly's observations were photographed and submitted as evidence. In total, 128 photographs were presented and marked as Exhibit 9.

On cross examination by Mr. Campbell, Mr. Caverly testified that he had only been in the home on one occasion and that his opinions regarding the process of construction and any deficiencies thereto were formed based upon his review of the photographs provided to him by the Applicants.

As it relates to Ontario Building Code violations, Mr. Caverly testified that he found no violations in the exterior brick cladding and the installation of floor joists. The Tribunal notes that the evidence given by Mr. Caverly in chief indicated that the installation of the floor joists was a building code violation.

The major issue relates to the undulations in the floor and that aside from the issues of compliance with the Ontario Building Code, an engineer should be retained.

Lastly, Mr. Caverly testified that his report was not written with the view of whether a deficiency was covered by the Ontario New Home Warranty Plan.

On cross examination by Ms. Street, Mr. Caverly confirmed that his report was prepared in the context of a possible action against Rose Valley and not for a claim against the Ontario New Home Warranty Program. Mr. Caverly further confirmed that he is not familiar with the process of advancing a claim against the Program and the limitations provided within the warranty.

As it relates to the trueness of the floors, Mr. Caverly testified that the proper approach would be to first fix the LVL beam and then look at any other damage.

Ms. Street's cross examination was completed by Mr. Caverly's reconfirming his evidence that the installation of hardwood flooring was deficient, that the ceramic floor installation did not comply with the Ontario Building code, that areas of the home suffered from shrinkage, temperature variations needed to be remedied and that the jacuzzi motor access panel was in breach of the electrical code.

Rose Valley's first witness was Sandro Soscia. As an accommodation to Mr. Soscia, the Tribunal agreed to hear his evidence out of normal sequence.

Mr. Soscia graduated from Concordia University in 1987 with a Bachelor of Building Engineering Degree and since 1992 has been the principal of Soscia Engineering Ltd., a company that provides engineering services in building science and residential project management. The Tribunal accepted the qualifications of Mr. Soscia as an expert in engineering.

Mr. Soscia provided a 4 page written report which was filed at the hearing and marked as Exhibit 6.

In his report Mr. Soscia indicates that the floor system has sufficient capacity to carry the strength and allowable deflections. In evidence, Mr. Soscia was critical of Mr. Caverly's crown up crown down theory and stated that the Ontario Building Code permitted a deflection of 3/4" or 16mm, that the floor should not be re-engineered and that although he noticed a dip in the floor, it is within allowable specifications.

Mr. Soscia stated that in order to remedy the dip in the floor he would remove a portion of the hardwood floor in the complained area in order to determine the extent and nature of the problem.

Mr. Soscia continued by testifying that he did not view any apparent defects in the hardwood flooring, did not see any gaps and that any problems were as a result of normal shrinkage.

As it relates to the ceramic tiles, Mr. Soscia testified that he did not lift the register in order to determine if there was felt paper beneath, but stated that he saw no problems with the tiles and that the installation had been completed in a good and workmanlike manner.

For both the ceramic & hardwood floor issues, Mr. Soscia testified that as the home is now 2 years old, any defects would have become apparent by now.

Mr. Soscia continued by testifying that the installation of brick met the spirit of the Ontario Building Code in that it restricts the penetration of snow, rain and is durable and that any lack of symmetry was not readily visible.

Mr. Soscia confirmed the existence of separation of material on the second floor and recommends the repair of the same.

Mr. Soscia did not find any problems with temperature variations, that there were no problems with the installation of insulation and vapour barriers and that scratches in the bathroom were not visible.

Mr. Soscia's evidence in chief concluded by him agreeing that the attic hatch be relocated, jacuzzi tub access must be provided and the drywall separating on the second floor should be repaired as a result of truss uplift or shrinking.

On cross examination by the Program, Mr. Soscia disagreed with the suggestion that the LVL beam installation was defective and that any repair should be approached in a localized fashion. When shown photograph 19 of Exhibit 7 Mr. Soscia conceded that the crack in the wall should be repaired.

With regard to the issues of ceramic & hardwood flooring and brick symmetry, Mr. Soscia denied any breaches of the Ontario Building Code and stated that the intent of the code had been met.

When questioned by the Tribunal regarding photograph 19 of Exhibit 9, Mr. Soscia testified that it was not common for the wall in question to crack and that this is in need of repair.

The Program's first and only witness was James Fortune, a warranty representative with the Program since 1989. Prior to becoming employed by the Program, Mr. Fortune was a building inspector with the Town of Tottenham and Chief Building Inspector with the Town

of Adjula and has attended numerous seminars relating to building construction issues. The Tribunal accepted Mr. Fortune's qualifications.

Mr. Fortune testified that the CCP in the Program's possession consisted of 2 pages, the standard CCP first page and a second page entitled PDI which form was blank with a reference to attachments. These attachments were not in the possession of the Program.

For the purpose of determining whether notice of a claim was provided to the Program in time, the Program relied upon the Applicants letter dated January 9, 2001 filed at the hearing and marked as Exhibit 4B, as the Program's first year notice of the Applicants claims.

As it relates to the floor system, joist, beams, columns lifting and sagging, Mr. Fortune testified that while he did not notice lifting & sagging, he did find separation of floors, undue undulations and that the floor had dipped excessively.

Mr. Fortune conducted string line tests and found variances of 1/4" to 1/2". Whereas Mr. Fortune disagreed with Mr. Caverly's theory of crown up & crown down he testified that a variation of 1/2" at the LVL beam was not acceptable. This problem continued through the home to the second floor and would remain a problem until the LVL beam is fixed.

Whereas the Program found that this issue is warranted, coverage was denied on the basis of the Applicants' refusal to permit Rose Valley to effect repairs.

With regard to the installation of the hardwood floors and ceramic tiles, Mr. Fortune testified that the installation was typical, for the hardwood floor he did not notice any lifting, loose boards or excessive separation. Likewise, for ceramic tiles, he did not view any unevenness, the grout was fine and no cracks were visible. In addition, any deterioration as a result of improper installation or workmanship would have been evident within the first year in the home.

For joint and trim work separation Mr. Fortune testified that this claim was not in the Applicants letter, Exhibit 4B and is therefore out of time. Mr. Fortune testified that in any event the separation complained of is as a result of normal shrinkage and settlement and therefore not warranted.

Mr. Fortune admitted that the issue of the Jacuzzi tub electrical access was received by the Program in time and that this item is warranted.

As it relates to brick symmetry, Mr. Fortune testified that this item was not warranted as it was not contained in Exhibit 4B. In response to questions by the Tribunal, Mr. Fortune testified that the brick work at the front of the home suffered from poor workmanship and that he would have warranted this item if the Program had received notice in time.

Mr. Fortune continued by testifying that upon his inspection he recorded temperature variations of 1.5 degrees and that this was not excessive nor a violation of the Ontario Building Code. Although not complained of, Mr. Fortune testified that during his inspection he found a gap between the steel support beams and the brick which could allow air and gas infiltration. Mr. Fortune noted that this item should be corrected as it posed a health and safety threat.

With regard to the issue of air vapour barriers, Mr. Fortune found that the poly/air vapour barrier in the basement lacked acoustic sealer and construction taped joints and was therefore warranted. Mr. Fortune denied coverage for this item on the basis of the Applicant's refusal to permit Rose Valley the opportunity to effect repairs.

As it relates to the attic hatch Mr. Fortune testified that this is a violation of the Ontario Building Code and would be warranted but denied the claim on the basis that notice of the claim was not made within the first year.

For damage to the drywall on the second floor, Mr. Fortune testified that this claim was also out of time having been received after the first year period. Had notice been given, he would have done a further investigation.

As it relates to the scratches in the bathroom, Mr. Fortune testified that this item was out of time and that as the scratches complained of were not visible to him, this item would have been denied, in any event.

The issue of the man door is warranted and should be fixed by re-caulking the door.

The issues of wood extension windows was disclosed for the first time at the conciliation and is therefore out of time. This item would have been refused in any event due to normal shrinkage.

Mr. Fortune concluded his evidence in chief by stating that the Rose Valley must be given reasonable access at reasonable times to conduct repairs. It was his view that the Applicants were not content with the methods of repair proposed by Rose Valley and that unless the builder did the work in accordance with what the Applicants wanted, they would not permit the builder to do the work.

Mr. Fortune's cross examination was brief and did not disclose any new information or testimony.

Rose Valley called the last witness of the hearing, Robert DeMarchis.

Robert DeMarchis has been employed by Rose Valley for 3 years and acts as the project coordinator and is responsible for after sales service.

Mr. DeMarchis testified that he was not involved in the CCP process and that he did not receive Exhibit 4E until November 27th 2000. Mr. DeMarchis acknowledged that the attachments to the CPP were not delivered to the Program.

As it relates to the items contained in Exhibit 4E Mr. DeMarchis testified that Rose Valley had re-attended to the home on numerous occasions to effect repairs. These repairs consisted of inter-alia: January 23, 2001 to effect drywall repairs and adjust doors; January 24, 2001 to adjust & install a railing, varnish railing and adjust doors; January 25, 2001 paint touch-ups, trim; and on March 25, 2001 balance of the heating system. 5 invoices detailing particulars of the remedial work were filed collectively and marked as Exhibit No. 13.

In addition to the above repairs, Mr. DeMarchis testified that Rose Valley attempted on three instances to perform remedial work but the Applicants would not permit work to be done.

Mr. DeMarchis continued by testifying that once the Statement of Claim was served the matter was in the lawyer's hands and that no further remedial work was undertaken.

Mr. DeMarchis concluded by testifying that Rose Valley was always prepared to perform the necessary remedial work but felt that the report of Mr. Caverly was unrealistic and that the Applicants would not agree to Rose Valley's methodology of repair.

Mr. DeMarchis's cross examination did not disclose any new or conflicting evidence.

ISSUES:

There are three issues.

The first is whether the Program obtained notice of the Applicants 13 claims within the time frame provided by the Act.

The second is whether the claims received by the Program within the proper time frame are warranted under the Act.

The third is what is the appropriate remedy for the warranted items.

THE LAW:

The relevant sections of the Act are as follows:

13. (1) Every vendor of a home warrants to the owner,;

- (a) that the home,
 - (i) is constructed in a workmanlike manner and is free from defects in material
 - (ii) is fit for habitation, and
 - (iii) is constructed in accordance with the Ontario Building Code
- (b) that the home is free of major structural defects as defined by the regulations; and
- (c) such other warranties as are prescribed by the regulations.

(2) A warranty under subsection (1) does not apply in respect of;

- (c) normal wear and tear;
- (d) normal shrinkage of materials caused by drying after construction;
- (e) damage caused by dampness or condensation due to failure by the owner to maintain adequate ventilation; and
- (f) damage caused by improper maintenance.

(3) The vendor of a home shall deliver to the owner a certificate specifying the date upon which the home is completed for the owner's possession and the warranties take effect from the date specified in the certificate.

(4) A warranty under section (1) applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed.

14 (6)

In assessing the amount for which a person is entitled to receive payment out of the guarantee fund under this section, the Corporation shall take into consideration any benefit, compensation, indemnity payable, or the value of work and materials furnished to the person from any source;

Regulation 892, Section 15 (2)

Every vendor of a new home warrants to the owner,

- (d) that the home is free from violations of the Ontario Building Code regulations under which the Building Permit was issued, affecting health and safety, including but not limited to fire, safety, insulation, air and vapour barriers, ventilation, heating and structural adequacy;

15 (3) The warranties described in subsection (2) apply only in respect of claims made within two years after the home was completed for possession.

APPLICATION OF THE LAW TO THE FACTS & FINDINGS:

The Program relies upon correspondence from the Applicants dated January 9, 2001, received by the Program on January 11, 2001 as its notice of first year claims within the first year of the new home warranty.

This letter is filed as Exhibits 4B and 3-2 referring to the following:

- hardwood floors - lifting, separating & sagging;
- floors unlevel upstairs and downstairs;
- drafts coming in from light switches and baseboards in the two front bedrooms;
- cold air return not finished;
- bathroom in ensuite tiles not finished (no access panel for jacuzzi)
- leaks in basement, not cemented under the door.

Mr. Guy testified that Exhibit 4E was his pre-delivery inspection and that he relied upon this list as his list of deficiencies. Rose Valley admits that it did not append this list to the CPP nor did it forward the list to the Program.

Exhibit 4E as filed at the hearing, had the majority of items ruled off as they had been remedied by Rose Valley. At the hearing the parties agreed that in addition to the items contained in Exhibit 4B referred to above, the only item of complaint from Exhibit 4E not listed in Exhibit 4B pertains to brick alignment and mortar.

As it is admitted that the items referred to in Exhibit 4B were received by the Program in time, the Tribunal concurs and formally finds that notice of these complaints were received by the Program within the first year of the warranty.

As it relates to the issue of whether the complaints relating to brick work were received within the first year, the Program takes the position that as this complaint was not contained in Exhibit 4B, notice was not received within the first year.

Counsel for the Program provided the Tribunal with cases pertaining to whether a claim is received by the Program within the one year period.

The applicable cases are summarized in the decision of the Commercial Registration Appeal Tribunal in the Eleanor Murray matter, released as [1995] O.C.R.A.T.D. No. 77. In the case of C. Ray Webb of March 1982 the Tribunal found that the only proper notice must be written notice served or posted to the Program within the proper time. Failure of the builder to file the Certificate of Completion and Possession did not alter the fact that the one year warranty lapsed and that no claim had been made. On that basis Mr. Webb's claim was disallowed.

A different result was rendered in the case of Giuseppe Brundia of April 22, 1998 where the Tribunal found that it would be "strange indeed to have a builder and subsequently the program escape liability through a failure of the builder to file the Certificate as required."

In the Murray matter, the Tribunal agreed with the Brundia decision and found that the Program should not be able to escape liability through a failure of the builder to file the Certificate as required.

This Tribunal agrees with the Brundia decision. The Program cannot rely on the failure of the builder to file the list of deficiencies attached to the Certificate of Completion and Possession as having not received notice of the deficiency claims. The Tribunal therefore deems that the Program received the Certificate of Completion and Possession with the attached pages of deficiencies within the first year and therefore had notice of the defects contained therein within the one year time period.

Based upon the foregoing and as it relates to Exhibit 4E the Tribunal finds that the Applicants' claim relating to brick & mortar was received within the one year time period.

Aside from the above-noted complaints, the balance of the Applicant's claims were contained in the Statement of Claim issued in the Ontario Superior Court of Justice on July 27, 2001 as Court File No. 01-W-214953CM, at Toronto.

The Program testified that the Statement of Claim was received on August 8, 2001. This position was not contested and therefore the Tribunal finds that the date of service of the Statement of claim was August 8, 2001. On its face it appears that the first year claims contained therein for the first time, were prima facie received beyond the one year time period.

Counsel for the Program provided the Tribunal with the case of John and Teresa Tepylo, a decision of the Commercial Registration Appeal Tribunal dated Nov. 10, 1992. In its decision the Tribunal found that it had no jurisdiction to extend the time for the commencement of the one year period stipulated in the Act and therefore could not assist the applicants in that respect.

This Tribunal agrees with the Tepylo decision and is unable to assist the Applicants in their first year claims that were received by the Program after the first year from the date of the Certificate of Completion and Possession.

On the basis of the foregoing the Tribunal makes the following decision with respect to the timeliness and warrantability of the 13 items referred to in the Decision Letter of the Program of January 21, 2001:

1. Uneven Floor Systems Throughout the Home

The Tribunal finds that notice of this complaint was received by the Program within the one year period.

The Tribunal heard conflicting evidence as it relates to whether the floor systems are defective. Sandro Soscia, P. Eng. testified that the floor systems were constructed properly and that the deviations are within allowable tolerances. On the other hand, Mr. Caverly takes issue with the engineering of the joists and finds the deviations and deflections to be excessive. While Mr. Fortune does not agree with Mr. Caverly's methodology, he found an excessive downward deflection of the floor system in the LVL beam and that this would result in unevenness in the second floor as well.

The photographs contained in Exhibit 10-21 clearly illustrates a dip in the floor at the LVL beam and photograph Exhibits 7-19 and Exhibit 10-19 illustrate a floor to ceiling crack in the wall located at the LVL beam.

It is patently clear to this Tribunal that there is a defect in the floor system.

Whereas the Tribunal would have preferred to make a specific direction for the nature and scope of remedial work required in this complaint, the Tribunal was not presented with sufficient evidence that would have enabled it to make a specific direction.

Based upon the evidence presented to the Tribunal, the Tribunal finds that the downward deflection of the of the floor system at the LVL beam is excessive, that this item is warranted and must be repaired. In addition, the Tribunal also finds that all cracks arising from this complaint are also warranted and must be repaired.

2. Separation of Joints and Trim

The first notice that the Program received of this claim was by way of the Statement of Claim served on August 8, 2001. The Tribunal upholds the decision of the Program and finds that notice of this claim was received by the Program beyond the one year period and is therefore not warranted.

3. Installation of Hardwood and Ceramic Floor Systems

The Tribunal finds that notice of these complaints were received within the one year period.

As it relates to defects in workmanship and material for the hardwood floor the evidence indicated that the installation of the hardwood floor was not in accordance with manufacturer's guidelines and the Tribunal finds that the installation was not in accordance with the manufacturers guidelines and that a piece of trim is missing.

No evidence was tendered to establish that the method of installation of the hardwood flooring resulted in damage to the floor. The problems relating to the hardwood floor are as a result of normal shrinkage and therefore not warranted. The Tribunal finds that a piece of trim is missing and therefore this specific issue is warranted and should be installed.

As it relates to the installation of the ceramic tiles this issue forms two complaints in the decision letter of the Program. The Tribunal heard conflicting evidence as to whether the method of installation was a breach of the Ontario Building Code or installed in an acceptable method in the spirit of the building code. The Tribunal did not hear any evidence that the ceramic tiles had shifted or broken, nor was there any problems with the grout.

There was no evidence that the ceramic floor is damaged nor that the method of installation of the ceramic tiles has resulted in any damage to the tiles or grout. As in excess of 2 years has passed since the installation of the ceramic floor and no defects have materialized, the Tribunal finds no defects in the installation of the ceramic tiles and therefore dismisses the Applicants two claims in this regard.

4. Access to the Jacuzzi Tub

Notice of this claim was received within the one year time period and the parties agree that this item is warranted. The Tribunal therefore finds that this complaint is warranted and that electrical access to the Jacuzzi tub must be provided.

5. Lack of Symmetry in the Brick

In accordance with the Tribunal's prior reasons, the Tribunal finds that notice of this complaint was received in time.

Mr. Soscia testified that defects in the brick were not readily visible and that the installation met the requirements of the Ontario Building Code. The Tribunal heard evidence from Mr. Caverly detailing the improper installation of the bricks at the front of the home. Mr. Fortune was equally critical and testified that had notice been received in time, he would have warranted this item.

The photographs filed in Exhibit 9-5, 9-6, 9-7, 9-8, 9-9 and 9-10 illustrate the poor workmanship in this area. Specifically, these photographs illustrate rough edges, different size mortar joints and different courses of bricks.

The Tribunal finds that the installation of brick at the front of the home is a defect in workmanship and is warranted and that the brick work on the front of the home must be repaired.

6. Temperature Variations Throughout the Home

The Tribunal finds that notice of this claim was received by the Program within the first year.

Mr. Soscia and Mr. Fortune testified that the temperature variations that they found were within acceptable variations. Mr. Caverly was not of assistance on this issue as he recommended that further tests be conducted.

Mr. Fortune testified that during the course of his inspection he noticed in a gap in the garage between the steel support beams and brick that could allow air and gas infiltration into the west wall of the north-west bedroom. Although this item was not part of the Applicants' claim, Mr. Fortune warranted this item as it may pose a threat to health and safety.

As it relates to the issue of temperature variations, the Tribunal finds that the Applicants have not proven any defect with regard to this complaint and therefore dismisses this claim.

The Tribunal finds that the gap in the garage between the steel support beams and brick, as discovered by Mr. Fortune and described above, is warranted and must be repaired.

7. Improper and Incomplete Vapour Barrier System

In accordance with Exhibit 4B the Tribunal finds that notice of this claim was received by the Program within the one year period.

Mr. Caverly's evidence of improper vapour barrier and insulation was based primarily from his review of Mr. Guy's photographs that were taken as construction proceeded. Mr. Caverly did not conduct a complete inspection with respect to these systems and therefore his evidence was not helpful to the Tribunal on this issue.

Mr. Fortune testified that in the basement he observed that the poly/air vapour was installed in pieces, was not sealed as required and was therefore warranted.

The Tribunal finds that this complaint is warranted insofar as it relates to the poly/air vapour barrier in the basement and that this poly/air vapour barrier must be repaired.

8. Relocation of Attic Hatch

The first notice that the Program received of this claim was by way of the Statement of Claim served on August 8, 2001. This complaint is therefore out of time as it relates to a first year warranty claim.

All three witnesses agreed that the installation of the attic hatch was defective and that the hatch needs to be relocated. Mr. Fortune testified that this was a breach of the Ontario Building Code and would have been warranted had notice been received in the first year. Mr. Caverly testified that the location of the attic hatch was not only a breach of the Ontario Building Code but a breach of the fire code as well. Mr. Soscia did not provide specifics on this complaint.

As this complaint was received after the first year the Tribunal only has jurisdiction in the event that this is a valid second year claim. The Tribunal accepts the evidence of Mr. Caverly that this is a fire code violation as well and therefore finds that this a valid second year claim, is warranted and that the attic hatch must be relocated.

9. Second Floor Drywall Taping Separation

The first notice that the Program received of this claim was by way of the Statement of Claim served on August 8, 2001 and is therefore out of time for first year warranty claims.

As the nature of this complaint pertains to workmanship and/or truss uplift, this does not qualify as a second year claim and therefore the Tribunal dismisses this claim.

10. Scratches on Main Bathroom Shower Stall

The first notice that the Program received of this claim was by way of the Statement of Claim served on August 8, 2001. This complaint is therefore out of time for first year claims.

The nature of this complaint is a defect in workmanship or materials and does not qualify as a second year claim. The Tribunal therefore dismisses this claim.

11. Gas and Fire Proofing of Man Door

The Program agrees that man door between the garage and house has not been fireproofed and that this item is warranted as a valid second year claim. The Tribunal concurs and finds that this is a warranted item.

12. Wood Extension Window Sills are Bowed and Out of Shape

The first notice that the Program received was by way of the Statement of Claim served on August 8, 2001. This claim is therefore out of time for first year claims.

The nature of this complaint relates to an alleged defect in workmanship and materials and does not qualify as a second year claim. The Tribunal therefore dismisses this claim.

ORDER

In the foregoing section the Tribunal found that items 1, 4, 5, 6, 7, 8, and 11 are valid complaints as they relate to the issues of timeliness and warrantability. Where necessary, the Tribunal was specific as to what component of the complaint is warranted.

The Tribunal heard evidence that whereas Rose Valley performed numerous repairs to the home, this work ceased following delivery of a Statement of Claim and was further complicated by the inability of the Applicants and Rose Valley to agree on the method of repair.

Throughout the hearing Rose Valley maintained the position that it was ready willing and able to perform the necessary remedial work. In their submissions, the Applicants agreed to permit Rose Valley to perform the work the Tribunal found to be warranted, without pre-condition.

On the basis of the foregoing, the Tribunal hereby orders as follows:

1. Rose Valley shall attend to the repair of warranted items as outlined in the preceding paragraphs 1, 4, 6, 7, 8 and 11 within 90 days hereof.
2. Rose Valley shall attend to the repair of item 5 (brick & mortar) within 120 days hereof.
3. Rose Valley and the Applicants shall cooperate with each other in order coordinate the remedial work in order to minimize any inconvenience.
4. The Tribunal upholds the remaining decisions of the Program to disallow the Applicants other claims.

LICENCE APPEAL TRIBUNAL

Michael H. Turk, Vice-Chair

Released: October 2, 2002

RICHARD AND LINDA MORRIS

MOTION TO GRANT AN ADJOURNMENT OF THE HEARING
OF THE APPEAL WHICH IS SCHEDULED TO COMMENCE
ON NOVEMBER 4, 2002

TRIBUNAL: CARL F. DOMBEK, Chair, presiding

APPEARANCES: JACKIE E. McGAUGHEY-WARD, Counsel, representing the
Applicants
KEN ROSENBERG, Counsel, representing the Ontario New Home
Warranty Program
RONALD G. RENZINI, Counsel, representing the Added Party,
Build North Construction Inc.

DATE OF
HEARING : October 28, 2002 Toronto

ORDER

Upon reading the Affidavit of Jason J. Larton and upon hearing the submissions of Counsle and upon reviewing the Licence Appeal Tribunal's Practice Direction on Adjournments, the Tribunal orders that:

1. The application for an adjournment is dismissed since the hearing was previously adjourned and the new hearing dates were made peremptory against all parties; that there were no compelling reasons given to grant a further adjournment; that the hope of reaching a settlement in a warranty claim which is over ten years old is remote; and that due to the high cost involved in rescheduling the hearing, it is not in the public interest to grant a further adjournment.

LICENCE APPEAL TRIBUNAL

Carl Dombek, Chair, presiding

Released: October 28, 2002

GREGORY A. SKINNER AND CATHERINE J. SKINNER

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSE OF THE *ONTARIO
NEW HOME WARRANTIES PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL: TERENCE A. WARDROP Q.C., Vice Chair
 ALBERT LONGO, Member

APPEARANCES: GREGORY A. SKINNER, on behalf of himself and
 Catherine J. Skinner, Applicants
 MARCUS KNAPP, Counsel for the Ontario New Home
 Warranty Program, Respondent
 CHRISTOPHER JOHNSON, on behalf of Chris Johnson &
 Associates Ltd., Added Party

DATE OF September 16, 2002 Toronto.
HEARING:

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal by Gregory A. Skinner and Catherine J. Skinner (the "Applicants") pursuant to their Request for a Hearing dated March 19, 2002, (the "Notice of Appeal") to the Licence Appeal Tribunal (the "Tribunal") from a decision of the Ontario New Home Warranty Program (the "Program"). The Applicants in this appeal base their claim on the provisions of section 13 and section 14(1)(b) of the Ontario New Home Warranties Plan Act, R.S.O. 1990. Ch. 0.31 (the "Act"). The Applicants' claim was denied by the Program in its Decision Letter dated March 4, 2002, (the "Program's Decision") and the Applicants are appealing pursuant to section 16 of the Act.

Upon the application made by the Program to the Registrar of the Tribunal dated April 12, 2002, Chris Johnson & Associates Ltd. (the "Builder") was joined in this appeal as the Added Party by the Order of the Chairman of the Tribunal dated April 15, 2002, and the appropriate notice of application and notice of the Order were served upon the Parties.

ISSUES:

On July 17, 2001, the Applicants complained to the Program (the "Complaint") that the Builder is in breach of its warranty to construct the new home which it contracted to build for the Applicants in accordance with the Agreement of Purchase and Sale entered into between the Applicants and 1329044 Ontario Limited on October 16, 2000 (the "Agreement"). The Agreement was executed by Christopher Johnson as an officer on behalf of 1329044 Ontario Limited and he is also the principal of the Builder. The main issue of the Complaint was that the pitch of the roof was not in accordance with the plans and/or drawings prepared by the Builder as shown in the elevation depictions thereof which the Builder supplied and were attached to the Agreement as Schedule "B", or otherwise were in accordance with those "already examined by the" Applicants.

The Applicants, on August 16, 2001, thence requested conciliation services from the Program respecting the alleged breaches of warranty, and in response the Program provided such conciliation services between the Applicants and the Builder on December 3, 2001. The Program thence issued the an undated Conciliation Inspection Report (the "Conciliation Report"). being a listing of the two complaints made by the Applicants, which the Program decided, were "not warranted" under the Act. The Program made the following comments in its assessment of the Complaint in the Conciliation Report:

"This complaint does not represent a defect in materials or workmanship ... the Builder's contractual obligations have been met ... there [are no] measurements or written specifications as to the roof pitch. The Agreement of Purchase and Sale does not have ... any reference to the roof pitch. The builder has not made a substitution with respect to an item that is referred to in the Agreement of Purchase and Sale ... pursuant to the Act."

Following receipt of the Applicant's request for a decision based upon the Conciliation Report, a further inspection was scheduled for January 18, 2002, and the Program thence issued the Program's Decision which elaborated but essentially reiterated the assessment made in the Conciliation Report respecting the Complaint. The Applicants, in the Notice of Appeal state, inter alia, that "it is the position of the [Applicants] that the lower roof pitch has a significant negative impact on the value of ..." their home.

EVIDENCE:

Each of the Applicants, Catherine Skinner and Gregory Skinner, gave evidence as to the main issue claimed as a breach of warranty with respect to their new home at 34 Mill Street, Hillsdale, and situate on Lot 11 according to Plan 51M-638, in the Township of Springwater, in the Province of Ontario (the "home"). Completion of the home by the Builder and occupancy by the Applicants took place on or about January 12, 2001, (the "Date of Possession"). The Applicants testified also as to their various dealings with the

Builder, the Program and the Municipality. The evidence for the Applicants was limited to the Applicants themselves as no expert testimony was submitted on their behalf and no other witnesses were called by the Applicants.

The Respondent called two witnesses, Donald Straiko, a warranty representative of the Program, and Christopher Johnson, the principal of the Builder, who, coincidentally, is also the next-door neighbor of the Applicants residing at 32 Mill Street, Hillsdale. Mr. Straiko gave evidence respecting his dealings with the Applicants and the Builder and the inspections of the home. Mr. Johnson testified as to the Agreement and the construction of the home including his various dealings with the Applicants and the Program.

The Tribunal has no difficulty with the evidence given by all of the witnesses during the examinations in-chief and cross-examinations as such testimony was straight forward and clear giving rise to no dispute or disagreement on the facts and circumstances in this case. The conclusion which is to be reached from the evidence submitted on the issue is, however, more difficult. The opposing points of view by each of the principal witnesses was most generous to each other and indicated only a misunderstanding or miscalculation of the other viewpoint and, of course, led to the problem inherent in the issue in this case. There is also no suggestion by the Applicants of bias on the part of the Program in favour of the Builder, only grave disappointment in the assessment contained in the Conciliation Report and the reasoning elaborated in the Program's Decision.

Taking the evidence as a whole, the Tribunal observes that either the Applicants failed to make it clear to the Builder the importance to them of the appearance of the home and the pitch of the roof as depicted in the drawings and elevation sketches exchanged between them, or on the other hand, the Builder did not pay close enough attention to this particular detail and was otherwise concentrating on a roof design similar to the other residences it constructed in the area. The Tribunal makes no choice between these two observations as it is probable that the problem has arisen in this case as a result of a combination of both observations. In any event, the issue was ignored by both parties and the home was built by the Builder without defect in workmanship or inferior materials, and the Applicants thence accepted the home as built, took possession thereof and only later discovered its unintended appearance from their point of view.

ISSUES OF LAW:

The Applicants are appealing the Program's Decision to the Tribunal under Section 16(2) of the Act and this hearing and this decision of the Tribunal is issued pursuant to Section 16(3) of the Act.

16. ...

(2) A notice under subsection (1) shall state that the person or owner served is entitled to a hearing by the Tribunal if the person or owner mails or delivers,

within fifteen days after service of the notice under subsection (1), notice in writing requiring a hearing to the Corporation and the Tribunal.

(3) Where a person or owner gives notice in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and may by order direct the Corporation to take such action as the tribunal considers the Corporation ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Corporation."

Section 13(1) of the Act specifies certain warranties and sets out a list of circumstances in Section 13(2) in respect of which such specified warranties do not apply.

13 (1) Every vendor of a home warrants to the owner,

(a) that the home,

(i) is constructed in a workmanlike manner and is free from defects in material,

(ii) is fit for habitation, and

(iii) is constructed in accordance with the Ontario Building Code;

(b) that the home is free of major structural defects as defined by the regulations; and

(c) such other warranties as are prescribed by the regulations.

(2) A warranty under subsection (1) does not apply in respect of,

(a) defects in material, design and work supplied by the owner;

(b) secondary damage caused by defects, such as property damage and personal injury;

(c) normal wear and tear;

(d) normal shrinkage of materials caused by drying after construction;

(e) damage caused by dampness or condensation due to failure by the owner to maintain adequate ventilation;

(f) damage resulting from improper maintenance;

(g) alterations, deletions or additions made by the owner;

- (h) subsidence of the land around the building or along utility lines, other than subsidence beneath the footings of the building;
- (i) damage resulting from an act of God;
- (j) damage caused by insects and rodents, except where construction is in contravention of the Ontario Building Code;
- (k) damage caused by municipal services or other utilities;
- (l) surface defects in work and materials specified and accepted in writing by the owner at the date of possession.

Provision is made in Section 13(1)(c) of the Act for these specified statutory warranties to be expanded by regulation, and Part IV of Ontario Regulation 892 (Sections 14 to 24, inclusive) provides for such additional specific warranties by regulation together with terms, conditions, exceptions and exclusions which attach to these regulatory warranties. Such terms, conditions, exceptions and exclusions set forth in Part IV of Regulation 892 only apply to these additional regulatory warranties and do not affect those specified statutory warranties set out in Section 13(1)(a) and (b) of the Act.

Section 13(6) of the Act not only provides that all such specified statutory warranties and specified regulatory warranties apply despite any agreement or waiver to the contrary, but also recognizes that the owner may have other rights and other agreed warranties in addition to the warranties specified in Section 13(1)(a) and (b) of the Act and the regulatory warranties prescribed in Section 13(1)(c).

13. (6) The warranties set out in subsection (1) apply despite any agreement or waiver to the contrary and are in addition to any other rights the owner may have and to any other warranty agreed upon.

Under Section 14(1)(b), where an owner has a cause of action against a vendor for damages resulting from a breach of warranty, such an owner is entitled to be paid out of the guarantee fund the amount of such damage. The right to make a claim is set out in Section 14(1) in the Act.

14. (1) Where,

(a) ... ;

(b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty; or

(c) ... the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations."

A warranty is a defined term under the Act. Section 1 provides:

1. In this Act,

...

"warranty" means a warranty set out on section 13."

It is notable that this definition includes a warranty "agreed upon" in subsection (6) of section 13 in addition to "the warranties set out in subsection (1)". Were this not the case, the drafters of the Act would have limited the definition of "warranty" as those set out in subsection (1) of section 13. As such, owners are "entitled to be paid out of the guarantee fund the amount of" damages "resulting from a breach of" such an "agreed upon" warranty under subsection (6) "in addition to [a warranty under] subsection (1)".

The Applicants are "owners" as defined by the Act and the Tribunal finds them so to be as a fact. As such, they are entitled to compensation or remedies from the assets of the guarantee fund for any and all breaches of warranties pursuant to Section 13 by virtue of Section 14(1)(b) thereof, subject only to the limitation of amount as set out in the regulations thereto.

PROVEN FACTS:

As hereinbefore stated, all witnesses testified respecting the issue claimed by the Applicants and there appears to be neither differences of opinion nor any conflict in the evidence heard by the Tribunal.

The Tribunal finds, pursuant to the evidence given in these proceedings, the following as proven facts:

- (1) the Agreement was reached on October 16, 2000;
- (2) the Builder and the Applicant agreed that the home would have the appearance as shown in the plans and drawings exchanged between them, some of which were computer-produced by the Builder and noted in the Agreement as attached as Schedule "B" thereto, or otherwise "already examined by the" Applicants, all of which depicted a roof pitch of approximately 6:12;
- (3) the Date of Possession of the home was January 12, 2001;
- (4) it became apparent to the Applicants in April of 2001, that the roof did not have the pitch agreed upon and the Builder acknowledged that the roof pitch of the home was inadvertently built to a pitch approximating 4:12 in accordance with the Builder's truss documentation and consistent with other residences constructed by the Builder in the area:

- (5) there is no breach of warranty by the Builder alleged by the Applicants with respect to the roof of the home as to workmanship or materials, or any evidence to support such an allegation or breach;
- (6) the Builder breached its warranty to construct the roof as agreed upon in the Agreement by constructing the roof of the home with a pitch approximating 4:12 thereby altering the appearance of the home to a substantial degree and the Applicants claim for an increased roof-pitch of fifty percent is a warrantable claim;
- (7) the roof as constructed by the Builder is of equal quality to the roof as depicted in the Agreement;
- (8) the Program's Decision was issued by the Program on March 4, 2002; and
- (9) the Notice of Appeal was made on March 19, 2002.

DECISION OF THE TRIBUNAL AND ORDER:

Combining the proven facts of this case with the issues of law, the Tribunal is not in agreement with the Program's Decision nor the assessment made by the Program in the Conciliation Report. The Builder clearly agreed to build the home in accordance with the plans and drawings exchanged between the parties to the Agreement which included elevation drawings prepared by the Builder depicting a roof with a pitch of approximately 6:12 and, inadvertently or otherwise, constructed a roof with a pitch one third less which resulted in the home having a markedly different appearance from that which was agreed upon. Pursuant to Section 13(6), this warranty was breached by the Builder and is in addition to the warranties set forth in Section 13(1) but included within a warranty under Section 14(1)(b). As such, the Applicants are entitled to recover damages from the guarantee fund under the Act.

However, the Applicants neither gave any direct evidence as to the damages, if any, suffered by them as a result of the breach of (the agreed) warranty, nor did they tender any expert evidence to assist the Tribunal in assessing such damages. Indeed, the Tribunal requested the Applicants to address the issue of the relief sought by the Applicants but received only an unsatisfactory response. The Applicants admitted that they did not wish a replacement roof with a pitch of 6:12 with all the attendant disruption of the necessary remedial construction. The Applicants tendered indirect evidence of a lower valuation of the home which was speculative at best and not subject to cross-examination, and as such is rejected by the Tribunal. Such evidence dealing with design or appearances was also very subjective and from a different perspective could very well have resulted in an increased value of the home from different eyes and differing tastes. The Builder tendered evidence as to the difference in cost to the Builder of a 6:12 roof to that of a 4:12 roof which the Tribunal finds as not relevant to the issue of damages suffered by the Applicants. The Applicants have,

therefore, not satisfied the onus of proof placed upon them in this issue of damages suffered by them as a result of the breach by the Builder of the (agreed) warranty.

The Tribunal rejects the Applicants' claim that the roof as constructed is a substitution under Section 18 of the Regulations promulgated under the Act since it is not "an item of construction or finishing for which the [Applicants are] entitled to make [a] selection pursuant to the [Agreement] without [their] written consent". The Applicants' claim for substitution is, therefore not relevant since the roof as constructed is of equal quality to that depicted in the Agreement.

The Program's Decision makes reference to "a cash settlement of \$1,000" offered by the Builder "to resolve this matter", and as such the Tribunal takes notice of this generous offer since it is no longer protected as being "without prejudice". Other settlement arrangements may have been discussed but the Tribunal cannot take notice thereof. Based upon the offer of which the Tribunal can take notice and should have been accepted by the Applicants, the Tribunal orders that the Program pay out of the guarantee fund the sum of \$999 to the Applicants as damages for the breach of the Builder's (agreed) warranty, with the usual subrogation rights to recover such sum from the Builder at the option of the Program. It is assumed by the Tribunal that the Applicants and the principal of the Builder can now resume good neighborly relations once again.

Terrence A. Wardrop,
Vice-Chair, Presiding

Albert Longo, Member

Released: October 18, 2002.

TONY AND ROSE DURANTE

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE *ONTARIO
NEW HOME WARRANTIES PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL: JOHN ORT, Member

APPEARANCES: PATRICK DIMONTE, Counsel, representing the Applicants
ANDREW LEWIS, Counsel, representing the Ontario New
Home Warranty Program
LAWRENCE F. WALLACH, Counsel, representing the Added
Party, Rutherford Generation Investments Inc.

DATES OF
HEARING: September 9, 10, 11, and 12, 2002 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") by Tony and Rose Durante (the "Applicants") under section 14(3) of the *Ontario New Home Warranties Plan Act* (the "Act") respecting a decision of the Ontario New Home Warranty Program (the "Respondent" and the "Program") dated April 12, 2002, (the "Decision") denying the Applicants' claim for compensation.

The Decision, exhibit 1, described the Applicants' complaints as follows:

1. Third garage is significantly shorter then contract car will not fit (it is specifally (sic) shown on contract) this is my biggest issue. Approx 3+ feet shorter.
2. Missing a door in my laundry room to go outside. dining pillars were suppose to go to ceiling.
3. Pillars missing in family room and living room and dining pillars were supposed to go to ceiling.
4. Master bedroom bath tub should be six feet oval step up instead of corner tub as per contract.
5. Missing two windows next to family room fireplace (no problem with City by law missing another window in master bedroom. Builder told me before we closed he would add these windows. He did not.
6. Main family room window should have been a bow window as per contract (no

problem with City by law missing another window in master bedroom. Builder told me before we closed he would add these windows. He did not.

7. Washroom lay out upstairs is not as per our contract we did not approve.
8. We are missing basement windows (your plan specifically shows more windows).
9. Furnace was not put in the original location as per drawings. The furnace was put in the back corner of the house therefore the front two bedrooms don't get enough hot air. They also forgot to hook up two furnace ducts to one of the front bedrooms (which is now hooked up.) But those ducts are in the garage and are not insulated nor is the floor under the bedroom which is freezing. (There is no way my daughter could sleep in that room) the attic of the garage was open to the floor of the bedroom.
10. We did not get full size trim through out the house all the bedrooms have the smaller trim and extra contract says upgrade trim package. We paid \$2500 for that.
11. Kitchen is 3 feet shorter in width by 12 feet (all rooms have been reduced approx 267 sq ft). Master bedroom is 1 to 2 feet shorter in width. Please see attached document for size discrepancies.

EXHIBITS:

- Exhibit #1 - Decision letter from the Program dated April 12, 2002, denying the Applicants' claim;
- Exhibit #2 - Notice of Appeal form received at the Tribunal on April 26, 2002, filed by the Applicants;
- Exhibit #3 - Pre-hearing order released by the Tribunal on July 22, 2002;
- Exhibit #4 - Program's book of documents;
- Exhibit #5 - Book of documents of the added party;
- Exhibit #6 - Santa Cruz Brochure;
- Exhibit #7 - Letter dated July 17, 2000, from Applicants to Stella;
- Exhibit #8 - Zone Requirement Table and Ontario Building Code excerpt;
- Exhibit #9 - House plans;
- Exhibit #10 - Photograph of front of house;
- Exhibit #11 - Survey; and
- Exhibit #12 - Nova Valley Homes Bern brochure.

FACTS:

The Applicants' witnesses were Tony Durante and Raymond Nicolini, Mr. Durante's real estate agent. The witnesses for the added party were Carlo Rinomato, manager of Rutherford Generation Investments Inc., Stella Cellucci, and Franco G. Montano. The Program's witness was Bruce Stephens, author of the Decision.

Front Elevation and Floor Plans

Mr. Durante stated that the front elevation and the floor plans (the "Sketch"), three pages in total, were part of the agreement of purchase and sale (the "Agreement"), tab 31 of exhibit 5. He testified that the three pages were attached to the Agreement when it was signed in November 1999. The front page of the agreement is signed by the parties. It identifies the dwelling as "Santa Cruz – modified". The elevation is stated to be "as attached". Mr. Durante identified the initials C.R. on the front elevation and on the floor plans as initials of Carlo Rinomato (the "Builder"). The floor plans are entitled "Modified Santa Cruz". They were prepared by Mr. Durante and Mr. Nicolini. The Builder and Mr. Nicolini removed the stated total square footage from the floor plans. There is no other description of a modified Santa Cruz villa in the Agreement. Mr. Durante testified that no other elevation and no other floor plans were attached to the Agreement when it was signed.

Mr. Rinomato, the Builder, testified that he faxed the two pages containing the floor plans to Mr. Montano (the "Architect") and asked him to prepare design drawings.

Mr. Montano, the Architect, stated that he received the three pages including the front elevation and the floor plans from the Builder. He was asked by the Builder whether a modified Santa Cruz could be sited on the lot selected by the Applicants. The Architect stated that changing the front elevation would require new architectural control approval.

On cross-examination Mr. Durante admitted that the Sketch states the following at the bottom of the page: "Actual usable floor space may vary from stated area...All renderings are artist's concept. Materials, dimensions and architectural detailing are subject to modifications." Paragraph 1 of Schedule "A" of the Agreement states in part: "The Purchaser acknowledges and agrees that the Vendor may from time to time, in its sole discretion, or as required by any governmental authority of the Mortgagee, change, alter, vary or modify the Plans...without notice thereof to the Purchaser. The Purchaser agrees to accept such changes, alterations, variations or modifications." Paragraph 21 of Schedule "A" adds "it is agreed that there is no representation, warranty or collateral agreement affecting this Agreement."

Mr. Durante testified that the house purchase closed on October 6, 2000. Except for a complaint about the total square footage of the house, all the Applicants' complaints were made in a letter received by the Program on January 5, 2001, tab 12 of exhibit 4.

1. Third Garage

The Sketch gives the length of the third garage as 18' 10". Mr. Durante testified that the inside length of the garage is about 15'9'. He stated that the garage is too small for his car.

The Architect testified that he had to push the third garage back four feet rather than two feet due to architectural control. He stated that he could have moved back the back

wall of the garage.

Mr. Stephens measured the inside of the third garage. It was 15'9" in length. He observed that the garage was being used for storage.

2. Laundry Room Missing Door to Exterior

The Decision states that the Sketch indicates a side door opening off the laundry room and that this door was not installed. Mr. Durante testified that a window was substituted for the door without the Applicants' consent.

The Architect said that due to stairs in the laundry room there was no room for two appliances to be placed side by side as shown on the Sketch. He situated the appliances front to back; thus he could only put in a door or a window. He put in a window.

3. Pillars

The Program conceded that the living room pillars should have been installed.

No pillars are shown on the Sketch at the entrance to the family room. Mr. Durante testified that such pillars are shown on the Santa Cruz Villas brochure, exhibit 6.

During cross-examination Mr. Durante stated that the dining room pillars are not suitable, but that the issue is not being dealt with at the hearing.

4. Master Bedroom Bathtub

The Decision states that the builder installed a 5' acrylic tub on a 45-degree angle across the southeast corner of the en suite bathroom.

The Sketch shows a bathtub against the rear wall with 6' written inside it. An arrow is drawn across the width of the bathtub with 3' written in. A step is indicated as leading to the bathtub.

The Decision states that there is no reference in the Agreement to clarify whether the dimension references a 6' x 3' tub or the space for the tub.

Mr. Durante admitted that the bathtub is usable.

The Architect testified that he could not put in a six-foot bathtub. He stated that he could not fit in a bidet and a toilet opposite each other together with space to walk to the bathtub in addition to a double-vanity sink on the wall opposite the bathtub.

The Builder testified that an angle bathtub costs more.

5. Missing Two Windows Next to Family Room Fireplace and Missing Window in Master Bedroom

The two windows next to the fireplace appear on the Sketch. The Architect stated that the The Maximum Percentage of Unprotected Openings or Glazed Areas, % of *Exposing Building Face Area* Table of the Ontario Building Code, exhibit 8, allows additional windows of up to eleven sq. ft. in that location.

The Builder testified that putting in the extra two windows at the time of construction would not cost extra. He said that the cost now would be \$600 per window.

The missing window in the master bedroom is on the Architect's drawing.

6. Main Family Room Window Should Be Bow Window

The Sketch shows a window extending out from the room with angled sides. The window area is labelled "all window".

Mr. Durante testified that the Builder installed two windows instead of a bow window.

The Architect did not put in a bow window on the design drawings, exhibit 9. He stated that a bow window could have been put in.

The Builder said that there would have been no cost difference to put in a bow window during construction. Now there would be a cost of \$1,500 to \$1,600.

Mr. Stephens testified that the shape of a bow window is an arc. He stated that a bay window consists of three windows meeting at an angle.

7. Washroom Layout Upstairs Is Not Per Contract

The Decision states that the Sketch indicates one washroom on the east side and one washroom on the west side of the second floor of the home. The builder has installed the two washrooms back to back on the west side of the second floor.

Mr. Durante testified that his mother would later move into the Applicants' house. The Applicants wanted a washroom next to her bedroom. Mr. Durante conceded that he never advised the Program that his mother would be moving in with the Applicants. He stated that both washrooms work properly.

The Architect said that placing the washrooms back to back would have changed the front elevation and would have increased the area by about 250 sq. ft.

8. Missing Basement Windows

The Sketch does not show a full layout for the basement. Mr. Durante said that the Santa Cruz brochure, exhibit 6, shows a window in the basement that was not provided.

The Architect testified that the window with French doors above it had to be omitted. People exiting through the French doors could be injured by stepping into its window well.

9. Furnace

Mr. Durante testified that the furnace is located in the basement about three to four feet away from the back wall and about two feet away from the side wall. He stated that both front bedrooms are cold in winter and hot in summer. Counsel for the Applicants asked for a secondary assist mechanism to be installed in the ductwork to help move air from the furnace area to the front of the house.

The Sketch does not show the location of the furnace. The Santa Cruz brochure, exhibit 6, and the Architect's production drawings, exhibit 9, show the furnace in a more central location, closer to the front.

The Builder stated that the heating contractor has the ultimate decision of where to place the furnace. A letter from Appleton H.V.A.C. Inc. to Rutherford New Generation Investments dated June 22, 2001, tab 23 of exhibit 4, states the following: "In the fall of the year 2000 we had found that two (2) heat runs had not been connected in the Basement and we rectified the problem. Also, at that time we did a heat balance and found that the system was working satisfactorily."

Mr. Durante stated that when the heating contractor connected the two runs in the basement, about two feet were taken away from the two larger garages. Mr. Stephens confirmed the presence of a 1'10" x 8'7" projection in the garages.

10. Trim

The Decision states that the builder installed 3" casing and 5 ½" baseboard on the main floor and in the upper hall area and 2 ¾" casing and 4 ¼" baseboard in the bedrooms and washrooms on the second floor. Mr. Durante complained that the larger trim package should also have been installed in all the bedrooms.

Tab 8 of exhibit 4, an Extra Schedule, specifies an "upgraded trim package" at a price of \$2,500. A cost sheet, tab 8B of exhibit 4, states that the cost of upgraded trim throughout is \$2,500. A notation on the cost sheet states the following: "The upgraded trim throughout price shown here would've been honoured if they took all the other items on this list. They did not. We have 3 ways of upgrading trim...1st and 2nd floor throughout (avg. pr. \$2,800)". Mr. Stephens stated that builders discount prices based on the volume of extras ordered.

11. Kitchen and Master Bedroom are Narrower (All Rooms Have Been Reduced Approximately 267 Sq. Ft.)

Mr. Durante stated that the kitchen is 12' x 11' instead of the 12' x 14' indicated on the Sketch. The Applicants complain that the master bedroom is one to two feet narrower.

At tab 12 of exhibit 4, Mr. Durante submitted a spreadsheet with a calculation of 268 sq. ft. as the reduced area of the specified rooms. Mr. Durante stated that the square footage of the unmodified Santa Cruz was 4,124 sq. ft. and that the Applicants received a house with 3,568 sq. ft., which is 556 sq. feet less. Mr. Durante also said that the Applicants expected to get a house with 3,800 to 4,000 sq. ft. Mr. Rinomato testified that the house was priced based on an area of 3,400 sq. ft. On cross-examination, Mr. Durante stated that the Applicants never complained to the Program about the reduced total area of the house.

The Architect said that the dimensions of the kitchen were modified because the outside walls were fixed and the rear wall was set. He stated that the master bedroom width is set from the ground floor plate that was done first.

LAW:

The *Ontario New Home Warranties Plan Act*, R.S.O. 1990, Chapter O.31, states the following:

13. (1) Every vendor of a home warrants to the owner,

(a) that the home,

(i) is constructed in a workmanlike manner and is free from defects in material,

(ii) is fit for habitation, and

(iii) is constructed in accordance with the Ontario Building Code;

(b) that the home is free of major structural defects as defined by the regulations; and

(c) such other warranties as are prescribed by the regulations.

(3) The vendor of a home shall deliver to the owner a certificate specifying the date upon which the home is completed for the owner's possession and the warranties take effect from the date specified in the certificate.

(4) A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed.

14. (3) Subject to the regulations, an owner of a home is entitled to receive payment out of the guarantee fund for damages resulting from a breach of warranty if,

(a) the person became the owner of the home through receiving a transfer of title to it or through the substantial performance by a builder of a contract to construct the home on land owned by the person; and

(b) the person has a cause of action against the vendor or the builder, as the case may be, for damages resulting from the breach of warranty.

14.(7) The Corporation may perform or arrange for the performance of any work in lieu of or in mitigation of damages claimed under this section.

16. (3) Where a person or owner gives notice in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and may by order direct the Corporation to take such action as the Tribunal considers the Corporation ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Corporation.

Regulation 892 under the Act adds the following

18.(1) Every vendor of a new home warrants to the owner that the vendor shall make no substitutions in those items of construction or finishing for which the purchaser is entitled to make selection pursuant to the purchase agreement without the written consent of the purchaser.

(2) Subsection (1) does not apply where,

(a) the purchaser, having been notified, does not make a selection within thirty days after executing the purchase agreement or within such other time period as may be agreed; or

(b) an item selected under clause (a) is not available and the purchaser does not make a selection within seven days of receiving written notice from the vendor or within such other time period as may be agreed that the item is unavailable.

(3) Every vendor of a new home warrants to the owner that where the purchaser fails to make a selection under clause (2) (a) or (b) that the vendor will make a selection on the purchaser's behalf that is of equal or better quality than the original selection as set out in the purchase agreement.

19. Every vendor of a new home warrants to the purchaser that, where the vendor makes a substitution with respect to an item that is referred to in the purchase agreement that is not an item that is to be selected by the purchaser, the item will be of equal or better quality than the item referred to in the purchase agreement.

20. A claim may be made under subsection 17 (1), subsection 18 (1) or section 19 only where,

(a) the transaction closes; and

(b) the claim is made by an owner within one year after the date upon which the home is completed for possession.

CASELAW:

In *Gallo (Re)*, [2002] O.L.A.T.D. No. 49, it was necessary to relocate the furnace to comply with the Ontario Building Code and to enhance the operation of the equipment. The Tribunal found

that "item" in section 19 of Regulation 892 under the Act and the requirement that it possess "equal or better quality" implies a material thing rather than its location.

The Tribunal also dealt with the Applicant's complaint that the foyer closet was too small to accommodate full-length coats. The Tribunal found that the size of the closet is not a warranted matter unless it was not constructed in a workmanlike manner. The Tribunal noted that there was no evidence that space for a full-length closet was available but ignored.

APPLICATION OF LAW TO FACTS:

The Tribunal finds that the front elevation and the floor plans, three pages in total, the Sketch, are a part of the agreement of purchase and sale. The Tribunal accepts the testimony of Mr. Durante that the three pages were attached to the Agreement when it was signed. Further, if the three pages were not part of the Agreement, the identification of the dwelling as "Santa Cruz - modified" would be ambiguous. The intention of the parties was to treat the Sketch as part of the Agreement. The Builder used the Sketch to price the house. Later the Builder sent the Sketch to the Architect with instructions to prepare production drawings.

The third garage is too small for the Applicants' car. The garage can only be used for storage. It is defective and is not constructed in a workmanlike manner. Alternatively, the vendor made a substitution with respect to an item that is referred to in the purchase agreement, on the Sketch, and the substituted item, the smaller garage, is not of equal or better quality than the original item. The Architect testified that the back of the garage can be moved back two feet. The Tribunal allows the Applicants' claim regarding the third garage.

The Applicants claim a door to the outside in the laundry room. The Architect testified that he had to relocate appliances within the laundry room and then put in a window rather than a door. According to the Architect, the Sketch, the design provided by the Applicants was defective. Also, Mr. Durante testified that moving the third garage back is more important to the Applicants than having a door in the laundry room. Once the garage is moved back there does not appear to be room for a door. The laundry room window will have to be moved back. The Tribunal disallows the claim for a door in the laundry room.

The Program conceded that the living room pillars should have been installed. No pillars at the entrance to the family room are shown on the Sketch or mentioned in the Agreement. Such pillars are shown on the Santa Cruz Villas brochure, but the brochure is not a part of the Agreement. The Tribunal finds that the Applicants are not entitled to pillars at the entrance to the family room. Mr. Durante stated that the dining room pillars are not an issue being dealt with at the hearing. In any event, there is no statement in the Agreement or on the Sketch that the dining room pillars should go to the ceiling. Only the Applicants' claim regarding the living room pillars is allowed by the Tribunal.

The Applicants claim a six-foot bathtub against the rear wall of the master bedroom washroom. The Architect testified that there were problems with the layout of the washroom as shown on the Sketch. The Builder testified that the angled bathtub is more expensive than the

straight bathtub shown on the Sketch. The Builder made a substitution, but the substituted item is of equal or better quality than the item referred to in the Agreement. This claim is disallowed.

Two windows shown on the Sketch next to the family room fireplace are missing. The Builder substituted a wall, an item that the Tribunal finds not to be of equal or better quality than the windows. The Builder estimated the cost of putting in the two windows to be \$1,200. The Tribunal allows the Applicants' claim for these missing windows. Similarly, a window is missing in the master bedroom, which appears on the Sketch and on the Architect's production drawings. Again, the Builder substituted a wall, an item of lesser value, for the window. The Tribunal allows the Applicants' claim for the master bedroom window.

The Applicants claim that the main family room window should be a bow window. The window shown on the Sketch is either a bow window or a bay window, not a straight window. The Tribunal finds that the Builder made a substitution and that the substituted item is not of equal or better quality than the window referred to in the Agreement. The Tribunal allows this claim.

The Applicants claim damages for the change in positioning the washrooms. The Sketch indicates one washroom on the east side and one washroom on the west side of the second floor of the house. There was a defect in the design provided by the Applicants. The Architect stated that placing the washrooms side by side would have changed the front elevation that was subject to architectural control. Alternatively, as decided in *Gallo (Re)*, O.L.A.T.D. No. 49, a change in location is not a substitution. In addition, no damages were proved by the Applicants. The Tribunal disallows the Applicants' claim.

The Applicants claim missing basement windows. The Sketch shows a basement window under the French doors. The Architect omitted that window because of danger of injury by stepping into the window well. The design provided by the Applicants was defective in this instance. The Applicants also claim a basement window on the west side of the house. The Sketch does not show such a window. The Agreement does not mention it. The Tribunal denies this claim.

The furnace was not put into the original location. The Applicants claim that, as a result, the furnace is not operating properly. The heating contractor found that the system was working satisfactorily. The Tribunal prefers the more-informed opinion of the contractor and disallows the claim.

The Applicants claim upgraded trim throughout the house. The Extra Schedule specifies an "upgraded trim package" at a price of \$2,500. The trim package was priced by the Builder. The cost sheet at tab 8B of exhibit 4 states that the cost of upgraded trim throughout is \$2,500. There is no suggestion that the trim should be provided only in a part of the house. Any ambiguity is the result of the Builder not specifying the location of the trim. The vendor substituted an item of lesser value, smaller trim, in the bedrooms and washrooms of the second floor. The Builder estimates the cost of putting in the larger trim as \$1,500. The Tribunal allows this claim.

The Applicants claim that the kitchen and master bedroom are narrower than shown on the Sketch. The Architect testified that the design provided by the Applicants for the rooms was defective and had to be altered. Further, no damages were proved. The Tribunal disallows the claim.

The Applicants also claim that the total square footage of the house is less than that suggested by the Sketch. On cross-examination, Mr. Durante testified that the Applicants never complained of this problem to the Program. A written complain must be received by the Program within one year after the date upon which the home is completed for possession. In addition, the Builder testified that price for the house was based on providing 3,400 sq. ft. and that such area was provided. The Tribunal disallows this claim.

DECISION:

Accordingly, by virtue of the authority vested in it under section 16(3) of the *Ontario New Home Warranties Plan Act*, the Tribunal directs the Ontario New Home Warranty Program to allow the Applicants' claim in part as follows:

- 1) The third garage is to be moved back two feet and the laundry room window is to be moved back if necessary.
- 2) Living room pillars are to be installed.
- 3) A bay window is to be installed in the family room to replace the existing straight window.
- 4) The missing window in the master bedroom is to be installed.
- 5) \$1,200.00 is to be paid to the Applicants regarding the two missing windows next to the family room fireplace.
- 6) \$1,500.00 is to be paid to the Applicants regarding the trim.

The Tribunal directs the Ontario New Home Warranty Program to disallow the remaining Applicants' claims.

LICENCE APPEAL TRIBUNAL

John Ort, Presiding Member

STEWART GRAHAM AND TOINI JARVINEN

**APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE ONTARIO NEW
HOME WARRANTIES PLAN ACT**

**TO ALLOW A PART OF A CLAIM AND TO DISALLOW A PART OF
A CLAIM**

TRIBUNAL: JEAN-MARC LEFEBVRE, Q.C., Vice-Chair

APPEARANCES:

NETANUS RUTHERFORD, Counsel for the Ontario New Home
Warranty Program,
HEATHER MAYHEW, Manager for the Ottawa branch of the Ontario
New Home Warranty Program
TOINI JARVINEN, Applicant on her own behalf and on behalf of Stewart
Graham

DATE OF

PRE-HEARING: September 23, 2002

By Teleconference

ORDER

This pre-hearing is a continuation of a prehearing before this Tribunal held on July 18, 2002.

At that time, the Ontario New Home Warranty Program (hereinafter called "the Program") had sought an adjournment of that prehearing on the basis that the Applicants and the Program were actively pursuing efforts to resolve the issues being the subject matter of the appeal, and on the further basis that work which it had undertaken on the premises in question was ongoing.

A mutual arrangement whereby the Program would perform work at the Applicants' premises and would thereafter conduct an "**Air and Settled Dust Sampling**" report was already in place at the time of the original pre-hearing and the work was to be completed in July 2002.

Counsel for the Program advised that it had now provided that Applicants and the Tribunal with a **Mold Assessment and Sampling Report**, prepared by Jacques Whitford Environment Limited (hereinafter called the "Whitford report"). Ms. Jarvinen confirmed that the Applicants had received the report on Friday evening, September 20, 2002. She indicated that the report was of a technical nature and that it needed to be reviewed by her own expert, Dr. Gunter

Riedel, a doctor of physics associated with Health Canada. She indicated that she was unable to assess the report herself, because it dealt with matters unfamiliar to her.

The Whitford report, previously mentioned, was the result of the assessment and samplings of the air taken at the Applicants' residence following the work conducted at the premises in July 2002.

Counsel for the Program seeks an order, today, which would compel the Applicants to either permit the Program to send in the original contractor to do more work at the premises or, in the alternative, the Applicants would be required to secure three estimates from separate contractors who would do the work and the Program would select which one would be doing the work (at the Program's cost), indicating that it would probably be selecting the contractor providing the cheapest estimate. The Applicants resisted the suggestions on the basis that the original contractor had damaged the residence during previous attendances to conduct work and was no longer welcome. The Applicants were also unwilling to permit the Program to select who would perform the remaining corrective works. This Tribunal declined the request for the order, sought by the Program, on the basis that the previous prehearing had already dealt with the matter and a terminal date for performance of the works had already been the subject of a decision of this Tribunal at the previous prehearing, which set the deadline at July 25, 2002.

This Tribunal canvassed the parties to ascertain what persons would be in attendance and to determine who would be appearing as witnesses at the hearing:

The parties who will likely be appearing for the Applicants are:

1. & 2. The Applicants;
3. Kim Melanson, as counsel for the Applicants, or some other member of her law firm;
4. Dr. Gunter Riedel, as an expert witness;
5. The expert who presented a report at the previous CRAT hearing who dealt with this matter a few years ago on behalf of the Applicants.

The parties who will likely be appearing for the Program are:

1. Counsel for the Program;
2. Heather Mayhew, Ottawa area manager for the Program;
3. & 4. Melissa Nadeau and/or Marie Graveline, as an expert witness to deal with

the Whitford report;

5. Paul Picard, of the Program;
6. Stephen Hibbert, on behalf of SHREC, the contractor who did the work at the premises

The Tribunal alluded to Rule 6 of the Tribunal's rules dealing with disclosure requirements and with the requirements to be complied with where a party intends to rely on, or refer to the evidence of an expert witness. The Tribunal also alluded to the specific time frame requirements which had to met by each of the parties. Ms. Jarvinen professed a lack of familiarity with the rules and was directed by this Tribunal to the availability of the rules by calling the Licence Appeal Tribunal to secure a copy thereof, and this Tribunal also wishes to indicate that the rules and many other brochures, outlining procedures and requirements, are also available at the Tribunal's website www.lat.gov.on.ca. It is important that all parties become familiar with the rules and that the time delays and prescriptive requirements of the rules be complied with in all respects, in order to expedite the conduct of the hearing.

The following issues were listed by each of the parties as matters which would be raised at the hearing:

Applicants' issues:

1. The basement of the premises needs to be cleaned.
2. Damages have been done to the steps on the stairway leading to the basement by the Program's workers when they attended at the premises.
3. The basement floor needs to be fixed (sealing and re-painting) at a cost of approximately \$500.00.
4. Mold has to be removed from the basement and from the second floor spare bedroom of the residence. Ms. Jarvinen indicated that she had secured a quote from "O'Reilly Bros." (approximately \$11,000.00 plus G.S.T. and taxes).
5. House furnishings to a value of approximately \$11,000.00 need to be replaced.
6. Contaminated materials presently stored in the basement in plastic bags (containing household items) need to be disposed of.
7. A number of household items, such as building materials and other things, have been lost or discarded by the Program's workers (a list will be compiled).
8. Hydro costs, involving use of the Applicants' utilities for a period spanning thirty months, to power tools such as sump pumps, jackhammers, etc... are being sought at the rate

of approximately \$100.00 per month, for 30 months, and the Applicants are seeking interest accruing thereon as well.

9. Compensation is being sought for damages which were caused to the Applicants' vehicle by the Program's workers when they were in attendance at the Applicants' residence (approximate amount \$1,000.00).
10. Punitive damages are sought against the Program, to compensate the Applicants for approximately 150 days which they had to take off work when various inspectors and experts were in attendance at the premises and when works were conducted by the Program.
11. Legal fees, currently around \$7,000.00, plus additional anticipated legal fees for preparation and appearances at the hearing (approximately \$5,000.00).

The Program's issues:

1. The Program believes that the Whitford report substantiates its position that the cleaning of the premises has been substantially completed, except for residue of mold in one bedroom upstairs and in the basement, both of which are minor in nature.
2. The Program has been prepared to return to the premises to conduct the residual work and to retest, however, access to the premises has been denied by the Applicants. An alternative has been suggested involving the securing of three estimates from other contractors who could do the work, and the Program would select one of these; the alternative solution has been rejected by the Applicants.
3. The Program intends to contest some of the items raised, as issues, by the Applicants, on the basis that they may be outside the framework of the legislative enactments under review and beyond the *Ontario New Home Warranties Plan Act* and its regulations. The Program maintains that the appeal must be governed by case law and legislation rather than under common law rules.

It is not within the scope of this prehearing to determine whether any of the specific issues raised by the Applicants or by the Program are matters which can be adjudicated by this Tribunal. It is important, however, that each specific issue raised fit within the confines of the statutory enactments under which the appeal is proceeding and be within the jurisdiction of this Tribunal. In an effort to expedite the hearing, the parties are therefore urged to confine each issue to the particular point of law to be considered.

Ms. Jarvinen indicated that she expected that the Applicants' presentation at the hearing would last at least 4 hours. It is not possible to ascertain the duration of the hearing with any degree of certainty and the Tribunal therefore reserves the 3 days originally allocated for the hearing which will be held on November 13, 2002 with November 14 and November 15, 2002 reserved for continuation thereof, if and as necessary.

The Tribunal makes the following Orders:

1. The parties to the hearing are the Applicants and the Program.
2. The parties to the hearing shall fully comply with the requirements of disclosure of documents or things as set forth in rule 6.3 of the Rules of Practice of the Tribunal and shall also fully comply with the disclosure requirements set forth in rule 6.4 of the Rules of Practice of the Tribunal dealing with expert witnesses.
3. The hearing shall be held on November 13, 2002 with November 14, 2002 and November 15, 2002 reserved for continuation thereof if and as necessary.

LICENCE APPEAL TRIBUNAL

Jean-Marc Lefebvre, Q.C., Vice-Chair

RELEASED: October 9, 2002

JOSEPH COUSE AND DIANA PLUMPTON

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE *ONTARIO NEW
HOME WARRANTIES PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL: TERENCE A. WARDROP Q.C., Vice Chair.

APPEARANCES:

JOSEPH COUSE, on behalf of himself and Diana Plumpton,
Applicants,

CAROL STREET, Counsel for Ontario New Homes Warranty
Program, Respondent.

M. COHEN, Counsel on behalf of Townwood Homes Limited,
Added Party.

DATE OF
HEARING: August 21, 2002

Toronto

DECISION AND ORDER

BACKGROUND:

This is an appeal by Joseph Couse and Diana Plumpton (the "Applicants") pursuant to their Request for a Hearing dated May 1, 2002, (the "Notice of Appeal") to the Licence Appeal Tribunal (the "Tribunal"), from a decision of the Ontario New Home Warranty Program (the "Program") which denied their claim in its Decision Letter dated April 17, 2002, (the "Program's Decision"). The Applicants are appealing the Program's decision pursuant to Section 16 of the Ontario New Home Warranties Plan Act (the "Act"), R.S.O. 1990. Ch. 0.31 and base their claim on the provisions of Section 13(1) and clause (b) of Section 14(1) of the Act.

The Applicants, by a notice to Townwood Homes Limited dated July 14, 1999, a copy of which was sent to the Program, claimed that the vendor/builder, Townwood Homes Limited (the "Builder") was in breach of several of its warranties to construct the new home at 37 Jack Rabbit Crescent, Brampton, Ontario, which it contracted to build on Lot #64, Plan #43M-1283 in a workmanlike manner and free from defects in material. The Agreement of Purchase and Sale was entered into between the Builder, as vendor, and the Applicants, as purchasers, dated January 16th, 1998 (the "Agreement") and the

transaction contemplated in the Agreement was closed pursuant to its terms on September 8, 1998. The predelivery inspection of the new home took place about two weeks prior to the closing of the transaction in late August, 1998. A Conciliation Inspection Report was issued by the Program on September 15, 1998, which listed some sixteen items of complaint which were deemed covered under warranty by the Program and twenty-three items deemed not covered under warranty.

Some of the correspondence, reports and documentation between the Applicants, the Program and the Builder since the date of possession of the new home are contained within the "BOOK OF DOCUMENTS OF THE ONTARIO NEW HOME WARRANTY PROGRAM" entered as Exhibits #4 at the hearing, and further documentation is contained in the Notice of Appeal marked as Exhibit #2. Included in these Exhibits is a copy of the Program's Decision, the Notice of Appeal, the Agreement and the original complaint by the Applicants.

A prehearing consultation was scheduled and heard by the Tribunal on July 8, 2002, from which a prehearing Order was released dated July 11, 2002, listing only three issues to be heard at this hearing.

At the hearing, one of the Applicants, Joseph Couse, gave evidence on behalf of the Applicants but, during a recess, his evidence was interrupted by brief settlement discussions between the Parties which yielded a resolution of the remaining three issues between the Parties.

Counsel for the Added Party stated that as a result of such discussions, in consideration of the payment to the Applicants of \$1,500 by the Program and \$2,000 by the Builder, a Full and Final Release would be executed by the Applicants and the Applicants "will shut down any web sites & will not erect any signs". This settlement was acknowledged by Counsel for the Program and by Joseph Couse on behalf of the Applicants. A copy of the Minutes of Settlement was filed at the hearing.

DECISION AND ORDER:

Subsequent to hearing from the Applicants, the Added Party and Counsel for the Respondent, the Tribunal gave an oral decision subject to the release of this written order.

Accordingly, this Tribunal, pursuant to the authority vested in it by section 9(4) of the Act:

1. Directs the Respondent to pay to the Applicants the sum of \$1,500;
2. Directs the Builder to pay to the Applicants the sum of \$2,000;

3. Orders that the Applicants "shut down any web sites" and refrain from erecting any signs which address any of the issues set out in the Notice of Appeal; and
4. Orders that the claims of the Applicants be dismissed due to the withdrawal by the Applicants of the Notice of Appeal.

LICENCE APPEAL TRIBUNAL

Terence A. Wardrop, Q.C.,
Vice-Chair

Released: October 9, 2002

MANDEV DEVELOPMENTS LTD.

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE *ONTARIO NEW
HOME WARRANTIES PLAN ACT*

TO REFUSE REGISTRATION

TRIBUNAL: SIMON DANN, Presiding Member

APPEARANCES: FRANK DiADAMO, Applicant, representing himself
KEN ROSENBERG, Counsel, representing the Registrar, *Ontario
New Home Warranties Plan Act*

DATES OF
HEARING: September 3, 2002 Toronto

REASONS FOR DECISION AND ORDER

This is a hearing before the Licence Appeal Tribunal ("the Tribunal") arising out of a Notice of Proposal issued by the Registrar under the *Ontario New Home Warranties Plan Act* ("the Registrar" and "the Act" respectively). The Notice of Proposal dated April 25, 2002 proposed to refuse registration of Mandev Developments Ltd., ("Mandev") under the Act.

BACKGROUND:

The Registrar under the Act proposed to refuse to renew the registration of Mandev. The grounds relied upon by the Registrar for the Proposal are set out below:

1. The applicant has failed or refused to:
 - (a) Provide security with respect to the construction and sale of units, requested of the applicant by letter dated February 13, 2002;
 - (b) Comply with a term and condition of registration to which the applicant agreed, dated February 13, 2002 requiring blanket security in the amount of \$100,000.00;
 - (c) Provide the outstanding amount owing for enrolment fee adjustments in the amount of \$4.50.

2. In failing or refusing to provide the above noted documentation, the applicant has contravened the following provisions of the Ontario New Home Warranties Plan Act, R.S.O. 1990, Chapter O.31, (the "Act") as amended, and Regulations:
 - (a) The applicant has failed to comply with section 9 of Regulation 892;
 - (b) Section 1.0.3 of Regulation 894 obliges the applicant to provide such information or material relating to the applicant's entitlement to registration as the Registrar may require and request;
 - (c) Section 7(1)(c)(i) and 8(1) of the Act allows the Registrar to refuse to register an applicant where, having regard to the applicant's financial position, it cannot reasonably be expected to be financially responsible in the conduct of its undertakings and where in the Registrar's opinion, the applicant is disentitled to registration.

EXHIBITS:

- EXHIBIT #1 Notice of Proposal to Refuse Registration dated April 25, 2002
- EXHIBIT #2 Notice Appeal Form, received May 15, 2002
- EXHIBIT #3 Respondent's Supplementary Book of Documents
- EXHIBIT #4 Respondent's Book of Documents
- EXHIBIT #5 Respondent's Book of Authorities
- EXHIBIT #6 Builder Bulletin 28 (Revised)
- EXHIBIT #7 Application for Renewal of Registration, Received November 22, 2001

FACTS

Opening Statement:

Mr. Ken Rosenberg, Counsel for the Registrar stated the Registrar had refused to register Mandev, as it had not provided the required security and was not in compliance with the terms and conditions of a registration agreement, which the Applicant had signed and agreed to in writing.

The Registrar's witnesses were Adil Darr and Sherri Budgell.

The evidence of Adil Darr is as follows:

Mr. Darr is a Chartered Accountant and holds the position of senior underwriting analyst for the Registrar. He completed his articling work with KPMG and now performs financial analyses to determine if builders are financially viable and any potential risks.

Mr. Darr referred to Builder Bulletin 28 (Exhibit 6) which reviews the various aspects of the assessments the Registrar carries out in his effort to "to ensure that registered

builders are able to meet all financial and warranty obligations ” and identified a number of documents that were used to perform the builder’s risk assessment (Exhibit 4, Tabs 1,2,3,4,5,6). Mr. Darr pointed to the differences between the Builder and Vendor Agreements (Exhibit 4, Tabs 7,8), which is signed by the builder, as outlining and clarifying each party’s obligations.

Once terms and conditions are set, a letter describing them is sent to the builder. Mr. Darr also confirmed that he reviews an average of 80 files a month.

Mr. Darr then identified the following Exhibit 4 documents in a review of correspondence between the Registrar and Mandev:

- Tab 9 Dec. 6, 2000 - Registrar's letter to Mr. DiAdamo requesting additional information with regard to registration renewal;
- Tab 10 January 16, 2001 - Registrar's letter advising Mr. DiAdamo he would refuse the renewal application if the he did not hear from Mr. DiAdamo by January 30, 2001;
- Tab 12 March 15, 2001 - Notice of Proposal to refuse to renew registration;
- Tab 14 April 4, 2001 - Registrar's letter requesting a certified replacement cheque for the amount of \$977.50 re 2 enrolments;
- Tab 15 July 4, 2001 - letter to Registrar from Harendorf, Lebane, Moss, Mandev’s accountants, advising that October 31, 1999 financial statements marked ‘Draft’, previously submitted, were final figures;
- Tab 16 July 6, 2001 - Supplemental Notice of Proposal advising the builder of additional grounds regarding two judgements against the company, in support of the March 15, 2001, Notice of Proposal

Mr. Darr testified that when a builder does not return a renewal form the registration will lapse, meaning the builder can not legally build or sell homes in Ontario and would require a completely new application, which would involve a new registration number.

Mr. Rosenberg asked the witness to clarify the meaning of the word “Pending” (Exhibit 4, Tab 9). Mr. Darr confirmed this to mean a ‘renewal’ application and that it was this application which had lapsed as the builder had not returned the 2001 renewal form.

The witness confirmed that the year 2000 renewal, which was originally due June 30, 2000, was not received until October of 2000.

Renewal for the 2001 year was also not received on time and when it was allowed to lapse, it was determined that a new application was required. On November 27, 2001, a refund cheque was issued to Mandev in the amount of \$321.00 as the builder’s registration had not been renewed on time and had therefore expired.

Consistent with application procedures, Mr. DiAdamo then signed new Indemnity, Builder and Vendor Agreement documents with the Registrar on November 27, 2001 (Exhibit 3, Tabs 7, 8, 9).

Mr. Darr stated that a subsequent request for financial information (Exhibit 3, Tab 11) was sent. This letter of November 30, 2001 included the request for a \$5,000 security payment for a new home located in 18 Golden Terrace Crt. Construction on this home had started prior to Mandev's enrollment with the Registrar. Therefore, as the builder was not currently registered, Mandev was building without registration.

The builder replied by letter (Exhibit 3, Tab 12) and offered the following information:

- he was not a new builder and that he did not believe security was required.;
- the Registrar should rely on the previous year's statements (for 1999) as the 2000 statements would be ready "within two weeks";
- tax bill/assessments that property held in trust for Mr. DiAdamo showed equity in excess of one million dollars; and
- Mr. DiAdamo's advice that the lien information the Registrar had received was not current or accurate (an additional information request by the Registrar and what was provided by the builder are contained in Exhibit 3, Tabs 13, 14, 15 including a confidential construction report in Tab 16 of the same exhibit book).

On January 7, 2002, the Registrar sent another letter (Exhibit 3, Tab 13) to the builder requesting:

- financial statements;
- notice that there was insufficient equity to support the existing and proposed homes; and
- supporting documentation to confirm that claims/liens had been resolved.

On February 13, 2002, the Registrar submitted a letter to the builder outlining the terms and conditions for a new registration and which specifically required a blanket security payment in the amount of \$100,000, due by March 29, 2002, and a security of \$30,000 from the sale proceeds of specified units, as well as a security of \$5,000 for any other individual units that had closed before March 29, 2002 (Exhibit 3, Tab 18).

The terms and conditions outlined in the letter were agreed to and signed by the builder.

Mr. Darr confirmed that Items 1(a) and 1(b) were resolved but the balance of the \$100,000 security was never received.

On April 25, 2002, the Registrar forwarded a Notice of Proposal to the builder to advise him that his application for registration had been refused due to a failure to comply with:

- provision of security re. construction and sale of units; and
- provision of security in the amount of \$100,000.

Mr. Darr added that a subsequent credit check was carried out in July 2002 and the report (Exhibit 3, Tab 27) was not favourable. As a result, the Registrar issued a

Supplemental Notice of Proposal stating “the Applicant cannot reasonably be expected to be financially responsible in the conduct of its undertakings” and noted that the builder has a number of judgements, collection claims, statement of claims and builders liens, a history of cheques returned marked “Insufficient Funds”, as well as a failure to indemnify the Registrar for claim payments. The Schedule A attachment to the Supplemental Notice of Proposal showed collection claims, statement claims, judgements and liens with a total of close to \$300,000. The report additionally shows 4 NSF cheque events (Exhibit 3, Tab 28).

Mr. Darr confirmed that homes at 18, 20, 22, 28 Golden Terrace were not registered.

In cross-examination of Mr. Darr he testified that:

- Mandev had not had any warranty issues;
- in 1999, Mandev was not required to provide security;
- the February 11, 2002 credit report (Exhibit 3, Tab 16) dealt with pre-2000 matters and the Equifax report (Exhibit 3, Tab 27) referred to the past 2 years;
- Mr. Darr’s confirmation that “trends are what (they) have to go by”;
- that the Registrar was aware Mandev was building and selling even though it did not have a valid registration; and
- that Mandev was allowed to close homes during this period as the Registrar received letters of direction from Mandev to ensure it received the payments required from each closing.

The evidence of Sherri Budgell is as follows:

Ms. Budgell has been with the Registrar for 14 years and is currently a Customer Service Representative located in the Sudbury office that deals with delayed closing and deposit refund claims. Her role does not require site visits and she completes “desk assessments”. Prior to joining the Registrar, Ms. Budgell was with Ontario Hydro and the Regional Municipality of Sudbury’s Building Department. Ms. Budgell stated she always encourages claimants to work with their builder in resolving any outstanding issues.

When asked about her process, Ms. Budgell explained that after reviewing a file and report she issues a desk assessment and as required, will send the builder a request to provide a refund to the claimant. If the builder does not do so, the Registrar will send out a breach of performance letter and pay the claimant out of the fund. Ms. Budgell said she handled about 200 files last year.

Ms. Budgell confirmed she has handled a total of four claims regarding Mandev and each claim is in the amount of \$10,000.00. She confirmed that three have already been paid out for a total of \$30,000.00. The fourth is currently in process.

Ms. Budgell stated she only spoke with the builder once after writing to request information about a refund claim (Exhibit 3, Tab 43). The builder telephoned her in

response and advised he was not paying the deposit back. Ms. Budgell encouraged him to submit information.

Ms. Budgell stated the builder called again to say he did not understand the form and that was the last she heard from him. Additional exhibits referenced were: Exhibit 3, Tabs, 36, 38, 39, 40, 41, 42, 44, 45, 46, 47, 49.

On May 31, having received no information from the builder to enable the Registrar to resolve the financial loss claim (Exhibit 3, Tab 50), Ms. Budgell wrote to the builder to advise him that he was in breach of "obligation to perform the contract" and that the Registrar would proceed to resolve the claim.

Mr. DiAdamo had no cross-examination questions.

The Applicant, Mr. DiAdamo, then provided the following testimony points on his own behalf:

- regarding 2001 renewal registration, Mandev sent in renewal forms September 31, 2001; he had thought that was all that was required;
- of the houses Mandev has and is building and selling, 3 have been sold and closed and 5 more are waiting to be closed; Mandev has been trying to close these houses since November but has been unable to do so due to no closing certificates;
- regarding the blanket security payment, Mr. DiAdamo said that on March 28, 2002 he telephoned the Registrar's office to advise he needed a little more time before he could provide the additional \$70,000 and was advised he could have an extension to the end of May;
- in June he telephoned the Registrar's office to again say there would be a further delay in submitting the funds and was advised that he was not a registered builder;
- the August 2002 closing certificates were signed by Mr. Darr and of the 12 houses built, 8 were occupied and 4 were not; and
- that he was willing to give the Registrar the \$70,000 and that the \$30,000 in refund payments could also be paid back if he could get all his houses closed.

On cross-examination by Mr. Rosenberg, the Tribunal heard Mr. DiAdamo confirm that he did not take issue with the 3 refund payments made by the Registrar.

To the direct question of could he make the security payment "today", as outlined in the conditions of registration, Mr. DiAdamo replied that he could not provide the Registrar with a \$70,000 payment as the money is in the houses which have not closed and that he did not have the money available in the bank.

When asked about the Registrar's letter of Final Notice (Exhibit 3, Tab 4), dated October 1, 2001, and the notice that Mandev had until October 15, 2001 to submit the required document, Mr. DiAdamo had no reply.

Mr. Rosenberg raised the issue of financial statements and the Tribunal heard that the last completed statements were the ones submitted October 2000 and that the 2001 year statements were being done now.

Closing Arguments

Counsel for the Registrar argued the evidence showed Mandev had been an enrolled builder but failed to renew and that the registration lapsed after passing the June 30, 2001 renewal date deadline.

Mr. Rosenberg stated the Registrar had been lenient with the builder and attempted to help with closings even after filing the Notice of Proposal. Mr. Rosenberg argued that while the builder had stated he did send his renewal form in on time, the only evidence the Registrar had on record was the application form stamped November 22, 2001 (Exhibit 7).

Mr. Rosenberg argued that “there has to be a finality to the administrative process” and that under oath, Mr. DiAdamo had testified he could not comply with the conditions of registration contained in the Registrar’s letter of February 13, 2002 (Exhibit 3, Tab 18). Mr. Rosenberg pointed to the financial statement for the year 1999 (Exhibit 4, Tab 4) and that it suggested the company had problems.

On the matter of “reasonable evidence”, Mr. Rosenberg referred to case law examples as found in the Respondent’s Book of Authorities, specifically Exhibit 5, Tab 5, pg 3, *Ontario (Registrar of Real Estate and Business Brokers) v. Vogelsberg (Ont. Div. Ct.), O.J. No. 226, DRS 94-07860*, and that despite the builder’s best intentions, the evidence shows “the respondent has carried on activities in contravention of the Act and regulations”.

Mr. Rosenberg asked the Tribunal to consider the builder’s history and referred to Tab 6, pg 2, *Ontario (Registrar of Real Estate and Business Brokers) v. Faccenda (Ont. Div. Ct.), O.J. No. 954, DRS 94-10620*, and “whether the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law...” and that clearly, Mandev was not in compliance with s.7(1)(a)(b) of the Act.

In his closing argument, Mr. DiAdamo argued that Mandev was “profitable yearly and able to look after its affairs”; that although there were trade claims and liens, the company was always able to deal with them.

Further, Mr. DiAdamo argued that Schedule A (Exhibit 3, Tab 28) contained duplicate claims and everything except for \$40,000 had been resolved. He concluded by stating that of the \$100,000 security, he is prepared to pay the additional \$70,000 as well as to pay back the refund payments made by the Registrar. He also pointed out that there has only been one conciliation report.

In redirect, Mr. Rosenberg argued there is no evidence that the balance of trade debts is only \$40,000 and that the \$100,000 security was a pre-condition to continue, “not a post-facto excuse”.

ISSUE:

Does the Registrar, *Ontario New Home Warranties Plan Act* have sufficient grounds to refuse the registration of the Applicant as a builder under the said Act?

THE LAW

Section 9 of Regulation 892 and Section 7(1)(c)(1), 8(1) of the Act, states as follows:

9. (1) Each applicant desiring registration under the Plan shall complete, execute, and deliver to the Registrar such form or forms of application as the Registrar may require from time to time.

9 (3) The applicant shall furnish to the Registrar:

...

3. Financial statements of the applicant and such other information relating to the applicant's financial affairs as the Registrar may require.

7. (1) An applicant is entitled to registration by the Registrar except where,

(c) the applicant is a corporation and,

(i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its undertakings,

Section 8(1) of the Act states as follows:

8. (1) Subject to section 9, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 7.

APPLICATION OF LAW TO FACTS:

The evidence shows:

- despite repeated requests for renewal form completion, the Applicant was overdue on the 2000 year registration completion;

- despite repeated requests, in 2001, the Applicant did not provide the financial information as requested by the Registrar in letters of November 30, 2001 (Exhibit 3, Tab 11) and January 7, 2002 (Exhibit 3, Tab 13);
- the builder did not assist or participate in resolving the refund claims from homebuyers; and
- the builder was unable to comply with the terms and conditions of a new registration, as set out in the Registrar's letter of February 13, 2002.

The Tribunal considers it to be of concern that despite the implications of this hearing to Mandev's ability to obtain registration, without which it cannot remain in business as a new home builder, Mandev had no substantiating documentation to submit as evidence in support of Mr. DiAdamo's claim that Mandev was "profitable yearly and able to look after its affairs".

With regard to Mandev's outstanding financial matters, Mr. DiAdamo argued that the credit history obtained by the Registrar was not current and that only \$40,000 out of a list totaling close to \$300,000 in claims and liens remained.

Mr. DiAdamo failed to present any evidence to substantiate this claim.

In regard to s.7(1)(a) and whether the Applicant can reasonably be expected to be financially responsible in the conduct of its undertakings, the fact that Mandev was unable to comply with the blanket security payment of \$100,000 in full, despite being given an extension from the end of March 2002 to the end of May, shows the Applicant did not have the financial ability to do so.

Mr. DiAdamo's confirmed that he could not provide the Registrar with a \$70,000 payment as he did not have the money available in the bank.

The Tribunal found this testimony disconcerting in its potential impact to the Registrar, specifically in consideration of the fact that the Registrar owes a duty to consumers and to the general public to ensure that only those builders who can demonstrate financial responsibility in the conduct of their undertakings are allowed to participate in the industry

The Tribunal also takes note of the fact that Mandev has failed to indemnify the Registrar and hold him harmless with respect to 3 refund claim payments of \$10,000 each, with a 4th still in process.

In summary, the Tribunal believes the Registrar is entitled to expect and receive timely disclosure of an applicant's financial details if that applicant is seeking approval to construct housing which, of necessity, exposes the warranty program to potential liability for claims. In the absence of an acceptable explanation, failure to provide such disclosure may in itself be capable of constituting reasonable grounds for the Registrar's

belief that the Applicant will not be financially responsible in the conduct of its undertakings.

The further inability of the builder to satisfy the security payments required in the terms and conditions of registration, as well as the builders confirmation that Mandev did not have the funds to make the outstanding payments, seriously questions the ability of the builder to withstand unexpected circumstances or ensure that the company has the financial ability to meet its contractual and warranty obligations.

DECISION:

Accordingly, by virtue of the authority vested in it under section 16(3) of the *Ontario New Home Warranties Plan Act*, the Tribunal directs the Registrar, *Ontario New Home Warranties Plan Act* to refuse the application for registration.

LICENCE APPEAL TRIBUNAL

Simon Dann, Presiding Member

Released: October 11, 2002

NATIONAL FIBRES LTD. AND
P.S. SANDHUS AND ASSOCIATES LTD.

Appeal under section 50. (1) of the *Highway Traffic Act* R.S.O. 1990, Chapter H.8 as amended (the "Act") from the Suspension and Seizure Order of the Deputy Registrar pursuant to section 47(1) of the Act.

TO APPEAL A SUSPENSION AND SEIZURE
ORDER ISSUED BY THE DEPUTY
REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: BRIAN MAROTTA
Presiding Vice-Chair

APPEARANCES: PAUL GILL
Applicant Unrepresented

PATRICK MOORE
Counsel for the Respondent

DATES OF HEARING: September 18 and 19, 2002 Toronto

REASONS FOR DECISIONS

An oral hearing was held on September 18 and 19, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50. (1) of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Suspension and Seizure Order imposed by the Deputy Registrar pursuant to section 47(1) of the HTA.

BACKGROUND:

This is an appeal under section 50(1) of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Deputy Registrar of Motor Vehicles (the "Registrar") issued a Notice of Suspension and Seizure on March 4th, 2002.

On March 19th 2002, the Applicants had an opportunity to make submissions at a meeting with the Deputy Registrar.

As a result of that meeting, the Deputy Registrar issued the following suspension and seizure order on May 22nd, 2002:

SUSPENSION AND SEIZURE ORDER

WHEREAS a Notice of Suspension & Seizure dated the 26th day of April, 2001 was issued proposing a 30 day suspension of the CVOR certificate issued to National Fibres Ltd. (135-961-490) and P.S. Sandhus & Associates Ltd. (125-174-646) and thereafter until all fines were paid and suspension and seizure of plate portion of permits and number plates;

AND WHEREAS provided in the notice, you had the opportunity to make submissions at a meeting with the Deputy Registrar on the 19th day of March 2002, to show cause why the suspension and seizure order should not be issued;

AND WHEREAS I have considered your submissions, your safety record, your history of and current unpaid fines, I remain concerned for highway safety;

NOW THEREFORE IT IS ORDERED that pursuant to Section 47 & 47.1 of the Highway Traffic Act that as of 29th day of May, 2002, CVOR certificate #'s 135-961-490 and 125-174-646 and the plate portion of permits for all commercial motor vehicles and trailers issued to National Fibres Ltd. & P.S. Sandhus & Associates Ltd. be suspended for 14 days and thereafter until all fines are paid and the plate portion of permits, or if issued by a jurisdiction other than Ontario, the permits, and the number plates be seized.

The Applicant filed an appeal of this Suspension and Seizure Order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 filing fee.

PRELIMINARY MATTERS

At the outset of the hearing, Mr Paul Gill, representing both Applicants, advised the Tribunal that P.S. Sandhus & Associates Ltd. was no longer carrying on business. He had authority to speak for the company and it was withdrawing its appeal.

Counsel for the Registrar asked that the Tribunal confirm the Suspension & Seizure Order of the Applicant, P.S. Sandhus & Associates, and Mr. Gill had no objection to that request.

Counsel also advised that the Register would refer to the safety record of P.S. Sandhus, as it was a related company to the Applicant National Fibres Ltd.

ISSUES:

Should the Tribunal confirm, modify or set aside the decision of the Registrar to issue a suspension and seizure order for 14 days?

FACTS:

The Tribunal heard from Ms. Bernadette McKenna, Carrier Safety Rating Administrator, with the Ministry of Transportation. It was her duty to review CVOR files referred to her from a CVOR Analyst for possible sanctions. Prior to that she was a CVOR Analyst who monitored the CVOR system concerning operators safety and performance and before that she was a driver examiner.

She stated that the objective of the Ministry of Transportation is to monitor carriers to ensure that they comply with the provisions of the Act and Regulations. She explained how the CVOR rating system operated and the point system attributed to each infraction. She showed how this was all set out in the Ontario's Carrier Safety Rating and Commercial Vehicle Operators Registration System Public Guideline.

The goals of the CVOR system are to promote safe operation of commercial motor vehicles as defined by the Act. The CVOR system monitors a two-year time frame based upon certain computer data, which is updated regularly and entered into the CVOR system. The updating of the system is a continual process.

With the CVOR system, a threshold limit is established by comparing the record of the CVOR holder with operators of comparable fleet size. The threshold limit of the applicant was therefore adjusted to compare with operations of a similar fleet size.

When the CVOR holder reaches 35% of the threshold, a warning letter is sent out. At 65% of the threshold, the holder is put in an audit stage. At 80% of the threshold, the operator reaches an interview stage and at 100% of threshold the sanction stage is triggered.

The Minister's actions are discretionary and can be taken at any stage where the safety of the public is of concern.

The system works upon a point rating system. An example is that convictions are rated from 0 to 30 points for violations with the more serious violations having the higher points assigned to them. The accidents are rated on a range from 0 to 12 points depending upon the seriousness and the driver impropriety involved. The out of service (OOS) has a two-point maximum if two OOS items are reported on a vehicle inspection.

Ms. McKenna produced the CVOR Abstract of the Applicant, which set out all accidents, convictions and inspections.

The applicant became a CVOR holder in July, 2000 under the CVOR certificate 135-961-490. This was only one week after P.S. Sandhus & Associates ceased operating.

In February, 2002, Ms. McKenna did an analysis of the CVOR record of the Applicant since it obtained its CVOR Certificate in July 2000. This period was less than the normal two-year period covered by an analysis, however the Applicants record required an earlier review. This was forwarded to the applicant along with all supporting documentation.

The analysis showed that the applicant had been involved in eight accidents in the period from July 18 2000 to January 18 2002.

Point values were assigned to some of these events in accordance with the tables in the Ministry's CVOR Guideline. Not all events on the record were point able.

The Applicant's violation rate was determined by calculating the number of points in each category by the number of vehicles and the number of months. There was no dispute in this case about the accuracy of the Ministry's records or calculations.

The Applicant's violation rates were as follows:

Accident	– 215.7%
Conviction	– 86.7%
Inspections	– 24.9%
Overall	– 135.8%

Ms. McKenna testified that this was a high overall violation rate. The Ministry is concerned whenever a carrier's violation rate exceeds 35%.

The Safety Net Report from January 18, 2000 to January 18, 2001 showed a 16.7% OOS. From the period January 19, 2001 to January 18, 2002, the Safety Net Report showed 56.6% OOS, indicating that the out of service rate had increased dramatically.

An ICON Report indicated that the Applicant, National Fibres Limited owed \$1,003.75 in unpaid fines and that P.S. Sandhus & Associates Inc. owed \$1,125.00 in unpaid fines.

Jatinder Sandu held the position of Vice President of P.S. Sandhus & Associates Inc. That Company's violation rate exceeded the threshold rate established for a two-year period in its last six months of operation.

MTO enforcement had advised that drivers from P.S. Sandhus & Associates Inc. were producing a letter at roadside inspections allowing National Fibres to utilize their CVOR and operating authorities. Galaxy Freightways do not have operating authorities or a CVOR in Ontario. Information obtained indicated that Galaxy Freightways is now a division of National Fibres Ltd. and that P.S. Sandhus & Associates Inc. ceased operations.

National Fibres Ltd. and P.S. Sandhus & Associates Inc. had the same address in Surrey, British Columbia and National Fibres Ltd. commenced operation the same week that P.S. Sandhus & Associates Inc. ceased operation. Jatinder Sandhu who held the position of Vice President with P.S. Sandhus & Associates Inc. was the President of

National Fibres Ltd. and Navjot Gill (the wife of Paul Gill) was the Secretary, according to information received from the B.C. Registrar General.

According to the Commercial Vehicle Operators Registration Certificate application of National Fibres Ltd. signed on March 27, 2002, the President is listed as Navjot Gill and the application signed by Navjot Gill as President. A copy of the application was faxed on the cover sheet of Galaxy Freightways.

A Corporate Search for Galaxy Freightways on July 17th, 2002, showed Harinderpal S. Gill as an officer and director and Parminder Singh Sandhu as President. The Corporate Search of National Fibres Ltd. showed Navjot Gill as officer and Director and Jatinder Singh Sandhu as President.

On March 4, 2002, a Notice of Suspension and Seizure for thirty days was sent by courier and fax to National Fibres Ltd. and P.S. Sandhus & Associates Ltd. to the same address in Surrey, British Columbia. Accompanying the Notice were the following: Commercial Vehicle Operator Record;

1. Analysis dated February 2002;
2. Safetynet Inspection Reports;
3. Inspection template;
4. Accident Report;
5. Accident Template;
6. Ontario's Carrier Safety Rating and Commercial Vehicle Operators Registration System Public Guidelines.

As a result of the Notice, a meeting was held at the Ministry of Transportation on March 19, 2002 with the Deputy Registrar, the Manager Carrier Safety Rating and Ms. McKenna, Carrier Safety Rating Administrator. Paul Gill was present as Operations Manager representing National Fibres Ltd. and P.S. Sandhus & Associates Ltd.

At the show cause hearing, Mr. Gill explained how P.S. Sandhus & Associates Ltd. (dba Galaxy Freightways) was started by Parminder and Jatinder Sandhu with Mr. Gill working for the Company as owner/operator. Mr. Gill then became a partner and shortly after the partnership was dissolved due to financial problems. Mr. Gill and Jatinder Sandhu then purchased National Fibres Ltd., which started operating as National Fibres Ltd. dba Galaxy Freightways in July 2000. All equipment owned by P.S. Sandhus was sold to National Fibres and shortly thereafter Navjot Gill became the sole owner and president of National Fibres Ltd.

Paul Gill as operations manager explained how he was responsible for all vehicle maintenance, drivers, contracts and day-to-day operation of the business. George Simpson was full time safety manager responsible for hiring drivers, discipline, safety programs, log books and driver training. He also explained how verbal and written warnings were issued to drivers as a result of incidents involved on an Ontario highway. He provided two examples of such warnings.

At that time, Mr. Gill stated that the Company operated twelve Company owned and nine owner/operator vehicles. The vehicles operated along the Vancouver/California coast and Ontario to British Columbia. When asked why the application submitted

March 1, 2002 by Navjot Gill stated that the Company had thirty-two commercial motor vehicles, Mr. Paul Gill stated that Navjot Gill was his wife and she might have made a mistake in completing the application.

Mr. Paul Gill continued to explain the strict hiring practices at the Company, driver incentives for safety, the audit of all log books by George Simpson when a driver returned from a trip and warnings that were given to drivers found to be in non-compliance. A warning was issued for the first offence, a warning for the second offence and possible termination for a third offence.

Mr. Gill was presented with the outstanding fines of P.S. Sandhus & Associates Ltd. And National Fibres Ltd. And he assured the Deputy Registrar that the fines would be paid that week by his accounting department. He stated that if the Registrar would give him more time, the Company safety record would improve.

After considering the submissions, safety record and history of unpaid fines, the Deputy Registrar remained concerned for highway safety and issued the suspension and seizure Order dated May 22, 2002

Ms. McKenna asserted that the decision of the Deputy Registrar was correct as the safety record of the applicant had not improved and up until the first day of this hearing, when she last checked, none of the outstanding fines had been paid. She stated that all Company's were related because of common corporate officers and that the safety record of both P.S. Sandhus & Associates Ltd. And National Fibres Ltd. could be considered by the Ministry.

Ms. McKenna also stated that George Simpson, the safety manager for National Fibres Ltd. Was familiar to her as Mr. Simpson had been the safety manager for three other affiliated companies operating out of Surrey, British Columbia with CVOR licences in Ontario and all three companies had their Ontario CVOR certificates canceled for safety related reasons.

Ms. McKenna also gave evidence that if the fleet size of the Applicant had been reduced, the overall violation rate would be much higher as the analysis was done on the basis of the applicant having a fleet size larger than had been represented by Mr. Gill.

On cross-examination, the applicant established that the convictions were a result of driver impropriety and in most cases there was only property damage. The accidents were a result of driver fatigue, improper driver action, speeding or careless driving. Although Mr. Gill tried to establish that the OOS had declined since he had become operations manager, the evidence indicated that the rate of OOS had actually increased.

The only witness for the applicant was Mr. Paul Gill. He stated that he was Operations Manager for the applicant and was aware of all of the safety issues. Since he became Operations Manager he had fired the problem drivers and is very strict with his drivers on violations. The company had gone through some hard times but had learned from its mistakes.

He agreed with all of the Ministries findings and issues, both at the Show Cause Hearing and with what was said and presented to the Tribunal by the Ministry at this Hearing. He wanted the applicant to be given another year to show improvement.

On cross-examination, Mr. Gill admitted that he had told the Deputy Registrar in February 2002 that the fines would be paid off in a week. He admitted that they were still not paid but said the Company was having a cash flow problem. He again promised that they would be paid by next week.

Mr. Gill stated that the fleet size was now twenty-one vehicles, which was much less than the Ministry had in their records based upon the application completed by his wife. There were not thirty-two vehicles double shifted, but only twenty-one vehicles and not were all double shifted.

Mr. Gill also stated that his trucks were not spending as much time in Ontario as they use to as they are doing more traveling along the British Columbia and California coast. Mr. Gill was presented with the two hand written driver warnings, which he had submitted, to the Registrar as samples of the strict warnings that are given to his drivers. One warning to Krewal Sidhu was dated November 18, 2001 for tailgating. The form provides for the driver signing and acknowledging that he had received the warning. The driver's signature was dated March 14, 2002. He could not say when the driver got the warning or why he did not sign it until four months after its date. He suggested that Mr. Simpson may have warned him verbally and the driver did not get around to signing it until four months later.

The second warning, which was produced, was to a driver named Inderjit Rai and the date of the warning was October 28, 2001. The warning was for driving with a damaged air hose and failure to obey road signs. Mr. Gill could not explain how the driver was given a written warning for having a damaged air hose on October 28, 2001 when the record of conviction of the driver showed that the damaged air hose did not occur until November 9, 2001. He again suggested that Mr. Simpson may have warned him verbally and perhaps then added that to an earlier dated report.

In reviewing the present business of National Fibres Ltd. in Ontario, Mr. Gill stated that the ten trucks a week that he had traveling in Ontario during the time of the analysis was now down to three to five trucks a week maximum. The analysis was based upon 18% travel in Ontario and Mr. Gill stated that it was now less than half of that amount and may be as low as thirty percent of what it was before. Travel in Ontario was a very small part of the business of National Fibres Ltd. The Company had only one major customer in Ontario who gave him business on the west coast and loads between Alberta, British Columbia and California. He was concerned that if he could not service that customer in Ontario that the company may lose the business of that customer on the west coast. He could not produce any evidence of that other than his own suspicion.

Even though he was operations manager and in charge of vehicle maintenance, he was unaware of the dramatic increase in the rate of OOS in the last year since he had been in charge of maintenance.

Although the applicant was given the opportunity to produce witnesses in addition to himself, he chose not to do so.

LAW:

47(1) Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
 - (b) a driver's licence; or
 - (c) CVOR certificate, on the grounds of,
 - (d) misconduct for which the holder is responsible directly or indirectly, related to the operation or driving of a motor vehicle;
 - (e) conviction of the holder for an offence referred to in subsection 210(1) or (2); or
 - (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
 - (g) any other sufficient reason not referred to in clause (d), (e) or (f).
- (10) The Registrar may, at any time for misconduct or contravention of this Act, the Truck Transportation Act, the Public Vehicles Act or of any regulation thereunder by an owner or lessee of one or more motor vehicles or trailers for which permits have been issued by a jurisdiction or jurisdictions other than the Province of Ontario, order that the permit and number plates issued for the vehicle or vehicles be seized and any police officer or any officer appointed for carrying out this Act or the enforcement of the Public Vehicles Act or the Truck Transportation Act may seize the permit and number plates and deliver them to the Ministry which shall return them to the authority that issued them.

According to Section 22(e) HTA:

- 22(e) the Lieutenant Governor in Council may make regulations, governing the suspension or cancellation of CVOR certificates under subsection 47(1) or the imposition of a limitation on the feet size operated under a CVOR certificate under subsection 47(2).

The maintenance requirements under the HTA are found, inter alia, at Regulation 575 (commercial motor vehicle inspections); Regulation 577 (covering of loads); Regulation 587 (re brake push rod travel); Regulation 597 (gross vehicle weights); Regulation 625 (tire standards and specifications); Regulation 762/91 (safety inspections); Regulation 614 (security of loads).

The appeal comes to this Tribunal by virtue of s. 50(1) of the HTA which provides:

- 50(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.
- (2) The [Tribunal] may confirm, modify or set aside the decision of the Minister or Registrar.

Regulation 574, also addresses appeals to this Tribunal;

- 3(3) Upon receipt of a notice of appeal under subsection (1) the [Tribunal] shall forthwith notify the Minister or Registrar, as the case may be, and the person notified shall forthwith provide the [Tribunal] with all the relevant documents and other material in his or her possession.
- 3(6) At any hearing under this section, the person making the appeal has the right to attend and make representations and, subject to subsection (7), to adduce evidence respecting the appeal either personally or through counsel.
- 3(7) At any hearing under this section, the [Tribunal] shall hear only such evidence as was submitted to the Minister or the Registrar, as the case may be, respecting the matter in dispute."

APPLICATION OF FACTS TO THE LAW:

At the outset of the hearing, Mr. Gill representing P.S. Sandhus & Associates Ltd. withdrew the appeal of that Company. Accordingly, the suspension and seizure Order against P.S. Sandhus & Associates Ltd. is confirmed.

Paul Gill was a director of P.S. Sandhus & Associates Ltd. and now is a key person in the operation of National Fibres Ltd. Paul Gill was part owner of P.S. Sandhus & Associates and his wife Navjot Gill is now the sole owner of National Fibres Ltd. Both Companies have used the Galaxy name. When P.S. Sandhus & Associates Ltd. was in jeopardy of receiving a sanction because of its poor safety record, it ceased operations in July 2000 at nearly the same time National Fibres Ltd. commenced operations with the equipment of P.S. Sandhus & Associates Ltd.

The Tribunal finds that P.S. Sandhus & Associates & Ltd. and National Fibres Ltd. are related companies for the purposes of Section 17 (3) of the Highway Traffic Act. Both P.S. Sandhus & Associates Ltd. and National Fibres Ltd. have outstanding fines that have not been paid despite the warnings given and the promise of payment of Mr. Gill on behalf of the companies. The rate of accidents, convictions and OOS demonstrates that the continued operations of National Fibres Ltd. in Ontario may pose a serious threat to the safety of other users of Ontario highways.

The Tribunal finds that the Deputy Registrar had sufficient and reasonable grounds to believe that the past conduct of the applicant supported the belief that it would not operate commercial vehicles safely or in accordance with the law. The Tribunal also finds no reason to interfere with the extent of the sanction imposed by the Deputy Registrar.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50. (2) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the decision of Registrar of Motor Vehicles to issue a suspension and seizure order of CVOR certificates 135-961-490 and 125-174-646 and the plate portion of permits for all commercial motor vehicles and trailers issued to National Fibres Ltd. & P.S. Sandhus & Associates Ltd. for 14 days and thereafter until all fines are paid and

the plate portion of permits, or if issued by a jurisdiction other than Ontario, the permits, and the number plates be seized.

The suspension and seizure order will become effective on a date to be set by the Registrar.

LICENCE APPEAL TRIBUNAL

Brian Marotta, Presiding Vice-Chair

RELEASED: October 22, 2002

1085091 ONTARIO LIMITED o/a EMBASSY AUTO SALES SERVICES ("EMBASSY")
and MOHAMAD MANSOOR

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF
THE MOTOR VEHICLE DEALERS ACT

TO REVOKE REGISTRATION

TRIBUNAL: F. BRUCE FITZPATRICK, VICE CHAIR

APPEARANCES: NORMAN SWEDKO, counsel for 1085091 Ontario Limited
o/a Embassy Auto Sales Services and Mohamad Mansoor

A. MICHAEL ROTHE, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: September 20th, 2002 Ottawa

REASONS FOR DECISION AND ORDER

BACKGROUND

This is an appeal to the Licence Appeal Tribunal ("Tribunal") from a notice of proposal (the "Proposal") by the Registrar of the Motor Vehicle Dealers Act (the "Registrar") pursuant to section 7 of the *Motor Vehicle Dealers Act* ("the Act"). The Proposal dated the 7th day of May, 2002, seeks to revoke the registrations of Embassy as a motor vehicle dealer and of Mohamad Mansoor ("Mr. Mohamad") as a motor vehicle sales person.

The Proposal sets out the Registrar's reasons for the Registrar seeking an order for the revocation of both the above registrations. The reasons are stated as follows.

The intention and objective of the Act is to protect the public interest. The requirements of the Act include that Registrants be financially responsible in the conduct of business and that Registrants carry on business in accordance with the law and with integrity and honesty. The Registrant's past conduct is inconsistent with the intention and objective of the Act, and therefore warrants disentitlement to registration under the Act. Therefore, the Registrar is unwilling to continue to register 1085091 Ontario Limited o/a Embassy Auto Sales Service and Mohamad Mansoor under the Motor Vehicle Dealers Act.

The particulars upon which the Registrar relies are stated in the Proposal as follows.

1. 1085091 Ontario Limited o/a Embassy Auto Sales Service has been registered as a motor vehicle dealer since on or about August 15, 1996.
2. Mansoor Mohamad has been registered as a salesperson since on or about August 15, 1996. He is an officer of the corporate dealership.

3. On or about January 24, 2002, the dealer was convicted pursuant to the Business Practices Act and Motor Vehicle Dealers Act. **The convictions relate to the misrepresentation of odometer readings with respect to 2 vehicles. [Emphasis added].**

At the hearing, the Registrar sought and was granted a slight amendment to the particulars in the Proposal in paragraph 3 as noted above.

By written notice, Embassy and Mr. Mohamad informed the Tribunal in terms of Section 7(2) of the Act, that they require a hearing regarding their appeal to the Registrar's Proposal.

THE EVIDENCE

At the opening of the hearing, counsel indicating that they had agreed as a fact that Embassy had pled guilty to five separate counts relating to two incidents of odometer tampering. Charges were laid under both the *Business Practices Act*, R.S.O. 1990 c. B-18 and under the Act and the Regulations to the Act. The Corporation was fined \$2,000.00 in respect of one count and received a suspended sentence in respect of the four other counts. Mr. Mohamad had also been charged with the same five counts, but charges were withdrawn against him personally.

The evidence presented to the Tribunal by the Registrar consisted of documentary evidence, as well as the evidence of Aviva R. Harari. Ms. Harari's evidence was as follows.

Ms. Harari is counsel to the Ontario Motor Vehicle Industry Council ("OMVIC") and has served in that capacity for five years. She outlined in broad terms her role in advising OMVIC, as well as acting on certain hearings before this Tribunal, together with disciplinary matters and other regulatory affairs of OMVIC. She was called to the Bar in 1991. She outlined in broad terms OMVIC's responsibility for regulating used car salespersons and dealers in Ontario.

She testified as to the corporate status of Embassy and specifically that Mr. Mohamad was a director and officer of Embassy. This fact was agreed by counsel for Embassy and Mr. Mohamad during the course of the Registrar's case. Ms. Harari testified that she had acted as "Crown counsel" in respect of the charges brought against Embassy and Mr. Mohamad. She testified and identified certain correspondence that went back and forth between herself and a student-at-law at Mr. Swedko's firm in December 2001 and January 2002 wherein a deal was made concerning the guilty pleas. Ms. Harari also testified in broad terms that odometer tampering is a very serious matter for OMVIC and is of particular significance to its role as regulating the sale of used cars in the Province of Ontario.

On cross-examination Ms. Harari admitted that she was not aware of any prior convictions against either Embassy or Mr. Mohamad. She did testify however that there

were a number of consumer complaints with respect to Embassy, although no particulars were given or requested in cross-examination. She did admit she was not 100% sure how the particular charges at issue came to the attention of OMVIC. Ms. Harari admitted she did not speak to those persons who did the investigations directly nor did she speak directly to the individuals who purchased the cars for which the odometers were admitted to have been tampered with.

On cross-examination a used vehicle bill of sale in respect of a 1998 Mazda 626 purchased by one Verena Tanner (the "Tanner Vehicle") was put to Ms. Harari. Specifically, she was requested to identify the fact that on the box wherein it was indicated the amount of kilometers, the letters "TMU" had been indicated. Ms. Harari indicated that to her knowledge, this meant "true mileage unknown" and is a notation known to used car dealers to connote when the actual kilometers travelled by a used vehicle are not known to the vendor of the used car. Also, on cross-examination, a document entitled "Wholesale Buyer's Car Order and Agreement" between Edna Bass and Embassy with respect to a 1992 Toyota Camry was indicated. Ms. Harari testified that as far as she was aware no complaint had been made to OMVIC with respect to this particular vehicle.

Mr. Mohamad gave evidence on behalf of Embassy and himself.

Mr. Mohamad admitted he was an officer and director and the sole sales person of Embassy Auto. He and Embassy have been licenced since 1996.

Mr. Mohamad testified (over the objections of counsel for the Registrar) that he would not have pled guilty on behalf of the corporation had he known that it would have led to these present proceedings.

Mr. Mohamad also testified that he had discussions with Joe Newbold, an inspector with OMVIC. He testified that Mr. Newbold had led him to believe that if a guilty plea was entered on behalf of the corporation in the Provincial Offences matter, that the Registrar would take no further punitive steps in respect of the subject matter that formed the complaints. Mr. Mohamad testified that he believed the corporation had a valid defence, but decided to plead guilty as a result of cost considerations and his belief that no further punitive measures would be taken against himself or the corporation arising from the facts relating to the charges.

Mr. Mohamad indicated that Edna Bass had actually filled out the Wholesaler Buyer's Car Agreement for the 1992 Toyota Camry, which he admitted did not include a indication of the kilometers on the vehicle at the time of the sale. Mr. Mohamad candidly indicated that in his view if he had done anything wrong, it was the fact that he had not noticed that the kilometers had not been filled out on the form. Mr. Mohamad indicated that he had filled out the kilometers on his garage register with respect to the vehicle. With respect to the so called Tanner vehicle, Mr. Mohamad explained that when he obtained the vehicle he determined that its tachometer and temperature gauge were not working. This required him to replace the entire assembly which included the

speedometer and the odometer. Mr. Mohamad indicated that the used odometer that he purchased was set at 144,039 kilometers and he did not believe it was necessary for him to change the odometer to read what he acknowledged to be the some 198,786 kilometers that the vehicle had travelled at the time he purchased it. In his view, had he changed the used odometer, this in and of itself would have constituted odometer tampering. Mr. Mohamad testified that he had told Ms. Tanner, the purchaser, of the precise kilometers on the vehicle notwithstanding his notation of "true mileage unknown". On cross-examination Mr. Mohamad admitted that he appeared in court on January 24th, 2002, at which time he entered a plea of guilty on behalf of the corporation.

Further, Mr. Mohamad testified that the Tanner vehicle had been subject to a Used Vehicle Lease Agreement which had been signed in March of 2000. That agreement was made an exhibit to the proceedings. On that exhibit, the kilometers for the Tanner Vehicle indicated 198,786. Mr. Mohamad testified that although the contract was executed by Embassy and by a lessee, the lessee did not "follow through" and did not take possession of the vehicle.

At the conclusion of the case for Mr. Mohamad and Embassy, Ms. Harari was called in reply. She testified that absolutely no representations had been made by her as counsel that as part of the plea bargain that the Registrar was giving up any rights to proceed with the revocation of the registrations of either corporation or Mr. Mohamad personally.

FACTS FOUND PROVEN

On the documentary and oral evidence, the following facts are found to have been proven.

1. Mr. Mohamad is presently registered as a motor vehicle sales person under the Act;
2. Embassy is presently registered as a motor vehicle dealer under the Act;
3. Mr. Mohamad was at all relevant times the sole director of Embassy and represented Embassy in all its purchases and sales transactions;
4. Mr. Mohamad acted on behalf of Embassy in respect of two transactions identified above as the Tanner Vehicle (1988 Mazda 626), which was sold to Ms. Tanner on January 22nd, 2001, and in respect of a 1992 Toyota Camry which was purchased by Edna Bass on July 21st, 2000.
5. On January 24th, 2002, Embassy pled guilty to the following counts:
 - (1) Engage in an unfair practice by making a false, misleading or deceptive consumer representation to Verena Tanner, a consumer, in respect of the true distance travelled regarding the sale of a 1988 Mazda motor vehicle, vehicle identification number JM1GD2214J1583592, contrary to

Section 2.1 and Section 3 (1) of the Business Practices Act, Revised Statutes of Ontario, 1990, Chapter B.18 as amended, and thereby knowingly committed an offence under Section 17 of the said Act.

- (2) and further that 1085091 ONTARIO LIMITED trade name EMBASSY-AUTO-SALES-SERVICE and MANSOOR MOHAMED also known as MANSOOR MOHAMAD between March 7, 2000 and January 22, 2001, inclusive, at the City of Vanier in the East Region and elsewhere in the Province of Ontario did commit the offence of being a motor vehicle dealer and exchanging the odometer of a 1988 Mazda motor vehicle, vehicle identification number JM1GD2214J1583592, fail to ensure that the identical reading in kilometers appeared on the odometer of the said motor vehicle after the exchange had been effected contrary to Section 19 (2) of Ontario Regulation 801, Revised Regulations of Ontario, 1990, and thereby knowingly committed an offence under Section 22 of the Motor Vehicle Dealers Act, Revised Statutes of Ontario, 1990, Chapter M.42 as amended.
- (3) and further that 1085091 ONTARIO LIMITED trade name EMBASSY-AUTO-SALES-SERVICE and MANSOOR MOHAMED also known as MANSOOR MOHAMAD on or about the 18th day of September, 2000 at the City of Vanier in the East Region did commit the offence of engage in an unfair practice by making a false, misleading or deceptive consumer representation to Xu Meng, a consumer, in respect to the true distance travelled regarding the sale of a 1992 Toyota motor vehicle, vehicle identification number JT2VK11F0N0028356, contrary to Section 2.1 and Section 3 (1) of the Business Practices Act, Revised Statutes of Ontario, 1990, Chapter B. 18 as amended, and thereby knowingly committed an offence under Section 17 of the said Act.
- (4) and further that 1085091 ONTARIO LIMITED trade name EMBASSY-AUTO-SALES-SERVICE and MANSOOR MOHAMED also known as MANSOOR MOHAMAD between July 21, 2000 and September 19, 2000, inclusive, at the City of Vanier in the East Region and elsewhere in the Province of Ontario did commit the offence of being a motor vehicle dealer alter, adjust or permit the alteration or adjustment to the odometer of a 1992 Toyota motor vehicle, vehicle identification number JT2VK11F0N0028356, in such a manner that as a result of the alteration or adjustment the total distance indicated on the odometer is other than the total distance travelled by the said motor vehicle contrary to Section 19 (1) of Ontario Regulation 801, Revised Regulations of Ontario, 1990, and thereby knowingly committed an offence under Section 22 of the Motor Vehicle Dealers Act, Revised Statutes of Ontario, 1990, Chapter M.42 as amended.
- (5) and further that 1085091 ONTARIO LIMITED trade name EMBASSY-AUTO-SALES-SERVICE and MANSOOR MOHAMED also known as MANSOOR MOHAMAD on or about the 21st day of July 2000 at the City of Vanier in the East Region did commit the offence of fail to complete a used motor vehicle purchase order with the required information, to wit: the recorded odometer reading at the time of purchase regarding the purchase of a 1992 Toyota motor vehicle, vehicle identification number JT2VK11F0N0028356, contrary to Section 16 (3) of Ontario Regulation 801, Revised Regulations of Ontario, 1990, and thereby knowingly committed an offence under Section 22 of the Motor Vehicle Dealers Act, Revised Statutes of Ontario, 1990, Chapter M. 42 as amended.

In respect of the Tanner Vehicle, at the time of sale, Mr. Mohamad knew that the actual kilometers travelled were some 58,000 kilometers more than the amount indicated on the Used Vehicle Bill of Sale.

The term “true mileage unknown” is a term of art in the used car industry in Ontario. However, contrary to the indication on the Tanner Vehicle Used Vehicle Bill of Sale, “TMU”, Mr. Mohamad in fact knew how much the car had travelled at the time it was resold to Ms. Tanner.

The five counts enumerated above were withdrawn against Mr. Mohamad personally. The corporation was fined some \$2,000.00 in respect of the counts which it had pled guilty.

THE LAW

Section 3.(1)(a) of the *Motor Vehicle Dealers Act* states:

- 3.(1) No person shall,
 - (a) carry on business as a motor vehicle dealer unless the person is registered under this Act; or

Section 5.(1)(b) of the *Motor Vehicle Dealers Act* states:

- 5.(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,...
 - (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty;

Section 6.(2) of the Act states:

- 6.(2) Subject to Section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5 if the registrant were an applicant, or where the registrant is in breach of a term or condition of the registration.

Section 16.(2)(o) of Regulation 801 as amended states:

- (2) Where a used motor vehicle is sold, the sales or purchase order shall show,
 - (o) the distance travelled by the vehicle at the time of sale;

APPLICATION OF LAW TO THE FACTS

In determining these matters, the Tribunal is entitled to refuse to direct the Registrar to carry out its proposal only if it finds that the Registrar was in error in concluding the past

conduct of the applicants affords reasonable grounds for the belief that the applicants will not carry on business in accordance with law and with integrity and honesty.

The Tribunal is concerned by the fact that there were some unexplained gaps in the evidence from both parties. To begin, the primary investigator from OMVIC, Mr. Newbold was not called on behalf of the Registrar. The reasons for appeal filed by Embassy and Mr. Mohamad clearly set out that Embassy and Mr. Mohamad took the position that had they believed they would have been subjected to the present proceedings, a guilty plea would not have been entered in the Provincial Offences matter. The Tribunal specifically inquired of counsel for the Registrar as to the status of Mr. Newbold. No explanation was offered as to why he did not testify and in the face of the evidence of Mr. Mohamad that Mr. Newbold had made the suggestion that a guilty plea would in effect terminate all future proceedings, counsel for the Registrar did not seek an adjournment to call Mr. Newbold to rebut this evidence. In argument, counsel for the Registrar suggested that Mr. Newbold had no authority in any event to bind the Registrar with respect to any plea bargains. Further, there is no suggestion in the correspondence from counsel for Embassy and Mr. Mohamad that somehow Mr. Newbold had made such representations prior to a plea bargain being entered. Ms. Harari was unequivocal in saying that no such arrangement was part of the plea bargain. Again, the counsel for Mr. Mohamad who had entered into the arrangement when she was a student-at-law was not called to testify. Again, while calling the student as a witness may have caused some difficulties for Mr. Swedko to continue as counsel, given that an associate of his would have to testify, no explanation was given as to why the student was not called.

Further, there were no particulars given in the evidence of either party as to what false, misleading or deceptive consumer representations were made to one Xu Meng, a consumer with respect to the true distance travelled regarding the sale of the 1992 Toyota vehicle which had been sold to Embassy by the Besses and for which Embassy had pled guilty. Mr. Mohamad gave no evidence concerning it, other than to proffer the Wholesale Buyer's Car Order Agreement which had nothing to do with the sale to Xu Meng.

The Tribunal was left with no evidence as to what was the degree of "deception" regarding the odometer.

The Tribunal believes the particulars of misconduct are necessary to assess the reasonableness of the Registrar's position. It is only through the testimony of Mr. Mohamad that the Tribunal is aware that when Tanner purchased the vehicle, the odometer read some 58,000 kilometers less than the vehicle had actually traveled. In the Tribunal's view, this is a significant variation, some 30%. The notation on the contract "TMU" is inaccurate. Mr. Mohamad actually knew how much the vehicle had travelled. The Tribunal does not accept Mr. Mohamad's suggestion that his hands were tied and he would be guilty of odometer tampering had he actually changed a used odometer to reflect the actual kilometers which were travelled by the vehicle into which it was being placed. Surely, if that kind of conduct were permissible, used car dealers

could misrepresent the kilometers of any vehicle, simply by changing odometers with those from vehicles with significantly lesser mileage.

Clearly, a plea of guilty and the registration of a conviction is not something that can be subsequently explained away by a suggestion that economic considerations drove the decision to enter the plea. Indeed, in giving the evidence before the Tribunal Mr. Mohamad's explanation of the circumstances behind the plea were quite brief.

On the other hand, the Registrar did withdraw charges against Mr. Mohamad when they could have pressed for a conviction and a suspended sentence on all counts, as was the case for the corporation.

In these circumstances, a corporation has to act through a person notwithstanding the legal fiction of a separate existence in law for the corporation. In a case such as this where there are no other persons actively involved in the operation of the corporation, Mr. Mohamad is its directing mind. The acts of the corporation can be taken to be his, at least for the purposes of the legislation at issue.

The Tribunal is of the view that Mr. Mohamad's explanation as to the circumstances of the sale of the Tanner vehicle, and specifically the indication of TMU on the bill of sale in the face of actual knowledge of the vehicle's mileage, were actions that would reasonably lead the Registrar to believe that Mr. Mohamad will not carry on business in accordance with law and with integrity and honesty. Accordingly the Tribunal finds that based on the convictions registered against the corporation, the failure of Mr. Mohamad to lead any evidence with respect to the Toyota sale to Ms. Meng and the admission by him that he indicated "true mileage unknown" with respect to a vehicle for which he clearly did know the mileage, in the Tribunal's view, affords the Registrar with reasonable grounds for his belief that Embassy and Mr. Mohamad will not carry on business in accordance with law and with integrity and honesty.

DECISION

Accordingly, pursuant to the authority vested in it by Section 7(4) of the *Motor Vehicle Dealers Act*, the Tribunal hereby directs the Registrar to carry out his proposal dated May 7th, 2002, to revoke the registrations of Mohamad Mansoor as a motor vehicle sales person under the Act and of 1085091 Ontario Limited o/a Embassy Auto Sales Services, as a motor vehicle dealer under the Act.

LICENCE APPEAL TRIBUNAL

F. Bruce Fitzpatrick, Vice Chair

Released: October 3, 2002

SILVERLAND HOMES & DEVELOPMENT INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*

TO REVOKE REGISTRATION

TRIBUNAL: SIMON DANN, Member

APPEARANCES:

BRIAN CAMPBELL, Counsel, representing Silverland Homes &
Development Inc.
CAROL STREET, Counsel, representing the Registrar, Ontario New
Home Warranty Program

DATE OF
HEARING: September 30, 2002 Toronto

ORDER

Pursuant to the provisions of the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, Chapter O.31, as amended, Silverland Homes & Development Inc. (the "Applicant") appealed a Notice of Proposal dated May 10, 2002 of the Registrar of the Ontario New Home Warranty Program (the "Registrar") to revoke registration of the Applicant;

WHEREAS the Applicant appealed the proposal to the Licence Appeal Tribunal requesting a hearing;

AND WHEREAS the hearing commenced on September 30, 2002 and Counsel for both parties advised the Tribunal that they had arrived at a settlement of all issues and agreed as follows:

1. Silverland will complete ONHWP's renewal of registration form, for the renewal year October 10th, 2002 to October 9th, 2003, and provide it to ONHWP along with the required renewal fee, forthwith.
2. As a condition of that renewal being approved, Silverland hereby agrees that its current right to build and sell and its right to build and sell during the renewal year from October 10th, 2002 to October 9th, 2003 is limited to the 36 unit project currently under construction by Silverland in the Town of Goodwood, in the Municipality of Uxbridge.
3. As a further condition of the renewal of registration, Silverland will provide to ONHWP security of \$5,000 per home, for the said 36 homes in the Town of Goodwood, payable as follows:
 - a. Security for 23 of the 36 homes will be provided to ONHWP in a form acceptable to it in the total amount of \$115,000 on or before 4:30 p.m. on October 14th, 2002;

- b. Security for the remaining 13 homes will be provided to ONHWP in the amount of \$5,000 per home in a form acceptable to ONHWP within 7 days of the commencement of construction or the issuance of a building permit, whichever occurs first, with respect to each of the said 7 homes.
4. Silverland has enrolled 23 of the said 36 homes. Silverland will enrol the remaining 13 homes within 7 days of the commencement of construction or the issuance of a building permit, whichever occurs first.
5. Silverland will provide to ONHWP the Guarantee and Indemnity of Gennaro Musto in a form acceptable to ONHWP, on or before 4:30 p.m. on Monday, October 14th, 2002.
6. In the event that Silverland complies with paragraphs 1, 3(a) and 5 on or before 4:30 p.m. on Monday, October 14th, 2002, ONHWP will renew the registration of Silverland for the year October 10th, 2002 to October 9th, 2003, and will withdraw the Notice of Proposal. In the event that Silverland fails to comply with any or all of the said paragraphs by that date and time, Silverland agrees that its appeal of the Notice of Proposal is withdrawn; the Notice of Proposal will be carried out, and its registration will come to an end.

NOW THEREFORE this Tribunal orders that the proceedings in this matter are hereby settled in accordance with the terms agreed to by the parties and attached to this Order as "Minutes of Settlement".

LICENCE APPEAL TRIBUNAL

Simon Dann, Member,

Released: October 8, 2002

JOHN AND ANNE MORRISON

**APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE *ONTARIO NEW
HOME WARRANTIES PLAN ACT***

TO DISALLOW A CLAIM

TRIBUNAL: SIMON DANN, Member

APPEARANCES: JOHN MORRISON, Applicant, representing himself
ANDREW LEWIS, Counsel, representing the Ontario New Home
Warranty Program

DATES OF
HEARING: September 25, 2002

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") by John and Anne Morrison (the "Applicant") under section 14(3) of the *Ontario New Home Warranties Plan Act* (the "Act") respecting a decision by the Ontario New Home Warranty Program (the "Respondent" and the "Program") dated May 21, 2002, (the "Decision") denying the Applicant's claim for compensation.

The Applicant's claim relates to a dwelling located at 36 Abbotsford Road, RR1 Gormley, Ontario (the "home") which was constructed by Landford Lake Ltd. in terms of a written agreement of Purchase and Sale dated March 15, 1991 and the transaction was completed for possession on August 20, 1992. Landford Lake Ltd (the "builder") subsequently ceased business.

The Applicant provided notice of complaint by numerous letters dating back to December 8, 1992 up to March 4, 2002. Throughout this time the Program inspected and or visited the Applicant's residence on various occasions with a first inspection on September 30, 1993 and the last occurring on July 18, 2001.

The Decision Letter described the Applicant's complaint as: "Water leak under the West Bay Window and Various colours of brick and mortar."

EXHIBITS:

Exhibit #1 Decision Letter dated May 21, 2002;

Exhibit #2 Notice of Appeal dated June 2, 2002;

Exhibit #3 Book of Documents of the Respondent VOL 1 of 2;

Exhibit #4 Book of Documents of the Respondent VOL 2 of 2;

Exhibit #5 Photographs by Chad Foresheew, ONHWP comprised of:

5-1, South Elevation

5-2, West Bay Window

5-3, Front Door Between Bay Windows

5-4, Front Door Between Bay Windows

5-5, East Bay Window and Side Entrance Door

Exhibit #6 Photographs by John Morrison, comprised of:

6-1, North Wall & East Wall

6-2, Side Door West & East Sides

6-3, Side Door East Side

6-4, Main Door West Side

6-5, Main Door East Side

6-6, Main Door East Side Full View

6-7, Main Door West Side Close Up View

6-8, Side Door East Side Close Up View

6-9, Side Door West Side

FACTS:

The reasons given by the Decision Letter, Exhibit 1, for denying the Applicant's claim are:

With respect to the water leak under the west bay window, the owners have identified the complaint of water penetration on numerous occasions dating back to September 30, 1993 with the latest report being on March 4, 2002. Water was observed on only two occasions, January 1997 and June 1998. Detailed remedial work was carried out and accepted by the Applicant. Following this and between January and May 2000, additional complaints were resolved through a negotiated cash settlement in the amount of \$4,000.00. The Applicant accepted and signed a Full and Final Release on May 23, 2000.

The Applicant subsequently arranged for a contractor to replace the bay windows. Upon removal of the easterly window, the owner observed evidence of moisture and after testing by a Program representative, the owner indicated he would apply sealant and conduct his own water testing. After replacing the windows and in July 2000, the owner advised the Program there were no more problems.

Subsequently, additional water leakage was reported from September 2000 through May 2001. A Program representative conducted extensive water testing on July 18, 2001 but was unable to find to find any water leakage. No further complaint was received until March 4, 2002.

Therefore it is concluded that moisture migration may be evident during the colder seasons due to possible condensation and or abnormal storms. The ONHWP concludes the owner has not shown actual water or proven that leakage is the result of remedial work carried out by ONHWP. With respect to the various colours of brick and mortar and the owner's complaint that the new bricks, in the repaired areas of the brick veneer, do not match the original areas or colour of brick, ONHWP concludes that it is impossible to expect exact colour matches in product manufactured eight years apart and that over time, environmental soiling will mute the new bricks and mortar to blend with the

already soiled existing brick. Therefore the slight variation in brick colour is not a defect in workmanship or material.

The Applicant, Mr. John Morrison, confirmed the two issues being leaking around the west bay window and that the colour of the new brick did not match the old brick. The Applicant did not have any witnesses and gave testimony on his own behalf.

The Program's counsel, Mr. Andrew Lewis, agreed these were the two issues and submitted that the current issues arise out of repairs done. Mr. Lewis submitted there was no evidence of further water penetration and that in any event, the owner had signed a full and final release when accepting compensation and agreed to obtain his own contractor for window replacement. Mr. Lewis advised the Program would have two witnesses: Chad Foresheew and John Huismans.

The evidence of the owner, Mr. John Morrison is as follows:

Mr. Morrison testified that there is still water penetration and water is leaking around the west bay window even though the window was replaced and that this leaking is not from the window but in the area around the window. He stated that the July 18, 2001 testing conducted by the Program's representative was inconclusive and that when he spoke with his contractor who had completed the bay window replacement, he had been advised the leaking was not from the window.

Mr. Morrison advised that most of the water penetration in his home occurs in the Spring and Fall when it rains the most. Testing for water penetration or leakage was first done in February 1995 (Exhibit 3, Tab 64).

Mr. Morrison stated that when the July 18, 2001 water testing proved inconclusive, he understood the Program's representative to suggest more testing could be done, such as vacuum and drywall removal. Following that test, Mr. Morrison received the Decision letter from the Program.

Mr. Morrison confirmed his complaint is to do with water penetration after rain.

Mr. Morrison then referred to the occasion when Chad Foresheew, the Program representative, was on-site as remedial work was being carried out at the front of the home. He showed Mr. Foresheew colour differences on the north wall. Mr. Morrison said when he originally spoke with the Program's representative in 1994-1995 about different brick colours, he was advised not to worry about it and that it would be dealt with at the end of the process. Mr. Morrison confirmed his complaint that he has a house with many brick colours.

On cross-examination by the Program's counsel, Mr. Morrison confirmed his complaints were always about leakage around windows and that aside from the west bay window leakage complaint, all leakage issues had been dealt with by the Program. Mr. Morrison confirmed the Program had done a lot of work and spent tens of thousands of dollars.

Mr. Morrison confirmed his complaints in Exhibit 4, Tabs 134 and 135 were about the same issue and that he did sign the letter of May 5, 2000 (Exhibit 4, Tab 136), being a Full and Final Release for issues described in the documents and that he had received payment in the amount of \$4,000.00 as described in the cash settlement, as well as a previous amount of \$750.00 for interior finish restoration.

In response to cross-examination questions about how the monies were used and his further complaints, Mr. Morrison confirmed he had the window replaced with his own contractor and that his complaints about leakage were the same after the window was replaced. He did add it was not exactly the same complaint as water was now on the floor.

Mr. Lewis asked Mr. Morrison if he had understood what he signed when he signed the Release form (Exhibit 4, Tab 136) and that he agreed the Release referred to the west bay window. Mr. Morrison replied "yes" to the first question and acknowledged "that's what the release applies to" in response to Mr. Lewis' second question.

Through further questioning by Mr. Lewis, the Tribunal heard that water leakage does not happen every time it rains; that Mr. Morrison did not have any photographs of where the leakage is; and that he did not call the ONHWP office after a rain when leakage did occur, even though the area ONHWP office is only about a 15 minute drive from his home.

In reply to questions about lighter bricks, Mr. Morrison said the following:

- that "the bricks are not a mistake
- (it is the) best they could do"
- "as close as they come with off-the-shelf product"
- that he understood there could be "different dye lots at the same time".

When asked if he knew that bricks weathered, Mr. Morrison replied, "yes".

When Mr. Lewis asked if tinting brick were able to fix the colour problem then the rebricking would not be required, Mr. Morrison agreed and confirmed that tinting brick would be acceptable if colour were the only issue.

In addressing information arising out of cross-examination, Mr. Morrison stated there had been no effort to match colour or tint the brick and mortar. In addition, Mr. Morrison referred to the July 18, 2001 water test as having been unsuccessful as well as to Exhibit 4, Tab 102, page 2, which contained comments regarding areas that remain to be tested.

The Program's witnesses were Chad Foreshaw and John Huismans.

The evidence of Chad Foreshaw was as follows:

Mr. Foreshaw joined the ONHWP in 1994 with a background in civil engineering and experience as a building department official with several municipalities. In the Spring of 2000, he became Manager Technical Operations with the ONHWP and holds that position today.

Mr. Foreshaw first examined the Morrison house in 1995, confirming that the builder ceased business sometime in the 1995-96 period and that he had left homes in various stages of completion. Mr. Foreshaw confirmed that while the Program's process is to address complaints, it will take an active role if the builder is not in the picture.

It was confirmed that the source of water penetration is difficult to locate and the first step is to look for obvious indicators such as poor caulking and examine areas where flashings are located. Mr. Foreshaw stated the Program took a very methodical approach to its examination and that the work had been successful since the area pointed out by the owner is only "a spot about the size of a grapefruit".

A number of issues which Mr. Foreshaw discussed were:

- rebricking of north wall where it had been found that the moisture barrier was not in place or had been poorly installed (re Exhibit 6 -1)
- that seasonal conditions are a factor in the way or timeliness of work and its completion
- that it was a big house with big problems to which the Program took a methodical approach and "we've been successful"
- Exhibit 5-1 shows bricks around window
- Exhibit 5-2 shows galvanized thru-wall flashing where previously there was none
- that flashing was installed below the window

Mr. Foreshaw spoke about how he personally supervised the work and that the only thing not replaced was the window, "Everything from the bottom of this window has been rebuilt". When after the work was completed and the owner again complained about water penetration, Mr. Foreshaw testified to his belief that the only possible area that could still be a problem was the window.

Mr. Foreshaw stated the purpose of the negotiated settlement was to complete resolution of the water penetration and the Full and Final Release was intended to conclude the matter. He further stated that in his view, he could not be certain about the window replacement work but there was no question in his mind that the work he supervised around the window had been successfully completed.

Regarding the matter of the brick colour, Mr. Foreshaw testified that the several dark bricks were part of the manufacturer's approach to dealing with naturally occurring colour variations based on the materials used to make bricks and that he was confident

that if the new bricks were subjected to the same soiling conditions, that occur with the passage of time, they would blend in and become indistinguishable from the existing bricks. (Exhibit 4, Tab 139).

Mr. Foresheew confirmed his belief there was no necessity for any change as bricks do age and if they were tinted, they might actually become darker as tinting would likely accelerate the aging process.

Mr. Foresheew did not believe the slight variation in brick colour was either a defect in workmanship or material and therefore it was not a warrantable item.

Through cross-examination questions submitted by Mr. Morrison, the Tribunal heard Mr. Foresheew confirm his view the brick colour variation was “very subtle” and that it might be due to some random darker bricks.

When Mr. Morrison questioned the west bay window wall work, Mr. Foresheew testified that:

- he did recall a conversation with Mr. Morrison about water running down the bay window roof
- that when the building contractor opened the wall there was very little moisture barrier and the brick ties were only fastened to the sheathing
- that with the new thru-wall flashing it was improbable moisture was not being properly diverted
- that a water penetration test was conducted on the west wall but no water penetration was seen

Mr. Foresheew also confirmed that he did recall Mr. Morrison’s reluctance to accept a cash settlement.

The evidence of John Huismans was as follows:

Mr. Huismans has been with ONHWP for two years as Operations Manager for the East Central Office with responsibilities for administering policies and providing support to ONHWP representatives and customer service. Previously, Mr. Huismans spent 30 years with CMHC, holding positions in the technical sector and working in the areas of planning, National Technical Services, served on technical committees dealing with National Building Code issues and has inspected buildings up to 55 stories in height. Mr. Huismans wrote the ONHWP decision letter (Exhibit 4, Tab 151).

Mr. Huismans stated he inspected the owner’s home on July 18, 2001, specifically the southwest wall for evidence of water penetration. Mr. Huismans heard about how water would penetrate the home under rain and wind conditions. Mr. Morrison also showed him the trim underside (at the inside of the bottom left side shown in Photo Exhibit 5-1); where there was some damage about the size of a grapefruit. The damage was described as paint bubbling or delaminating from the surface of the drywall.

Mr. Huismans said he was allowed to do a water test and Mr. Morrison provided a ladder and hose. The test was conducted from the bottom, moving gradually upwards...

- covering the foundation joint
- the area between the quoining and window
- the window canopy (bay window roof section)
- along the sill at the bottom part of the window
- the window jamb
- the mullions
- the roof edge.

He testified he concentrated on an area of the roof under-hang and also compared the section construction with the other side.

Mr. Huismans said he remained approximately 10 to 15 minutes at each location and after one to one and a half hours he had not witnessed any evidence of water penetration. Mr. Huismans said that Mr. Morrison confirmed there was no water penetration. The witness testified that with this type of testing he would generally expect to find signs of water penetration within 2 to 3 minutes but did not see any indications after 5 to 10 minutes.

Mr. Huismans testified he discussed the results of the test with Mr. Morrison who explained the problems but also did not see any reason to continue the test.

In closing argument, Mr. Morrison, the owner, confirmed the Program's efforts and professionalism but said there are still leaks and brick colour variations. He stated the window replacement helped but had not completed the work. He argued that his understanding of the release dealt with the windows only and felt that a complete rebricking at a cost of \$39,985.00 would bring about a complete resolution to the problems.

In closing, the Program's counsel, Mr. Lewis, argued that the central issue of the matter was that Mr. Morrison had signed a full and final release, including a cash settlement which he used to hire a contractor to replace the west bay window, and that the purpose of a release is to cover all items as identified and incorporated in the release documents (Exhibit 4, Tab 136).

Mr. Lewis argued that the release covers the complaint but if it is a new leak, then it is no longer warranted as there is only a one year water penetration warranty.

Mr. Lewis referred to Entwisle, OCRATD No. 152, July 6, 1999 (Case Law Book of Authorities: Tab 4, page 9) in arguing for the validity and meaning of "Release". In addition, Mr. Lewis argued that the Tribunal heard Mr. Foresheew state the owner had used his own contractor to replace the window and the most probable cause of Mr. Morrison's complaint about leakage would be consistent with how the window was installed.

In addition, repairs under section 13 (2) (a) and (g) are not warrantable and Mr. Morrison had not established or proven that leakage was caused by either an original defect or a Program contracted repair.

Regarding the brick colour, Mr. Lewis argued that Program warranties “do not cover perfection” and referred the Tribunal to Shafman (Re), OCRATD No. 45, May 23, 1995 (Case Law Book of Authorities: Tab 6, page 10) in arguing that “to keep these imperfections at reasonable acceptable levels” and that “the colour variation on the brick and mortar on the Applicants’ home is noticeable especially on very close inspection but when viewed from a reasonable distance is acceptable” and therefore the onus of proof has not been met (found in Case Law Book of Authorities: Tab 5, page 14).

Referring to the same case (Tab 5, page 15), Mr. Lewis argued that the Applicant had not proven a defect in workmanship or materials and therefore had not proven a breach of warranty under the Act (found in Case Law Book of Authorities: Tab 5, page 15).

ISSUE:

Is either the leakage or brick colour a breach of warranty and should the Tribunal set aside, confirm, or modify the decision of the Program to disallow the Applicant's claim for compensation under section 14(3)(b) of the *Ontario New Home Warranties Plan Act*

APPLICABLE LAW:

Section 14 of the *Ontario New Home Warranties Plan Act* (the “Act”) states in part:

- (3) Subject to the regulations, an owner of a home is entitled to receive payment out of the guarantee fund for the cost of the remedial work required to correct a breach of warranty if,
- (3)(b) the person has a cause of action against the vendor or the builder, as the case may be, for damages resulting from the breach of warranty

Section 13(1) of the Act adds:

Every vendor of a home warrants to the owner,

(a) that the home,

- (i) is constructed in a workmanlike manner and is free from defects in material,
- (ii) is fit for habitation, and
- (iii) is constructed in accordance with the Ontario Building Code;

- (b) that the home is free of major structural defects as defined by the regulations;
and
- c) such other warranties as are prescribed by the regulations.

Section 13(4) states in part:

“A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect...”

Section 15 of Regulation 892 under the Act states:

- (2) Every vendor of a new home warrants to the owner,
 - (a) that the home is constructed in a workmanlike manner and is free from defects in materials including windows, doors and caulking such that the building envelope of the home prevents water penetration;
 - (c) that all exterior cladding of the home is free from defects in material and work resulting in detachment, displacement or physical deterioration;
 - (d) that the home is free from violations of the Ontario Building Code regulations under which the Building Permit was issued, affecting health and safety, including but not limited to fire safety, insulation, air and Vapour barriers, ventilation, heating and structural adequacy;
- (3) The warranties described in subsection (2) apply only in respect of claims made within two years after the home was completed for possession...

APPLICATION OF LAW TO FACTS:

The onus of proof in this matter rests upon the Applicant to prove whether there has been a breach of warranty with regard to leakage in the west bay window area and whether there is a defect in materials and or workmanship with regard to brick colour.

A finding by the Tribunal as to whether there is a breach of warranty on the first issue, regarding leakage, is an issue on which the burden was on the Applicant to prove that the leakage was a new breach of warranty on remedial work carried out by the Program and completely unrelated to leakage that was covered by the Full and Final Release signed by the Owner.

The Applicant acknowledged that both the remedial work was completed by the Program and that he had signed the Full and Final Release and accepted the cash settlement compensation for replacement of the southwest bay window.

While the Applicant stated he thought the release pertained to the windows only, the Schedule clearly specifies “the resolution of their complaints regarding water penetration through the building envelope of the house *in the area of* the southeast and

southwest bay windows.” Further, the Applicants, in signing the Full and Final Release, confirmed their understanding of the document and that they released and forever discharged ONHWP of and from any and all claims, however arising, for all items in the Settlement Schedule dated May 5, 2000.

Black’s Law Dictionary defines ‘Release’ as being...

To discharge a claim or an oral statement manifesting an intention to discharge another from an existing or asserted duty. The relinquishment, concession, or giving up of a right, claim, or privilege, by the person in whom it exists or to whom it accrues, to the person against whom it might have been demanded or enforced. Abandonment of claim to party against whom it exists, and is a surrender of a cause of action and may be gratuitous or for consideration.

A discharge of a debt by act of party, as distinguished from an extinguishment which is a discharge by operation of law, and, in distinguishing release from receipt, “receipt” is evidence that an obligation has been discharged, but “release” is itself a discharge of it.

The Tribunal was not presented with any substantive evidence to contradict the Release, nor did the owner present expert witness testimony, to support either the claim that the leakage had been unresolved by the Program’s remedial work or that the newly installed window was not the cause of the leakage.

In weighing the Program’s evidence of remedial work and inspections as well Mr. Morrison’s acceptance of the cash settlement and signing of the Full and Final Release in releasing and forever discharging the ONHWP “for the resolution of their complaints regarding water penetration through the building envelope of the house in the area of the southeast and southwest bay windows”, the Tribunal finds no evidence upon which to consider there has been a new breach of warranty on work carried out by the Program.

On the matter of the brick colour, the Tribunal was not provided with evidence to contradict Mr. Foresheew’s testimony that the new bricks would age and blend in with the original bricks over time, as appears to be occurring on the south elevation (Exhibit 5-1). Therefore the Tribunal has no basis upon which to find that the colour variations are either a defect in workmanship or materials or that they have an appearance that is substantially unreasonable.

The Applicant has failed to present credible or acceptable evidence to discharge the onus that rested upon him and has not satisfied the Tribunal that his version of the issues, where in conflict with the Program, is correct.

The Tribunal finds that the Program is not in breach of warranty on leakage or brick colour, that the Full and Final Release is binding, and therefore the Program is not obliged to compensate the Applicant for any amount whatsoever.

DECISION:

Accordingly, by virtue of the authority vested in it under section 16(3) of the *Ontario New Home Warranties Plan Act*, the Tribunal directs the Ontario New Home Warranty Program to disallow the Applicants' claim.

LICENCE APPEAL TRIBUNAL

Simon Dann, Member

RELEASED: October 9, 2002

MADJID, a.k.a. MIKE, BANKI

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: ANTOINE AOUAD, M.D., Presiding Member

APPEARANCES:

ALNAZ I. JIWA, Counsel, representing the Applicant
MADJID, a.k.a. MIKE, BANKI, Applicant

MICHAEL ROTHE, Counsel, representing the Registrar under the
Motor Vehicle Dealers Act

DATES OF
HEARING:

September 27, 2002

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the “Tribunal”) from a notice of Proposal issued by the Registrar under the Motor Vehicle Dealers Act (the “Registrar”), pursuant to section 7 of the Motor Vehicle Dealers Act (the “Act”). The Proposal dated the 23rd day of May 2002, seeks to Refuse the Registration of Madjid, a.k.a. Mike, Banki.

The Proposal sets out the Registrar’s reasons for seeking an order to refuse the registration. The reasons are stated as follows:

The intention and objective of the Act is to protect the public interest. The requirements of the Act include that Registrants be financially responsible in the conduct of business and that Registrants carry on business in accordance with the law and with integrity and honesty. The Registrant’s past conduct is inconsistent with the intention and objective of the Act, and therefore warrants disentitlement to registration under the Act.

Therefore, the Registrar is unwilling to register Madjid, a.k.a. Mike, Banki under the Motor Vehicle Dealers Act.

The particulars in the Notice of Proposal dated the 23rd day of May 2002, are:

1. On or about February 28, 2002, Madjid, a.k.a. Mike, Banki ("Banki"), applied for registration as a motor vehicle salesperson. He proposed to work for Mills & Hadwin Ltd.
2. Banki was originally registered as a salesperson and officer of 1079326 Ontario Corp. o/a Parsco Investments and Consulting Inc. (the "Dealer") under the Act and has been registered since on or about March 24, 1997. At all material times, Banki was the sole officer and director of the Dealer.
3. The Dealer was a corporation, which was first registered as a dealer on or about March 24 1997.
4. On or about September 17, 2001 the Registrar, Motor Vehicles Dealers Act proposed to revoke the registration of both Banki and the Dealer for the following reasons:
 - a) Acting on behalf of the Dealer, Banki entered into a security agreement with the Automotive Finance Corporation (AFC) to finance vehicles purchased by him on behalf of the Dealer. Banki arranged for the financing of several vehicles pursuant to his security agreement and then disposed of the vehicles in violation of the security agreement.
 - b) As a result of Banki's breach of the security agreement with AFC, the Dealer is indebted to AFC in the amount of approximately \$80,000.00.
 - c) The Dealer is not operating from its registered premise.
5. On or about October 9, 2001 both Banki and the Dealer were revoked.
6. On application to become a registered salesperson question 6 asks: "Are you engaged now or have been involved in personal bankruptcy proceedings? If yes, attach a copy of the Assignment of Bankruptcy or proof of discharge and provide explanation of circumstances leading to the bankruptcy." The Applicant indicated "Yes" and attached the following explanation: "I was the Director of the business my Lawyers recommended that I declare personal bankruptcy to safeguard my personal interests. I acted according to their recommendation. The bankruptcy will be discharged on April 4, 2002."
7. Banki has failed to comply with the Motor Vehicles Dealers Act and in particular with section 5.

By Notice of Further and Other Particulars dated the 10th day of September 2002, the Registrar stated as follows:

1. Acting on behalf of 1079326 Ontario Corp. o/a Parsco Investments and Consulting Inc. (the "Dealer"), Madjid, (a.k.a. Mike), Banki ("Banki") entered into a security agreement with the Manheim Auto Auctions to finance vehicles purchased by him on behalf of the Dealer. Banki arranged for the financing of several vehicles pursuant to his security agreement and then disposed of the vehicles in violation of the security agreement.
2. As a result of Banki's breach of the security agreement with Manheim, the Dealer is indebted to Manheim Auto Auctions in the amount of approximately \$51,232.00.

By written Notice of Appeal Mr. Banki informed the Tribunal in term of section 7 (2) of the Act that a hearing was requested regarding an appeal to the proposal.

THE EVIDENCE:

The evidence presented to the Tribunal by the Registrar consisted of documentary evidence as well as the oral testimony of Mr. Roy Vandermeere, Mr. John Murray and Ms. Jean Cameron.

The evidence presented by Madjid Banki consisted of his statement in the Notice of Appeal dated June 6, 2002 together with the admissible information contained in the complete package constituting the Applicant's submissions as well and Mr. Banki's oral testimony.

A summary of the evidence follows:

WITNESSES FOR THE REGISTRAR

Testimony of Ms Jean Cameron

Ms Jean Cameron has been an Inspector with Ontario Motor Vehicles Industry Council ("OMVIC") since 1997; as such her duties are to conduct inspections on Dealer's premises to ensure that they are in compliance with the requirements of the Act.

OMVIC is a non-profit corporation which has been delegated the responsibility to administer the Motor Vehicles Act. The Motor Vehicles Act is a public protection statute regulating dealers, and salespersons in the trade of buying and selling motor vehicles. Section 5 of the Motor Vehicles Act requires that individuals and corporations registered or applying to be registered under the Act meet standards of honesty, integrity, compliance with law and financial responsibility.

Ms Cameron reiterated the information contained in Exhibit #4, Tabs #1 & 2 as the grounds for the Registrar's refusal to accept the Applicant's Registration.

Referring to the Applicant's Application for Registration under the Motor Vehicles Dealers Act, found at Tab # 8 of Exhibit # 4, Ms Cameron pointed out that the Applicant checked section A, acknowledging that he would be "...buying or selling vehicles on behalf of the dealership". The Applicant, as the sole officer and director of 1079326 Ontario Corp., was registered in 1997 as Dealer and Salesperson. The Applicant's original license as Dealer and Salesperson was revoked on October 9th, 2001. Yet, in section B of the application form, the Applicant check marked the answer: "First-time Registrant".

Ms Cameron testified that Mr. Banki answered “No” to “Question 3: Have you ever had a commercial, professional or business registration, certification or licence of any kind refused, suspended revoked or cancelled, or are you currently involved in such proceedings?”

The Applicant did admit, in his application, that he had previously filed for bankruptcy and was awaiting discharge. Although the Bankruptcy Trustee initially opposed discharge, Mr. Banki was discharged in April 2002.

In general credit reports speak to an individual’s financially responsibility and provide information regarding debts. The Applicant’s credit report, found at Tab #9 of Exhibit #4, proves that the Applicant had several bad debts and collections against his name.

As part of her testimony Ms. Cameron identified and explained the information contained on Tab # 11, A & B of Exhibit #4. The documents refer to the two vehicles financed by AFC subsequently sold by the Applicant without AFC’s knowledge, and for which the Applicant obtained replacement ownerships.

The Registrar, according to Ms. Cameron’s testimony, does not differentiate between Dealers and Salespersons, the requirements are the same. The Registrar proposes to refuse the Applicant’s registration due to concerns regarding his past business and financial conduct.

In cross-examination, Ms Cameron testified that the Motor Vehicle Dealer’s Act is meant “...*to be preventative not reactive*...”. Although the Registrar may impose limitations on a licence, Ms Cameron believes that in this case, limitations would not sufficiently ensure consumer protection.

Ms Cameron testified that bankruptcy is not in itself a restriction to registration. Registration is dependent on a number of facts. Mr. Banki lied on his application, therefore causing concern to the Registrar and to his honesty and integrity.

Testimony of Mr. Roy Vandermeere

Mr. Vandermeere testified as to his past employment history as well as to his current duties as Manager of Finance for Manheim Auto Auctions.

The witness identified the documents contained in Tab # 12 of Exhibit #4. The documents show that the Applicant signed two Security Agreements with Manheim. An agreement signed on April the 6th, 2000, entitling the Applicant to a maximum line of credit of \$50,000.00, sets out credit fees for the 28-day program. An Amending Agreement was signed on January 9/2001 increasing the Applicant’s line of credit to \$80,000.00 and extending the payment term to 56 days.

Mr. Vandermeere detailed, for the Tribunal, the main terms and conditions under which Manheim Auto Auctions provides bridge financing for dealers buying vehicles through Manheim.

Advanced funds together with fees, must be paid within the prearranged time whether or not the financed vehicle is sold; within 48 hours of a vehicle being sold; and in the event of a short fall between the purchase and sale price, the Dealer is responsible to cover the difference.

Mr. Vandermeere attested to the fact that the Applicant purchased and sold several vehicles within the period of April 5th 2002 and June 7th, 2002. The Dealer issued cheques to the Applicant for the sale of these vehicles, yet the Applicant's cheques to cover the purchase cost of the vehicles, were returned "Insufficient Funds" and "Account Closed".

As a result, the Applicant remains indebted to Manheim in the amount of \$51,232.00.

In cross-examination Mr. Jiwa asked Mr. Vandermeere to explain Manheim's business practices. Mr. Vandermeere offered reasons as to the need for a Power of Attorney; reiterated the charges levied Dealers by Manheim; and confirmed them in some instances Manheim requests signed blank cheques from the dealers. Mr. Vandermeere agreed with Mr. Jiwa that the Applicant had lost money on a number of transactions. However, to the best of his knowledge there had been no problems with the Applicant prior to the cheques being returned.

Testimony of Mr. John Alfred Murray

Mr. Murray has been a Branch Manager for AFC Finance Corporation, for approximately eleven months, but has been with AFC for approximately four years.

Mr. Murray described his duties as Manager for AFC as well as the type of service that AFC provides to dealers. Mr. Murray identified and clarified the contents of the documents filed under Exhibit #4, Tab 11.

Mr. Murray emphasized that AFC was not notified, by the Applicant, of the sale of two vehicles, as required under the terms of the Security Agreements. The Applicant breached the terms of the Agreement by obtaining replacement ownership certificates from the Ministry of Transportation. The Bills of Sale are clearly stamped with the wording: **'ORIGINAL OWNERSHIP HELD AT AFC / KITCHENER / 519-622 2863 DEALER CANNOT APPLY FOR DUPLICATE OR LOSS'**

As seven of the Applicant's cheques were returned and only part of the inventory was recovered, AFC suffered an approximate loss of \$84,500.00. The total loss includes extra expenses incurred by AFC. For instance, AFC was not able to sell the recovered vehicles at a fair market price. Also, in order to be able to dispose of the vehicles recovered, AFC had to pay the Retail Sales Tax on behalf of the Applicant.

AFC received notification of the Applicant's bankruptcy proceedings but Mr. Murray was not aware of what transpired at the Creditor's Meeting.

Mr. Murray attested that originally, in 1997, the Applicant started out with a \$10,000.00 credit limit, and that by 2002 the Applicant's credit limit had been increased to \$100,000.00.

WITNESSES FOR THE APPLICANT

Testimony of Mr. Madjid Banki

The Applicant testified as to his personal information and professional history. The Applicant has an automotive background, and dealing in motor vehicles is his major skill to enable him to earn a living.

With respect to the issues affecting this matter, the Applicant attested that he had no desire to file for bankruptcy, yet he was forced into doing so, due to a downturn in business as well as purchaser's cheques being returned as "insufficient funds". The Applicant claims he returned all unsold vehicles to the finance companies at his own expense, and that he was forced to sell some vehicles at a loss in order to cover his debts. The Applicant incurred several debts, with "*loan sharks*". These loans had to be paid otherwise the Applicant's safety could have been endangered.

In cross-examination, the Applicant stated that he never intended to hold a Managerial position. His curriculum vitae was written strategically, as the Applicant was advised by friends to set a higher expectation on his resume, so that he would least be considered for a salesperson's position.

The Applicant testified that he did not apply for an increase in his line of credit, but as it was offered, he accepted, hoping that it would facilitate his ability to continue in business.

As far as obtaining the replacement ownerships, the Applicant explained that this was "*...nothing new...*". The Applicant's place of business was in London, whereas the Finance Company was in Kitchener, sometimes he was given permission to ask for a duplicate ownership, due the distance between the two businesses.

Submissions by Counsel for OMVIC

Mr. Rothe quoted sections of Section 5 of the Act, and argued that the Registrar does not come to a decision based on future intentions but rather on past behaviour. The Applicant does not meet the standards required under the Act and it is in the public's best interests that he not be allowed to work within the motor vehicles sales industry.

The Applicant did not ensure that there was sufficient money in his account to cover outstanding cheques. Mr. Vandermeer described the Applicant's behavior as fraudulent.

Mr. Murray testified that the Applicant sold two vehicles in breach of the existing agreement between the Applicant and AFC Finance.

Mr. Rothe argued that the Applicant ignored the rules and did not intend to pay for the vehicles he purchased. Thus, the Registrar did not err in law, but had a reasonable belief that the Applicant, if issued licence, would not act with honesty and integrity. Counsel emphasized that this was not a situation where restrictions on the license was an adequate solution.

Submissions by the Applicant's Counsel

Mr. Jiwa argued that the Applicant made some bad business decisions. As far as the application is concerned there was no intent to mislead, the Applicant simply did not understand the questions clearly.

There is no evidence that the Applicant's actions in filing for bankruptcy were fraudulent. This premise is corroborated by the fact that the Applicant returned all unsold vehicles.

The Applicant is applying for a salesman's licence, there are no financial responsibilities involved. The public interest would be served, if restrictions were imposed on the Applicant's licence.

FACTS FOUND PROVEN:

The following are the facts found by the Tribunal to have been proven.

1. Banki was originally registered as a salesperson and officer of 1079326 Ontario Corp. o/a Parsco Investments and Consulting Inc. (the "Dealer") under the Act on or about March 24, 1997.
2. At all material times, Banki was the sole officer and director of the Dealer.
3. The Dealer was a corporation, registered as a dealer on or about March 24 1997.
4. Banki filed for bankruptcy on or about July 3, 2001.
5. At the time of his bankruptcy Banki owed AFC approximately \$80,000.00.
6. At the time of his bankruptcy Banki was indebted to Manheim Auto Auctions in the amount of approximately \$51,232.00.
7. On or about October 9, 2001 both Banki and the Dealer were revoked.
8. Banki's was discharged from bankruptcy on or about April 4, 2002.

9. Madjid, a.k.a. Mike, Banki ("Banki"), applied for registration as a motor vehicle salesperson, proposing to work for Mills & Hadwin Ltd.

THE LAW:

Section 5. (1) of the *Motor Vehicle Dealers Act* states:

An applicant is entitled to registration or renewal of registration by the Registrar except where,

- (a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
- (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law, and with integrity and honesty; or

APPLICATION OF LAW TO FACTS:

The issue for consideration by this Tribunal is, whether the Applicant's past conduct affords reasonable risk to the public to refuse his registration as a Salesperson, as per Section 5 b of the Act.

Under both the Notice of Proposal to Refuse Registration and the Notice of Further and Other Particulars, the Registrar implies that the Applicant is still indebted to Automotive Finance Corporation and Manheim Auto Auctions. The amounts outstanding were the subject of the Applicant's bankruptcy however, the Applicant has been discharged. Thus, it would appear the Applicant's debts have been cleared.

From the evidence presented, the Tribunal discerned three areas of concern raised by the Registrar as grounds for denial to register the Applicant as a Salesperson under the Motor Vehicle Dealers Act:

- 1. allegation of fraudulent behaviour with respect to the bankruptcy;
- 2. impropriety in obtaining replacement ownership under false pretenses;
- 3. lying on his current application for registration.

The Tribunal will address each issue separately.

First the Applicant was in business from 1997 until July 2001, when he filed for bankruptcy. It is not this Tribunal's purview, to re-open the matter of the bankruptcy, therefore the Tribunal will only refer to the bankruptcy as it reflects on the Applicant's character. The Registrar inferred, that the question before the Tribunal is whether the Applicant's behaviour, at the time of his

filing for bankruptcy, could be considered fraudulent. The applicant suggested he simply exercised bad business judgment.

It would have been within the parameters of the Trustee in Bankruptcy mandate to investigate and deal with any allegations of fraud that might have surfaced at the time of the bankruptcy. There is no evidence before the Tribunal that the Trustee were concerned with the issue of fraud. Therefore, the Tribunal does not find the Applicant's behaviour as fraudulent.

Secondly, there are two explanations before the Tribunal as to why the Applicant applied for replacement ownership papers. The Registrar asserts that the Applicant committed fraud. The Applicant submits that due to the distance between the Dealer and the Finance Company, that there was an implied agreement that allowed the Applicant on occasion to request replacement ownership from the Ministry of Transportation. The Tribunal will not presume to conjecture what was going through the Applicant's mind at the time, but will take into consideration his probable state of mind under the pressure of a failing business. Extending the Applicant the benefit of the doubt, the Tribunal, while not condoning the Applicant's behaviour, does not find that any possibility of fraudulent behaviour, was intentional and/or premeditated in this instance.

The last issue the Tribunal must determine is whether the Applicant lied on his application. By indicating that he was a first time registrant it would appear that he did in fact lie. Nonetheless, it is also plausible, as put forward by the Applicant's Counsel that the Applicant simply misunderstood the question. This assumption is substantiated by the fact that the Applicant admitted to the bankruptcy and provided details of his past dealership. Thus, the Tribunal will consider the incident a misunderstanding rather than a deliberate lie.

There is no doubt that the Applicant has made some bad business judgments, and that those judgments might have compelled him into behaviour that could be considered questionable. Therefore, the Registrar was prudent with respect to the decision made. Nevertheless, the Applicant demonstrated a sense of decency by returning unsold vehicles at his own expense. This does not appear to be an action carried out by an intentionally dishonest individual. Further the Applicant's behaviour is in the past. He was punished for his errors, by losing his Dealer's and Salesperson's licence.

The Applicant is now asking for a Salesperson's licence. The Tribunal disagrees with the Registrar's position that a Salesperson carries the same responsibility as a Dealer and sees no reason as to why the Applicant should not be allowed to practice his trade, albeit with strict conditions. The Tribunal hereby orders that a Salesperson's be granted to the Applicant, with the following terms and conditions:

1. The Applicant is not to be allowed to handle cash.
2. The Applicant is not to be allowed to attend auctions, on his own, and purchase or sell vehicles at auctions, on behalf of the Dealer.

3. The Applicant is not to carry on business transactions for the sale or purchase of motor vehicles outside the premises of the Dealer.
4. All transactions of trade, purchase or sale of motor vehicles are to be approved and verified by the Sales Manager, prior to the Applicant closing any deal with prospect buyers and or sellers.
5. The Applicant is to inform any perspective employers of the limitations on his licence.
6. The Applicant shall advise the Dealer, employing him that the Dealer is required to notify the Registrar, in writing, within thirty days of offering employment to the Applicant that the Dealer is aware of the restrictions imposed on the Applicant's licence.

Further, this Tribunal orders that:

1. In the event of breach of any of the conditions listed above, the Applicant shall forthwith forfeit his Salesperson's licence.
2. In the event a conviction of fraud is registered against the Applicant, the Applicant shall forthwith forfeit his Salesperson's licence.

DECISION:

Therefore by virtue of the authority vested in it under section 7(4) of the Motor Vehicle Dealers Act, the Licence Appeal Tribunal directs the Registrar to **not to carry out the proposal to refuse** the registrations of Madjid, a.k.a. Mike, Banki ("Banki"), but to issue a Salesperson's licence subject to the terms and conditions hereinto before stated.

LICENCE APPEAL TRIBUNAL

ANTOINE AOUAD, M.D.
Presiding Member

Released: October 11, 2002

JOHN AND SANDRA PLACKO

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JOHN ORT, Member

APPEARANCES: JOHN PLACKO and SANDRA PLACKO, Applicants,
representing themselves
KEN ROSENBERG, Counsel, representing the Ontario
New Home Warranty Program
No one appearing for 1236059 Ontario Inc., the Added Party

DATES OF
HEARING: September 23 and 24, 2002 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") by John and Sandra Placko (the "Applicants") under subsection 14(3) of the *Ontario New Home Warranties Plan Act* (the "Act") respecting a decision of the Ontario New Home Warranty Program (the "Respondent" and the "Program") dated May 30, 2002, (the "Decision") denying the Applicants' claim for compensation.

The Decision, exhibit 1, described the Applicants' complaints as follows:

1. The loft should be 13'6" x 19'. It is only 12'6" x 19'. Therefore it is one foot narrower than it was supposed to be.
2. Missing railing to the loft.
3. Fireplace missing variable (sic) speed fan. Dangerous to use because it over heats and could cause a fire.
4. The front porch has unfinished steps. Front of the porch steps going all along the front with two posts. Mandatory Inspection Report # 17. Front conc. Steps require foundation or to be hung as per OBC.
5. The tiles in the foyer need repair.
6. Unsite (sic) shower to have 1 colour tiles (no pattern) tile.

PRELIMINARY MATTER:

Since no one appeared as scheduled at 9:30 a.m. on September 23, 2002, on behalf of 1236059 Ontario Inc., the added party, and no word had been received as to his absence, the Tribunal adjourned for half an hour. When the hearing resumed at 10:00 a.m., the Tribunal proceeded in the absence of the added party.

EXHIBITS:

Exhibit#1- Decision letter from the Program dated May 30, 2002, denying the Applicants' claim;
Exhibit#2- Notice of Appeal form received at the Tribunal on June 11, 2002, filed by the Applicants;
Exhibit #3 - Program's book of documents;
Exhibit #4 - Applicants' documents;
Exhibit #5 - The Sutton, Lakeside Village brochure; and
Exhibit #6 - Photographs provided by the Applicants.

FACTS:

The Applicants' witnesses were John and Sandra Placko. The witnesses for the Program were Wendy Skyba and Chad Foresheew. Ms. Skyba stated that she is a warranty representative and has worked for the Program for over three years. She is the author of the Decision. Mr. Foresheew was a warranty representative for eight years until he became Manager for Technical Operations for the Program. He was asked by the Program to provide a second opinion on the Applicants' claims.

The agreement of purchase and sale, tab 2 of exhibit 3, is dated December 1997. Paragraph 22 of the agreement states the following: "There is no representation, warranty, collateral agreement or condition affecting this Agreement or the Property, or supported hereby, for which the Vendor can be held responsible or liable in any way, whether contained, portrayed, illustrated or represented by, or in, any plan, drawing, brochure, display, model or any other sales/marketing material, other than expressed herein in writing."

The Certificate of Completion and Possession for the house at 94 Bayview Avenue, Keswick, tab 3 of exhibit 3, is dated March 17, 1999.

1. Loft

Mr. Placko testified that the loft is only 12'6" wide. The Applicants advised the Program of this claim by a letter received on September 2, 1999, tab 6 of exhibit 3. As stated in the Decision, Ms. Skyba found that the actual interior dimensions of the loft are 12'6" x 19'0", totaling 237 sq. ft.

Schedule "G" of the Agreement of Purchase and Sale (the "Agreement"), tab 2 of exhibit 3, shows the dimensions of the loft, the optional family room, as 13'6" x 17'6", totaling 236 sq. ft. The agreement of purchase and sale states that schedule "G" is an integral part of the Agreement. Schedule "G" is a copy of the Sutton, Lakeside Village brochure, exhibit 5, which states the following: "Actual usable floor space may vary from the stated floor area. All renderings are artist's concept. Dimensions, Specifications and architectural detailing subject to minor modifications."

2. Missing Railing to the Loft

By letter dated December 3, 1999, and received by the program on December 7, 1999, the Applicants complained of "missing railing to the loft." The Decision states the following: "During the inspection done on December 9, 1999 the owner pointed out that a half wall guards the exposed side of the stairs to the loft and a handrail attached to it. A half-wall with a handrail guards the exposed side of the stair. The owners contend they are entitled to an oak guardrail and pickets." Schedule "F", which is stated to be an integral part of the Agreement, reads as follows: "Banister with pickets and oak on main staircase in two storey models." The loft is situated above the garage; therefore, Mr. Placko claimed that the house is a two-storey model. Mr. Foresheew testified that the house is not a two-storey model because there is no living area above another living area; the attached garage is not living space.

During the hearing, Mr. Placko testified that the Applicants are not asking for a complete railing, merely an end post. Ms. Skyba stated that she had not heard of a demand for an end post prior to the hearing. Page 15 of exhibit 4 dated 1999 contains a complaint of "fix around stairs."

3. Fireplace

The Applicants complained to the Program in a letter received December 7, 1999, tab 22 of exhibit 3, that the fireplace is missing a variable-speed fan. Schedule "F" of the agreement states that there is included a "directed vented gas fireplace(s) as per plan." Schedule "G", the only plan in the Agreement, simply indicates a gas fireplace with the notation "gas f.pl." Mr. Placko referred to architectural production drawings dated October 1998, issued for building permit on April 29, 1998, page 36A of exhibit 4, that describe the fireplace as follows: "To be direct gas vent, air circulating type, zero clearance, factory built steel fireplace with variable speed fan,...in finish and style as selected by the Owner, from the standard range." Ms. Skyba stated that if the building department had considered the notation on the architectural production drawings, it would have concluded that the variable-speed fan is an option. She further testified that she had examined the owner's manual and the metal plate attached to the fireplace and that both say that a variable-speed fan is an option.

Mr. Placko stated that the mantle is hot to the touch when the fireplace is used; thus, it is a fire hazard. Mr. Foresheew testified that he examined the fireplace and that it is a zero clearance model, which can be installed right up to combustibles.

4. Front Porch Steps

Mr. Placko complained that the house does not have stairs across the full width of the front landing. Schedule "G" of the Agreement contains a front elevation of the house that shows such steps. The Decision states that the vendor installed pre-cast concrete stairs in front of the main entrance only. Further, the Decision claims that the steps provide safe access to the house. Mr. Foreshew described the existing steps as five-foot wide.

Tab 43 of exhibit 3 is a full and final release dated August 2, 2000, signed by the Applicants and witnessed, releasing the Program, in consideration of the payment of \$37,341.50, "from any and all actions, causes of action, covenants, contracts, debts, demands, claims, and costs, for damages, loss, or injury however arising, which I/we ever had, now have or may hereafter have...for items #1 through #40 on the Settlement Schedule dated August 2, 2000...in respect of the home located at 94 Bayview Avenue, Keswick." Item sixteen in the settlement schedule dated August 2, 2000, tab 43A of exhibit 3, states the following: "Complaint: The front porch has unfinished steps. Front of the porch steps going all along the front with two posts. Mandatory Inspection Report #117. Front conc. Steps require foundation or to be hung as per OBC."

5. Tiles in the Foyer

Mr. Placko testified that the corner tile in the foyer is sticking up $\frac{1}{4}$ " instead of being even with the wooden floor. Tab 6 of exhibit 3, a letter received by the Program on September 2, 1999, complains that the tiles in the front foyer need repair. The Applicants also complained that the tiles slope and that there are hairline cracks in the grout between tiles. Ms. Skyba stated that these complaints were first made at the time of her inspection on October 30, 2000.

Ms. Skyba testified that the tile is not a tripping hazard, that it is minor in nature, and not readily visible. She stated that the edge of the tile bevels down. Further, she said that the hairline cracks in grout between tiles is the result of normal shrinkage and is not a defect in workmanship.

Mr. Foreshew stated that the edges of the tiles are intended to be exposed to a degree since the tiles have joints. He walked over the tiles and did not find a tripping hazard. Mr. Foreshew testified that there are normally height differences between flooring materials. He said that the cement under tiles is normally variable in height. He also testified that the problem is not unusual and has no aesthetic impact. Mr. Foreshew said that the hairline cracks in the grout are barely visible from a standing position and are the result of the wood substrate shrinking. He characterized the slope of the tiles as minor and stated that he could not really see it and could not feel it in stocking-covered feet. Mr. Foreshew concluded that there is no defect.

6. Colour Tiles in Shower

Mr. Placko testified that the Applicants ordered plain tiles for the ensuite shower. Instead, he

said, they also received six or eight tiles with a pattern. The complaint was received by the Program on December 7, 1999, by letter set out at tab 22 of exhibit 3.

Mr. Foresheew said that the patterned tiles are the same colour as the other tiles in the shower. He testified that people often ask to pay extra for such patterned tiles. Both he and Ms. Skyba testified that the Applicants ordered some randomly installed, patterned tiles for their other bathroom.

LAW:

The *Ontario New Home Warranties Plan Act*, R.S.O. 1990, Chapter O.31, states the following:

13. (1) Every vendor of a home warrants to the owner,
 - (a) that the home,
 - (i) is constructed in a workmanlike manner and is free from defects in material,
 - (ii) is fit for habitation, and
 - (iii) is constructed in accordance with the Ontario Building Code;
 - (b) that the home is free of major structural defects as defined by the regulations; and
 - (c) such other warranties as are prescribed by the regulations.
 - (3) The vendor of a home shall deliver to the owner a certificate specifying the date upon which the home is completed for the owner's possession and the warranties take effect from the date specified in the certificate.
 - (4) A warranty under subsection (1) applies only in respect of claims made there under within one year after the warranty takes effect, or such longer time under such conditions as are prescribed.
14. (3) Subject to the regulations, an owner of a home is entitled to receive payment out of the guarantee fund for the cost of the remedial work required to correct a breach of warranty if,
 - (a) the person became the owner of the home through receiving a transfer of title to it from a vendor or through the substantial performance by a builder of a contract to construct the home on land owned by the person; and
 - (b) the person has a cause of action against the vendor or the builder, as the use may be, for damages resulting from the breach of warranty.
 - (7) The Corporation may perform or arrange for the performance of any work in lieu of or in mitigation of damages claimed under this section.
 - (3) Where a person or owner gives notice in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and may by order direct the Corporation to take such action as the Tribunal considers the Corporation ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Corporation.

Regulation 892 under the Act adds the following:

18. (1) Every vendor of a new home warrants to the owner that the vendor shall make no substitutions in those items of construction or finishing for which the purchaser is entitled to make selection pursuant to the purchase agreement without the written consent of the purchaser.
- (2) Subsection (1) does not apply where,
 - (a) the purchaser, having been notified, does not make a selection within thirty days after executing the purchase agreement or within such other time period as may be agreed; or
 - (b) an item selected under clause (a) is not available and the purchaser does not make a selection within seven days of receiving written notice from the vendor or within such other time period as may be agreed that the item is unavailable.
- (3) Every vendor of a new home warrants to the owner that where the purchaser fails to make a selection under clause (2)(a) or (b) that the vendor will make a selection on the purchaser's behalf that is of equal or better quality than the original selection as set out in the purchase agreement.
19. Every vendor of a new home warrants to the purchaser that, where the vendor makes a substitution with respect to an item that is referred to in the purchase agreement that is not an item that is to be selected by the purchaser, the item will be of equal or better quality than the item referred to in the purchase agreement.
20. A claim may be made under subsection 17(1) and subsection 18(1) or section 19 only where,
 - (a) the transaction closes; and
 - (b) the claim is made by an owner within one year after the date upon which the home is completed for possession.

CASELAW:

In *Florio (Re)*, [1999] O.C.R.A.T.D. No. 84, the Tribunal states that multi-storey houses have a living area above another living area such that a vertical plane will intersect more than one living area.

APPLICATION OF LAW TO FACTS:

1. Loft

With respect to the loft, the Tribunal finds that the vendor made a substitution, but the item provided to the Applicants is of equal or better quality than the item referred to in the purchase agreement. The square footage of the loft is slightly greater than the square footage shown on

schedule "G" of the Agreement. The schedule states that dimensions are subject to minor modifications. There is no evidence that the smaller width of the room resulted in damages to the Applicants. The Tribunal disallows the claim concerning the loft.

2. Missing Railing to Loft

The Tribunal finds that the Agreement does not entitle the Applicants to a railing or an end post. The Agreement requires a "banister with pickets and oak on main staircase in two storey models." The Tribunal agrees with Mr. Foreshew that the house is not a two-storey model because there is no living area above another living area. The loft is found above the garage, but the garage is not a living area. The Applicants' claim is denied.

3. Fireplace

The Tribunal concludes that the fireplace is not a fire hazard. The onus of proof on a balance of probabilities rests upon the Applicants. The fireplace is a zero-clearance model that can be installed next to combustible materials. The Applicants stated that the mantle gets hot when the fireplace is used, but no fire hazard was proved. The Tribunal does not find the fireplace to be defective.

The agreement of purchase and sale does not entitle the Applicants to a variable-speed fan. The architectural production drawing that mentions a fireplace with a variable-speed fan states that it was issued for a building permit on April 29, 1998; thus, that drawing was prepared after the Agreement was signed. The Tribunal finds that the production drawing is not a part of the Agreement and finds that there was no substitution. The Applicants' claim is disallowed.

4. Front Porch Steps

The Tribunal finds that the Applicants released the Program from their claim for valuable consideration as set out at tab 43 of exhibit 3. The Applicants' claim with respect to the front porch steps is denied.

5. Tiles in the Foyer

Ms. Skyba and Mr. Foreshew, both experienced in inspecting houses, found no defect. The Applicants complained that the corner tile in the foyer is sticking up $\frac{1}{4}$ " instead of being even with the floor. Mr. Foreshew testified that there are normally height differences between flooring materials. He said that the cement under tiles is usually variable in height. Mr. Foreshew and Ms. Skyba stated that the hairline cracks in the grout between the tiles are minor and are the result of normal shrinkage of materials caused by drying after construction, an exception to the warranties granted by subsection 13(1) of the Act. Mr. Foreshew testified that the slope of the tiles is minor and that he could not really see it or feel it. Tribunal accepts the testimony of Ms. Skyba and Mr. Foreshew and finds no defect. The Applicants' claim is disallowed.

6. Colour Tiles in Shower

The Tribunal finds that providing the patterned tiles was a substitution of an item of equal or better quality than the plain tiles of the same colour that were requested by the Applicants. Mr. Foresheew testified that purchasers pay extra for such patterned tiles as an upgrade. There is no defect in materials. The Tribunal disallows the Applicants' claim.

In summary, the Applicants failed to prove a breach of warranty under the Act.

DECISION:

Accordingly, by virtue of the authority vested in it under section 16(3) of the *Ontario New Home Warranties Plan Act*, the Tribunal directs the Ontario New Home Warranty Program to disallow the Applicants' claim.

LICENCE APPEAL TRIBUNAL

John Ort, Member

Released: October 24, 2002.

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
GILAD LEGERMAN

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATION
- Proposal dated: June 7, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

GILAD LEGERMAN

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Gilad Legerman, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: October 28, 2002

REAL ESTATE AND BUSINESS BROKERS ACT
Revised Statutes of Ontario, 1990, Chapter R.4

IN THE MATTER of the REGISTRATION of
BRIAN HAYWOOD

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Real Estate and Business Brokers Act*
TO REVOKE REGISTRATION
- Proposal dated: June 17, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

BRIAN HAYWOOD

Applicant

- and -

REGISTRAR, *REAL ESTATE AND BUSINESS BROKERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Brian Haywood, the Applicant, and the Registrar under the *Real Estate and Business Brokers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Real Estate and Business Brokers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: October 8, 2002

DAVID ELSTER

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF THE
MOTOR VEHICLE DEALERS ACT

TO REFUSE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: ANTHONY BAK, Counsel, representing David Elster
MARY JANE SOUTH, Agent for the Registrar,
Motor Vehicle Dealers Act

DATE OF HEARING: October 7, 2002 Toronto

ORDER

WHEREAS the Registrar under the *Motor Vehicle Dealers Act* (the "Registrar") issued a Proposal dated June 13, 2002 to refuse the registration of David Elster (the "Applicant") as a motor vehicle salesperson under the *Motor Vehicle Dealers Act* (the "Act");

AND WHEREAS the applicant has appealed the Registrar's Proposal;

AND WHEREAS a hearing of the Applicant's appeal to the Tribunal commenced on October 7, 2002 in the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto Ontario;

AND WHEREAS at the commencement of the hearing, Applicant's Counsel moved that the hearing be adjourned;

AND WHEREAS the Tribunal heard submissions by the Applicant's Counsel and the Registrar's Agent as to the adjournment of the hearing;

UPON having heard submissions by the Applicant's Counsel and the Registrar's Agent, the Tribunal issues the following order:

The hearing of this matter is adjourned to 9:30 a.m. on November 12, 2002 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario and thereafter to continue, if necessary, at 9:30 a.m. on November 14, 2002 at the Tribunal's aforesaid Chambers.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: October 7, 2002

BRYAN JAMES SEATON

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: CARL DOMBEK, CHAIR

APPEARANCES:

BRYAN JAMES SEATON, the Applicant
FIL CECE, Agent, representing the Ontario New Home Warranty
Program
DANIELLE FIEDLER, Agent, representing the added party Eglinton
Place Inc.
JENNY ZHENG, Further added party

DATE OF

PRE-HEARING: October 22, 2002,

Toronto

ORDER

Following the attendance before the Licence Appeal Tribunal (the "Tribunal") on October 22, 2002 at a pre-hearing of Bryan James Seaton (the "Applicant") with Fil Cece and Al Stevenson for the Ontario New Home Warranty Program (the "Program") Robert Calderwood and Danielle Fiedler for Eglinton Place Inc. and Jenny Zheng (the "Added Party");

1. The parties to the hearing are Bryan James Seaton, the Applicant, Ontario New Home Warranty Program, the Respondent, Eglinton Place Inc., the Added Party, Jenny Zheng, the Further Added Party.
2. The Applicant will advise, the other Parties and the Tribunal in writing whether he intends to retain counsel and the name, business address, business telephone number and business facsimile number of his counsel at least 15 days prior to the date set for the commencement of the Hearing.
3. The Applicant's counsel (if any) is to be advised by the Applicant that the Hearing is peremptory as to the Applicant.

4. The issues at the Hearing are limited to the issues contained in the additional information to the Notice of Appeal which is in the letter dated October 16, 2002, addressed to the Licence Appeal Tribunal (LAT).
5. All Parties are to adhere to the LAT's Procedural Rules relating to disclosure including any reports, documents, witness list or will say statements or other things. Failure to disclose may result in the report document, evidence of the witness or any other things not being admitted into evidence. A witness list will be considered complete as long as it names the witness and briefly identifies the scope of his testimony.
6. The Applicant shall allow the Respondent and Eglinton Place Inc. (including any third party retained by them) access to the premises to inspect it at least 10 days prior to the commencement of the Hearing at a time agreed to by the Parties.
7. The Hearing will commence on a Date set by the Registrar.

LICENCE APPEAL TRIBUNAL

Carl Dombek, Chair

Released: October 24, 2002

APPEAL FROM A DECISION OF THE
CORPORATION DESIGNATED FOR PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MICHAEL H. TURK, Vice-Chair

APPEARANCES: CAROL STREET, Counsel, representing the Ontario New Home
Warranty Program

DATE OF
HEARING: October 17, 2002 Toronto

ORDER

FOLLOWING attendance on October 17, 2002 at a hearing before this Tribunal of Carol Street, Counsel, appearing on behalf of the Ontario New Home Warranty Program and upon Counsel's advice that this matter has been resolved in accordance with the correspondence filed as Exhibit No. 3, the Tribunal makes the following Order:

1. The Applicant's Appeal of the Ontario New Home Warranty Program's decision letter dated June 19, 2002 is withdrawn without prejudice to the Applicant's right to have any remaining claims not referred to in the decision letter assessed in the normal course by the Ontario New Home Warranty Program.

LICENCE APPEAL TRIBUNAL

Michael H. Turk,
Vice-Chair, Presiding

RELEASED: October 18 , 2002

PREHEARING

ROBERT AND JOAN HAMBLIN,
CARL W. BOWKER,
OTTAWA CARLETON CONDOMINIUM CORPORATION NO. 619

APPEALS FROM DECISIONS OF THE
CORPORATION DESIGNATED FOR THE
PURPOSES OF THE *ONTARIO NEW HOME
WARRANTIES PLAN ACT*

TO DISALLOW THEIR RESPECTIVE CLAIMS

TRIBUNAL: STEPHEN KELLY, VICE-CHAIR

APPEARANCES: KENNETH BOWKER, representing the three Applicants
SEAN KELLY, representing the Ontario New Home
Warranty Program
DEBORAH BELLINGER, representing El-pine
Homes Corporation, the Added Party

DATE OF
PREHEARING: September 18, 2002
Ottawa

ORDER

Following the attendances of September 18, 2002 at a pre-hearing before this Tribunal by Kenneth Bowker, Agent on behalf of the Applicants (the "Applicants"), Sean Kelly, Counsel on behalf of the Ontario New Home Warranty Program (the "Program") and Deborah Bellinger, Counsel on behalf of El-pine Homes Corporation (the "Added Party");

The Tribunal makes the following Order respecting the hearing scheduled to commence on Friday, July 4, 2003 continuing until Friday, July 11, 2003, resuming on Tuesday, July 29, 2003, and continuing until Wednesday, August 6, 2003, if necessary;

- 1) The three Applications are to be heard together;
- 2) In the Bowker Application, the Parties confirmed that the Appeal with respect to warranty items 1 through and including 54 have been resolved, as have the issues concerning items 2, 6, 7, and 8 on the list of non-warranty items. The hearing will then proceed with regard to items 55 through 58 of the warranty list and 3, 4, 11, 16, 18, and 22 of the non-warranty list;
- 3) The Parties to the Hamblin Application have indicated that it will proceed with warranted items 1 through 11 and non-warranted items 7, 8, and 9. It has also

been agreed that the item shown as number 12 on the warranted lists should have been listed as non-warranted, and it will also proceed for hearing;

- 4) In the Hamblin Application, the Program will provide, by September 27, 2002, a Supplemental Decision Letter on the issue of the sound installation of the interior bathroom walls.
- 5) The Application of the Ottawa Carleton Condominium Corporation No. 619 will proceed with regard to warranted items 1, 2, 4, 12, 13, and 18, and non-warranted items 1, 2, 10, 11, 13, 17, 27, 31, 39, 40, 41, 42, 43, 44, 45, 46, 47, 49, 51, 52, 53, 64, and 68;
- 6) With regard to the Ottawa Carleton Condominium Corporation No. 619 Application, the Parties agree that, with exception to the issues concerning the HVAC system in the dryer vent, the only issue is the quantum of compensation to be paid. With regard to the HVAC system and the dryer vent, the issue is the extent of the deficiencies, if any;
- 7) The Parties to all three Actions agree that any resolutions of the issues will be on a cash payment basis and will not involve an order that work be performed by the Third Party or anyone on behalf of the Program;
- 8) With regard to productions in all three Applications, the Applicant's productions are to be completed by October 7, 2002. The Programs' productions are to be completed by November 30, 2002. The Third Party's productions are to be completed by December 31, 2002;
- 9) With regard to the finding of expert reports of experts in the three Applications, the Applicants will produce a Supplemental Report by Buchan, Lawton, Parent Ltd. by October 7, 2002. Further, the Applicants will produce the Report of Morrison Hershfield Consulting Engineers, which was provided to them by e-mail October 7, 2002;
- 10) The Program will produce a Report by Hiens Keller and any mechanical engineering reports that it intends to rely upon by November 30, 2002;
- 11) The Third Party will provide reports by any expert it intends to rely upon by December 31, 2002;
- 12) The Applicant, Hamblin, will act as Agent for all three Applicants concerning coordinating access by representatives of Hiens Keller to the interior or exterior of the subject units and building;
- 13) The Program will provide a written consent by September 20, 2002 to the Applicants authorizing Morrison Hershfield Consulting Engineers to release any reports in its possession. Upon receipt of the Consent, the Applicants will in turn request productions of the reports, including any e-mail reports by September 23, 2002. Copies of any reports that are received by the Applicants are to be provided to the Program and the Third Party at their respective costs. If Morrison Hershfield Consulting Engineers requires that the Applicants pay any

more than the costs of photocopying charges for the production of reports, then the Applicants are to advise the Program and the Third Party, and the Program will then produce any reports of Morrison Hershfield Consulting Engineers in its possession within such notice;

- 14) Ken Bowker, Agent for the Applicant is to advise the Program and the Third Party by October 7, 2002 if he intends to appear as both an Agent for the Applicants and an expert witness. If Ken Bowker indicates his intention to do so, the Program and Third Party will bring a Motion to address the issue of Ken Bowker's status on Tuesday, May 20, 2003. If Ken Bowker decides to appear as both Agent for the Applicants and an expert witness, he will provide a report by e-mail by October 31, 2002 and an original by November 15, 2002, together with a copy of his resume;
- 15) If Ken Bowker decides not to appear as an expert witness and chooses to obtain another expert in engineering, a report of that expert is to be provided by November 15, 2002 with a copy of the expert's resume;
- 16) The Program shall have 30 days from the date of receipt of the Applicants' expert engineering report to file a responding report. The Third Party will file a responding report within the time frame already established for providing its expert reports;
- 17) Ken Bowker is to provide the Program and Third Party with documentation confirming that the Applicant, Ottawa Carleton Condominium Corporation No. 619, has authorized him to act as its Agent in this matter;
- 18) On Tuesday, May 27, 2003, the Parties through their Agent and/or Counsel are to consult for the purposes of drafting an agreed Statement of Facts, which is to be submitted to the Registrar by May 30, 2003;
- 19) Nothing in the foregoing shall relieve any Party from complying with the rules of disclosure referred to in the Rules of Practice of the Tribunal.

LICENCE APPEAL TRIBUNAL

Stephen Kelly, Vice-Chair

Released: October 29, 2002.

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of
GLOBAL TRAVEL CENTRE ADVANTAGE

AND IN THE MATTER of a decision of the
Travel Industry Council of Ontario

TO DISALLOW A CLAIM
- Decision dated: June 28, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Decision

GLOBAL TRAVEL CENTRE ADVANTAGE

Applicant

- and -

TRAVEL INDUSTRY COUNCIL OF ONTARIO

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a prehearing in the above matter on October 2, 2002;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the prehearing *peremptory against all parties* to commence, by teleconference, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto at 9:30 a.m., on Wednesday, October 16, 2002.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: October 1, 2002

PREHEARING

GLOBAL TRAVEL CENTRE ADVANTAGE

APPEAL FROM A DECISION OF THE BOARD OF DIRECTORS
OF THE TRAVEL INDUSTRY COUNCIL OF ONTARIO

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, VICE-CHAIR

APPEARANCES:

ANTONINO LICANDRO, Counsel, representing Global Travel
Centre Advantage
TREVOR C.D. BRANION, Counsel, representing the Travel
Industry Fund of Ontario

DATE OF

PRE-HEARING: October 16, 2002, *by teleconference*

ORDER

Following attendances on October 16, 2002 at a prehearing before this Tribunal of Antonino Licandro, Counsel, appearing by teleconference on behalf of Global Travel Centre Advantage (the "Applicant"), and Trevor C.D. Branion, Counsel, appearing by teleconference on behalf of the Travel Industry Council of Ontario ("TICO");

The Tribunal makes the following order respecting the hearing scheduled to commence at 9:30 a.m. on Tuesday, December 3, 2002 at Gillespie Reporting Services, 130 Slater Street, Suite 200, Ottawa, Ontario;

1. The Parties to the hearing are the Applicant and TICO.
2. It was agreed by the parties' respective counsel that the issues for adjudication at the hearing shall be as follows:
 - (i) Did Claire and James Lough ("the customers") pay the Applicant for travel services to be supplied to them by Renaissance Cruises in respect of a cruise due to depart on November 24, 2001 in compliance with Section 51.(1) of Regulation 806/93 under the *Travel Industry Act*.

- (ii) Did the Applicant pass all or part of the customers' money to Renaissance Cruises in compliance with Section 51.(1)(b) of Regulation 806/93 under the *Travel Industry Act*.
 - (iii) Did the customers comply with Section 50.(3) 6 of Regulation 806/93 under the *Travel Industry Act* and pay for the travel services with cash or by cheque, credit card or other similar cash payment method.
3. The parties shall fully comply with the disclosure requirements as set forth in Rule 6 of the Rules of Practice of the Tribunal.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair,

Released: October 17, 2002

STAR VAN SYSTEMS INC. AND VAN-ES, ANDRIES AND REGISTRAR OF
MOTOR VEHICLES

MOTION TO SET ASIDE THE ORDER OF THE DEPUTY
REGISTRAR OR TO REQUIRE THE DEPUTY REGISTRAR
TO DELIVER PARTICULARS OF THE REASONS FOR THE
ISSUANCE OF HIS ORDER

TRIBUNAL: CARL F. DOMBEK, Chair, presiding

APPEARANCES: CAROLE McAFEE WALLACE and ROBERT WARREN,
Counsel, representing the Applicant
PATRICK MOORE, Counsel, representing the Respondent

DATE OF
HEARING : October 8, 2002 Toronto

ORDER

Upon reading the Affidavit of Carole McAfee Wallace and the written submissions of the Appellant and the Respondent; and upon hearing the submissions of Counsel for the Appellant and the Respondent, the Licence Appeal Tribunal

1. Dismisses the application for an order to set aside the Order of the Deputy Registrar dated July 8, 2002; and
2. Dismisses the alternative application for an order requiring the Deputy Registrar to deliver particulars of the reasons for the issuance of his Order.
3. The parties shall disclose to each other, by letter, their list of witnesses in accordance with the Disclosure Rules of the Licence Appeal Tribunal.

LICENCE APPEAL TRIBUNAL

Carl Dombek, Chair, presiding

Released: October 9, 2002

STAR VAN SYSTEMS INC. AND VAN-ES, ANDRIES

APPEAL FROM A NOTICE OF THE DEPUTY REGISTRAR OF
MOTOR VEHICLES

TO ORDER SUSPENSION AND SEIZURE

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: ROBERT WARREN AND CAROLE McAFEE WALLACE, Counsels,
representing Star Van Systems Inc. and Van-Es, Andries

PATRICK MOORE, Counsel, representing the Registrar of Motor
Vehicles

DATE OF MOTION: September 25, 2002 Toronto

ORDER

WHEREAS the Deputy Registrar of Motor Vehicles (the "Respondent") issued a suspension and seizure order dated July 8, 2002 regarding the CVOR certificates and plate portion of permits for all commercial motor vehicles and trailers issued to Star Van Systems Inc. and Van-Es, Andries.

AND WHEREAS Counsel for the Applicants has delivered to the Deputy Registrar and the Tribunal a Notice of Motion in writing seeking certain relief;

AND WHEREAS the Tribunal, by written notice dated September 10, 2002 addressed to the Applicants' Counsel of record and the Registrar's Counsel of record, appointed September 25, 2002 as the date for the hearing of the Applicants' motion;

AND WHEREAS when the hearing of the motion commenced before the Tribunal on September 25, 2002, the Respondent's Counsel moved that the hearing of the motion be adjourned to October 8, 2002 at 9:30 a.m.;

AND WHEREAS Counsel for the Applicants consented to the hearing of the motion being adjourned to October 8, 2002;

NOW THEREFORE, this Tribunal orders that:

The hearing of the motion shall, by consent of the parties Counsel, be adjourned *peremptorily against both parties* to commence at 9:30 a.m. on Tuesday, October 8, 2002 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: October 3, 2002

NICK NOEL

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: DOUGLAS MACKINTOSH, Vice-Chair

APPEARANCES:

NICK NOEL, Applicant, appeared on his own behalf
YOVANKA McBEAN, Agent, representing the Registrar under the
Motor Vehicle Dealers Act

DATES OF
HEARING:

October 4, 2002

OTTAWA

REASON FOR DECISION AND ORDER

This is an appeal by the Applicant, Nick Noel, to the Licence Appeal Tribunal from a proposal dated June 27, 2002 by the Registrar under the *Motor Vehicles Dealers Act* ("the Act") to refuse his registration as a motor vehicle salesperson.

The Registrar relies solely on the Applicant's failure to meet the criteria set out in Section 5 of the Act.

THE EVIDENCE

The Tribunal heard from two witnesses.

Michael Rothe gave evidence for the Registrar. He gave an explanatory background for the documentary evidence that was introduced on behalf of the Registrar.

Mr. Rothe has been involved since January of 2000 with administration and prosecution for the Ontario Motor Vehicle Industry Council ("OMVIC"). Consequently, he understands the requirements needed by an applicant for registration as a salesperson under the Act. OMVIC oversees such applications, having been created in 1997 to enforce compliance with the Act and its regulations.

The documents identified by the witness show that on April 25, 2002 the Applicant, Nick Noel, applied on the prescribed form to become a salesperson. The Registrar's concern arose for two reasons from this application.

First, in answer to question 6 on the form, ".... have you been engaged in personal bankruptcy proceedings?" the Applicant marked the answer "No" with a cross in the space provided, indicating that he had not been so involved.

Quite clearly this was wrong. Records received from Equifax indicated "A bankruptcy was filed in 11/99 in SC Ottawa" and as well a certified copy from the trustee showed a discharge dated August 22, 2000.

The second concern arose from the answer to question 9 on the form, "Have you ever been found guilty or convicted of an offence under any law? If yes, list all the charges and/or convictions, and the circumstances surrounding each (attach additional information if necessary)" Again the Applicant marked the answer NO with a cross in the space provided.

This answer was also clearly wrong. The Police records obtained by OMVIC and submitted as evidence showed that Mr. Noel had been convicted of the following 11 offences:

MAR 1995 BREAK AND ENTRY SUSP SENT & PROB 1 YR

JAN 1997 FAIL OR REFUSE TO PROVIDE SAMPLE SEC 254(5) FINED \$300 & PROB

JUL 1998 MISCHIEF UNDER \$5000 FINED \$250 & PROB

FAIL TO APPEAR FINED \$75

AUG 1998 DRIVE DISQUALIFIED FINED \$600 & PROB

FAIL TOP APPEAR FINED \$100

FAIL TOP APPEAR FINED \$75

MAR 2000 ASSAULT FINED \$548.67

OBSTRUCTION SUSP SENT & PROB

MISCHIEF UNDER SUSP SENT & PROB

SEP 2000 OBSTRUCT PEACE OFFICER FINED \$500

When this information was received by OMVIC, a letter was sent to the Applicant's sponsor indicating, without giving details, "Criminal record checks can result in false positives" and requesting the sponsor to discuss this with the Applicant.

The Applicant wrote back "I apologize for not enclosing all the pertinent information as requested due to the fact that I assumed it may not be relevant since there is nothing

but a few minor fines (which I will take care of within the next couple of weeks) that is outstanding".

Then, apparently in response to a telephone call from an OMVIC representative, the Applicant wrote a second letter saying, "... I have neglected to mention two other cases which took place in the year 2000 of which one has been dismissed and the other resulted in a fine"

Finally, after a call from the Deputy Registrar, the Applicant submitted the details of his convictions. With respect to the Break and Entry he wrote, absolving himself, "My friend at the time Richard Harris asked me to drive him to a house which he intended to rent. I parked my car in front of the house and waited for Richard. When he came out he had some items I thought were his. When we were ready to leave a police cruiser stopped us and charged us both ..."

The Applicant gave evidence, which did not assist his appeal. He acknowledged that on the application form after a caution reading in capitals, 'NOTE: PLEASE ENSURE THAT YOU HAVE READ THIS SECTION IN FULL BEFORE SIGNING' the following paragraph appears:

"I understand that I may not buy or sell vehicles for a motor vehicle dealer unless I am registered under the Act as a salesperson to that dealer. I acknowledge that "buying and selling" refers to any form of negotiation concerning the purchase or sale of a vehicle, and is not limited to the signing of contracts."

The Applicant said he was a pretty good salesperson and had sold over 60 cars. This, of course, put him in direct violation of the requirement to be registered first.

With respect to the Break and Entry conviction, the Applicant testified he pleaded guilty to get the matter over.

THE LAW

The relevant sections of the Act provides as follows:

5. (1) An applicant is entitled to registration or renewal of registration by the Registrar except where,
 - (a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business, or:
 - (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with the law and with integrity and honesty; or

- 6.(1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 5.

DECISION AND REASONS

The Tribunal finds that the Applicant obviously gets on well with people. However, the only question the Tribunal has to answer is whether the Registrar was in error in concluding that the Applicant is not in compliance with the requirements of section 5 of the Act.

The leading case on the proper test to be applied is set out in Brenner v. Registrar of Motor Vehicles and Salesmen 1983 19 CRAT Divisional Court which confirms how the Act. should apply:

"The effect of s. 7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the Applicant afforded reasonable grounds for the belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question. Instead the Board seems to have been pre-occupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself."

It is therefore the Applicant's past conduct, not his prospects which govern the outcome.

Accordingly by virtue of the authority vested in it under section 7. (4) of the Motor Vehicles Dealers Act, the Tribunal directs the Registrar to carry out his proposal dated 11th February 2002.

LICENCE APPEAL TRIBUNAL

Douglas Mackintosh, Vice Chair

Released: October 17, 2002

PREHEARING

LURKAN HOMES INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: VICTOR DREVNIG, Vice-Chair

APPEARANCES:

RICHARD LUTZER, Agent, representing the Applicant
NETANUS RUTHERFORD, Counsel, representing Registrar, Ontario
New Home Warranty Program

DATE OF

PRE HEARING: September 30, 2002

Toronto
(By teleconference)

ORDER

Following attendances by Teleconference at a Pre-hearing before this Tribunal of Richard Lutzer, Agent on behalf of Lurkan Homes Inc. (the "Applicant") and Netanus Rutherford, Counsel on behalf of the Registrar, Ontario New Home Warranty Program (the "Registrar");

The Tribunal makes the following order respecting the hearing scheduled to commence on Friday, November 8, 2002 at 9:30 a.m. at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario:

1. The Parties, by consent, agree that the Registrar has received certain financial information which will satisfy their concerns provided that:
 - a) The Registrar will fax a Letter of Conditions of the Proposed Renewal to the Applicant today, Monday the 30th day of September, 2002 and that, the Applicant will sign and return the letter to the Registrar and to this Tribunal by fax on or before Friday, the 4th day of October, 2002, in which case the appeal will be allowed.
 - b) If the Applicant fails to return the Letter of Conditions of the Proposed Renewal on or before the 4th day of October, 2002, the hearing will proceed on the 8th day of November, 2002.

- c) All witness reports and a witness list should be served and filed in accordance with the Rules of the Tribunal.

LICENCE APPEAL TRIBUNAL

Victor Drevnig
Vice-Chair

Released: October 17, 2002

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
X L KARS INC. AND CHARLES PETER TWIGG

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATIONS
- Proposal dated: July 10, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

X L KARS INC. AND CHARLES PETER TWIGG

Applicants

-and-

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on October 22, 2002;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against all parties* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Wednesday, November 20, 2002.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: October 15, 2002

SAUGEEN VALLEY HOMES INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *ONTARIO NEW HOME WARRANTIES
PLAN ACT*

TO REFUSE TO RENEW THE
REGISTRATION

TRIBUNAL: WILLIAM M. MCINTOSH
Presiding Vice-Chair

APPEARANCES: NETANUS RUTHERFORD,
Counsel for the Ontario New Home Warranty Program
by telephone conference

JAMES WEBBER, Agent
on behalf of Saugeen Valley Homes Inc.
by telephone conference

DATE OF PREHEARING: October 18, 2002 Toronto

ORDER

Following the attendances by teleconference on October 18, 2002 at a prehearing before this Tribunal of James Webber, appearing on behalf of Saugeen Valley Homes Inc. (the "Applicant"), and Netanus Rutherford, Counsel on behalf of the Ontario New Home Warranty Program (the "Respondent").

The Tribunal makes the following Order:

1. The parties to the hearing are the Applicant and the Registrar, *Ontario New Home Warranties Plan Act*.
2. The parties agreed that the remaining outstanding issue is the failure of the Applicant to forward its current financial statements in satisfaction of 1 (a) of the Notice of Proposal. To resolve this issue the Applicant must deliver to the Respondent such financial statements by October 31, 2002.
3. In addition to the Respondent will retain the security on hand of \$9,435.00 and will require the Applicant to be limited to the construction of 10 new homes prior to the date of the Applicant's registration renewal being February 18, 2003.

4. The requirements in (2) and (3) will be incorporated into a "Terms and conditions" letter and sent to the Applicant by facsimile on October 18, 2002. A response satisfactory to the Respondent will be required by Monday October 21, 2002.
5. The Parties shall comply fully and in a timely manner until the disclosure requirements of Rule 6 of the Tribunal's Rules of Practice.
6. The hearing remains scheduled to commence at the time and place listed in the Notice of Hearing dated August 22, 2002 and failing resolution of the matter outstanding will proceed.

LICENCE APPEAL TRIBUNAL

William M. McIntosh
Presiding Vice-Chair

Released: October 22, 2002

PREHEARING

AMAN MALHOTRA

APPEAL FROM A DECISION OF THE BOARD OF TRUSTEES OF
THE MOTOR VEHICLE DEALERS COMPENSATION FUND
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

AMAN MALHOTRA, representing himself

AVIVA HARARI, Counsel, representing the Board of Trustees, Motor
Vehicle Dealers Compensation Fund

DATE OF

PREHEARING: October 24, 2002

Toronto

ORDER

FOLLOWING attendances on October 24, 2002 at a pre-hearing before this Tribunal of Aman Malhotra, representing himself (the "Applicant"), and Aviva Harari, Counsel, appearing on behalf of the Board of Trustees of the Motor Vehicle Dealers Compensation Fund ("The Board of Trustees") under Regulation 801 to the *Motor Vehicle Dealers Act*;

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on November 25, 2002 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario;

1. The Parties to the hearing are the Applicant and The Board of Trustees.
2. There was no settlement of the issues which remain to be decided at the hearing.
3. It was agreed that the Applicant has no claim against the Motor Vehicle Dealers Compensation Fund in respect of an extended warranty plan issued to him by Autogard Advantage under application #12042 respecting a 1994 Nissan Maxima GXE motor vehicle VIN JN1HJ0IC8RT112584 and that whatever claim the Applicant may have had under the above warranty plan has been settled to the satisfaction of the Applicant by the payment to him by the Motor Vehicle Dealers Compensation Fund of the sum of

\$285.07 and which payment was made under cover of the aforesaid Fund's letter dated June 4, 2002 to the Applicant and cashed by the Applicant.

4. The Applicant acknowledged receiving at the pre-hearing conference from the Board of Trustees' Counsel two certificates issued by the Superintendent of Bankruptcy certifying that neither A Motors Fine Cars Ltd. or 1320283 Ontario Ltd. are in bankruptcy.
5. The Applicant acknowledged at the pre-hearing conference that he has no personal knowledge of any criminal convictions being recorded against A Motors Fine Cars Ltd. or 1320283 Ontario Inc.
6. Both parties shall fully comply with the requirements of disclosure of documents or things as set forth in Rule 6.3 of the Rules of Practice of the Tribunal.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: October 29, 2002

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
DONOVAN ASHLEY

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: June 27, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

DONOVAN ASHLEY

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Donovan Ashley, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: October 15, 2002

ROBERTO GIOIA

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: KENNETH W. KOPROWSKI
Presiding member

APPEARANCES: LUBA NEUWIRTH
Representative for the Registrar of Motor Vehicles
by Written submission only

ROBERTO GIOIA, Applicant
by Written submission only

DATE OF HEARING: October 1, 2002

DECISION RELEASED: October 3, 2002 **written**

REASONS FOR DECISION

A hearing was held on October 1, 2002, at Fort Frances, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Roberto Gioia (the "Applicant")
Motor Vehicle:	1990 Chevrolet Beretta GT, Plate No. 927 TTF (the "vehicle")
Date of Appeal:	September 4, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence (i.e. all reasonable efforts) to determine that the driver's licence was not suspended and the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(c) and (d) of the Act.

This matter came before this Tribunal on October 1, 2002 and proceeded as a written hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

The hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

This letter is to Appeal the impounding of my car: 1990 Chevrolet Berretta GT

VIN: 1G1LW11T4LY100983

This experience of having our car impounded has caused my (recently separated) wife (Nancy Margaret Gioia) un-do hardship. We have just recently separated and her and her daughter live alone in an apartment. For her to survive on her own, she has to work two separate jobs. The vehicle in question is her only transportation, and without it, has made it virtually impossible to continue working her part-time job. She only has 30 minutes to travel from Yonge and Finch to Don Mills and Lawrence between the hours of 4:30 pm to 5:00 pm. I am not available to pick her up to take her to her part-time employment due to my full-time working hours. Also, she leaves her part-time job at 9:00 pm and at that hour it takes her approximately 1 hour to arrive at her residence with public transit and walking through dark fields, so I am concerned with her safety.

She informed me that prior to her allowing Mr. Fraser to use our vehicle, he had produced a valid Florida Driver's License but P.C. #7959 Kevin Drake confiscated it at the area of which our car was towed from.

I thank you in advance for taking your time to read my appeal and hope to hear from you shortly with your decision in this matter.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Thomas Fraser;

3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Fail to Remain at Accident under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until October 11, 2003.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

- (3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:
 1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
 2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
 3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(c) and (d).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. Law. The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
- (b) financial or economic loss to any person;
- (c) loss of employment or employment opportunity to any person; or
- (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;

- (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

As to the first issue, that of due diligence, section 50.2(3)(c) of the Act specifically states :

- (c) that the **owner** of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension
(emphasis is added)

Thus, it is the owner of the vehicle who must exercise due diligence. There is no provision in the legislation that would, in a case like this, permit the owner to delegate his responsibility.

The certified copy of the records from the Ministry of Transportation, filed with Exhibit 3, clearly reveals that the owner in this case is Roberto Gioia. However, in his letter of appeal, filed with Exhibit 2, Mr. Gioia specifically states that it was his wife, Nancy Gioia, and not Mr. Gioia himself, who made the inquiry about the validity of the Driver's Licence of the driver, Thomas Edwin Fraser.

Unfortunately, for Mr. Gioia, Nancy Gioia is not the owner of the vehicle in question.

In order to comply with section 50.2(3)(c) of the Act, it should have been Roberto Gioia, as owner, and not Nancy Gioia, who made the inquiry. Mr. Gioia, therefore, did not comply with this provision. Therefore, his appeal on the ground of due diligence must fail.

As to the second ground of appeal, that of exceptional hardship, Mr. Gioia, in his letter of appeal, filed with Exhibit 2, refers to two consequences of the impoundment of his vehicle; namely:

1. His wife works at two separate jobs, but cannot continue working her part-time job because she only has thirty minutes to travel from one location in the city of Toronto to another. Presumably, this means that Mrs. Gioia has only thirty minutes to travel from one of her jobs to another, although Mr. Gioia does not make this clear in his letter of appeal. Mr. Gioia cannot transport her himself because of his own job.
2. Mrs. Gioia leaves her part-time job at 9:00 p.m., and, using public transportation, requires one hour to arrive at her residence, which also requires her to walk through dark fields, thereby raising concerns in Mr. Gioia for her safety.

No other details are provided by Mr. Gioia about these two circumstances.

The first issue that this Tribunal must consider, in deciding the issue of exceptional hardship, according to section 22(1) of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, is whether no alternative to the impounded vehicle is available. If there is, that is the end of the matter. If there is not, certain other factors must be considered.

In his letter of appeal, Mr. Gioia makes reference to public transportation in Toronto. Perhaps public transportation may not be as fast as travel in a personal vehicle; nevertheless, public transportation is an alternative, in this case, to travel in the impounded vehicle.

Perhaps, as a further result, there may be financial loss, loss of employment or employment opportunity, or loss of education or training or of education and training opportunity. This Tribunal does not know whether these results follow the impoundment because Mr. Gioia does not indicate these results in his letter of appeal.

Regardless, this Tribunal cannot consider those factors unless, pursuant to section 22(3) of the above Regulation, there is no alternative to the impounded vehicle, and unless the loss would be immediate, significant and lasting, as provided for in paragraphs 22(3)(a) and (b). Nor is there evidence that the impoundment would cause a threat to the health and safety of any person ordinarily transported by the impounded vehicle, as required by section 22(1).

There simply is not enough evidence before this Tribunal to enable it to conclude that the impoundment of the vehicle in question results in exceptional hardship, as that phrase is defined earlier in this Decision. This Tribunal finds, on the evidence, that there is, in fact, alternative transportation. However, even if the evidence were such as to permit this Tribunal to hold that there was no alternative transportation, the evidence still falls far short of establishing the other criteria in section 22(1) and section 22(3) of the above Regulation that must be satisfied before a finding of exceptional hardship can be made out.

The onus in this Appeal is on the Applicant to prove his case. Considering the evidence that Mr. Gioia has provided, this Tribunal finds that he has not met that onus. Therefore, the Appeal must fail.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Kenneth W. Koprowski, Presiding
Member

RELEASED: October 3, 2002

AMY C. SCRIMSHAW

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: CHARLES J. SANDIFORD
Presiding member

APPEARANCES: LUBA NEUWIRTH
Representative for the Registrar of Motor Vehicles

AMY C. SCRIMSHAW, Applicant
unrepresented

DATE OF HEARING: September 20, 2002

DECISION RELEASED: October 1, 2002 Belleville

REASONS FOR DECISION

A hearing was held on September 20, 2002, at Belleville, Ontario, to consider the Applicant’s appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Amy C. Scrimshaw (the “Applicant”)
Motor Vehicle: 1991 Pontiac Convertible VIN JG7MR316XMK618771
Plate ALXF889
Date of Appeal: September 4, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on September 20, 2002 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant’s request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant’s appeal.

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant’s evidence follows.

Applicant’s written submission filed with the Tribunal in support of appeal states:

To whom it may concern. On the night in question, it started off by me getting off the 3-11pm shift. My boyfriend (Kurtis) was at my house waiting for me to get home to drive him to work for midnight. I was tired so I just threw the keys at him and said. "I'm too tired to take you". No question was asked about his license' and this was the first time he had driven my car. So now I have learned a hard lesson, and it puts me in a hard position because, I have to get to and from work, and take my kids ages 5 and 7 to and school and day care. Which I have to do all myself 'cause the father of the kids was murdered 5 years ago. I believe that these are reasonable grounds to request an oral hearing before the Tribunal

: Attached Documents

- Children's Birth certificates

- Work schedule and what was worked the week of Aug 19 2002.

Testimony given by the Applicant detailed her effort to get to work and handle her child care duties. Working shifts presents a problem due to the public transportation ending at 11 p.m. Furthermore, delivering the children to a day care centre when they finish school presents another problem. She stated that her mother has been of considerable help as she drives and has supplied transport whenever her own shift work permits. She has used taxis from time to time but the fare of \$9 per trip is more than she can continue to afford. No other evidence in regard to renting a car or borrowing a vehicle was offered.

Her boyfriend Kurtis Munnings, the driver of her car, was unable to supply any financial help as he was keeping his money to pay for a lawyer for his pending court case.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record as Exhibit#1 on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner.
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Kurtis M. Munnings;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Blood/Alcohol Content in Excess of .08 under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until May 29, 2003.

The Respondent's evidence included a review of the Applicant's testimony specifically as it related to public transportation and the securing of an alternative vehicle which left a number of

options unexplored, specifically borrowing a car from a friend or relative. The Respondent went on to detail the requirements under the Act which she, in her closing statement, claimed had not been met by the Applicant .

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,

- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant has appealed under 50.2(3)(d) of the Act on the basis that the impoundment of her vehicle will result and has resulted in exceptional hardship. Section 22 of the Regulation 632/98 is very specific and provides the Tribunal with clear criteria that must be met by the Applicant in order to establish exceptional hardship as a result of the impoundment. The Tribunal cannot consider any other factors arising from or directly related to the impoundment itself.

Under section 22(2) of Regulation 632/98 the Tribunal cannot consider financial or economic loss or loss of employment or employment opportunity unless the Applicant demonstrates that all criteria set out in section 22(3) apply. One of those criteria is that no alternative vehicle is available.

In this case the Applicant does have the use of her mother's car from time to time and no doubt options exist to further facilitate the use of this vehicle with care and planning. The mother's co-operation has already been demonstrated as it was her cheque that accompanied the Applicant's appeal papers. No evidence was offered to demonstrate any effort to rent a car.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Charles J. Sandiford,
Presiding Member

RELEASED: October 1, 2002

1266-MED-ALCL

**Appeal under Section 50(1) of the *Highway Traffic Act*,
R.S.O. 1990, Chap. H.8 as amended, from a Decision of the
Registrar of Motor Vehicles pursuant to Section 47(1) of
that Act.**

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ROY MELVIN, M.D., Presiding Member

APPEARANCES: LUBA NEUWIRTH
Representative for the Registrar of Motor Vehicles
Applicant

DATE OF
HEARING: October 2, 2002 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by The Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

FACTS:

The Applicant is a 63 year old retired airline pilot who was admitted to the North York General Hospital, Toronto on January 16, 2002 directly from a hospital in Honolulu Hawaii, where he had been treated for alcohol intoxication and dependency. He had a previous admission to this Hawaii hospital in 2000 with the same problem. He recovered from withdrawal symptoms and was diagnosed with Korsakoff syndrome, substantiated by C.T. Scan showing cerebral atrophy. At the North York General Hospital, he was under the care of Physician #1 Psychiatrist and seen in consultation by Physician #2 Neurologist. He elicits a history of alcoholism for about 25 years and has previously been diagnosed with alcoholic and viral hepatitis and thrombocytopenia secondary to alcoholism.

Clinically, he showed signs of cognitive impairment. He was admitted to assess his competency and provide guidance to relieve his social stresses, which could trigger further

episodes of alcoholism. He was kept at the North York General Hospital until February 22, 2002, where he improved to the point where it was felt he could function on his own. There was a question of whether he had sustained head injuries because a recent photograph showing bruises to the right side of his face and the finding that he had drooping on this side of the face. The discharge diagnosis was (1) Chronic Alcoholism (2) Korsakoff Dementia (3) Possible head injury- and was prescribed medications (1) Risperdal- an anti- psychotic and (2) Imovane – for insominia. Korsakoff Dementia is a neuropsychiatric disorder caused by Vitamin B1 –thiamine, deficiency, typically associated with chronic alcoholism because of malnutrition.

Physician #2 notified the Ministry of Transportation on January 20, 2002 that The Applicant was medically unfit to drive a motor vehicle, whereupon the Ministry suspended his licence on the basis of the *Highway Traffic Act* Section 47(1). Reconsideration would be given on receipt of favourable medical reports and verification of compliance with an alcohol rehabilitation program. The Applicant was referred by his family doctor to see Physician #3, consultant in Addiction Medicine, whose report of June 7, 2002, recommended total alcohol abstinence and A.A. attendance, but was unable to offer an opinion as to his ability to drive safely. The Ministry's Medical Advisory Committee's report of July 19, 2002 concludes that his licence remain suspended. He was advised on July 26, 2002, and an appeal was submitted on September 5, 2002.

The Applicant has been divorced for over 20 years. He has two grown sons living in Ottawa, who initially were very supportive during his acute illness. He lives a very peripatetic lifestyle and since his retirement four years ago has lived in Ottawa, Toronto, the Turks Island, Hawaii and Vancouver. He resides presently at a motel in Richmond B.C. He lists his permanent address in Don Mills, Ontario where he lived with his last lady friend. He attributes his last alcoholic bout in December 2001 to distress caused by his break up with his lady friend and declares that he has had no alcohol since. Ministry of Transportation records show that his licence was suspended for impaired driving on August 9, 2000 until August 9, 2001. Eight days later on August 17, 200, he was given an ADLS suspension for 90 days.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly

interfere with his or her ability to drive a motor vehicle of the applicable class safely;
and

- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50(1) Every person aggrieved by a decision of the Minister under sub clause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

The Ministry of Transportation accepts medical guidelines published by the Canadian Medical Association for determining fitness to drive. Section 3.3 recommends that a patient with a diagnosis of alcohol dependence should not be allowed to drive until he/she completes a recognised rehabilitation program and remain alcohol free for 12 months.

Section 13.5 and 13.5.1 addresses the problem of dementia and recommends that such

patients should have an up to date assessment of their cognitive functions.

The Applicant has not provided the Ministry of Transportation with sufficient information to satisfy the above guidelines.

DECISION:

Upon the application by the Applicant to appeal the decision dated March 7, 2002 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the Highway Traffic Act ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

Roy Melvin, M.D., Presiding Member

RELEASED: October 15, 2002

CORA LOUISE BOWMAN

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: NIVES MONTANO, Presiding member
TERRENCE LORETTE, Member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

CORA LOUISE BOWMAN, Applicant
unrepresented

DATE OF HEARING: September 26, 2002

DECISION RELEASED: October 2, 2002 *by teleconference*

REASONS FOR DECISION

A hearing was held by teleconference on September 26, 2002, at Toronto, Ontario, to consider the Applicant’s appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Cora Louise Bowman (the "Applicant")
Motor Vehicle:	1995 GMC Safari Van, plate 956 TFX (the "vehicle")
Date of Appeal:	September 6, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on September 6, 2002 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

Robert Hill is a boarder (sic) in my home. I did not know he didn't have a valid licence, nor did we discuss it.

I was in bed when he left to go visit his friend. A pickup truck that he owns was in the laneway. I assumed he would drive his own vehicle. We never discussed his not having a licence or taking my vehicle without my knowledge.

This has left me without transportation to and from work, and daily errand eg: groceries, Doctors appointments, work. I don't have the funds to be able to get my van from the impoundment if kept for 45 days or any amount of time. This is the only vehicle I own.

The following is a summary of the Applicant's affirmed testimony.

The Applicant has been a widow for the past 4 years. She has 3 adult children who no longer live at home and all own their own vehicles. The Applicant has legal custody of her 6 year old granddaughter. As the Applicant only receives a small widow's pension and has no significant savings, it is up to her to support herself and her granddaughter.

The Applicant is currently working 1 day a week at Lansdowne Child Centre as a home care counselor. Her responsibilities include physiotherapy, occupational therapy, provides various social activities for the handicapped as well as transporting kids to a specific location or she goes to their homes. She has been with Lansdowne Child Centre for 15 years.

Approximately 2 years ago, the Applicant had carpal tunnel surgery which limits her abilities in this field and the amount of contracts she receives. Opportunities would be available for her if she so decided to accept them.

The Applicant accepted Robert Hill, the driver of the impounded vehicle, into her home as a boarder on August 23, 2002. He was referred by and is a friend of some people she knows in Brantford. One week later on September 1, 2002, Mr. Hill left the home and without the Applicant's permission or knowledge, drove away with her vehicle instead of his pickup truck that was parked in the laneway. The Applicant only realized that her vehicle was missing when Mr. Hill phoned her from jail informing her of where he was and that her vehicle had been impounded.

In her testimony, the Applicant had no discussions with Mr. Hill regarding lending her vehicle to him nor was there a need for her to ask to see his valid driver's licence. At no time did Mr. Hill ask to borrow her vehicle. The Applicant hung her keys in plain view on a hook in the kitchen as there was no reason not to. Mr. Hill drove to work each day with his own vehicle. He is currently serving 23 months in jail.

During the time of impoundment, the Applicant was working full time in a clerical position and was also working at Lansdowne Child Centre. On September 13, 2002 the Applicant quit her full time job (on her own accord) and this had nothing to do with her vehicle having been impounded.

The Applicant stated that she also owns a 1981 motor home. It is only insured for fire and theft. She cannot afford to insure this vehicle to include a \$1 million liability insurance because she occasionally needs to transport her handicapped clients. She has not suspended the insurance on her impounded vehicle nor transferred it to her motor home.

The Applicant's two of the three children live near her and have been helping her to get to and from work since the impoundment. It has been very difficult as they each have busy schedules and work long hours. Her daughter would drive her mother to and from work and the Applicant's daughter-in-law would look after her granddaughter. The Applicant borrows her daughter's vehicle on Tuesday nights when she works at Lansdowne Child Centre.

The Applicant testified that she had loaned one of her daughter's money towards the purchase of a vehicle (Tracker). This daughter is currently trying to sell this vehicle which is unavailable for the Applicant to use while her van is impounded.

Burford is approximately 4 kilometers from the Applicant's home. It is a small farming community with no public transportation. The cost of traveling by taxi from Burford to Brantford is approximately \$27 each way. There are no co-workers that live in Burford. The cost to rent a vehicle is approximately \$30 per day. As there is very little income coming in, the costs of the aforementioned are too expensive.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows (Exhibits 3 & 4):

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Robert Donald Hill;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Blood Alcohol in Excess of .08 under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension for life.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a

community in whose service the motor vehicle is ordinarily used.

- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Tribunal must determine whether it should set aside the Registrar's order to impound the vehicle on the basis that the owner of the impounded vehicle will suffer exceptional hardship.

The Applicant has appealed on the grounds of "exceptional hardship" under section 55.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the criteria the Applicant must meet to determine if in fact "exceptional hardship" will result from the impoundment. The Applicant in this case has argued that the impoundment will result in hardship as described in section 22(2). In order for her appeal to be considered under section 22(2), she must have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulations provides the criteria for demonstrating that every reasonable option has been considered respecting an alternative vehicle.

1. The Applicant has testified that she is currently using her daughter's vehicle on Tuesday evenings.
2. She has not determined whether Mr. Hill's vehicle is, in fact, owned by him. If that were the case, she could borrow it during the impoundment period.
3. One of her daughters is selling a vehicle in which the Applicant has lent her money for its initial purchase. This could be an alternative for a short period of time.
4. The Applicant could transfer the insurance from the impounded vehicle to the motor vehicle for the duration of the impoundment.

With regard to possible threat to the health or safety of any person ordinarily transported by the motor vehicle, the Applicant testified that her granddaughter has asthma which is currently not a problem. The community in which the Applicant resides is "911" accessible. Since the impoundment, she has not had and therefore not missed any doctor's appointments.

Although the Applicant is a person in crisis, her plight with regard to her significant financial losses regarding this impoundment cannot be addressed by this Tribunal since there are alternatives to the impounded vehicle.

Evidence was heard that the Applicant has incurred severe financial hardship as a result of the loss of the vehicle. The Applicant testified that Mr. Hill indicated he would pay the impoundment charges. The Applicant may pursue compensation from the suspended driver, Robert Hill, as is stated in section 55.1(21) of the *Highway Traffic Act*:

"The owner of a motor vehicle that is subject to an order to impound under this section may bring an action against the driver of the motor vehicle at the time the order was made to recover any costs or other losses incurred by the owner in connection with the order".

After considering the above requirements, the Tribunal finds that the Applicant has alternatives to the impounded vehicle and the impact of the loss will only be financially significant, but not immediate and lasting.

Accordingly, after considering the criteria set out in section 22(3) and (4) of Regulation 340 as amended by Ontario Regulation 632/98, the Tribunal finds the Applicant has not established exceptional hardship as set out in section 50.2(3)(d) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Nives Montano, Presiding Member

Terrence Lorette, Member

RELEASED: October 2, 2002

JOY JENSEN DAY

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: CHARLES SANDIFORD
Presiding member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

JOY JENSEN DAY, Applicant
unrepresented

DATE OF HEARING: September 26, 2002

DECISION RELEASED: October 1, 2002 *by teleconference*

REASONS FOR DECISION

A hearing was held on September 26, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Joy Jensen Day (the “Applicant”)
Motor Vehicle: 1989 GMC SAFARI, plate AJTY 370 (the “vehicle”)
Date of Appeal: September 4th 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on September 26th 2002 and proceeded as an electronic hearing.

ISSUE:

The Applicant’s request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant’s appeal.

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant’s evidence follows.

Applicant’s written submission filed with the Tribunal in support of appeal states:

I hereby am requesting the release of my van from a 45 day impoundment.

My husband, whose license is currently under suspension took my van without my consent, while I was out walking our 21 month old daughter. As I had no clue as to where he went I couldn’t retrieve the van from him.

I truly need to have this vehicle. I have 3 children, one 21 months old, who I need to be able to get to doctor’s appointments. I also have a 12 year old daughter who needs a ride to school as

she's been transferred to a school out of our area and the distance between our home and her school is approximately 8 km. My son is involved in a variety of sports all over our area and I was one of the parents who did a great deal of team transportation (having a van) and it is very embarrassing for my 14 year to have to explain why his mother doesn't have a van any longer.

I, personally, as of Sep 12, 2002 will be resuming doctor's appointments once a week in Hamilton, Ontario, which is at least 30 km from my home.

I truly would not allow my husband to take my vehicle because this type trouble can happen.

I've requested an electronic hearing because unless there is a Tribunal meeting someplace in Brantford, I would have no way to get to such a hearing. Those people that I do know that own vehicles are very hesitant to lend them to anyone to go out of town.

I truly hope you can see your way to release my vehicle.

In the written statement submitted by the Applicant it is noted that her friends will lend her a vehicle but not for out of town trips or so it is implied. Testimony in respect to other sources of a substitute vehicle was given and indicated a rental car could not be had as she had no credit card a basic requirement by all agencies. Her brother-in-law lives in Oshawa and is seldom in contact with her family. She has no relatives at all and hence no help from that direction. While transport to her daughters school has not been provided, even though it is 8km distant, by the local school board this is a distinct departure from most school boards and I question the Applicant's effort in this direction. The son's sports activities continue as other parents of team mates provide the transport.

There is hardship here with a husband in jail ,a gross family income of \$1522,,an overdue mortgage payment on their home (with less than 13% equity). Her own medical condition requires weekly trips to Hamilton for methadone treatments which resumed on September 12, 2002. She has hitch hiked and bussed to these appointments since the loss of her vehicle.

Her husband Robert A. Day has been denied bail, a rather unusual position for the court, as his trial is not scheduled until early next year. He is an electrician who is usually taken to work by a co-worker according to her testimony. Mr. Day has had previous driving convictions and is currently under suspension until February 2003.

No information was offered as to her case workers' help nor had she explored the help that might be offered by United Way or other local charities. She is a former Administrative Assistant but has not pursued an active job search. Whether or not she still receives Employment Insurance was not determined.

No letter was offered from her doctor in Hamilton to verify her methadone treatment was only available in Hamilton. The Applicant also failed to supply a letter in respect to the lack of bus service for her child from the School Board.

Evidence for the Registrar

A summary of the Registrar's evidence follows.(Exhibit #2)

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner.
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by the Applicant's husband Robert A. Day
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until February 14, 2003.

The Respondent vigorously pursued the Applicant's position in respect to an alternative vehicle and was given the same position as was originally declared by the Applicant in her written and oral evidence.

The Respondent then produced search documents that indicated the Applicant had two other cars registered in her name which according to the Applicant had been scrapped. She also stated she had signed the ownership permits and turned them over to the wrecker, however they have yet to be processed by the Ministry of Transport.

The Respondent suggested to Mrs. Day that she follow up the wrecking yard to ensure these documents have been forwarded to the Ministry of Transport as required by law.

Public transport was discussed as an alternative but the Applicant could not afford the time nor the cost. Treatment for methadone is not available in Brantford according to the Applicant but no letter in support of this notion was provided by the Applicant.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
- (b) financial or economic loss to any person;
- (c) loss of employment or employment opportunity to any person; or

- (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant has appealed under section 50.2(d) Of the Act on the basis that the impoundment of her vehicle will and has resulted in exceptional hardship and has caused her difficulty in getting her to family medical appointments and her child to school. Section 22 of Regulation 632/98 is very specific and provides the Tribunal with clear criteria that must be met by the Applicant to establish exceptional hardship as a result of the impoundment.

The Tribunal cannot consider any other factors arising from or directly related to the impoundment itself.

Under section 22(2) of Regulation 632/98 the Tribunal cannot consider financial or economic loss or loss of employment or employment opportunity unless the Applicant demonstrates that all criteria set out in section 22(3) apply. One of those criteria is that no alternative to the impounded vehicle is available.

Furthermore section 22(4) of the Regulation requires the Applicant to demonstrate that every reasonable option has been explored including an alternative vehicle.

In this case the Applicant has indicated in her evidence that friends will lend her a car except for out of town use. Her methadone treatment could be suspended until her vehicle is released. It is also unclear as to whether the local hospital could provide this treatment.

No letter was presented from the school board in respect to the denial of bus service for her child. Some question remains in respect to the other two vehicles still registered in the Applicant's name.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Charles Sandiford, Presiding Member

RELEASED: October 1, 2002

LOLITA TAKERAM

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: CHARLES SANDIFORD
Presiding member

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles

LOLITA TAKERAM, Applicant
unrepresented

DATE OF HEARING: September 30, 2002

DECISION RELEASED: October 3, 2002 Toronto

REASONS FOR DECISION

A hearing was held on September 30, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Lolita Takeram (the “Applicant”)
Motor Vehicle:	1990 Ford Aerostar, plate 913 VKM (the “vehicle”)
Date of Appeal:	September 12, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on September 30, 2002 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

I am appealing on the grounds of hardship. I rely upon the use of my car because I have 2 young children that need to be taken to school, my 9 year old needs to be dropped to school, picked up for lunch at 12:00 noon, returned and picked up again at 3:30 p.m. I have a 4 year old starting kindergarten 9th Sept, he needs to be taken to school at 1:15 p.m. and picked up 3:30 p.m. This is a 20 minute walk one way, several times a day. I also need to do grocery shopping, my children are with me. I also do grocery shopping for my elderly parents who are in their 70's a couple times a week. I am unable to do the above without extreme hardship.

I am also unable to go to work as I have no transportation to go to work. I am suppose to go on a regular basis to select a route because when I was called to select a route, all routes in my Zoning area had been taken by senior drivers over me. I am presently waiting but unable to go to my work place because I still have my 4 year old with me in the morning, and I do not have enough time to use TTC to go down to my workplace and back as I have to pick up my 2 children from school at 3:30 p.m. At present I am not able to work because I have no vehicle. I cannot afford to take a taxi all over the place, this is very costly.

I also have a 17 year old girl who goes to high school using the TTC. She also has a part-time job in Toys 'R' Us. I am supposed to pick her up in my vehicle as I do not feel it is safe for her to be travelling on her own at night into the Kingston Rd/Morningside area. I also live in a lonely remote area where it is away from the main road. She has to walk from the bus stop to my home alone, again this is not safe for a young girl to be walking by herself alone.

In conclusion to my appeal, the circumstances that led up to my impoundment of my van were on Saturday 31st August 2002 we (myself, husband, 2 children and 2 young friends) decided to go fishing about 7:20 a.m. where we fished all day until about 5:30 p.m., we decided to leave for home. I got into the vehicle and as I was driving I started to feel quite ill, a nausea feeling started to come over me and I decided to exit on a service area at Cobourg. When I returned from the washroom I asked my husband who has not got a licence (convicted for impaired driving) to drive for a while until I felt better. We had barely got off the ramp and onto the 401 when a police officer stopped us. He asked for drivers licence, ownership and insurance, of course my husband had no licence and was duly charged. I then noticed a tow truck pull up one police officer came over and said to me he was impounding the vehicle for 45 days. I told him I was unaware of this law, he said it was enforced 2 years ago. I tried to plead with him to allow me to keep the vehicle, that I had 2 small children in the vehicle and I had no money to get home. He said he didn't care and that I put myself in this position for allowing my husband to drive. I received absolutely no sympathy and compassion from the police officer. He said he would drop us off at a motel about 3 minutes away from where he had stopped us. I had asked the assistant police officer who had been called on the scene to assist if he could give us details how to get back to Toronto via the Go train. He said he didn't know but one staff at the motel would know. Again when they dropped us off I again pleaded with the officer that had charged us, the I had no money and I wouldn't be able to go back to Toronto. He said that he didn't care and again that we caused this on ourself. I told him that I could not survive without a vehicle in Toronto, that I have to take my kids to school, the 9 year old take piano lessons at Kingston Rd./St. Clair and martial arts lessons and I need a vehicle, again he showed lack of interest and was in a hurry to leave us.

The hotel staff knew nothing about the Go-train and any details. We then had to ask strangers on the street how to get back to Toronto, eventually we phoned a cab firm in which they informed us it would cost \$130.00 to drive us to Toronto. We managed to get the fare down to \$100.00, we then proceeded home.

The testimony of the Applicant, together with her written submission, clearly indicates that the Applicant Lolita Takerman knew that her husband Ray M. Khedan had had his licence suspended and was not allowed to operate a car. In fact the driver of her car, her husband Ray M. Khedan, has had more than one conviction and is currently under suspension until February 19, 2004. The Applicant further identified her inconvenience in order to cope with her normal family chores. Additionally, she said her job as a School Bus Driver has been temporarily abandoned because the loss of her vehicle, together with her family needs, were in conflict due to route restrictions and scheduling.

In giving her evidence, replacement travel modes such as public transit, taxi use and walking were dismissed as too time costly and very awkward to schedule. Her entire evidence in respect to her hardship both written and oral centered on the absence of the vehicle or a replacement vehicle.

Much of the evidence submitted, in respect to the Applicant's description of the events following the impoundment, is not relevant to the matter before the Tribunal and should be pursued in another venue.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Ray M. Khedan;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving with more than 80 mgs Alcohol in Blood under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until February 19, 2004.

In pursuit of further clarification of the Applicant's hardship claim it was learned that Ray M. Khedan, the Applicant's husband, had been employed for 11 years at a furniture manufacturing plant and had a gross income of over \$30,000 annually. When the Applicant is driving for the bus company she earns a minimum of \$9600 a year. The townhouse where they live is owned by the parents and is rented for \$600 monthly. Family debts call for payments of approximately \$400 monthly.

Because she is now on Employment Insurance her income has been reduced by approximately 50% or \$400 monthly. These known figures would leave a disposable income of \$2400 gross when she returns to work where she can be reemployed.

The Respondent, in summing up the Applicant's position, recognized that it was currently very inconvenient at this time for the Applicant but it fails the test of section 50.2 (3) (d) of the Act.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases

where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether

no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,

- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.

(2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,

- (a) inconvenience to any person;
- (b) financial or economic loss to any person;
- (c) loss of employment or employment opportunity to any person; or
- (d) loss of education or training or of an educational or training opportunity to any person.

(3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,

- (a) no alternative to the impounded motor vehicle is available;
- (b) the loss will be immediate, significant and lasting;
- (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
- (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).

(4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant has appealed under section 50.2(3)(d) of the Act on the basis that the impoundment of her vehicle will and has resulted in exceptional hardship and has caused her difficulty in getting to her job and other family needs. Section 22 of Regulation 632/98 is very

specific and provides the Tribunal with clear criteria that must be met by the Applicant in order to establish exceptional hardship as a result of the impoundment.

The Tribunal cannot consider any other factors arising from or directly related to the impoundment itself.

Under section 22(2) of the Regulation 632/98 the Tribunal cannot consider financial or economic loss or loss of employment or employment opportunity unless the Applicant demonstrates that all criteria set out in section 22(3) apply. One of those criteria is that no alternative to the impounded vehicle is available.

Furthermore section 22(4) of the Regulation requires the Applicant to demonstrate that every reasonable option has been explored, including obtaining an alternative vehicle.

In this case, the Applicant did not show that she has explored any of the options to the impounded vehicle which might be available to her, but instead focused most of her testimony on her hardship to the exclusion of any attempts she may have made to mitigate the loss of the vehicle. In particular, the Applicant did not provide any specific information with respect to a renting a car which, according to her testimony in respect to their financial position, would appear to be a logical solution to replace the impounded vehicle.

While the Applicant has established that the impoundment of her vehicle is very inconvenient, she has not presented the Tribunal with evidence that would support exceptional hardship, her grounds for Appeal under section 50.2(3)(d) of the Act. The burden to provide evidence to support an Appeal under the Act is that of the Applicant.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

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LICENCE APPEAL TRIBUNAL

Charles Sandiford, Presiding Member

RELEASED: October 3, 2002

KEVIN FRENETTE

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: CHARLES SANDIFORD
Presiding member

APPEARANCES: LUBA NEUWIRTH
Representative for the Registrar of Motor Vehicles

KEVIN FRENETTE, Applicant
unrepresented

DATE OF HEARING: SEPTEMBER 30, 2002

DECISION RELEASED: OCTOBER 4, 2002
Toronto
(By Teleconference)

REASONS FOR DECISION

A hearing was held on September 30, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Kevin Frenette (the "Applicant")
Motor Vehicle:	1994, PONTIAC SUNBIRD SLE, plate # 532 XEN (the "vehicle")
Date of Appeal:	September 13, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence to determine that the driver's licence was not suspended as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on September 30, 2002 and proceeded as electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

Vehicle was leased to Maureen and Daniel Murray. They lent car to son John Murray. He had not told them he had lost his licence. I 'm including the Ownership, the Insurance slip and a copy of Lease Agreement. Obviously, I would not have given permission to John Murray to drive vehicle or had knowledge of him driving the car. This happened to no fault of my own or the Murray's.

The lease between the Applicant and Daniel and Maureen Murray was for a period of not less than one year at a payment of \$1 per month. Details as to precise covenants were not offered nor was any figure supplied as to the deposit made in consideration of this lease. Detail of the taxes paid were not offered in evidence by the Applicant.

While a presumption was presumed that no unlicensed driver would operate the car no covenant was declared within the agreement by the Applicant.

The Applicant testified that this lease agreement was motivated by his desire to remove the car from his access so that he would not be tempted to drive it as his licence is under suspension until 2004.

No protection to the Applicant for possible exposure to an unlicensed person driving the leased vehicle was offered in evidence.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as vehicle owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by John Murray;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of driving with more than 80 mgs. alcohol in blood under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until June 13, 2003.

After a review of the Applicant's submission and testimony the Respondent outlined the requirements under the Act subsection 50.2(3)(c) that must be in evidence in order to support the Applicant's appeal. The conclusion of the Respondent was that no such evidence was offered by the Applicant and that his appeal should be denied.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate

portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(c).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. Law. The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

APPLICATION OF LAW TO FACTS:

Neither the owner, the Applicant Kevin Frenette nor the lessee Daniel Murray offered any supporting evidence to meet the required requisites of the Act subsection 50.2(3)(c). The lessee's son John Murray the driver in this case had 5 previous driving convictions and was under suspension until June 13 2003. The driving record of Daniel Murray's son would demand a verification of the validity John Murray's licence to drive.

No evidence was given by the Applicant, Kevin Frenette, to support any act of diligence on his part in spite of his own experience in licence suspension.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

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LICENCE APPEAL TRIBUNAL

Charles Sandiford, Presiding Member

RELEASED: October 4, 2002

FUJITEC CANADA INC.

**Appeal under section 50.2 of the *Highway Traffic Act*,
R.S.O. 1990, Chap.H.8 as amended (the “Act”), from
the Order of the Registrar of Motor Vehicles
pursuant to section 55.1(3) of the Act.**

**TO APPEAL AN ORDER TO IMPOUND A MOTOR
VEHICLE ISSUED BY THE REGISTRAR OF MOTOR
VEHICLES**

TRIBUNAL: STUART CORK,
Presiding member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

ROBERT WAPPEL,
Solicitor for the Applicant

DATE OF HEARING: September 27, 2002

DECISION RELEASED: October 1, 2002 Toronto

REASONS FOR DECISION

A hearing was held on September 27, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Fujitec Canada Inc. (the "Applicant")
Motor Vehicle:	2000 Ford Focus, plate no. AFLH 819 (the "vehicle")
Date of Appeal:	September 13, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence (i.e. all reasonable efforts) to determine that the driver's licence was not suspended and the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(c) and (d) of the Act.

This matter came before this Tribunal on September 27, 2002 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

The Respondent submitted a set of copies of documents bearing original certification seals, which were entered into evidence, and all documents entered into evidence were with the consent of both parties.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

OWNER'S POSITION

Fujitec Canada Inc. claims the return of its vehicle from impoundment.

Reason -

1. This vehicle contains elevator and escalator parts and equipment needed to install and maintain elevators.
2. The vehicle contains unique safety equipment to be used by elevator maintenance personnel. If Fujitec Canada, Inc. cannot have access to this equipment, then one field employee will not have the necessary safety equipment.
3. Fujitec Canada, Inc. exercises due diligence with all of its employees with vehicles to make sure that their licences are current and that they comply with Fujitec Canada, Inc.'s driving policy, which, among other things, prohibits drinking and driving. Fujitec Canada, Inc. was intentionally misled by the driver. The driver has been fired.

In his statement to the Tribunal, Mr. Wappel indicated that he was both general counsel for the Applicant, as well as a director of the company. He stated that the company is in the business of servicing elevators and related equipment, and relies upon several Ford Focus automobiles to transport pairs of service staff and their equipment to their customers' locations.

Mr. Wappel stated that it is the company policy to obtain an annual assessment from all of their employees. As part of this assessment, an un-sworn declaration is signed by each of the Applicant's employees attesting to, among other things, that the employee's driver's licence is in good standing. No further checks as to the validity of the employee's driver's licences are made by the Applicant. The most recent such declaration made by Mr. Robert Boyd, who was the driver of the vehicle at the time of the impoundment, was in November of 2001.

Mr. Wappel also stated that their Ford Focus vehicles have been modified by the car's supplier. These modifications allow their vehicles to transport the safety and service equipment required for their technicians for their calls.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as registered plate owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Robert S. Boyd;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until May 14, 2003.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(c) and (d).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. Law. The attention and care due from a person in a given situation....

Also, “due diligence” in Black’s Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.

- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Mr. Wappel stated before this Tribunal that it was the policy of the Applicant to have a declaration from each of their employees that their driver's licence was valid. However, sections 50.2(3)(c) of the Act is clear in that it states that in order to meet the grounds, the owner of the vehicle must exercise due diligence in attempting to determine that the driver's licence of the vehicle was not suspended. There was no evidence before this Tribunal that could be considered an attempt by the owner to determine the validity of Mr. Boyd's driver's licence. Mr. Wappel stated that it was the company's policy to rely solely upon the statement of the driver in their annual assessment, and not to pursue any further determinations as to the

validity of their employees driver's licences. It was also not known as to whether or not the Applicant actually ever viewed the driver's licences of their employees.

The Tribunal finds that in this case, the action of the Applicant's obtaining a declaration from each of their employees as to the status of their driver's licences, does not amount to due diligence as required by the Act.

The Applicant has also appealed on the grounds of exceptional hardship, in accordance with section 55.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the specific criteria the Applicant must meet to determine if in fact exceptional hardship will result from the impoundment. The Tribunal is precluded from considering any other factors not arising from or directly related to the impoundment itself.

In order for the Applicant's claims to be considered under section 22(2)(a), (b), and (c), he must also have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered for an alternative vehicle. The Applicant has made no specific claims of exceptional hardship as described by section 22(1)(a) or (b).

The Tribunal may consider economic loss only if no alternative to the impounded vehicle is available (see subsection 22(3)(a) of that Regulation). In this case, the Applicant's elevator service company has not been shown to be suffering any significant financial or employment loss, as there was evidence before the Tribunal that this particular modified Ford Focus was not the only such vehicle operated and owned by the Applicant.

The Applicant has not presented the Tribunal with any evidence that would demonstrate that every reasonable alternative option has been considered and inquired into as required under section 22(4) of the Regulation. In fact, there was no evidence from the Applicant that he had pursued any alternatives to the impounded vehicle. The Tribunal was told that these Ford Focus vehicles had been specially modified to carry equipment, however there was no evidence as to why only these particular vehicles, and not some other form of transport, could carry their equipment.

The Applicant has apparently been able to maintain the daily activities of the business and the Tribunal was not presented with any evidence as to what, if any, losses were being suffered as a result of the impoundment of their vehicle. The Tribunal finds that no evidence was heard that would support a finding of exceptional hardship, nor a loss that was significant or lasting, as required by the Act.

Therefore, the Tribunal finds that the Applicant has failed to meet the onus under section 22(4) of the Regulation and is therefore precluded from considering the Applicant's claim of exceptional hardship under section 22(2) of the Regulation.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

RELEASED: October 1, 2002

FILE NAME: 1283.mvia.Fujitec

ALL- LIFT LTD.

Appeal under Section 50.3 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from an Order of the Registrar of Motor Vehicles pursuant to Section 82.1 of that Act.

TO APPEAL AN ORDER TO SUSPEND AND
IMPOUND A COMMERCIAL MOTOR VEHICLE
OR TRAILER

TRIBUNAL: STUART CORK, Presiding Member

APPEARANCES: PATRICK MOORE, Solicitor for Respondent

ALLAN BENNETT, Applicant,

DATE OF
HEARING: October 10, 2002

Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by All-Lift Ltd. (the "Applicant") respecting an Order of the Registrar of Motor Vehicles (the "Respondent") pursuant to sections 50.3 and 82.1 respectively of the *Highway Traffic Act* (Ontario), R.S.O. 1990, Chap. H.8 as amended.

EXHIBITS:

Exhibit #1: Order to Impound and Suspend dated September 4th, 2002, issued by the Registrar of Motor Vehicles

Exhibit #2: Notice of Appeal Form received at the Tribunal September 16th, 2002, filed by the Applicant.

Exhibit #3: Respondent's Record Book

Exhibit #4: Applicant's Submissions, nine pages

PRELIMINARY MATTERS:

There were no preliminary matters raised at this hearing.

FACTS:

Evidence for the Respondent:

The Registrar's witnesses at this hearing were MTO Transportation Enforcement Officer Dennis Singh, and MTO Transportation Enforcement Officer Richard McConnell.

Officer Dennis Singh testified that on the date of the impoundment he was stationed at the Halton-Oakville truck inspection station and that the impounded vehicle was selected for a random full level 1 CVSA inspection. As part of the CVSA inspection, the brakes on the vehicle were checked accordingly. The impounded vehicle was equipped with three axels, with a hydraulic braking system for the front axel, and the two rear axels (axels two and three) were equipped with air brakes. The air braking system for the two rear axes were equipped with clamp type 30 regular type brake chambers, which are the most common type of system in use.

Officer Singh testified that with the vehicles wheels blocked, he instructed the driver of the vehicle, Mr. Leslie Sharpe, to apply pressure to the brakes and hold until instructed to release. The brake system air pressure gauge in the cab was observed by Officer Singh to indicate that the pressure was at 98 psi, the proper level for the system's operation. With the brakes fully applied, and then released, Officer Singh measured the pushrod travel for each of the four air brake actuator chambers by marking the rod with a sharpened soapstone, and measuring the travel difference with a steel tape measure. Officer Singh further testified that his marks on the rod were made in such a way that there was no space between the end of the mark and the face of the chamber when the rod was in the retracted position, giving the best possible accuracy.

Officer Singh found that four of the six brakes on the vehicle had pushrod travel in excess of the 2 ¼" allowed by the regulations (Exhibit #3, page 4). Officer Singh determined that the number of brakes having a critical defect was in excess of the 50% as per Regulation 512/97 7.(2), and called another MTO Enforcement officer, Richard McConnell to the scene to verify his measurements. The driver was given a Notice and a ticket, and the Applicant was subsequently informed that the vehicle was to be impounded. The Applicant then dispatched a mechanic to the scene to make the necessary repairs to the vehicle. Officer Singh stated that upon completing the repairs to the vehicle, the mechanic told him that "yes, the brakes were bad."

Officer Richard McConnell testified that he verified Officer Singh's original measurements of the air brake's pushrod travel with his own measurements. He confirmed that the marks on the pushrods were satisfactory, and the air pressure in the braking system was adequate for the test. Officer McConnell further testified that the one brake pushrod travel measured at 2 ¼" (Exhibit #3 page 4) for the left brake on the second axle, was in fact "a hair over" and a "very solid" 2 ¼" measure.

Evidence for the Applicant:

Mr. Alan Bennett, Owner of the company whose vehicle was impounded, challenged the use of a metal tape measure and sharpened soapstones to measure the pushrod travel. He argued

that this case turned on whether the single brake pushrod measured at 2 ¼" of travel, could have possibly been inaccurately measured by the slightest amount either way, thereby making precision very critical to whether there vehicle should have been impounded.

Mr. Burnett referred to several work orders (Exhibit #4 page 4) listing the various repairs that had been done to the impounded vehicle over the previous year. He stated that his company takes the approach of "when in doubt, have it serviced", though there was no formalized policy as to what time periods were required before certain repairs, such as brake adjustments, were done on the vehicle. These matters were the responsibility of the company service manager, who determines when certain tasks need to be performed.

Mr. Lesley Sharpe, the driver of the vehicle at the time of the impoundment, stated that his visual pre-trip inspection revealed no major defects the day of the impoundment. He also stated that if any defects were to be found, he would make a request to the shop of the service manager, who would not hesitate to correct them. He also indicated that he was not aware that air brakes had to be measured and recorded daily, and that he was not qualified to measure and adjust air brake systems.

ISSUES:

Should the order of the Registrar to impound and suspend the Applicant's commercial motor vehicle or trailer be confirmed or set aside?

LAW:

Section 50.3 of the *Highway Traffic Act* states as follows:

- (1) The owner of a commercial motor vehicle or trailer that is subject to an order to impound and suspend under section 82.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

Grounds for appeal:

- (3) The only ground on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound and suspend are:
 - (a) that the commercial motor vehicle or trailer that is subject to the order was stolen at the time the order was made;
or
 - (b) that the commercial motor vehicle or trailer had no critical defects at the time of the inspection under section 82.1

Powers of Tribunal:

- (5) The Tribunal may confirm or set aside the order to impound and suspend.

Section 82.1(37) provides that:

- (37) The Lieutenant Governor in Counsel may make regulations,
 - (a) prescribing what constitutes a critical defect;

Regulation 512/97 of the *Highway Traffic Act* states:

**PART II
CRITICAL DEFECTS**

INTERPRETATION

- 5.(1) In this Part,

“broken”, when used to refer to a vehicle component, means that the component or any of its sub-components is split into more than one part;

“cracked”, when used to refer to a vehicle component, means that the component is not broken but has a split that penetrates completely through the component or any of its sub-components;

“steering axle” means any axle of a commercial motor vehicle that is controlled by the driver to provide direction to the motor vehicle.

- (2) For the purposes of an inspection for critical defects under section 82.1 of the Act,
- (a) a liftable axle, being an axle that is designed to be adjusted vertically and to lift its tires from contact with the surface of the highway when in a raised position, shall be considered part of a vehicle;
 - (b) a conversion unit shall be considered part of the vehicle that it converts; and
 - (c) a trailer converter dolly, if carrying a trailer, shall be considered part of that trailer.

BRAKES

6. In sections 7 and 8, “rotor” includes a disc.

AIR BRAKES

- 7.(1) In this section, the measurement of travel of a pushrod out of a service brake chamber shall be taken with the vehicle engine turned off, the air system pressure between 90 and 100 psi (620 and 690 kPa), the park brakes released and the service brake actuator fully applied.
- (2) A commercial motor vehicle or trailer, if the trailer is required by subsection 64 (5) of the Act to have brakes, equipped with an air brake system other than an air-over-hydraulic brake system has a critical defect for the purposes of section 82.1 of the Act if one or more of the following defects is present on more than 50 percent of the wheel brakes of the vehicle:
- 1. A drum or rotor is cracked, broken or missing.

2. A chamber housing, chamber support, chamber pushrod, slack adjuster, camshaft, or camshaft support bracket is broken or missing.
3. A shoe, shoe lining, shoe block, pad, pad lining or pad block is missing.
4. The pushrod travel out of the service brake chamber is 1/4 inch (6.3 mm) or more beyond the measurement listed in Column 2 of Schedule 1 for the type of chamber listed in Column 1 of Schedule 1 if the brake is cam or disc type.

HYDRAULIC BRAKES

- 8.(1) A commercial motor vehicle or trailer, if the trailer is required by subsection 64(5) of the Act to have brakes, equipped with hydraulic or air-over-hydraulic brakes has a critical defect for the purposes of section 82.1 of the Act if two or more of the following defects are present on the vehicle:
 1. Brake fluid can be seen coming out of any location in the system upon full brake application with the vehicle engine turned on or the depth of hydraulic brake fluid in any reservoir of the master cylinder is less than 1/4 inch (6.3 mm) at its deepest point.
 2. A brake drum or rotor is cracked, broken or missing.
 3. The actuator, linkages or cables of the parking brake system are broken or missing or any cables are seized such that there is no movement of the cables to both rear wheel brakes when the brake actuator is applied.
- (2) If a commercial motor vehicle or trailer has two or more defects of the type described in paragraph 2 of subsection (1), the two or more defects under that paragraph constitute a critical defect for the purpose of section 82.1 of the Act.

STEERING

9. A commercial motor vehicle has a critical defect for the purposes of section 82.1 of the Act if either of the following defects is present:
 1. With the wheels of the steering axle on the ground in the straight ahead position and the engine turned on, the circumference of the steering wheel moves in excess of the measurements contained in Column 2 for the applicable diameter shown in Column 1 of Schedule 2, with no accompanying movement of the left front wheel.
 2. With the vehicle having been stopped with the wheels of the steering axle on the ground in the straight ahead position, with hand force alone applied, a steering linkage ball and socket joint relating to the steering axle moves other than rotationally by more than 1/4 inch (6.3 mm).

WHEELS AND RIMS

DEFINITIONS

- 10.(1) In this section,
 “fastener” means a component used to secure a vehicle’s disc wheels or spoke wheel

rim to the vehicle and may include a wheel stud, rim clamp stud, inner cap nut, outer cap nut, two-piece flange nut, ball seat nut, flat nut or any combination of them;

“loose”, when applied to a fastener, means that there is visually observable space between the fastener and its contact point on the disc wheel or spoke wheel rim or that the fastener can be moved using hand force only;

“wheel assembly” means disc wheels, spoke wheels and fasteners on one side of one axle.

- (2) A commercial motor vehicle or trailer has a critical defect for the purposes of section 82.1 of the Act if one or more of the following defects is present on two or more of its wheel assemblies:
1. A disc wheel or component of it is broken.
 2. 50 per cent or more of the stud holes in a stud piloted disc wheel are visibly elongated or 50 per cent or more of the stud holes in a hub piloted disc wheel are visible when the nuts are seated against the disc wheel.
 3. A spoke wheel, including a cast wheel, or a component of it, is broken.
 4. On a wheel with 10 or more fastener positions, any three fasteners or any two adjacent fasteners are cracked, broken, missing or loose.
 5. On a wheel with 9 or fewer fastener positions, any two fasteners are cracked, broken, missing or loose.

TIRES

- 11.(1) In this section,

“bias ply tire” includes belted bias ply tire;

“cord” means the strands of material used to strengthen a tire;

“radial ply tire” includes belted radial ply tire;

“sidewall” means the portion of a tire between the tread and the bead;

“tread” means the portion of a tire designed to come into contact with the road.

- (2) A commercial motor vehicle or trailer has a critical defect for the purposes of section 82.1 of the Act if one or more of the following defects is present on four or more of its tires;
1. A steering axle tire,
 - i. has no tread remaining across 75 per cent or more of the width of the tire at any location on the tire, or
 - ii. has exposed cord.
 2. In a bias ply tire, other than a steering axle tire,
 - i. two or more layers of cord are exposed, or

- ii. five square inches (32.3 square centimetres) or more of the outermost layer of cords are exposed.
- 3. In a radial ply tire, other than a steering axle tire,
 - I. two or more layers of cord are exposed in the tread area, or
 - ii. six square inches (38.7 square centimetres) of cord is exposed in the sidewall.
- 4. A tire,
 - I. is contacting a vehicle component, other than a tire, with the vehicle stopped in the straight ahead position,
 - ii. is void of air pressure or has an air leak that is audible or tangible, or
 - iii. is marked "not for highway use" or "farm use only" or bears the letters "SL", "NHS", "K", "SS", "AT", "DH", "VA" or "TG" as part of the tire designation or on any other location on the tire.

SUSPENSION AND FRAME

12.(1) In this section,

"helper leaf spring" means a leaf spring designed for auxiliary load resistance;

"leaf spring assembly" means an assembly of four or more leaf springs, not including helper leaf springs;

"leaf spring" means a long narrow plate of spring steel designed for load resistance.

- (2) A commercial motor vehicle or trailer has a critical defect for the purposes of section 82.1 of the Act if on one or more of its leaf spring assemblies 50 per cent or more of the leaf springs, including the helper leaf springs if in use, are broken.
- (3) A commercial motor vehicle or trailer has a critical defect for the purposes of section 82.1 of the Act if any of its frame members or other structural support members is broken, bent or perforated by corrosion resulting in the shifting of the vehicle's body onto any component of the vehicle's steering, clutch, fifth wheel, engine, transmission or suspension systems.

Schedule 1

COLUMN 1		COLUMN 2
Service Brake Chambers		Pushrod Travel
Clamp Type Brake Chamber Data		
Type	Outside Diameter	
6	4 1/2" (114.3mm)	1 1/4" (31.75mm)
9	5 1/4" (133.35mm)	1 3/8" (34.93mm)

12	5 11/16" (144.46mm)	1 3/8" (34.93mm)
12 Long Stroke	5 11/16" (144.46mm)	1 3/4" (44.45mm)
16	6 3/8" (161.93mm)	1 3/4" (44.45mm)
16 Long Stroke	6 3/8" (161.93mm)	2" (50.8mm)
20	6 25/32" (172.24mm)	1 3/4" (44.45mm)
20 Long Stroke	6 25/32" (172.24mm)	2" (50.8mm)
24	7 7/32" (183.36mm)	1 3/4" (44.45mm)
24 Long Stroke	7 7/32" (183.36mm)	2" (50.8mm)
24 Long Stroke with Square Inlet Port or With Square Raised Embossment on Lid . . .	7 7/32" (183.36mm)	2 1/2" (63.5mm)
30	8 3/32" (205.58mm)	2" (50.8mm)
30 Long Stroke with Square Inlet Port or With Square Raised Embossment on Lid . . .	8 3/32" (205.58mm)	2 1/2" (63.5mm)
36	9" (228.6mm)	2 1/4" (57.15mm)
Bolt Type Chamber Data		
Type	Outside Diameter	
A	15/16" (176.21mm)	1 3/8" (34.93mm)
B	9 3/16" (233.36mm)	1 3/4" (44.45mm)
C	8 1/16" (204.79mm)	1 3/4" (44.45mm)
D	5 1/4" (133.35mm)	1 1/4" (31.75mm)
E	6 3/16" (157.16mm)	1 3/8" (34.93mm)
F	11" (279.4mm)	2 1/4" (57.15mm)
G	9 7/8" (250.83mm)	2" (50.8mm)

Rotochamber Type Chamber Data		
Type	Outside Diameter	
9	4 9/32" (108.74mm)	1 1/2" (38.1mm)
12	4 13/16" (122.23mm)	1 1/2" (38.1mm)
16	5 13/32" (137.32mm)	2" (50.8mm)
20	5 15/16" (150.81mm)	2" (50.8mm)
24	6 13/32" (162.72mm)	2" (50.8mm)
30	7 1/16" (179.39mm)	2 1/4" (57.15mm)
36	7 5/8" (193.68mm)	2 3/4" (69.85mm)
50	8 7/8" (225.43mm)	3" (76.2mm)
Tie Rod Piston Type Chamber Data		
Type	Outside Diameter	
30 Long Stroke with Square Inlet Port	6 1/2" (165.1mm)	2 1/2" (63.5mm)
DD-3 Type Chamber Data		
Type	Outside Diameter	
30	8 1/8" (206.37mm)	2 1/4" (57.15mm)

Schedule 2

COLUMN 1	COLUMN 2
Steering Wheel Diameter	Free movement
Less than 16 inches (40.6cm)	8 inches (20.3cm)
16 inches (40.6cm) and larger but less than 18 inches (45.7cm)	9 inches (22.8cm)
18 inches (45.7cm) and larger but less than 19 inches (48.2cm)	10 inches (25.4cm)
19 inches (48.2cm) and larger but less than 20 inches (50.8cm)	11 inches (29.7cm)
20 inches (50.8 cm) and larger but less than 21 inches (53.3cm)	12 inches (30.4cm)
21 inches (53.3cm) and larger but less than 22 inches (55.8cm)	13 inches (33cm)
22 inches and larger (55.8cm)	14 inches (35.5cm)

APPLICATION OF THE LAW TO FACTS:

The Tribunal heard arguments for the Applicant that the single brake pushrod travel measurement of 2 1/4" on the vehicle was a determining factor in this impoundment. The Applicant stated that the measurement of this one pushrod was critical to whether there should have been an impoundment, and that the absolute precision required to make such a determination, was not possible with the tools and methods used by the MTO officers to measure the brakes. However, the undisputed testimony of the officers, was that the pushrod that was found to be at 2 1/4" of travel, and was clearly and with out any doubt at that measure, or slightly more. This was confirmed by the two officers, with each taking independent measurements for themselves. In fact, this would seem to have been confirmed by the comments of the mechanic who repaired the vehicle. Furthermore, the Tribunal notes that for the type of air brake components used on the vehicle, and pushrod travel over 2" would be considered in violation of Regulation 587 5.(1).

The testimony of the witnesses for the Respondent that the vehicle had 50% or more of it's brakes out of adjustment, was not challenged in any significant way by the Applicant. As a result of the veracity of the Officer's testimony, the Tribunal finds that the vehicle did in fact have sufficient critical defects to it's air braking system at the time of the impoundment, as per Regulation 512/97 7(2)(4).

DECISION:

Upon the application by All Lift Ltd. (the "Applicant") to appeal the order to impound and suspend dated September 4th, 2002 of the Registrar of Motor Vehicles ("Registrar") to impound and suspend a commercial motor vehicle or trailer pursuant to Section 50.3 of the Highway Traffic Act ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL that the Order of the Registrar to impound and suspend the commercial motor vehicle or trailer of the Applicant be confirmed.

LICENCE APPEAL TRIBUNAL

Stuart Cork
Presiding Member

RELEASED: October 24, 2002

FILE NAME: 1284.cvis.all-lift

BAI MANU CHAUHAN

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: NIVES MONTANO
Presiding member

DONALD BENNINGER
Member

APPEARANCES: LUBA NEUWIRTH
Representative for the Registrar of Motor Vehicles

BAI MANU CHAUHAN, Applicant
unrepresented

DATE OF HEARING: October 11, 2002

DECISION RELEASED: October 17, 2002 Toronto

REASONS FOR DECISION

A hearing was held on October 11, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Manu Bai Chauhan (the "Applicant")
Motor Vehicle:	2000 Honda CRV, plate AJFZ504 (the "vehicle")
Date of Appeal:	October 11, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on October 11, 2002 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows:

Applicant's written submission filed with the Tribunal in support of appeal states:

"My father-in-law, Madan L. Chauhan aged 65 yrs is suffering from kidney disorder and attends Peel Memorial hospital for Dialysis treatment at least 3 times a week and whenever required. He uses Honda CRV AJFZ504 for travelling to and from the hospital because of convenience in

getting in and out, higher seat and comfort of seating.

My work shift is 3.00 p.m. to 11.30 p.m. at Give & Go Prepared foods. I drop off and pick-up my husband Praveen K. Chauhan from his work (Canadian Tire distribution centre) when he is working the same shift. On Sep 13, 2002, as I was working later than my usual shift, I asked my husband to keep the vehicle and pick me up from work.

I request the board members to please release the car to me in light of the above circumstances as it is very difficult for my father-in-law to travel given the nature of his illness.

Manu Bai Chuhan"

The following is a summary of the Applicant's sworn testimony. The Applicant's brother-in-law was present with her, for translating purposes, but did not give testimony.

The Applicant is married and a mother of 2 daughters aged 6 and 9 years of age. She is employed full time with Give & Go Prepared Foods from 3 p.m. to 11:30 p.m. Her husband is employed at Canadian Tire Distribution Centre whose shift alternates each week (i.e., 1 week mornings, 1 week afternoons). The Applicant's husband is the driver at the time the vehicle was impounded.

The Applicant's mother-in-law and father-in-law also reside with her and her family. The Applicant's mother-in-law is currently employed and also provides child care to her grandchildren while the Applicant is at work.

The Applicant's father-in-law became quite ill in April 2002 and requires kidney dialysis for renal failure 3 times per week (Mondays, Wednesdays and Fridays) from 4:45 p.m. to 8:45 p.m. at Peel Memorial Hospital. The Applicant's father-in-law owns and operates a 1998 Acura.

In her testimony, the Applicant's father-in-law drives her to and from work most days as he finds her vehicle more comfortable especially after dialysis treatments.

In the Applicant's Owner's Position (Exhibit 2), she wrote that "*I asked my husband to keep the vehicle and pick me up from work*". In her own admission, she was aware that her husband was a suspended driver and was "*never allowed to drive the cars*".

With respect to the circumstances surrounding the impoundment, the Applicant was intending to work some overtime (until 1:30 a.m.), when a co-worker advised her, around midnight, that her husband was outside her place of employment with the police. Her husband advised her that he had come to pick her up and that the police had pulled him over for speeding. She was aware that her father-in-law had gone for dialysis treatment earlier that evening in which he was quite ill afterwards.

The Applicant advised the Tribunal that the Acura was experiencing engine problems that day and was not working. No service/repair receipts were provided to the Tribunal.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows (Exhibits 3 and 4):

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner Manu Bai Chauhan;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Praveen K. Chauhan;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until February 13, 2005.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1

may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section

55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Tribunal must determine whether it should set aside the Registrar's order to impound the vehicle on the basis that the owner of the impounded vehicle will suffer exceptional hardship.

The Applicant has appealed on the grounds of "exceptional hardship" under section 55.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the

criteria the Applicant must meet to determine if in fact “exceptional hardship” will result from the impoundment. The Applicant in this case has argued that the impoundment will result in hardship as described in section 22(2). In order for her appeal to be considered under section 22(2), she must have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulations provides the criteria for demonstrating that every reasonable option has been considered respecting an alternative vehicle.

The Tribunal’s consideration of subsections 22(3)(a), (b) and (c) follows:

- (a) “**no alternative to the impounded motor vehicle is available**”. The Applicant testified that: (i) since the impoundment, her friend, on occasion, has driven her home from work; (ii) she has taken public transportation as well as a taxi. She also, for 1 week, rented a vehicle. The Applicant’s father-in-law, who resides with the Applicant, owns a 1998 Acura.
- (b) “**the loss will be immediate, significant and lasting**” The Applicant testified that (i); she has not missed any days of work or lost any wages due to her vehicle’s impoundment; (ii) she nor her family have missed any doctor’s appointments; (iii) the Applicant’s friend has been driving her home from work on occasion; (iii) the Applicant has the option of public transit, a taxi as well as a rental vehicle, all of which have been utilized during this impoundment period; and (iv) the Applicant’s residence is 911 accessible and the hospital is approximately 10 minutes from home in the event of an emergency.
- (c) “**the impact of loss will be upon a person ordinarily transported by the motor vehicle**” The Applicant testified that before her vehicle was impounded, she would drop off her children at school each day and pick them up for lunch. Since the impoundment, her children have been walking to and from school. The Applicant’s father-in-law used the Applicant’s vehicle “*for travelling to and from the hospital because of convenience in getting in and out, higher seat and comfort of seating*” even though he owns and operates a 1998 Acura. Since the impoundment, the Applicant’s brother-in-law, who lives approximately 4 kilometres from the Applicant, drives her father-in-law to and from the hospital.

None of the claims presented by the Applicant have been substantiated with sufficient evidence. None of the losses presented in the Applicant’s submissions have been proven and/or have met the criteria required under the Regulation.

After considering the above requirements, the Tribunal finds that the Applicant has alternatives to the impounded vehicle and the impact of the loss will only be inconvenient and financially significant, but not immediate and lasting.

Accordingly, after considering the criteria set out in section 22(3) and (4) of Regulation 340 as amended by Ontario Regulation 632/98, the Tribunal finds the Applicant has not established exceptional hardship as set out in section 50.2(3)(d) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

NIVES MONTANO, Presiding Member

DONALD BENNINGER, Member

RELEASED: October 17, 2002

KAVITA DEVI BHAGOO

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: KEN KOPROWSKI
Presiding Member

APPEARANCES: KYLE M. BIEL
Representative for the Registrar of Motor Vehicles

RAYMOND DENOBREGA
Counsel, representing the Applicant

DATE OF HEARING: October 17, 2002

DECISION RELEASED: October 22, 2002 Written Hearing

REASONS FOR DECISION

A hearing was held on October 17, 2002, at Fort Frances, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Kavita Devi Bhagoo (the “Applicant”)
Motor Vehicle:	Mazda UML, plate AMXL 376 (the “vehicle”)
Date of Appeal:	September 19, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on October 17, 2002, and proceeded as a written hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant’s request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant’s appeal.

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant’s evidence follows.

The Applicant’s written submission filed with the Tribunal in support of appeal makes the following points:

1. It is extremely difficult to go about her normal duties without her car.
2. She drives her brother to work. His work is far away, and he does not know his way around.
3. She has no close relatives here.
4. She herself finds it difficult to go to work and to do groceries.
5. Matters are difficult for her, financially.
6. She does not know whether she can afford to pay the impound fee if the vehicle remains impounded.
7. She acknowledges that it was wrong to allow the suspended driver, Dennis Persaud Roopnarine, to drive the Applicant's vehicle, knowing that his driver's licence had been suspended.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Dennis Peraud Roopnarine.;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of dangerous driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until August 31, 2003.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or

set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;

- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity.
2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.

- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

Compare the contents of the Applicant's letter, outlined earlier, to the evidentiary requirements of section 50.2(3) of the Act and section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98.

Section 50.2(3) prescribes, as one of the specific grounds of appeal, that the Order for impoundment will result in exceptional hardship. The words "exceptional" and "hardship" have already been defined earlier in these Reasons.

Further, section 22(1) of the above Regulation provides that, in determining whether exceptional hardship will result from the Order to impound, the Tribunal must consider whether no alternative to the impounded vehicle is available.

On this latter point, the above letter of the Applicant gives no indication whether there is any such alternative. Although the Applicant states that she has no close relatives, she leaves unanswered the question as to whether there is any public transportation available to her or whether persons other than relatives can provide any assistance.

Were an alternative available, that would be the end of the matter, and the Applicant's appeal would be dismissed; however, even if this Tribunal were to conclude that there was no alternative available, there are still other matters that must be present before this Tribunal could allow this Appeal to succeed, as will be outlined later in these Reasons.

The Respondent, in its material, provides a copy of Routes and Schedules of the Grand River Transit (GRT) system. One of the Routes is even named "Route 58 - Alison". This is significant because "Alison" is the name of the street on which the Applicant lives. By filing this information, the Respondent seems to be arguing that the Applicant does, in fact, have alternative transportation to the impounded vehicle. However, with nothing more than this filed as evidence, this argument is still only speculative, so that this Tribunal still cannot draw any firm conclusion as to whether the GRT is alternative transportation for this Applicant.

However, having said this, even if the GRT were not considered to be alternative transportation, thereby supporting the Applicant's argument of exceptional hardship, the Applicant still has to provide further information, as required by statute and, by virtue of the powers granted in the enabling statute, as required by Regulation.

In the absence of alternative transportation, the Applicant must demonstrate, according to section 22(1) of the above Regulation, that the impoundment will result in either a threat to the health or safety of any person ordinarily transported by the motor vehicle, or a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used. The letter of the Applicant neither reveals nor hints at anything like this.

Furthermore, in the absence of alternative transportation, section 22(1) requires the Applicant to demonstrate financial or economic loss to any person; or, loss of employment or employment opportunity to any person; or, loss of education or training or of an educational or training opportunity to any person. The letter of the Applicant, again, reveals no evidence of such matters. The letter does state that she finds it difficult to go to work, but this is far different from saying that she will lose her employment, as the section requires.

Furthermore, in order to show that no alternative to the impounded vehicle is available, under section 22(1) or section 22(3)(a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded vehicle or a replacement during the impound period. These are matters that are prescribed to this Tribunal to consider. As much as this Tribunal may sympathize with the Applicant's circumstances, this Tribunal has no

discretion to ignore or to vary the prescribed matters. In light of that, the Applicant's letter, again, discloses none of the above information.

The Applicant has the onus, on a balance of probabilities, to prove its case. For the reasons given above, this Tribunal concludes that the Applicant in this case has not done so.

Therefore, this Appeal must be dismissed.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Ken Koprowski, Presiding Member

RELEASED: October 22, 2002

ROBIN GARLICK

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: TERENCE LORETTE
 Presiding member

APPEARANCES: RON GARLICK, Counsel representing the Applicant

 LUBA NEUWIRTH, Representative for the Registrar of Motor
 Vehicles

DATE OF HEARING: October 15, 2002

DECISION RELEASED: October 29, 2002 North Bay

REASONS FOR DECISION

A hearing was held on October 15, 2002, at North Bay, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Robin Garlick (the “Applicant”)
Motor Vehicle:	1986, FORD MLX, plate # AMHZ 498 (the “vehicle”)
Date of Appeal:	September 24, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on October 15, 2002 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

Mr. Ron Garlick of Garlick Consulting Services asked that a copy of Robin Garlick’s employment termination certificate be included as an exhibit for evidence purposes.

The Tribunal made its ruling on the preliminary issue and accepted the certificate in evidence.

The hearing proceeded.

ISSUE:

The Applicant’s request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant’s appeal.

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant’s evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

First, I was not aware of an Impound Program. I am a licenced G2 driver. I had a few drinks. I did not wish to jeopardize my licence.

As a result of this Impoundment I was terminated from my position at Tim Horton's North Bay as I could not obtain a ride. My shift was 6:30 a.m. – 3:00 p.m. I attempted to have my shift changed to 8:00 – 5:00 to locate a ride, but was terminated.

I live in Bonfield (40 km. East of North Bay). There [sic] no buses or other public transportation to North Bay. Now I can't even find another job and even if I did I wouldn't be able to get there. With no income, I can no longer afford housing.

I feel I am being unjustly punished for something I didn't do. I was simply trying to abide by the law by not driving and now I am on the verge of loosing everything I have worked so hard for.

P.S. I cannot pay the impound fee with no job either and it is my understanding to keep my licence. This must be paid.

The Applicant's representative, Mr. Ron Garlick of Garlick Consulting Services, first called Mr. Jean Dumont as a witness. Mr Dumont testified that at the time of the incident, resulting in the impoundment of the car, he was the registered owner of the vehicle, but that the car was actually purchased by Robin Garlick. Mr Dumont testified that he insured the vehicle in his name to reduce the insurance premium as a favour to Robin.

Mr. Garlick then called on Robin Garlick to give her testimony. She stated that she and her boyfriend (Jason Clarke) purchased the car and had spent considerable time and money fixing up so it could be used as transportation for her to and from work. She further stated that for several days before the incident the car was not working properly due to certain fuel pump problems. These problems caused her to miss work on Sept. 11, 12, and Friday September 13th, the day of the incident. When she went to work on the following Monday, her employer raised the issue of her not coming to work and dismissed her. By her own admission, her dismissal from her job was not directly related the impoundment of her vehicle but rather because she had missed work 3 days in a row.

The applicant went on to testify that due to her living some 40 KM outside the city she needed her car to secure another job, that there was no public transportation available, that a taxi service existed but was far too expensive for her to use. She further stated that she was aware of a Greyhound bus service but was unsure of its costs or its timetable.

Responding to questions, Ms. Garlick stated that she was aware of her boyfriend's driving record and that he was not permitted to drive but on the night in question she had been drinking and was in her words, "too drunk to drive," and that her boyfriend had also been drinking but insisted that he could drive and did so resulting in the impoundment of the vehicle.

In summation, Ron Garlick, pointed out that the applicant was suffering exceptional hardship because not having her car was an obstacle to her securing a new job and not having an

income would make it very difficult to pay the costs of the impoundment, finish the repairs to the car and insure it once the impoundment period was over.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Jason Clarke;
2. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
3. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving while Disqualified under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until October 14, 2005.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

- (4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).

- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The Applicant has appealed on the grounds of exceptional hardship, in accordance with section 50.2(3)(d) of the Act. Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the specific criteria the Applicant must meet to determine if exceptional hardship under the Act will result from the impoundment.

The Tribunal is precluded from considering other factors not arising from or directly related to the impoundment itself. This includes the unfortunate fact that the Applicant lost her job as a result of not showing up for work for several prior to the impoundment of her vehicle, as well as any fees associated with the impoundment and subsequent release of the vehicle.

In order for the Applicant's claims to be considered under section 22(2) (A), (B), and (C), she must have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulation provides that the Applicant demonstrate that every reasonable option has been considered for an alternative to the vehicle. The Applicant has made no specific claims of exceptional hardship as described by section 22 (1)(a) or (b).

The Applicant's oral testimony that she investigated alternatives lacked sufficient detail especially regarding possible bus line services. The Tribunal finds her testimony insufficient in meeting the onus of proof required by section 22(4) of the Regulation.

Though inconvenienced, the Applicant has not suffered any loss of employment as a result of the impoundment. Furthermore, the Applicant has not presented the Tribunal with sufficient evidence that would indicate that this loss of the vehicle would be immediate significant and lasting as per section 22(3)(b) of the Regulations.

The Tribunal finds that the Applicant has failed to meet the onus under the section 22(3) and 22(4) of the Regulation, and is therefore precluded from considering the Applicant's claim of exceptional hardship under section 22(2) of the Regulation.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Terence Lorette, Presiding Member

RELEASED: October 29, 2002

HIGHWAY TRAFFIC ACT
R.S.O. 1990, Chap. H.8 as amended

IN THE MATTER of the ORDER to IMPOUND a MOTOR VEHICLE Order # 2502036 OWNED BY: Yvonne Reaume of: 1836 Slater Street, Windsor, Ontario, N8W 5K1 made pursuant to section 55.1 of the *Highway Traffic Act*, effective on: September 19, 2002.

AND IN THE MATTER of a requirement for a hearing respecting an appeal of the said Order to Impound, pursuant to section 50.2 of the *Highway Traffic Act*.

YVONNE REAUME

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

CONSENT ORDER

Upon the application to the Tribunal by the Applicant, Yvonne Reaume, and by the representative for the Registrar of Motor Vehicles, for the issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22, and having reviewed the written settlement signed by the Applicant and the Registrar of Motor Vehicles as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the facts and on the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: October 3, 2002

Schedule "A"

LICENCE APPEAL TRIBUNAL

Between:

YVONNE R. REAUME

Applicant

-and-

THE REGISTRAR OF MOTOR VEHICLES

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

1. On September 19th, 2002, the motor vehicle described in **Order to Impound #2502036** was impounded in accordance with subsection 55.1(3) of the *Highway Traffic Act*, RSO 1990, c. H. 8 as amended.
2. The Applicant, Yvonne R. Reaume, whose name is shown on the vehicle portion and the plate portion of the permit for the impounded motor vehicle, is the owner of the said vehicle.
3. No other orders to impound under section 55.1 of the *Highway Traffic Act* has been previously made with respect to any motor vehicle then owned by the Applicant.
4. The Applicant filed an appeal to the impoundment order, in accordance with the grounds permitted under clause 50.2(3)(d) of the *Highway Traffic Act*, stating **that the order will result in exceptional hardship.**
5. Materials provided to the Registrar indicate that exceptional hardship will result from the impoundment of the motor vehicle as defined by Regulation 632/98 of the *Highway Traffic Act*.
6. The Applicant has had the opportunity to obtain independent legal advice with respect to consent to this Order.
7. The parties agree that this agreement does not bind the Ministry of Transportation or the Registrar of Motor Vehicles in any way, with respect to future hearings or consent orders.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsection 50.2(5) of the *Highway Traffic Act* that the Tribunal set aside the order to impound.

Yvonne R. Reaume

The Registrar of Motor Vehicles

(signature of Applicant)

(signature of Registrar)

(date)

(date)

1309-ALDS-RESP

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding Member

APPEARANCES: KYLE BIEL,
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF
HEARING: October 23, 2002

DECISION
RELEASED: October 25, 2002

Toronto

REASONS FOR DECISION

A hearing was held on October 23, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on October 25, 2002, with Reasons to follow.

THE TRIBUNAL RULED TO SET ASIDE the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated September 05, 2002, and was received by the Tribunal on September 27, 2002, together with the prescribed fee of \$100.00, paid by Cash.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

Prior to the commencement of the hearing, the Tribunal received notification that the Applicant has been delayed. As is the common practice of the Tribunal a 30-minute grace period was extended.

The Respondent's Representative, Mr. Kyle Biel informed the Tribunal that he had been advised that the Applicant had not received disclosure of documents tendered by the Registrar of Motor Vehicles. Mr. Biel showed the Tribunal a Purolator Courier proof of delivery report indicating that on October 17th, documents were sent to the Applicant's address as provided on the Applicant's driving record: 873 Jane Street, Box 98585 in Toronto. The package was signed for by "...Wendy at Reception..." on October 18th, at 12:48. Mr. Biel maintains that although the address is a post office box at the Jane Plaza Pharmacy, the duty of the Registrar to make disclosure available to the Applicant was fulfilled. The onus is on the Applicant to pick up his mail.

The Applicant confirmed that he had not picked up his mail, a copy of the documents was given to the Applicant and a recess was afforded to the Applicant to review the Registrar's submissions.

The Applicant raised concerns regarding the Constitutionality of an immediate licence suspension without due process. The Applicant asked the Tribunal for permission to verbally make a motion challenging the Constitution.

The Applicant pointed out that although a motion was not filed within the prescribed fifteen days, the intent to argue the issue of the Constitution was noted in the letter addressed to the

Tribunal dated October 5th.

The Respondent's Representative noted that the Registrar had not received a copy of the Applicant's October 5th letter. Mr. Biel substantiated his objection to a motion on a Constitutional issue, by referring to Section 8 of the Rules of Practice for the Licence Appeal Tribunal. Mr. Biel emphasized that not only had the Attorney General of Ontario, and the Attorney General of Canada not been notified, but the Ministry of Transportation did not receive basic notice as well.

In rebuttal the Applicant suggested that an adjournment might be in order, to allow him to prepare.

The Respondent's Representative vehemently objected to an adjournment contending that the Applicant had ample time to file a motion. Further, the Applicant is being ambivalent, in saying that he wanted no delays in the proceedings and yet asking for an adjournment.

The Tribunal considered Section 8.1 (1) of the Rules of Practice, which prescribes:

"notice shall be served on the other parties, the Tribunal, the Attorney General of Ontario, and the Attorney General of Canada as soon as the circumstances requiring notice become known and, in any event, at least 15 days before the question is to be argued before the Tribunal..."

As the Applicant himself established, he considered raising the Constitutional issue on or about October 5th, 2002. Had the Applicant acted at the time, the Applicant could have filed his motion on time. The Applicant's request to file a motion to challenge the Constitution was dismissed.

With respect to the request for an adjournment, having dismissed the Constitutional challenge, and acknowledging the Applicant's comments in his letter of October 5th, 2002, wherein he states that he "...simply cannot afford to consent to any delay or extension in this matter..." the Tribunal ruled the hearing proceed.

The Applicant raised the issue of the driving record being introduced as evidence. The Tribunal ruled the abstract inadmissible. As previously stated by this Tribunal, at issue is not the Applicant's previous record, but the possibility of an existing medical condition, which may have prevented the Applicant from failing or complying with the demand for a breath sample. The Applicant's Driver's Record is thus irrelevant to the proceedings.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice to Registrar dated August 27, 2002, issued by the Registrar of Motor Vehicles.
- b) Exhibit # 2 Notice of Appeal Form – received September 27, 2002

By the Respondent:

- a) Exhibit # 3 Ministry of Transportation submissions – received October 18, 2002

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

- 50.1(1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
 - (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
 - (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

- 15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
 - (a) the name, telephone number and address, with the postal code, of the medical practitioner;
 - (b) the name, date of birth and address of the person who is the subject of the report;

- (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

The Applicant's Driver's Licence was suspended "27-08-02" as per Notice of Appeal (Exhibit # 2)

Applicant's Evidence

Page two of Notice of Appeal was prepared on September 9, 2002 by Physician #1, the Applicant's physician for 23 years and 3 months.

Physician #1, states "Patient seen on 28/8/02 with 2 weeks history of itchy, throat, swollen glands/tonsils, fever, getting worse, with chest pain on inspiration. He was diagnosed with acute pharyngo-tonsillitis and acute bronchitis, pleurisy. Throat swab revealed Hemolytic Streptococcus, chest X-ray was normal ...seen again on 12/09/02..."

Attached to the Notice of Appeal is a Gamma-Dynacare Laboratories microbiology results form showing that a throat swab taken on 2002/08/28 indicates "Haemolytic Streptococci group A".

At the hearing the Applicant testified both in examination in chief and in cross examination, that on the evening in question he had not been drinking, that he was unable to take a long enough breath to provide an adequate sample due to the fact that he was experiencing breathing difficulties and chest pains at the time.

The Applicant did not fully recollect whether he told the officer about the sore throat or the chest pains, but he was adamant that he told her about his breathing difficulties. The Applicant had been feeling ill for a couple of weeks prior to the demand for a breath sample, yet at the time he was unaware of the severity of his condition. It was not until he visited his physician the following day that the Applicant was told he needed medication.

The Applicant called Witness #1 as a witness. Witness #1 testified that she had spent "11 1/2 hours" with the Applicant prior to his being stopped and that during that time she did not see him consume alcohol.

Further Witness #1 attested that the Applicant had complained to her about having a sore throat, and that she advised him to see a physician.

At the time the Applicant was demanded a breath sample, Witness #1 was sitting on a bench across the street from where the Applicant was stopped, and was able to see that he made several attempts to blow into a mouthpiece.

In closing, the Applicant stressed that he did not refuse to provide a breath sample but that he was unable to do so due a medical condition. The Applicant re-iterated his previous remarks that he was unaware of his condition until he visited his physician, at which time he was told that he had a highly contagious condition.

At the time of the breathalyzer test session the Applicant was not feeling well, and did ask the staff sergeant at the police station, whom he called on his cell phone, to have another type of test administered. The Applicant complained that his request was ignored.

The Applicant dismissed Physician #2's letter as too general and not applying to him or his case.

Respondent's Evidence

The Respondent provided the following Documents:

1. Certified Copy of Notice to Registrar, sealed October 1, 2002
2. Certified Copy of driving record of the Applicant, sealed October 2, 2002.
3. Certified Copy of Vehicle Search, sealed October 8, 2002.
4. Medical Report from Physician #2, MB,Ch,FRCP(UK),FRCP (C) FCCP dated October 4, 2002

Physician #2, MB,ChB,FRCP(UK)FRCP(C) FCCP, Director of Program in Respiratory Rehabilitation - University of Toronto, states that he is a "...consultant respirologist in practice since 1979 with particular interest in chronic respiratory conditions such as: asthma,

emphysema and chronic bronchitis ...Director of the University of Toronto, Respiratory Divisional Program in Rehabilitation, ...medical advisor to the pulmonary function laboratories for over 16 years ...familiar with the Alcotest and the Intoxilyzer 5000C having evaluated both machines in ...Pulmonary function laboratory ...have tested both the portable and the station monitor among a variety of individuals (men and women) age range 44-77 years, vital capacity range 1.6 to 4.5 litres, FEV1 range 0.4 to 2.9 litres, FEV1/FVC range 20% to 78% ...The vast majority of individuals, even with an FEV1 of 0.7 are able to satisfactorily provide a breath sample notwithstanding their respiratory condition..."

After reviewing the Applicant's medical report from Physician #1 and the microbiology report, Physician #2 concluded: "...the medical evidence gives absolutely no further information as to the possibility of the patient having obstructive lung disease..."

The Respondent called Constable #1, a member of the Toronto Police Services as a witness. Constable #1 testified that she has been a police officer for approximately three years.

Constable #1 described the events that led to the Applicant being stopped and the subsequent demand for a breath sample.

The Applicant was given a total of four opportunities to provide a breath sample, but failed to do so. According to Constable #1 the first sample was "...not done properly..." as the Applicant was not emitting enough air into the machine. The Applicant told Constable #1 that he was experiencing breathing difficulties but did not elaborate.

After the second unsuccessful attempt by the Applicant to provide a breath sample, Constable #1 formulated the opinion that the Applicant was simply "...feigning blowing..."

The third time the Applicant attempted to blow into the instrument, the machine "...immediately..." registered an E/O message, indicating that no air or very little air had gone into the device.

After cautioning the Applicant, Constable #1 allowed him one last attempt, which also proved to be inadequate.

During the breathalyzer test process, Constable #1 described the Applicant as uncooperative, evasive in replying to the simplest of questions, in fact "...belligerent...", but at no time did she notice the Applicant exhibiting any signs of physical discomfort. No medical assistance was requested by the Applicant.

Under questioning by the Applicant Constable #1 confirmed that there are options that can be exercised in the event an Applicant is physically hurt and not being able to provide a breath sample. Nonetheless, Constable #1 felt that Applicant's circumstances did not warrant such measures.

In his closing remarks, the Respondent's Representative cited the Applicant's actions as evidence of the Applicant's intent to not provide a breath sample. At the time of the breathalyzer test session, the Applicant was uncooperative and feigned blowing.

Although, suffering from a cold for a couple of weeks, the Applicant had not visited his physician prior to the incident. The Applicant continued to work, and go out until late at night which according to the Respondent's Representative is a clear indication that the Applicant's state of health was not that serious.

Mr. Biel continued his argument by referring to Constable #1's evidence that there was no coughing, or wincing or any other signs of medical distress, on the part of the Applicant.

As far Physician #1's report is concerned, it lists simply a variety of symptoms, but does not relate the symptoms to the Applicant's ability to provide a breath sample. Further the fact that the X ray was normal, indicates that there were no respiratory difficulties.

In conclusion the Respondent's Representative asked that the Tribunal uphold the Registrar's decision.

APPLICATION OF THE LAW TO FACTS:

Although the totality of the evidence presented was considered, the preceding reflects a summary of the proceedings. Evidence introduced not directly germane to the issue was not transcribed.

Prior to setting out the reasons for the decision, the Tribunal will address the issue alluded to by the Applicant regarding blood samples. While subsection 48.3 (3) 1 of the Highway Traffic Act, R.S.O. 1990, Chapter H-8 as amended is clear in its provision, that the concentration of alcohol in the blood may be obtained *"...by an analysis of the person's breath sample or blood taken..."* the decision to request a blood sample remains at the discretion of the officers.

According to established policy, no blood samples are to be demanded unless there are obvious visible physical signs preventing the individual from providing a breath sample. As no such signs were present, the issue of a blood sample is inconsequential.

An appeal was brought by the Applicant under Section 50.1 (2) (b) of the Highway Traffic Act, which prescribes:

"...person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason..."

At issue is not whether the Applicant was impaired, had been drinking, or expressed a vocal refusal to provide a breath sample. The subject of this appeal is whether the Applicant had a medical condition that at the time could cause the Applicant to fail or not comply with the breath demand.

The Tribunal heard evidence that the Applicant was evasive, uncooperative, and *"...belligerent..."* The Respondent's Representative contends this type of behaviour, indicates that the Applicant had no intention to comply with the demand for a breath sample. Since the

Applicant did not go to the doctor prior to the incident, and continued to work and party, Mr. Biel categorized the Applicant's condition as the "...*common cold*...", which does not preclude and individual from providing an adequate breath sample.

The Tribunal may or not may agree with the Respondent's Representative's arguments. Certainly, the Tribunal does not condone the Applicant's conduct, but the Tribunal cannot make a decision based on speculation and assumption. The Tribunal must abide by the medical evidence presented. Physician #2 is reluctant to proffer an opinion based on Physician #1's report. Yet, the Tribunal must accept Physician #1's diagnosis as incontrovertible evidence, which cannot be ignored. Physician #1, who examined the Applicant the day after the incident, diagnosed the Applicant as suffering from: "...pharyngo-tonsillitis and acute bronchitis / pleurisy...". It is unlikely that a sore throat caused by streptococci bacilli would interfere with breathing, however "...acute bronchitis / pleurisy..." could definitely induce breathing difficulties.

Based on the evidence before the Tribunal, and on a balance of probabilities, the Tribunal finds that the Applicant meets the criteria of Section 50.1 (2) (b), in that he was able to demonstrate that at the time of the breath demand, he was suffering from a medical condition which would prevent him from providing a breath sample.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated August 27, 2002 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal orders the suspension **set aside**.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: October 28, 2002

GORDON E. BERTRAND

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A
MOTOR VEHICLE ISSUED BY THE REGISTRAR
OF MOTOR VEHICLES

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding member

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles

GORDON E. BERTRAND, Applicant
unrepresented

DATE OF HEARING: OCTOBER 18, 2002

DECISION RELEASED: October 23, 2002
Toronto
(By Teleconference)

REASONS FOR DECISION

A hearing was held, by way of an electronic (teleconference), on October 18, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Gordon E. Bertrand (the "Applicant")
Motor Vehicle:	1998, DODG, plate # 9395KE (the "vehicle")
Date of Appeal:	September 30, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence to determine that the driver's licence was not suspended as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on October 18, 2002 and proceeded as an electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

The Respondent filed certified copies of Ministry of Transportation documents, previously submitted as part of the Respondent's evidence.

Documents tendered were entered into evidence as exhibits with the consent of both parties.

There were no other preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

I, Gordon Bertrand the owner of said vehicle had lent my truck to my daughter Stephanie Bertrand to drive and because she was not feeling well she let Jeffrey Campbell drive unknown to me the owner, she had asked Jeff if he had a license and he told her that he did which was a false statement and completely out of my control. I never gave my permission for anyone other than her to drive.

At the hearing the Applicant re-iterated the statements made in the Notice of Appeal.

The impounded vehicle was in the care and possession of the Applicant's daughter, for her sole use. The Applicant's daughter was not authorized to allow anyone else to drive the vehicle except in extenuating circumstances.

At the time of the impoundment the Applicant's daughter asked Mr. Campbell to drive, as she was not feeling well.

In cross-examination, the Applicant admitted that he did not physically had an opportunity to ask for or look at the suspended driver's licence as he was not present when his daughter allowed Mr. Campbell to drive the vehicle. The Applicant testified that he believes his daughter asked the driver if he had a licence, and he responded affirmatively.

In closing, the Applicant emphasized that it would have been impossible for him to question Mr. Campbell as he was not present at the time.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner.

2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Jeffrey Grant Campbell.
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle.
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of blood/alcohol content in excess of .08, ccc under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until April 22, 2003

The Respondent offered no viva voce evidence at the hearing choosing to stand on the information provided.

In his closing remarks, Mr. Biel, the Respondent's Representative, contended that the Applicant failed to prove her grounds of due diligence in respect to Mr. Campbell's driver's licence. Mr. Biel quoted section 50.2 of the Act which clearly states that the "owner" of the vehicle must exercise "due diligence".

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(c).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. *Law.* The attention and care due from a person in a given situation...

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

APPLICATION OF LAW TO FACTS:

The onus is on the Applicant to establish the due diligence ground of appeal as provided in subsection 50.2(3)(c) of the Act.

The Tribunal agrees with the Applicant that the circumstances were totally beyond his control, nonetheless, Section 50.2 (3) (c) is clear in the requirement:

“that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver’s license of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension.”

The word “owner” as used in the abovementioned section, is further defined in section 55.1 of the Highway Traffic Act:

“owner” means the person whose name appears on the certificate of registration for the vehicle...”

After assessing the evidence presented, the Tribunal has no alternative but to find that the Applicant did not satisfy the criteria of Section 50.2 (3) (c).

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant’s motor vehicle.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.
Presiding Member

RELEASED: October 23, 2002

1311-MED-ADJ

**Appeal under Section 50(1) of the *Highway Traffic Act*,
R.S.O. 1990, Chap. H.8 as amended, from a Decision of
the Registrar of Motor Vehicles pursuant to Section
47(1) of that Act.**

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ROSS C. BENNETT, M.D., Presiding Member

APPEARANCES: KIM BEINTEMA, Representative for the Registrar of Motor Vehicles

Applicant, unrepresented

DATE OF HEARING: October 28, 2002 Toronto

ORDER

WHEREAS a hearing was scheduled to be heard on October 28, 2002 in Toronto in the above matter;

AND WHEREAS at the commencement of the hearing on October 28, 2002, the Registrar of Motor Vehicles requested an adjournment to consider recent reports and evidence presented by the Applicant;

NOW THEREFORE, upon consent of both parties, the Tribunal Orders that this matter is adjourned to be heard on Tuesday, November 12, 2002, at 9:30 a.m. at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario;

LICENCE APPEAL TRIBUNAL

Ross C. Bennett, M.D., Presiding Member

RELEASED: October 30, 2002

VALERIE ANN PHILPOTTS

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: NIVES MONTANO
Presiding member

APPEARANCES: LUBA NEUWIRTH
Representative for the Registrar of Motor Vehicles

VALERIE ANN PHILPOTTS, Applicant
unrepresented

DATE OF HEARING: October 17, 2002

DECISION RELEASED: October 22, 2002 *by teleconference*

REASONS FOR DECISION

A hearing was held on October 17, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Valerie Ann Philpotts (the "Applicant")
Motor Vehicle:	1990 Buick Century, plate AFWW 049 (the "vehicle")
Date of Appeal:	October 1, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on October 17, 2002 and proceeded as an electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

My husband took car without my permission and I need vehicle for my own use. Have family responsibilities that require me to have my vehicle such as helping my daughter who is due to have another child Oct 15 and I was going to drive to Kingston to assist her. Due to financial circumstances I cannot afford alternative transportation. My husband will no longer have access to the vehicle as I will be taking a new residence. I feel I am being unfairly penalized because of my husband's actions and hope you will take my consideration seriously.

The following is a summary of the Applicant's affirmed testimony.

The Applicant is a 64 year old woman who has been married to George Philpotts, the driver at the time the vehicle was impounded, for the past 41 years. From March, 2000 to February 1, 2002, the couple had been separated. In her testimony, the Applicant advised the Tribunal that Mr. Philpotts was an alcoholic and was possibly mentally unstable. She took him back to help and support him as he promised to get into an alcohol rehabilitation program.

The Applicant attended this teleconference hearing from Kingston where she arrived 3 days prior to this teleconference because one of her two daughters was giving birth to her 7th grandchild. That grandchild was born the day after the Applicant arrived in Kingston.

In her testimony, the Applicant was aware of her husband's suspension and indicated that he tried to find alternative arrangements to see his lawyer in Val Caron and Kingston, but was unsuccessful. They argued continually 1 week prior to the impoundment. He would "hassle" and pressured her wherein "I had no choice but to give him my car". Mr. Philpotts was of the view that "the law was for other people".

With respect to the circumstances surrounding the impoundment, apparently Mr. Philpotts was en route to Val Caron when he realized he was about to run out of gas. He pulled over near a Legion Hall wherein he entered and consumed 4 beers. Mr. Philpotts forgot to put fuel in the vehicle and proceeded to continue driving and got as far as Espanola where the car ran out of gas. He called for a tow truck. The tow truck driver realized Mr. Philpotts was impaired and called the police. Mr. Philpotts was arrested and charged with "impaired driving".

Since his incarceration, and with the help of his parole officer, he was able to see someone at a psychiatric facility. There is currently a warrant out for his arrest as he did not appear in court for a scheduled hearing on October 7th. He also has another court date in mid-November in Espanola regarding this impoundment.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows (Exhibits 3 and 4):

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by George Henry Philpotts;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Blood Alcohol Content in Excess of .08 under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until March 20, 2003.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

- (4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using

another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Tribunal must determine whether it should set aside the Registrar's order to impound the vehicle on the basis that the owner of the impounded vehicle will suffer exceptional hardship.

The Applicant has appealed on the grounds of "exceptional hardship" under section 55.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the criteria the Applicant must meet to determine if in fact "exceptional hardship" will result from the impoundment. The Applicant in this case has argued that the impoundment will result in hardship as described in section 22(2). In order for her appeal to be considered under section 22(2), she must have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulations provides the criteria for demonstrating that every reasonable option has been considered respecting an alternative vehicle.

The Applicant has resided in Elliot Lake for the past 6 years as it is an inexpensive area for retirees. She and Mr. Philpotts owned a home which was sold approximately 2 years ago. Once she paid off her mortgage and all her debts, there was no money left. She is currently renting a townhouse. She is on a fixed income consisting of a Canada Pension and supplement totaling \$564 per month and currently has \$250 in her bank account.

She has no relatives in Elliot Lake. She has one daughter in Kitchener who is single and is currently going through some difficulties and is not in a position to help financially with regard to the impoundment cost. The Applicant's other daughter and family resides in Kingston. This daughter just gave birth to her 7th child.

The Applicant's daughter and son-in-law who live in Kingston paid half of her fare (\$125) to Kingston from Elliot Lake. The day the Applicant set out for Kingston, she took public transportation to Kitchener. The daughter, who lives in Kitchener, picked her up and drove her to Barrie. The Applicant then proceeded by way of bus from Barrie to Toronto where she transferred and continued onto Kingston.

Elliot Lake is 911 accessible and the nearest hospital is a 20-25 minute walk away. She has not had and therefore did not miss any doctor's appointments. She has been able to walk to her counseling sessions which are about 2 miles away. Public transit runs once an hour from 8:10 a.m. weekdays (9:10 a.m. on Saturdays) until 6 p.m. each night. There are no buses on Sunday.

In her testimony, the Applicant used her vehicle to purchase groceries, attend church on Sundays and attend a euchre game twice a week.

The Applicant only has one friend in Elliot Lake who works all day, but does not own a vehicle. Her aged mother and siblings reside all over the Province of Ontario. She cannot bring herself to ask them for financial assistance as there is friction with her husband.

The Tribunal is very sympathetic to the Applicant's plight, unfortunately her financial difficulties pre-existed the impoundment. Her health is not in jeopardy and she was able, by way of public transportation, to travel to Kingston with the assistance of her children.

After considering the above requirements, the Tribunal finds that the Applicant has alternatives to the impounded vehicle and the impact of the loss will only be inconvenient and financially significant, but not immediate and lasting.

Accordingly, after considering the criteria set out in section 22(3) and (4) of Regulation 340 as amended by Ontario Regulation 632/98, the Tribunal finds the Applicant has not established exceptional hardship as set out in section 50.2(3)(d) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Nives Montano, Presiding Member

RELEASED: October 22, 2002

HIGHWAY TRAFFIC ACT
R.S.O. 1990, CHAP. H.8 AS AMENDED, SECTION 50.2

IN THE MATTER of an application by Elaine
Louise Steele to appeal the decision of the
Registrar of Motor Vehicles pursuant to Section
55.1 of the *Highway Traffic Act*;

AND IN THE MATTER of

ELAINE LOUISE STEELE

APPLICANT

and

REGISTRAR OF MOTOR VEHICLES

RESPONDENT

ADJOURNMENT

WHEREAS a hearing in the above matter was scheduled to be held on Friday, October 18, 2002 at the Ramada Inn, Churchill "A" Room, 817 Exeter Road, London, Ontario.

AND WHEREAS letters were filed, dated October 8, 2002, by both the Applicant and the Respondent requesting an adjournment to October 10, 2002;

AND WHEREAS both parties have consented to the hearing being conducted by teleconference;

TAKE NOTICE, upon consent of all parties, the Tribunal Orders:

- (1) this matter is adjourned; and
- (2) the appeal is scheduled to be heard at 9:30 a.m., on Thursday, October 10, 2002 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

AND TAKE FURTHER NOTICE that upon failure to attend at the aforesaid time and place, the Tribunal may make a Decision in your absence and without further notice to you.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: October 9, 2002

ELAINE LOUISE STEELE

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A
MOTOR VEHICLE ISSUED BY THE REGISTRAR
OF MOTOR VEHICLES

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

、 KATHERINE ORKIN, Counsel for Applicant
ELAINE LOUISE STEELE, Applicant

DATE OF HEARING: October 10, 2002

DECISION RELEASED: October 16, 2002 Toronto

REASONS FOR DECISION

A hearing was held on October 10, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Elaine L. Steele (the "Applicant")
Motor Vehicle:	1998 GMC Sierra, plate 906 9KZ (the "vehicle")
Date of Appeal:	September 25, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on October 10, 2002 and proceeded as an electronic (teleconference) hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

By Order of the Tribunal released on October 9th, 2002, the Hearing originally listed to be held in London, on October 18th, 2002, was re-scheduled on consent, as a teleconference to be heard on October 10th, 2002.

The Respondent filed certified copies of Ministry of Transportation documents, previously submitted as part of the Respondent's evidence, save and except for the Vehicle Record. Apparently the vehicle was registered during the strike, and due to the backlog, no certified copies are as yet available.

Documents tendered were entered into evidence as exhibits with the consent of both parties.

There were no other preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

Elaine Louise Steele - Notice of Appeal - Licence Appeal Tribunal
SCHEDULE 'A'

GROUND OF APPEAL: Licence Appeal Tribunal

1. s. 50.2(c) HTA: Due Diligence: I met Mr. Cutajar through mutual friends in May or June 2002. In late August 2002, approximately two or three weeks before I lent Mr. Cutajar my truck in the incident that resulted in it being impounded, he showed me his Driver's Licence, which I had a chance to examine carefully because we were comparing photo I.D.'s on our respective licences. At that time, I noticed that his licence had an expiry date in 2003, and it appeared to me to be valid in every respect. Mr. Cutajar never mentioned his driving conviction to me or told me that his licence was suspended. In fact, since I have known him, I have rarely seen him take even one drink, so I had no reason to suspect he had ever been convicted of impaired driving. Furthermore, it is my understanding that when a person's licence is suspended, they must immediately surrender it to the Court or to the Police. Thus the fact that Mr. Cutajar had his Driver's Licence in his wallet, and readily offered it for inspection, gave me no reason to interrogate him further or to doubt that the licence Mr. Cutajar presented to me was anything other than what it appeared to be — i.e. a valid Ontario Driver's Licence. Based on that information and my personal visual inspection of the licence, and the fact that I had no reason to think that the information had changed in the interim, approximately two or three weeks later, I lent Mr. Cutajar my truck for what was to be a 1-2 hour period.

I only learned from Mr. Cutajar of his conviction and licence suspension after my truck was impounded on September 11, 2002. Mr. Cutajar informs me that, with the exception of the automatic 90-day removal of his Driver's Licence by the Police on the scene (after which the Licence was returned to him), he has never surrendered his licence to the authorities, and in fact still has it in his possession. I had hoped to produce it (or a notarial copy of it) as evidence to verify the information in the above paragraph, but Mr. Cutajar advises me that he has temporarily misplaced it. I am still hoping he can find it and it can be produced as evidence, but

I believe the fact that Mr. Cutajar's licence has never been surrendered pursuant to the suspension order should be on record with the Registrar / Ministry of Transportation.

Evidence relied upon:

- (a) My sworn Affidavit (which will be faxed to your offices by Friday, September 27, 2002, and the original sent by regular mail), and oral testimony with respect to the above information;
- (b) Mr. Cutajar's Driver's Licence, if he can locate it (a Notarial copy of which will be faxed to you, as per #1 above).
- (c) If Mr. Cutajar is unable to find his Driver's Licence, I will endeavour to obtain a letter the Ministry of Transportation, attesting to the fact that Mr. Cutajar never surrendered his Driver's Licence; and,
- (d) A sworn Affidavit from Mr. Cutajar (faxed and sent to you as per #1), and his oral testimony as to the facts in #1 and #2 above.
- (e) Notice to Registrar - copy attached - indicating that Mr. Cutajar is neither the owner of the impounded vehicle nor the person who ordinarily has use of it.

2. s. 50.2(d) **HTA**: Exceptional Hardship:

- (a) My husband and I separated in September 2000, and we share custody of our three children (ages 17, 15, and 12), who (prior to the impoundment) frequently visited between our two residences. I have the only vehicle in the family, and my husband does not have a phone (which makes it difficult to ascertain if the children are at home at any given time), so my truck is a necessity. The bus service in St. Thomas is not reliable and, in fact, not faster than walking the distance between our homes, which takes approximately 30 minutes (as opposed to 5 minutes driving). Since my truck was impounded, my time with my children has been cut almost in half due to the difficulties in co-ordinating our schedules and activities — a fact which is having a negative emotional effect on all of us, which seems all the more unfair in that we (and certainly my children) are innocent parties in this matter.
- (b) Since I am the only one in the family with a vehicle and a phone, my children's schools, friends, etc., have only my phone number for emergency contact purposes, and my truck was used to transport the children to medical/dental appointments, out-of-town extra-curricular activities, friends' homes, etc., which is impossible now, with the result that they are frequently unable to attend activities unless they can find someone to carpool with. Because of the proximity of the St. Thomas Psychiatric Institute, and because of several recent frightening episodes in St. Thomas involving out-patients or discharged former patients from that Institute, I am afraid to take the bus, and even more reluctant to have my children take the bus (or, more accurately, to stand at the bus stop for long periods of time, waiting for the bus to come) -- particularly after dark.
- (c) I work shift work at Formet Industries, which is located in the east end of St. Thomas, but I live in the west end of the city. The same concerns as mentioned in

(a) and (b) above apply to transporting myself to work on a daily basis. The situation will be exacerbated starting October 1st, 2002, when I start working the midnight shift. Although I am trying to arrange for a car pool for myself to get to work, I am particularly concerned about being unable, without a vehicle, to reach my children in an emergency.

- (d) There is no realistic alternative to the impounded vehicle without significant and lasting financial hardship. I rented a car for 4 days, at a cost of \$189.00 -- an amount which I cannot sustain for the length of the impound period on my income. Taxis are equally prohibitive and a luxury I cannot afford, particularly since those costs are in addition to the \$650 per month that I must still pay for the (impounded) truck (\$550/month truck payment and \$100/month insurance), rent, utilities, groceries, etc.. Since the reason my ex-husband lost his phone and car was that he was out of work for almost a year, the financial burden of caring for our family has fallen disproportionately on me and has exhausted my savings, such that any extra expense at this time in our lives genuinely constitutes a hardship, which has already severely impacted (both emotionally and financially) on myself and on my children (the people ordinarily transported by the vehicle in question) and will continue to do so both in the short- and (financially, at least) in the long-term.
- (e) Neither I, nor any of my family members or friends have access to a surplus vehicle (i.e. one that they do not need on a daily basis), nor can I obtain such a vehicle to replace the impounded vehicle during the impound period.

Evidence Relied Upon: (Copies to be faxed to your offices on September 27, 2002)

1. My pay stub.
2. Information evidencing monthly expenses for truck, insurance, rent, etc.
3. Copy of the receipt from the 4-day car rental.
4. Affidavit and oral testimony.

EXPEDITED HEARING REQUEST:

I request an expedited hearing, on the grounds that it is urgent that I obtain the release of my vehicle as soon as possible, and hereby consent to waive the disclosure period.

At the hearing the Applicant's Legal Counsel, Ms Katherine Orkin asked the Applicant to attest to the information contained in the Affidavits filed, with the Tribunal, in support of the hearing.

The Applicant confirmed that the information was, at time of swearing, and continues to be true. Further the information has not changed except for the fact that the Applicant's 15-year-old sister has now come to live with her. The new addition to the household means that the Applicant has assumed extra responsibilities, including that of driving her sister to and from appointments.

In cross-examination, the Applicant admitted that she merely glanced at Mr. Cutajar's driver's licence, whenever Mr. Cutajar's used it as a means of identification, or to compare pictures. The Applicant never really viewed Mr. Cutajar's driver's licence in detail for the purpose of ascertaining whether the licence was valid.

It was the Applicant's belief that Mr. Cutajar's driver's licence expired in 2003. The Applicant testified that she was not aware the expiration date of Mr. Cutajar's licence, would have been 2004.

On September 11th, 2002, the date that the vehicle was impounded, the Applicant had left the car at home. The Applicant had gone to lunch with friend who drove her to work, since they work together. The Applicant phoned Mr. Cutajar and asked him to take the car and run an errand for her. The Applicant did not physically look at Mr. Cutajar's driver's licence prior to allowing him to drive the car.

During the course of her testimony the Applicant re-iterated the information contained in her Affidavit: "separated in September 2000 ...share custody of ...three children ...Damian (age 17) and Lacey (age 12) live with ...father, while Shannon (age 15) live with me..." Prior to the impoundment, the Applicant drove the children to visit each other "...several..." times a week. The Applicant has just moved, and now lives about a half an hour walk from her ex-husband.

With respect to work, the Applicant stated that she works shifts, on a two-week rotation. The Applicant has had no problem working the midnight shift, as she has been able to get a ride. The Applicant testified that she has not yet found a ride for the afternoon shift coming up soon.

The Applicant has missed only one day off work to visit her solicitor, and has not sustained any losses other than legal fees and the future impoundment fee. Mr. Cutajar will assist in paying the impoundment fee but will not pay for travel expenses incurred by the children. The children have not missed school, and have been getting around, either by public transportation or by walking.

The Applicant agreed with the Respondent's Representative's comments that the impoundment has been a major inconvenience, but has not resulted in financial or educational loss.

The Applicant cannot afford to take a cab to and from appointments, but has managed to ensure that her sister attended the required appointments with Children's Aid.

In redirect the Applicant confirmed that her daughter has missed Volleyball that is an extra curricular activity. As far as financial distress, the Applicant testified that up until June her wages were being garnisheed which curtailed her spending ability. The Applicant's ex-husband filed for bankruptcy and is not able to provide much support for the children.

In closing Ms. Orkin, explained on behalf of the Applicant, that the problem is not necessarily the Applicant's ability to get to work, but rather her inability to run errands during breaks.

As far as examining someone else's licence, it is common belief that when a licence is suspended, the licence is actually confiscated, thus if somebody is in possession of a driver's licence no one would question its validity.

Ms. Orkin maintains that due to the separation, the Applicant has faced considerable financial hardship. The Applicant and her children are innocent parties of the impoundment, they have suffered hardship, in that there have been missed appointments due the financial circumstances of the Applicant.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as plate owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Todd M. Cutajar;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of "Driving with more than 80 mgs in Blood" under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until October 26, 2004.

Mr. Cutajar's driver's record indicates that his driver's licence is under suspension until October 4, 2004.

The Respondent offered no viva voce evidence at the hearing choosing to stand on the information provided.

In her closing remarks, Ms Beintema, the Respondent's Representative, contended that the Applicant failed to prove her grounds of due diligence in respect to Mr. Cutajar's driver's licence. Comparing photographs, does not, according to Ms. Beintema "...*constitute an act of due diligence as required by the Act...*". The Respondent's Representative maintains that the Act requires more than a cursory glance at a driver's licence. The Applicant did not, as she stated in her Affidavit, examine Mr. Cutajar's driver's licence carefully, otherwise she would have known the licence expires in 2004.

The Respondent's Representative emphasized that the Applicant was not at home, at the time

she asked Mr. Cutajar to ran an errand for her, thus she could not have physically seen his driver's licence as is required. Further, the Applicant did not actively question Mr. Cutajar to determine if his licence was under suspension, as she could have and should have done, in order to exercise due diligence.

As for hardship the Respondent's Representative referred to the criteria set out in Regulations which is clear that in order to establish hardship, the Applicant must not have alternative methods of transportation. The Applicant has managed to car pool, and there has been no loss of employment. As for the financial situation of the Applicant, the situation arises out of pre-existing conditions.

With respect as to how the children have been affected, Ms Beintema asserts that there is not evidence that the children have suffered educational or financial hardship.

As inconvenience is not grounds for appeal, the Respondent's Representative asked the Tribunal to confirm the decision of the Registrar and uphold the impoundment

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been

impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (2) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
 - (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

- (4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal

in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
 - (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
 - (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
 - (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making

arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The onus is on the Applicant to establish due diligence and exceptional hardship ground of appeal as provided in subsection 50.2(3)(c) and 50.2(3) and (d) of the Act, respectively.

The Tribunal will address the matter of due diligence first. Section 50.2 (3) (c) is clear in the requirement:

“that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver’s licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension.”

The Applicant testified both in her viva voce evidence and in her Affidavit that: “...*he handed me his Driver’s Licence which I had a chance to examine carefully because we were comparing photos...*” The Respondent’s Representative, argues that viewing a driver’s licence for social purposes, does not constitute due diligence.

The 6th edition of Blacks Law Dictionary, defines “due diligence” as follows: “Due diligence, such a measure of prudence, activity, assiduity as is properly to be expected from and ordinarily exercised by a reasonable and prudent man under the circumstances, not measured by any absolute standard but depending on the relative facts of the case.” Applying the Blacks Law Dictionary’s definition this matter, in order for the Applicant to establish that she exercised due diligence, the Applicant would have to prove that she made a “...reasonable effort...” to ensure that Mr. Cutajar had a valid driver’s licence. By her own admission the Applicant did not physically check Mr. Cutajar’s driver’s licence on the day she asked him to run an errand for her, as she was not home at the time. The Applicant did not, at any time prior to allowing Mr. Cutajar to driver her car, question Mr. Cutajar to determine whether his licence was under suspension. The fact that the Applicant was unaware of the actual expiry date of Mr. Cutajar’s driver’s licence, is an indication that she did not “...*examine carefully...*” Mr. Cutajar’s driver’s licence.

Given the preceding evidence, the Tribunal concurs with the Respondent’s Representative that the Applicant’s efforts to determine the validity of Mr. Cutajar’s driver’s licence were insufficient. Thus, the Tribunal finds that the Applicant did not satisfy the criteria of Section 50.2 (3) (c).

With respect to undue hardship as per subsection 50.2(3)(d) of the Act, the Tribunal will proceed to review the criteria required to meet the onus for consideration of financial loss.

Is there no alternative to the impounded vehicle?

Subsection 22(3)(a) Regulation 574 as amended by O. Reg. 632/98 provided that this Tribunal may not consider financial or economic loss as a ground of appeal unless no alternative to the impounded vehicle is available.

The Applicant owns no other another vehicle, but has been able to get to and from work, without loss of time. The Applicant has also testified that, although her daughter missed and extra curricular Volleyball match, she has been able to take the children to other required appointments.

As the Applicant has alternate methods of transportation available, the Tribunal may not consider the provisions of 22.1 of Regulation 574.

Is the loss immediate, significant and lasting?

The Appellant does not meet the criteria of O. Reg. 632/98, Subsection 22(3)(b) which provides that the Tribunal may not regard economic loss unless the Appellant shows proof that loss will be immediate, significant and lasting.

The Applicant was unable to substantiate the premise that she has suffered financially as a result of the impoundment. As pointed out by the Respondent's Representative, the Applicant's precarious financial situation arises out of a pre-existing situation, not as result of loss due to the impoundment.

Thus, the Tribunal may not consider O. Reg. 632/98, Subsection 22(3)(b).

Is the loss upon a person ordinarily transported in the motor vehicle?

The evidence indicates that the impact of the impoundment will be borne by the owner of the vehicle, who was not the suspended driver, however, as previously stated, there is no such loss. Therefore, the requirements under O. Reg. 632/98, Subsection 22(3)(c) are not met.

Is the loss upon a person other than the driver of the motor vehicle and not a result of that driver's loss?

O. Reg. 632/98, Subsection 22(3)(d)(i)(ii), amending Regulation 574 provides that this Tribunal may not consider economic loss unless the owner demonstrates that:

d) the impact of the loss,

i) will be upon a person other than the person whose driving while his or her driver's license was under suspension resulted in the order to impound the motor vehicle and...

ii) will not be a result of a loss by the suspended driver of the type set out in clause 2(b)(c) or (d).

The Applicant was not the suspended driver, but is the individual affected by the impoundment, nonetheless, the Applicant has an alternative method of transportation, and has incurred no significant or permanent loss.

After assessing the evidence presented, the Tribunal finds that the Applicant has not established exceptional hardship ground for appeal, as required under section 50.2(3) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.
Presiding Member

RELEASED: October 16, 2002

BRABANT CONSTRUCTION AND MANAGEMENT

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: TERRENCE LORETTE
Presiding member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

EDWARD A. BRABANT, Agent
Representative for Applicant

DATE OF HEARING: October 18, 2002

DECISION RELEASED: October 21, 2002

Orillia

REASONS FOR DECISION

A hearing was held on October 18, 2002, at Orillia, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO SET ASIDE the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Brabant Construction And Management (the "Applicant")
Motor Vehicle:	Mack 1600, plate no. 118 2JA (the "vehicle")
Date of Appeal:	October 2, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on October 18, 2002 and proceeded as teleconference.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

TO WHOM IT MAY CONCERN

I AS OWNER OF BRABANT CONST. WAS TOTALY UNAWARE. OF MY EMPLOYEE NOT HAVING A VALID DRIVERS LICENCE. I GAVE MY INSURANCE COMPANY DOUG'S DRIVERS LICENCE # IN APRIL AND NEVR HEARD BACK FROM THEM ASSUMING EVERTHING WAS OKAY. (THEY HAVE NOTIFIED ME IN THE PAST IF ANYTHING IS WRONG). I WAS UNAWARE THAT I SHOULD DO DRIVRS ABSTRACTS ON LONG TERM EMPLOYEES. (I'VE LEARNED A LESSON.)

The Applicant testified that he had employed Mr. Doug Summers as a dump truck driver over the past several years (7 or 8) and had found him to be a trusted employee. The nature of the Applicant's business is seasonal causing him to lay off his drivers in the late fall and then to rehire them in early spring. The Applicant testified that each spring he would ask to see each employee's driver's license and would forward the license information to his insurance company and that in the past his insurer would contact him if there were a problem with any of the submitted license information. In the spring of 2002 he did the same thing with Mr. Summers' information and not hearing back from the insurer he assumed all was well.

The Applicant further testified that he operates a small family owned business and that due to some personal health problems over the past summer the business was down and the company is currently losing money. The impounded vehicle, a 2000 model tri-axle dump truck, is the company's main source of revenue at this time of year and not having it available for work was compounding the company's financial problems and preventing the company from fulfilling on certain contracts.

Under questioning, the applicant stated that the company did own another truck that was licensed as well as an unlicensed 1979 truck. These vehicles could not be used to replace the impounded vehicle as the licensed model was rated for 12 tons instead of the 22 ton rating for the impounded vehicle and the unlicensed 1979 model (used only on construction sites) required too many repairs to make it road worthy.

In summation the Applicant reiterated his company's financial position, going over the submitted income statement and explaining that the monthly operating costs of the vehicle still had to be paid even though it was not earning revenue. The Applicant was a credible witness and the Tribunal accepts his evidence as to the company's financial situation and that these losses will be immediate, significant and lasting.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as plate owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Douglas R. Summers;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Blood/Alcohol content in excess of .08, CCC under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until February 27, 2003.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
 - (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
 - (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
 - (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The tribunal found that there was sufficient evidence to show that in this instance exceptional hardship will result from an order to impound under section 55.1 of the Act. A long-standing family run business will be put in financial jeopardy because of a significant loss of income due to the loss of its main income generator. In the circumstances of this case only the impounded vehicle is available for this purpose.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal sets aside the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Terrence Lorette, Presiding Member

RELEASED: October 22, 2002

1318-MED-ADJ

**Appeal under Section 50(1) of the *Highway Traffic Act*,
R.S.O. 1990, Chap. H.8 as amended, from a Decision of
the Registrar of Motor Vehicles pursuant to Section
47(1) of that Act.**

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ROSS C. BENNETT, M.D., Presiding Member

APPEARANCES: KYLE BIEL, Representative for the Registrar of Motor Vehicles

Applicant, unrepresented

DATE OF HEARING: October 30, 2002 Toronto

ORDER

WHEREAS a hearing was scheduled to be heard on October 30, 2002 in Toronto in the above matter;

AND WHEREAS at the commencement of the hearing on October 30, 2002, the Applicant informed the Tribunal that she intended to rely on reports and evidence sent October 6, 2002, which said reports and evidence had been not received at the Tribunal as of the date of the hearing;

NOW THEREFORE, upon consent of both parties, the Tribunal Orders that this matter is adjourned to be heard on Friday, November 29, 2002, at 1:30 p.m. at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario;

LICENCE APPEAL TRIBUNAL

Ross C. Bennett, M.D., Presiding Member

RELEASED: October 30, 2002

MONICA JULES

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: LUBA NEUWIRTH,
Representative for the Registrar of Motor Vehicles

MONICA JULES, Applicant
unrepresented

DATE OF HEARING: October 28, 2002

DECISION RELEASED: October 30, 2002 **Hamilton**

REASONS FOR DECISION

A hearing was held on October 28, 2002, at Hamilton, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by one of the owners. The owners, motor vehicle, and date of appeal are as follows:

Owners:	Glenmore Goulbourne and Monica Jules (the "Applicant")
Motor Vehicle:	Dodge Grand Caravan, plate ANRW817 (the "vehicle")
Date of Appeal:	October 10, 2002

The Applicant, Monica Jules, filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on October 28, 2002 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

Prior to the commencement of the Hearing the Respondent provided the Tribunal with original certified copies of the documents on file.

Entered on consent as Exhibit # 4 is a letter from Noel Marshall dated October 28th, 2002 explaining why he could not attend the hearing.

The Applicant submitted an undated medical report, from Dr. Allan H. H. Leung. As the Respondent's Representative raised no objection, Dr. Leung's report was filed on consent as Exhibit # 5.

There were no other preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

I had made prior arrangement for some one to drive the vehicle, with a valid driver's Liccence I will provide proof of doctor's that I have a herniated disc, the reason I didn't go on oct 5/02.

I just got the vehicle which I sold my old one and use the money as down payment on this vehicle which is finance through Trans Canada credit, and because I needed someone with good credit, glenmore had to get loan for me, the reason his name is with me. I insured the vehicle, that's why I always Let a License driver operate when I'm unavailable, Thank you.

Monica Jules
Oct 10 / 02

In an undated note attached to Exhibit # 2, Mr. Noel Marshall informs that he "...was the one that was to be driving the vehicle on Saturday, Oct 5/02..."

Dr. H. H. Leung details in his undated report the number of times that the Applicant has seen him since the first visit on April 22nd, 1996. After a CT scan on April 26th, 1999 the Applicant's condition was diagnosed as "...L5 S1 disc herniation...". The Applicant was scheduled for surgery on July 07th, 2002 but refused to follow through, although she continues to suffer from lower back pain.

At the hearing, in evidence-in-chief, the Applicant re-iterated the statements made in the Notice of Appeal, that the van is used to enable her to make her living.

The impounded vehicle is needed, as the Applicant is required to travel to Toronto at least three times a week, plus she is required to "...sign in with the police..." every Friday.

In cross-examination the Applicant affirmed that she does not have access to another vehicle. The Applicant rented a van but was only able to afford a three day rental charge.

As she has recently moved to Brantford the Applicant does not know too many people. The few friends she does have do not own a suitable vehicle.

The Applicant testified that she finds it hard to travel by bus as the rocking causes her discomfort. Thus far, the Applicant has missed some doctor's appointments, including a scheduled x-ray. The Applicant's daughter did not want to change schools when the Applicant moved, and must take a bus and walk in order to attend school. Because the Applicant has not been able to drive her, the Applicant's daughter has had to miss school a couple of days.

The Applicant's only income is from the re-sale of clothes that she transports in the van. Due to a herniated disc the Applicant is unable to hold any other job. The Applicant applied for Disability Benefits in July.

The Applicant believes that the van may be repossessed as she is unable to meet the payments.

Mr. Glenmore Goulbourne was called as a witness by the Applicant. Asked to make a statement, Mr. Goulbourne testified as to why he found it necessary to drive the van, while his licence was under suspension.

In closing the Applicant re-iterated her previous comments, emphasizing the she is totally dependent on the new van, in order to get her life back together. Without the van she is unable to earn a living and visit her physician in Toronto.

In rebuttal to the Respondent's remarks, the Applicant pointed out that she should be attending physio-therapy on a regular basis but has not been able to do so because of the impoundment. Also she must be in Toronto every Friday and traveling by bus is uncomfortable.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant and Glenmore Goulbourne as joint owners;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Glenmore Goulbourne;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of "DRIVING WHILE LICENCE IS SUSPENDED - H. T. A." pursuant to which the driver's licence of the driver was then

under suspension until July 26, 2004.

The Respondent's Representative offered no viva voce evidence at the hearing, relying only on information previously submitted to the Tribunal.

In closing the Respondent's Representative pointed out the criteria for an appeal on the grounds of hardship: significant and long lasting loss of employment or education by the person normally transported in the vehicle.

According to the Respondent's Representative, the Applicant has claimed a loss of income but the Registrar is not prepared to accept the claim as there is no documentation supporting the loss.

The Respondent's Representative asked that the Tribunal uphold the Registrar's decision.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
 - (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

- (4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may

make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and

inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The onus is on the Applicant to establish the exceptional hardship grounds of appeal as provided in subsection and 50.2 (d) of the Act.

Is there no alternative to the impounded vehicle?

Subsection 22(3)(a) Regulation 574 as amended by O. Reg. 632/98 provides that this Tribunal may not consider financial or economic loss as a ground of appeal unless no alternative to the impounded vehicle is available.

The Applicant owns no other vehicle, but public transit is available.

As the Applicant has alternate methods of transportation available, the Tribunal may not consider the provisions of 22.1 of Regulation 574.

Is the loss immediate, significant and lasting?

The Applicant does not meet the criteria of O. Reg. 632/98, Subsection 22(3)(b) which provides that the Tribunal may not regard economic loss unless the Applicant shows proof that loss will be immediate, significant and lasting.

The Applicant testified as to loss of income but had no available documentation or figures to substantiate her assertion. Further, the Applicant offered no evidence that the loss would be significant or long lasting.

Thus, the Tribunal may not consider O. Reg. 632/98, Subsection 22(3)(b).

The Applicant having an alternative vehicle and the loss due to the impoundment not being immediate, significant or lasting, it is not necessary to review further criteria set out in the Regulation. As the Applicant's alternative mode of transportation is public transit, the Tribunal will ponder the health and safety issue.

Section 22.2 (a) of Regulation 574, R.R O. 1990 as amended by Ontario Regulation 632/98 allows consideration in circumstances which could pose "*a threat to the health or safety of any person ordinarily transported by the motor vehicle.*"

The Tribunal reviewed the medical report submitted by the Applicant. There is no doubt that the Applicant is afflicted with chronic back pain. Nonetheless, a herniated disc albeit painful,

cannot justifiably be regarded as life threatening. Thus, the provisions of Section 22.2 (a) of the Regulation are not met.

The individual affected by the impoundment, has an alternative method of transportation, and has neither proven significant or permanent loss, nor health threat.

After assessing the evidence presented, the Tribunal finds that the Applicant has not established exceptional hardship ground for appeal, as required under section 50.2(3) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal **confirms** the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: October 30, 2002

SANDRA MARY SELIN

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: NIVES MONTANO
Presiding Member

APPEARANCES: LUBA NEUWIRTH
Representative for the Registrar of Motor Vehicles

SANDRA MARY SELIN, Applicant
unrepresented

DATE OF HEARING: October 24, 2002

DECISION RELEASED: October 29, 2002 Toronto

REASONS FOR DECISION

A hearing was held on October 24, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Sandra Selin (the “Applicant”)
Motor Vehicle:	1996 Dodge Dakota, plate 6175KF (the “vehicle”)
Date of Appeal:	October 8, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on October 24, 2002 and proceeded as a teleconference.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant’s request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant’s appeal.

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

The following is a summary of the Applicant's affirmed testimony.

The Applicant is married and a mother of 2 children, a daughter who attends the University of Manitoba and her 19 year old son, who resides at home, and is employed and attends high school, both on a part-time basis.

The Applicant is employed at a home for the aged where her shifts consist of 3 different alternate shifts (i.e., 2 days from 7:20 a.m. to 7:20 p.m., then 2 days off; 2 days from 6 a.m. to 6 p.m., then 2 days off; 2 days from 7:20 p.m. to 7:20 p.m., then 2 days off).

Mr. Selin is employed at the mill in Fort Frances wherein his shifts consist of 2-day shifts (6 a.m. to 6 p.m.), 2 night shifts (6 p.m. to 6 a.m.) then 4 days off.

Both places of employment are approximately 10 blocks from their home.

The Applicant and her husband own a second vehicle, which they are currently using.

With respect to the circumstances surrounding the impoundment, the Applicant's son turned 19 two months ago. The evening the vehicle was impounded, the Applicant's son borrowed the vehicle to go to a friend's house (about 1 mile away) to watch some movies and spend the night. Unbeknownst to the Applicant, her son and his friend went to a bar about 1½ mile from her son's friend's home wherein they became drunk. He and his friend were going to walk home when they met Tara Green, whom they did not know, who indicated she would drive them home with their vehicle. The Applicant's son asked to see her licence, which she provided. The Applicant's son told the Applicant the next day that Ms. Green did not appear to be intoxicated.

The police pulled them over and asked the Applicant's son if he could drive the vehicle home, which he told the officer he could not. Therefore, they left the vehicle on the side of the road. Unfortunately, the police lead him to believe that the vehicle would be there the next day, which it was not due to it being towed to East Kenora (250 miles away) and impounded.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows (Exhibits 3 & 4):

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Tara S. Green;

3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of impaired driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until September 11, 2003.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
 - (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
 - (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
 - (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Tribunal must determine whether it should set aside the Registrar's order to impound the vehicle on the basis that the owner of the impounded vehicle will suffer exceptional hardship.

The Applicant has appealed on the grounds of “exceptional hardship” under section 55.2(3)(d).

Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the criteria the Applicant must meet to determine if in fact “exceptional hardship” will result from the impoundment. The Applicant in this case has argued that the impoundment will result in hardship as described in section 22(2). In order for her appeal to be considered under section 22(2), she must have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulations provides the criteria for demonstrating that every reasonable option has been considered respecting an alternative vehicle.

The Tribunal's consideration of subsections 22(3)(a), (b) and (c) follows:

- (a) **“no alternative to the impounded motor vehicle is available”**. The Applicant testified that: (i) there is an alternative vehicle that her husband drives; (ii) since the impoundment, she has walked to work occasionally; (iii) her husband has, on occasion driven her to and from work when his shift permits; and (iv) in her testimony, there are co-workers that could provide her with transportation, but the Applicant does not want to burden them.
- (b) **“the loss will be immediate, significant and lasting”** The Applicant testified that (i); her employer is not aware of the situation and as such, she has not missed any days of work or lost any wages due to her vehicle's impoundment; (ii) she has currently taken a one week paid vacation since her husband went out of town with the alternative vehicle; (iii) she has not had nor has missed any doctor's appointments; (iv) the Applicant does not have the option of public transit nor train, but there are only 2 taxis in town; and (iv) the Applicant's residence is 911 accessible and the hospital is on the other side of town in the event of an emergency.
- (c) **“the impact of loss will be upon a person ordinarily transported by the motor vehicle”** Since the impoundment, the Applicant's son who is employed part-time at McDonald's (from 4:30 a.m. to 12 noon), walks to work. Once his shift is over, he walks to school to attend 2 courses from 12:30 p.m. to 3:30 p.m.

Although the Applicant indicated that she unfortunately feels violated and punished for something she did not do, her son is working towards paying for the impoundment costs. The Applicant may pursue compensation from the suspended driver, Tara Green, as is stated in section 55.1(21) of the *Highway Traffic Act*:

“The owner of a motor vehicle that is subject to an order to impound under this section may bring an action against the driver of the motor vehicle at the time the order was made to recover any costs or other losses incurred by the owner in connection with the order”.

After considering the above requirements, the Tribunal finds that the Applicant has alternatives to the impounded vehicle and has managed. The impact of the loss will only be inconvenient and immediate, but not significant and lasting.

Accordingly, after considering the criteria set out in section 22(3) and (4) of Regulation 340 as amended by Ontario Regulation 632/98, the Tribunal finds the Applicant has not established exceptional hardship as set out in section 50.2(3)(d) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Nives Montano, Presiding Member

RELEASED: October 29, 2002

RICHARD (a.k.a. RICK) RITCHIE

IN THE MATTER of the Highway Traffic Act,
R.S.O. 1990, c.H.8 as amended, Section 50.2;

AND IN THE MATTER of a motion by Richard
(a.k.a. Rick) Ritchie seeking an extension of the
time requirements for this Applicant to commence
this appeal from an impoundment order of the
Registrar under Section 55.1 of the Highway
Traffic Act;

AND IN THE MATTER

-of-

RICHARD (a.k.a. RICK) RITCHIE

APPLICANT

-and-

THE REGISTRAR OF MOTOR VEHICLES

RESPONDENT

TRIBUNAL: ANTOINE AOUAD, M.D., Presiding Member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

RICHARD (A.K.A. RICK) RITCHIE, Applicant

DATE OF
MOTION: October 16, 2002

By teleconference

ORDER

A motion was heard by teleconference on October 16, 2002, at Toronto, Ontario, to consider the Applicant's request for an extension of time to appeal the impoundment order of the Registrar affecting the Applicant's motor vehicle. The motion is brought pursuant to Section 20(7) of Ontario Regulation 632/98 amending Regulation 574 of the Revised Regulations of Ontario, 1990 made under the *Highway Traffic Act*, R.S.O. 1990. c.H.8 amended ("HTA").

The Tribunal grants the extension of time requested by the Applicant to commence an appeal for the reasons set out below.

SUBMISSIONS OF WRITTEN MATERIAL:

The Applicant submitted the following documents:

1. Original Notice of Appeal, including Applicant's position on Appeal, dated November 25, 2000 received by the Tribunal on December 8, 2000. (Exhibit # 1);
2. Undated letter, addressed: " Att. Kim Beintema- To Licence Appeal Tribunal" received by the Tribunal on September 24, 2002-10-17
3. Letter dated October 3rd 2002, addressed to the Tribunal to the attention of John Ripley. (Exhibit # 2)

The Registrar's Representative, Ms Beintema, requested the Tribunal note for the record, that the Registrar had not received a copy of the letter of October 3rd, entered as Exhibit # 2.

THE FACTS:

The Applicant's motor vehicle was impounded on July 30, 2000 while being driven by the Applicant, whose driver's licence appeared to be under suspension at the time of impoundment.

In his first letter to the Tribunal, addressed to Ms Beintema, the Applicant requests an extension to the time granted to file an appeal on the grounds that he was "*...working 7 day A week 12 hours days ...did not have the time...*"

The second letter explains in more detail that the Applicant was "*...staying in another area at the time ...asked girlfriend to mail ...her mother had taken sick ...hospitalised with colon cancer ...her concerns and thoughts were only with her mother...*"

At the hearing, the Applicant testified that three days after the impoundment, he was informed by the police officer, that he had been charged under the "*...wrong section...*", and advised to appeal. The Applicant then went about trying to obtain information on how to appeal, so that he would not have to pay the cost of impoundment.

Under questioning by Ms Beintema, the Applicant continued his testimony by re-iterating the comments in his letter of October 3rd, 2002.

According to the Applicant, he went to work in Windsor on Monday, August 5th, two days after finding out that he had the right to appeal, and asked his girlfriend to take care of the details on

his behalf. The Applicant works on a "...*tug boat*...", where communications with land are difficult as in the middle of the water cell phones do not have "...*much of a signal*...". The Applicant stated that his work requires him to stay away from home "...*a month at a time*...", and that he has no opportunity to contact anyone while at work. Upon his return from Windsor, the Applicant found out that his girlfriend had forgotten to mail the appeal form.

In her closing remarks, Ms Beintema argued that the Applicant knew about the appeal process prior to his leaving for Windsor. The Applicant could have, if acting in good faith, filed the appeal, but chose instead to delegate the matter to his girlfriend.

THE LAW:

Section 20(1) of Regulation 632/98 states:

20. (1) An appeal to the Tribunal under section 50.2 of the Act shall be commenced by filing a notice of appeal with the Tribunal within 15 days of the issuance of the order to impound, together with a fee of \$100 payable to the Minister of Finance.

Section 20(7) of Regulation 632/98 states:

20. (7) Despite subsection (1), the Tribunal may extend the time for commencing an appeal if the owner establishes that the owner, acting in good faith, was unable through accident, illness, or other cause beyond the owner's control to bring the appeal within the prescribed 15 days.

Section 7 of the *Licence Appeal Tribunal Act*, 1999 states:

7. Despite any limitation of time fixed by or under any Act for the giving of any notice requiring a hearing by the Tribunal or an appeal from a decision or order of the Tribunal under section 11 or any other Act, if the Tribunal is satisfied that there are reasonable grounds for applying for the extension and for granting relief, it may,

- (a) extend the time for giving the notice either before or after the expiration of the limitation of time so limited; and
- (b) give the directions that it considers proper as a result of extending the time.

APPLICATION OF LAW TO FACTS:

Section 20(7) of Regulation 632/98, provides the Tribunal with the specific criteria that the Applicant must meet to satisfy the Tribunal that an extension of the time for commencing an appeal ought to be granted. Where the Registrar does not give his or her consent in writing for an appeal to be commenced after the expiry of the prescribed time. The Applicant must establish that he, acting in good faith, was unable through accident, illness or other cause beyond his control to bring the appeal within the prescribed 15 days. The Tribunal is precluded from considering other factors not arising from or directly related to these criteria.

The Tribunal agrees with the Respondent's Representative that the onus is on the Applicant to file his own appeal. Nonetheless, the vehicle was impounded on Tuesday, July 30th; the Applicant testified that he only considered appealing approximately three days after the impoundment, when the officer told him that he should do so. The Tribunal also heard from the Applicant that he had to leave for work on Monday August the 5th, 2002. Thus, it is reasonable to accept that the Applicant would have delegated the responsibility of filing.

The Respondent's Representative maintains that the delay period is extensive. The Applicant attested that he did not follow up the matter earlier, as he was unable to contact his girlfriend while at work, and that his girlfriend had major concerns which caused her to forget to file.

In retrospect it is always clear that situations that seemed handled appropriately, could have, and sometimes should have, been handled differently. In this matter the Applicant's actions, may at first appear to be remiss. However, the Tribunal finds the Applicant's testimony credible. The Tribunal is satisfied that the evidence before it shows that the Applicant was unable through a cause beyond the Applicant's control, to bring the appeal within the prescribed fifteen days.

The evidence presented establishes that the Applicant's delay in appealing the order impounding the vehicle under Section 55.1 of the *Highway Traffic Act* was the result of a situation beyond the Applicant's control.

ORDER:

For the reasons set out above, the motion herein of the Applicant requesting an extension of time to appeal, pursuant to section 20(7) of Ontario Regulation 632/98 amending Regulation 574, R.R.O. 1990, is granted.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: October 18, 2002

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
FREDRICK G. IANNIZZI

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: June 27, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

FREDRICK G. IANNIZZI

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Fredrick G. Iannizzi, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: October 3, 2002

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
789 Don Mills Road, Suite 800
Toronto, ON, M3C 1T5

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON, M4V 1K6

FROM: Fredrick George Iannizzi
29 Foxtail Road
Brampton, ON L6R 1S8

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereinafter the "Act") the parties to the proceeding, Fredrick George Iannizzi (the "Applicant"), and the Registrar, *Motor Vehicle Dealers Act* (the "Registrar") waive the requirement of a hearing and hereby consent to an Order of the Licence Appeal Tribunal (hereinafter the "Consent Order") based on the following terms and conditions to their registrations as a motor vehicle salesperson:

1. The Applicant agrees that if he is criminally charged or convicted in the future, he will immediately notify the Registrar in writing and provide written particulars of the charges or convictions.
2. The Applicant agrees that if he is charged or convicted in the future of an industry specific offence, he will immediately notify his employer in writing of the charges or convictions against him and provide a copy of the notification signed by his employer to the Registrar, giving the particulars of the charges or convictions.
3. The Applicant agrees that if he is convicted of any industry specific offences under any Statute in the future, he will be automatically revoked.
4. The Applicant agrees to provide full and accurate disclosure on any applications, documents, statements or other form of communication or information provided to the Registrar or his authorized representatives regardless of previous disclosure.
5. The Applicant agrees that his explanation of the circumstances of his criminal record, are substantially correct.
6. The Applicant acknowledges that the Registrar is relying upon the accuracy of the disclosure provided by the Applicant in entering into these terms and conditions.
7. The Applicant agrees not to be a partner, shareholder, officer, or director of a dealership.
8. The Applicant agrees not to transfer his registration as a motor vehicle Salesperson to another dealer without having first obtained the prior written consent of the Registrar.
9. The Applicant agrees not to be involved in the process of buying or selling motor vehicles without the benefit of registration.
10. The Applicant acknowledges and understands that his registration will not be used to buy or sell motor

vehicles where the Applicant knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.

11. The Applicant agrees that his registration will not prevent the Registrar from taking administrative action, including a proposal to revoke his registration, arising from matters that may have occurred or may occur in the future related to his financial circumstances and honesty and integrity.
12. The Applicant acknowledges that his registration as a motor vehicle Salesperson will not prevent the Registrar from taking legal action, including a Provincial Offences prosecution arising from matters that may have occurred or may occur in the future related to his financial circumstances and honesty and integrity.
13. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
14. The Applicant will provide a copy of this order to any future employer.
15. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
16. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
17. The Applicant acknowledges that he has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____, this _____ day of _____ 2002

(Signature) Fredrick George Iannizzi

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Date:

Carl Compton
Registrar
Motor Vehicle Dealers Act

1190467 ONTARIO LTD. AND 1296945 ONTARIO INC. AND ADE TAITLBAUM

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
MOTOR VEHICLE DEALERS ACT

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: SIMON ZUCKER, Counsel, representing the Applicant
A. MICHAEL ROTHE, Counsel, representing the Registrar under
the *Motor Vehicle Dealers Act*

DATES OF
HEARING: August 8, and October 21, 2002 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal before the Licence Appeal Tribunal (the "Tribunal") from a Notice of Proposal (the "proposal") pursuant to Section 7 of the Motor Vehicle Dealers Act (the "Act").

The Proposal dated January 8, 2002 seeks to revoke the registrations of both 1190467 Ontario Ltd. operating as A1 Car Sales hereinafter referred to as ("1190467") and 1296945 Ontario Inc. hereinafter referred to as ("1296945") as well as the Salesperson registration of Ade Taitlbaum ("Taitlbaum"). 1190467, 1296945 and Taitlbaum are collectively referred to the "Applicants". The proposal sets out the Registrar's reasons for seeking an order for revocation of the Applicant's registrations. The reasons are stated as follows:

The intention and objective of the act is to protect the public interest. The requirements of the act include that Registrants be financially responsible in the conduct of business and that registrants carry on business in accordance with the law and with integrity and honesty. The Registrant's past conduct is inconsistent with the intention and objective of the act, and therefore warrants disentanglement to registration under the Act. Therefore, the Registrar is unwilling to continue to register 1190467 Ontario Ltd. o/a A1 Car Sales, 1296945 Ontario Inc. and Ade Taitlbaum under the *Motor Vehicle Dealers Act*.

(Exhibit 4 Tab 1)

The particulars upon which the Registrar relies as stated in the proposal, are as follows:

1. On or about August 25, 1992 Ade Taitlbaum ("Taitlbaum") was registered as a salesperson.
2. On or about April 21, 1997 1190467 Ontario Ltd. o/a A1 Car Sales was registered as a motor vehicle dealer. At all material times, Taitlbaum was the operating mind of the corporation.

3. On or about July 23, 1999 1296945 Ontario Inc. was registered as a motor vehicle dealer under the Act. At all material times, Taitlbaum was the operating mind of the corporation.
4. On or about October 27, 1998 the Registrar, *Motor Vehicle Dealers Act* proposed to revoke the registration of the 1190467 Ontario Ltd. o/a A1 Car Sales and Taitlbaum and further proposed to refuse the registration of 1266945 Ontario Inc. As a result of this proposal, in February of 1999 Taitlbaum on behalf of himself, 1190467 Ontario Ltd. o/a A1 Car Sales and 1266945 Ontario inc. signed Minutes of Settlement. Clause 4 of the Minutes of Settlement state:

"The Applicants agree that they will not make any representations to any 'consumer' which would constitute 'unfair practices' or 'unconscionable consumer representations' as defined by the Business Practices Act, R.S.O. 1990, C.B 18, as amended."

5. On or about March 29, 2000 the Dealer purchased a 1998 GMC Jimmy SL VIN 1FKCT18W0WK521384. At the time of purchase the vehicle was disclosed as accidental and repaired. On or about March 2, 2001 the dealer sold the vehicle to David J. Grayston without disclosing on the bill of sale that the vehicle was accidented and repaired.
6. On or about January 16, 2001 the Dealer purchased a 1998 GMC Safari VIN 1GTDM19WXWB5077939. At the time of purchase the vehicle was disclosed with unibody damage. On or about February 21, 2001 the dealer sold the vehicle to Michael A. Menezes without disclosing on the bill of sale that the vehicle had unibody damage.
7. On or about March 7, 2001 the Dealer purchased a 1998 Oldsmobile Intrigue GL VIN 1G3WS52K4WF340449. At the time of purchase the vehicle was disclosed as accidented and repaired, with frame damage and structural damage. On or about March 19, 2001 the dealer sold the vehicle to Paula Bateman without disclosing on the bill of sale that the vehicle was accidented and repaired, frame damage and structural damage.
8. On or about March 8, 2001 the Dealer purchased a 1998 Chevrolet Venture VIN 1GN DU03EDWD162826. At the time of purchase the vehicle was disclosed as accidented and repaired and with structural damage. On or about March 3, 2001 the Dealer sold the vehicle to Deanna M. Wright without disclosing on the bill of sale that the vehicle was accidented and repaired and had structural damage.
9. The Dealer has retained the services an unregistered salesperson.
10. The Dealer and Taitlbaum have failed to comply with the Act and in particular with section 5.

(Exhibit 4 Tab 1)

Subsequent to the proposal, by way of further and other particulars the Registrar added further allegations to his proposal, as follows:

1. On or about February 14, 2001, 1190467 Ontario Ltd. o/a A1 car Sales (the "Dealer") purchased a 1999 Pontiac Grand Am, (VIN 1G2N12E6XM710579). At the time of purchase the vehicle was disclosed as accidented and repaired and frame damaged. On or about April 3, 2001 the Dealer sold the vehicle to Stewart Leasing Ltd. without

disclosing on the bill of sale that the vehicle was accidented and repaired and frame damaged.

2. On or about February 14, 2001 the Dealer purchased a 1997 Pontiac Trans Sport (VIN 1GMDU06E9VD285804). At the time of purchase the vehicle was disclosed as accidented and repaired. On or about April 5, 2001 the dealer sold the vehicle to Ali Wahid without disclosing on the bill of sale that the vehicle was accidented and repaired.

(Exhibit 5)

The Evidence

The evidence presented to the Tribunal by the Registrar consists of documentary evidence of David John Grayston, Jennifer Andrew and Mary Jane South. The evidence presented by the Applicants consisted of the oral testimony of Ade Taitlbaum.

David John Grayston

Grayston stated in his testimony that by bill of sale date March 2, 2001 he purchased a 1998 GMC Jimmy from 1190467. Having viewed the vehicle he then sat down with "Tony", who he took for a salesperson. Tony wrote up the bill of sale and received the deposit from Grayston. The financing of the transaction required the approval of Scotiabank which approval was received the same day. After approval of financing on March 2, 2001 Grayston sat down with Taitlbaum who went over with Grayston the paperwork and filled in the missing items on the bill of sale. The latter document did not state that the vehicle had been damaged in an accident.

Subsequent to purchasing the vehicle Grayston received a visit from an OMVIC official who enquired of Grayston whether he knew that the vehicle he bought from 1190467 had been involved in an accident prior to his purchasing the vehicle. Grayston advised the OMVIC official he was not aware nor had he been told so by "Tony" or Taitlbaum when he concluded the transaction. He also states that had he known the vehicle had been involved in an accident he would not have purchased the vehicle.

Under cross-examination Grayston stated he did not enquire, when either negotiating the purchase of the vehicle with "Tony" or when later speaking with Taitlbaum, whether the vehicle had been involved in an accident.

Grayston further stated that he was unable to say whose signature appears on the Scotiabank financing agreement under "authorized sellers signature". He also stated he did not observe Taitlbaum sign the bill of sale.

Jennifer Andrew

Ms. Andrews testified that she is employed by OMVIC as Team Leader of Inspections

with the duty of overseeing inspectors employed by OMVIC. She stated that she visited the Dealer at 18 Martin Ross Avenue, North York on June 27 2001 and spoke with a male individual who identified himself as Avi. Asked if "Tony" was on the premises, Ms. Andrew was told by Avi, that he knew of no "Tony". Ms Andrew left an "Inspection Findings" note with Avi advising she would return the next day to conduct an inspection of the dealership and its books and documents.

(Exhibit 4 Tab 8)

The next day, June 28, 2001, Ms Andrew returned to the dealership and spoke with Taitlbaum. The latter told her he "sells a lot of accident repair" vehicles. He also said he did not know of a "Tony". He did supply Andrew with certain documentation which she took with her for copying purposes. Andrew left with Taitlbaum an "Inspection Findings" report which cautioned him that only registered salespersons may represent a dealer and show vehicles to potential purchasers and that neither Avi nor "Tony" are registered salespersons. She left a copy of OMVIC's Standards of Business Practice with Taitlbaum.

(Exhibit 4 Tab 9)

Under cross examination Ms. Andrew stated she did not ask Taitlbaum during her visit of June 28, 2001 if he had ever seen "Tony's" registration as a salesperson.

Mary Jane South

Ms. South testified that she is the Deputy Registrar under the Act.

She stated that the Ontario Motor Vehicle Industry Council (OMVIC) is a non-profit organization mandated to administer the Act and its regulations and to ensure compliance by motor vehicle dealers and salespersons with the Act and its regulations. The Act itself is a public protection statute which regulates the motor vehicle industry and Section 5 of the Act entitles applicants to registration, except where their past conduct affords the Registrar with reasonable grounds for belief that such applicant will not carry on business in accordance with law and with integrity and honesty.

Ms. South stated she is familiar with the proposal in this matter which is based upon the Applicant's failure to disclose material information to buyers of motor vehicles as well as upon employing an unregistered salesperson contrary to the Act. She also states that in October 1993 the Registrar has caused a proposal to be issued to revoke the registration of A1 Car Sales, then operated as a partnership by Taitlbaum and one Michael Adler.

(Exhibit 4 Tab 4)

By order of the Commercial Registration Appeal Tribunal that proposal of the Registrar was confirmed on March 24, 1994 and the registration of A1 Car Sale was revoked.

(Exhibit 4 Tab 5)

Ms. South went on to state that by Notice of Proposal dated October 27, 1998 the Registrar sought to refuse the applications for registration of 1190467 as a motor vehicle dealer and the registration of Taitlbaum as a motor vehicle salesperson as well as the registration of 1296945.

(Exhibit 4 Tab 7)

Pursuant to this proposal a consent order was issued by the Tribunal on March 4, 1999, incorporating certain agreed terms and conditions to the above registration. One of the terms agreed to under the Tribunal's order was:

"The Applicants agree that they will not make any representations to any "consumer" which would constitute "unfair practices" or "unconscionable consumer representations" as defined by the Business Practices act, R.S.O. 1990. C.B. 15, as amended."

(Exhibit 4 Tab 7)

Ms. South also testified that Taitlbaum is, according to the records of Companies Branch, both the sole director and officer of 1190467 and 1296945.

Ms. South further stated, by reference to copies of bills of sale obtained by OMVIC from the Applicants, that when 1190467 purchased certain six motor vehicles at various auction sales, the auctioneers' bills of sale indicated that in all six instances the vehicles were either accidented or repaired or had frame or unibody damage. Further, that when selling these vehicles there was no disclosure by 1190467 that five of the vehicles were accidented or repaired or had frame or unibody damage.

(Exhibit 4 Tabs 10 to 13 inclusive and Exhibit 5)

Ms. South also testified that neither "Tony" nor Avi were registered as motor vehicle salespersons under the Act.

ADE TAITLBAUM

Taitlbaum stated that he is a landed immigrant from Romania and he has never taken a course in the English language. He can read very little English.

He stated further that "someone else" fills out documents that he is required to sign, before he affixes his signature. He specifically denied that his signature appears on the Grayston bill of sale nor is anything on that document in his handwriting. He also stated that in regard to the bills of sale with purchasers Menezes, Wright and Wahid his

signature does not appear on the bills of sale.

(Exhibit 4 Tabs 10,11,12 and Exhibit 5)

He did admit that his signature is on the Scotiabank financing document relative to the Grayston transaction.

(Exhibit 6)

He denied knowing "Tony" but admitted knowing Avi Cousis "who came to him with good references" and who told him he was a registered motor vehicle salesperson. He further stated that he never looked at bills of sale before he signed those documents. He did not know that Avi was signing his name on bills of sale. He asked Avi on more than one occasion for his registration certificate as a motor vehicle salesperson but never was shown it over the approximate six months that Avi worked for him.

Under cross-examination Taitlbaum admitted to being sole Officer and Director of 1190467 and 1296945. He attended at all auctions to purchase vehicles on behalf of 1190467 and he understood the condition of vehicles he was purchasing.

When considering whether to purchase a vehicle the condition of the vehicle is important to him as it indicates what he should pay for the vehicle. He also stated that he instructed his salespersons to make full disclosure to purchasers of motor vehicles but beyond that instruction he did nothing further to ensure disclosure.

FACTS FOUND PROVEN

The Tribunal finds the following facts to have been proven:

1. Taitlbaum is currently a registered motor vehicle salesperson under the Act.
2. 1190467 is currently and has since April 21, 1999 been registered as motor vehicle dealer under the Act and presently operates under the business designation of A1 Car Sales.
3. 1296945 is currently and has since July 23, 1999 been registered as a motor vehicle dealer under the Act.
4. Taitlbaum is and at all relevant times was the sole Director and Officer of both 1190467 and 1296945.
5. Pursuant to the Registrar's Notice of Proposal of October 1998, Taitlbaum entered into Minutes of Settlement in terms whereof he agreed not to make any representations to consumers which would constitute "unfair practices" or "unconscionable consumer representations" under the Business Practices Act,

R.S.O. 1990. C.B. 18, as amended.

6. 1190467, therein represented by Taitlbaum, purchased a 1998 GMC Jimmy, a 1998 GMC Safari, a 1998 Oldsmobile Intrigue, a 1998 Chevrolet Venture, a 1999 Pontiac Grand Am and a 1997 Pontiac Trans Sport at various auctions. The auctioneer at each auction disclosed in writing to 1190467 that major and/or material structural damage had occurred to such vehicles prior to their sale by auction.
7. Subsequent to the purchase by 1190467 of the six above stated vehicles at auction, such vehicles were sold by 1190467 to various consumers. All of such consumers, save the consumer that purchased the 1999 Pontiac Grand Am, did not have disclosed to them by 1190467 that the vehicles purchased by them had suffered major and/or material structural damage.
8. 1190467 employed one Avi Cousis as a motor vehicle salesperson when such Avi Cousis was not registered as a motor vehicle salesperson under the Act.

THE LAW:

Section 3 of the *Motor Vehicle Dealers Act* (the "Act"), states as follows;

- (1) No person shall,
 - (a) carry on business as a motor vehicle dealer unless the person is registered under this Act; or
 - (b) act as a salesperson of or on behalf of a motor vehicle dealer unless the person is registered as a salesperson of such dealer and such dealer is registered as a motor vehicle dealer under this Act.

Section 5 of the Act, states as follows;

5. An applicant is entitled to registration by the registrar except where,
 - 1(a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
 - (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law, and with integrity and honesty; or
 - (c) the applicant is a corporation and
 - (i) having regard to its financial position, it cannot reasonable be expected to be financially responsible in the conduct of business, or
 - (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or
 - (d) the applicant is carrying on activities that are or will be, if the applicant is registered, in contravention of this Act or the regulations.

- (2) A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant, imposed by the Tribunal or prescribed by the regulations.

Section 6 of the Act states as follows;

- (6)
 - (1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion, the applicant is disentitled to registration under section 5.
 - (2) Subject to section 7, the registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5, if the registrant were an applicant, or where the registrant is in breach of a term or condition of the registration.

Section 4 of the Act, states as follows;

- (4) A motor vehicle dealer shall not retain the services of a salesperson who is not registered under this Act.

Section 17.(1) (c) of the Act, states as follows;

- (1) Every motor vehicle dealer shall, within five days after the event, notify the Registrar in writing of,
 - (c) any commencement or termination of the employment, appointment or authorization of a salesperson;

APPLICATION OF LAW TO FACTS:

The issues for consideration by the Tribunal are:

Issue 1

Did 1190467 retain the services of Avi Cousis and permit Cousis to act as a motor vehicle salesperson when he was not registered as a motor vehicle salesperson in terms of the Act.

Issue 2

Was Taitlbaum the sole Director and controlling mind of 1190467 at all material times.

Issue 3

Did 1190467 sell motor vehicles to certain five consumers without disclosing to those consumers that the motor vehicles they were purchasing were accidented and repaired, or had suffered frame and/or structural damage.

Before setting out the Tribunal's analysis of the above issues and the conclusions and findings of the Tribunal regarding those issues it is necessary to review the leading case of *Brenner 19 CRAT SCO Decisions and Orders (1971-1989)* page 95.

In the *Brenner* decision, Southey J. stated that "the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty."

That decision went on to state, in referring the matter back to the Tribunal for rehearing, that "The proper question at the rehearing remains, however, whether the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal."

Accordingly, it is the Registrar's belief that is at issue in these proceedings, and not the belief of this Tribunal. Only if the Tribunal believes that the Registrar was in error in concluding that the past conduct of the applicants afforded reasonable grounds for belief that such applicants would not carry on business in accordance with law and with integrity and honesty, should this Tribunal refuse to direct the Registrar to carry out his proposal.

The analysis of the issues as well as the Tribunal's conclusions and findings follow:

Issue 1

Taitlbaum conceded in his testimony that he employed Avi Cousis as a salesperson of motor vehicles. He stated that Cousis worked as a salesperson for 1190467 for about six months and that he came "with good references". When employing Cousis as a salesperson he stated that Cousis told him he was registered. He asked Cousis for his registration certificate on more than one occasion but was never shown a certificate nor did he ever see a certificate. It was Cousis who, according to Taitlbaum, completed the bills of sale of 1190467 during the time Cousis worked for 1190467. Only when OMVIC's inspector Andrew called to inspect the books and documents of 1190467 and started to make enquiries about who was employed as a registered salesperson did Taitlbaum tell Cousis of Andrew's enquiries. It was then that Cousis disappeared from the scene.

Taitlbaum has been in the industry since 1983 and during that time has been both a dealer and salesperson. In that time he clearly knew, or ought to have known, that a motor vehicle dealer was not permitted to retain the services of a salesperson who is not registered under the Act. He was never shown a certificate of registration by Cousis and at no stage made any inquiries of OMVIC as to whether Cousis was in fact registered. At no stage did Taitlbaum comply with the requirement under the Act that

every dealer shall, within five days after commencement or termination of a salespersons employment, notify the Registrar in writing. He clearly contravened sections 4 and 17. (1) (c) of the Act.

It is clear that Cousis was employed by 1190467 as a motor vehicle salesperson and that this fact was known to Taitlbaum who was and still is the sole Director of 1190467 which is a closely held corporation. It was Taitlbaum who, on behalf of 1190467, employed Cousis and told him, according to Taitlbaum's own evidence, that he must ensure full disclosure when selling vehicles to customers.

On the evidence before it the Tribunal accordingly finds that Cousis was employed by 1190467 as a unregistered salesperson and that Taitlbaum as his capacity as Director of 1190467, authorized Cousis' employment and failed to ensure compliance with sections 4 and 17. (1) (c) of the Act.

Issue 2

The Registrar presented documents from the records of the Companies Branch in relation to 1190467, these records show that Taitlbaum was appointed sole Director of 1190467 commencing July 15, 1996, and continues to be that corporation's sole Director.

Insofar as 1296945 is concerned the Registrar presented documents being computer print outs from the records of the Companies Branch that Taitlbaum was appointed sole Director on May 25, 1998, and continues to be that corporation's sole Director. Under cross-examination Taitlbaum admitted to being a Director of both corporations and did not put in issue the contents of the records of the Companies Branch.

(Exhibit 9)

The aforementioned records show no parties, other than Taitlbaum, have at any stage been directors of either corporation and there have been no officers appointed in either corporation. The evidence indicates that the only person in control of both Corporations was, and continues to be, Taitlbaum.

The Tribunal accordingly finds that Taitlbaum was the controlling mind of both corporations at all material times.

Issue 3

The onus of proof was upon the Registrar. The latter failed to have any purchasers of vehicles, other than Grayston, testify at the hearing. No explanation or evidence was offered by the Registrar as to why one or more or all of the purchasers failed to testify. Grayston, the only purchaser to testify, stated that he dealt with one "Tony" when negotiating the purchase of a vehicle from 1190467 and that he only met with Taitlbaum when the transaction was being finalized. He did not observe Taitlbaum

execute the bill of sale.

The uncontested evidence of Taitlbaum was that he cannot read and can barely write English. He relies on others to interpret documents for him. Also uncontroverted, was his evidence that his signature does not appear on any of the bills of sale placed before the Tribunal and that what appears to be his signature on all such bills is not his and is that of unregistered salesperson, Avi Cousis, who did not have authority to sign on behalf of 1190467. It was also not proven by the Registrar that Taitlbaum was present during the negotiations with the various purchasers of vehicles referred to in the proposal. Taitlbaum's denial that he was present during such negotiations was not attacked by the Registrar's Counsel.

The only document that Taitlbaum admits to signing on behalf of 1190467 was the Scotiabank financing agreement in the Grayston transaction and such document in no manner assists the Registrar's case by proving Taitlbaum was present at negotiations regarding the Grayston transaction or that Taitlbaum signed the bill of sale.

There is therefore no clear and cogent evidence to show that Taitlbaum, in his capacity as Director of 1190467, failed to ensure disclosure was made by 1190467 to the various purchasers of the vehicles as alleged.

Having considered all the evidence, the Tribunal finds that issue 1 and 2 have been proven by the Registrar to the satisfaction of the Tribunal. Issue 3 has, however, not been proven by the Registrar.

It was submitted by Counsel for the Applicants that a finding by the Tribunal against Taitlbaum on his capacity as a director of the dealer does not translate into a finding against Taitlbaum in his capacity as salesperson and that if Taitlbaum in his capacity as a dealer did not carry on business in accordance with law does not mean that he will in the future not carry on business in accordance with law as a motor vehicle salesperson. The Tribunal rejects this submission and conclusion as an individual's propensity to honesty, integrity and compliance with law cannot be compartmentalized into one domain but not into another. The failure of Taitlbaum, in his capacity as sole director and controlling mind of 1190467, to ensure compliance with the Act's requirements that salespersons be registered reflects directly on Taitlbaum's personal propensity for compliance with law.

The Tribunal believes that revocation of Taitlbaum's registration as a salesperson would be too harsh and extreme a penalty to impose for his having employed an unregistered salesperson. However, the public must be protected from those working in the industry, whether as dealers or salesperson, who fail to fully comply with the Act and its regulations. The Act is, after all, a consumer protection statute.

DECISION:

Accordingly, pursuant to the authority vested in it by Section 7. (4) of the *Motor Vehicle Dealers Act* the Tribunal directs that the Registrar carries out his proposal dated January 8, 2002 to revoke the registrations of 1190467 Ontario Ltd. and 1296945 Ontario Inc. as motor vehicle dealers under the Act.

Insofar as Ade Taitlbaum is concerned, the Tribunal directs the Registrar to refrain from carrying out his proposal dated January 8, 2002 to revoke Ade Taitlbaum's registration as a motor vehicle salesperson subject to his compliance with the following terms and conditions:

1. Taitlbaum shall forthwith enroll in the Canadian Automotive Institute's course at Georgian College and shall successfully complete all requirements under that course for the issuance of a certificate by either Georgian College or The Canadian Automotive Institute.
2. Taitlbaum shall forthwith enroll at Humber College of Applied Arts and Technology in a course commonly referred to as "ESL – English as a Second Language." The level of such ESL course that Taitlbaum shall enroll in shall be no lower than the "ESL 150" course offered by the aforesaid College. Upon full completion of the ESL course Taitlbaum shall produce to the Ontario Motor Vehicle Industry Council written proof from the above College that he has satisfied all the requirements of the course he enrolled in.
3. Until such time as Taitlbaum produces to the Ontario Motor Vehicle Industry Council written proof from both the above Colleges of having received a passing grade in both courses and having met all the requirements for the successful completion of both the above courses, Taitlbaum's registration as a motor vehicle salesperson shall be and remain suspended and he shall not be entitled to work for a motor vehicle dealer as a motor vehicle salesperson and he shall not be entitled to receive a certificate of registration as a motor vehicle salesperson.
4. The cost of and incidental to both the Georgian College and Humber College courses shall be borne solely by Taitlbaum.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: November 7, 2002

T&R AUTO SERVICE CENTRE INC. AND NASEEM JAMIL

IN THE MATTER OF the *Highway Traffic Act*, R.S.O. 1990 Chapter H.8, as amended;

AND IN THE MATTER OF an Appeal by T&R Auto Service Centre Inc. and Naseem Jamil dated February 27, 2002, for a hearing before the Licence Appeal Tribunal pursuant to section 95 of the *Highway Traffic Act* appealing the Notice of the Director of Vehicle Inspection Standards dated February 8, 2002;

AND IN THE MATTER OF Motor Vehicle Inspection Station Licence Number 23-40874 issued to T&R Auto Service Centre Inc.;

AND IN THE MATTER OF the registration of Motor Vehicle Inspection Mechanic Naseem Jamil holding Trade Certificate Number 310S-375502.

TRIBUNAL: JOHN ORT, Member

APPEARANCES: J. SEBASTIAN WINNY, Counsel, and JAN M. DAVIDSON, Counsel, representing the applicants,
PATRICK MOORE, Counsel, representing the Director of Motor Vehicle Inspection Standards.

DATES OF
HEARING: July 4 & 5, September 30, and October 1 - 3, 2002 Hamilton

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") by T&R Auto Service Centre Inc. and Naseem Jamil (the "Applicants") under section 95 of the *Highway Traffic Act* (the "Act") respecting a Notice by the Director of Vehicle Inspection Standards (the "Director" and the "Respondent") dated February 8, 2002, proposing:

to revoke effective twenty-one (21) days after service of this Notice, Motor Vehicle Inspection Station Licence Number... 23-40874 issued to T & R Auto Service Centre Inc., and to revoke effective twenty-one (21) days after service of this Notice, the registration of Motor Vehicle Inspection Mechanic Naseem Jamil who holds Trade Certificate Number 310S-375502

on the grounds that false statements were made on various safety standards certificates, and that inspections authorized by the licence and registration were either

incompetently performed or not performed in accordance with the Act and regulations in connection with various other safety standards certificates.

EXHIBITS:

- Exhibit #1 - Notice by Director of Vehicle Inspection Standards dated February 8, 2002;
- Exhibit #2 - Notices of Appeal filed by the Applicants with the Tribunal on March 1, 2002;
- Exhibit #3 - Prehearing Order of the Tribunal released April 2, 2002;
- Exhibit #4 - Director's Appeal Book;
- Exhibit #5 - Safety Standards Certificate Number 2529171;
- Exhibit #6 - Safety Standards Certificate Number 2408018;
- Exhibit #7 - Safety Standards Certificate Number 2529175;
- Exhibit #8 - Safety Standards Certificate Number 2529176;
- Exhibit #9 - Pay stub;
- Exhibit #10 - Letter from Mr. Eisenberg to Naseem Jamil dated October 19, 1995;
- Exhibit #11 - Mr. Jamil's itinerary;
- Exhibit #12 - Mr. Jamil's boarding pass(es);
- Exhibit #13 - Mr. Jamil's passport pages;
- Exhibit #14 - Force Coatings partnership registration dated January 30, 2002;
- Exhibit #15 - Letter from Mr. Skibinski to Mr. Hicks dated April 5, 2002, and letter from Mr. Hicks to Szpiech, Ellis, Skibinski, Shipton dated April 15, 2002; and
- Exhibit #16 - Cheque stub for \$1,000.00 paid to Jim Child.

FACTS:

The witnesses for the Director were Andrew Losztyn, former Ministry of Transportation Officer Don Rutherford, and Ministry of Transportation Officers Mark Horton, Rob Grabar, James Smith, and Larry Grimaldi. The witnesses for the Applicants were Naseem Jamil, Shane Bailey, Jabbar Abdul Javed, and Mohinder Singh Lamba.

Ministry of Transportation Officers identified numerous defects that, in their opinion as mechanics, would have been present in vehicles at the time of their safety standards certificate inspection. The officers testified that issuing safety standards certificates in such instances was contrary to the Act and regulations. The safety standards certificates state the following above the signatures of the inspecting mechanic and the licensee: "We hereby certify that the above described motor vehicle has been inspected in accordance with the provisions of Sections 88 to 100 of the *Highway Traffic Act* and Regulations issued thereunder, and that the items inspected met the prescribed standards on the Date of Inspection."

Former Ministry of Transportation Officer Don Rutherford testified about twenty convictions of Naseem Jamil for making false statements on safety standards certificates. The convictions were against the partnership of Naseem Jamil and his brother, rather than against Naseem Jamil personally. According to Mr. Rutherford, the charges were based on the testimony of Andrew Losztyn. Mr. Losztyn is now eighty years old. He testified before the Tribunal that he did not sign some of the safety standards certificates that appear to have his signature as inspecting mechanic. Mr. Losztyn said that he does not remember the vehicles concerned or their specific problems. Mr. Jamil stated that at court Mr. Losztyn testified that he signed some but not all of the safety standards certificates. Mr. Rutherford testified that Mr. Losztyn told him that he did not sign any of the twenty safety standards certificates. Mr. Jamil pled guilty to the first charge. He pled not guilty to the later nineteen charges, but was convicted and paid a fine in installments.

Mr. Rutherford also testified about three instances set out at tabs 8 to 10 of exhibit 4 where Naseem Jamil was convicted under section 90(3)(a) on behalf of his partnership, but not personally, for issuing safety standards certificates for vehicles that did not comply with inspection requirements and performance standards prescribed by regulations under the Act. In each case Mr. Jamil pled guilty and was convicted. Mr. Rutherford stated that rust holes identified on all three vehicles would have been present at the time of the safety standards certificates inspection.

Naseem Jamil and his brother dissolved their partnership. In October 1997, Naseem Jamil incorporated the Applicant T&R Auto Service Centre Inc. (the "Corporation"). Mr. Rutherford next testified about three convictions of the Corporation under section 90(3)(a) of the Act. Problems identified by Mr. Rutherford as having been present at the time of the safety standards certificate inspections included the following: a parking brake foot pedal that could not be depressed with front cable seized and rear cables binding (tab 11 of exhibit 4); rear frame rail rust holes, inoperative left rear parking brake

cable (tab 12 of exhibit 4); parking brake pedal that would not depress with front cable seized and both rear cables seized, and left front brake hose cracked with inner cord frayed (tab 14 of exhibit 4). In each case the Corporation pled guilty and was convicted.

In 1999 Naseem Jamil received his licence as a mechanic.

Mr. Rutherford also testified about a safety standards certificate that Naseem Jamil signed both as inspecting mechanic and licensee, as set out at tab 18 of exhibit 4. Mr. Rutherford stated that the oversized right rear drum, the rust-perforated holes in the floor pan and the quarter panel, and the absence of a locking device on the tie rod ends are all defects that would have been present at the safety standards certificate inspection. A wheel came off the automobile twice. Mr. Rutherford was unable to determine why the wheel came off. Naseem Jamil stated that the drum is only marginally oversized and that there were cotter pins on the tie rod ends. He stated that the cotter pins would have to be bent to fall out. At trial, Mr. Jamil entered into a plea bargain. Charges against the Company were dropped. Naseem Jamil in his personal capacity was convicted.

Mr. Jabbar Abdul Javed testified that Naseem Jamil refused to issue a safety standards certificate for the vehicle described at tab 18 of exhibit 4 until an emergency brake cable and a small hole in the muffler were fixed.

Officer Mark Horton identified several items as problems that would have existed at the time of the safety standards certificate inspection of the vehicle described at tab 17 of exhibit 4: a rusty hole in floor by driver's feet, a rust-perforated tail pipe, an emergency brake not applied by the foot pedal, an emergency brake cable seized solid on the right side, and brake fluid leaking at the connection of the rear wheel cylinder to the brake line. Mr. Jamil claimed that the brake fluid leak was actually oil that he bled off when installing a new wheel cylinder. Mr. Horton said that the mechanic stated that he missed the hole. Mr. Jamil claimed that the hole was in the firewall and not in the floor. Mr. Lamba testified that the purchaser of the vehicle tried to blackmail him. He said that the tailpipe was okay. He testified that a tail pipe leak always makes noise and that there was no such noise.

Officer Grabar claimed that several defects of the vehicle identified at tab 19 of exhibit 6 would have been present at the time of the safety standards certificate inspection: the left rear floor pan rot hole, the right rear floor pan perforation, and the rotten rocker panel. Mr. Grabar explained that the rocker panel is part of the unitized body and is part of the chassis. Naseem Jamil disagreed. Officer Grimaldi testified that Naseem Jamil had identified the licensee's signature on the safety standards certificate as his own. Naseem Jamil told the Tribunal that he did not sign the certificate and that he does not know who did sign it. Charges against the licensee Naseem Jamil and against the mechanic are pending.

Naseem Jamil claimed that the licensee's signatures on the safety standards certificates in tabs 20 to 23, both inclusive, are not his. He stated that he was out of the country on

July 26 and 27 when those certificates were issued. Mr. Jamil said that he was away from July 3 to July 28, 2001. The certificates were sent to the licensee by the Ministry of Transportation on July 12, 2001.

With respect to the vehicle at tab 20 of exhibit 4, Mr. Grabar concluded that the following problems existed at the time of the safety standards certificate inspection: a rust perforation on the left side of the driver's floor area, a detached left rear parking cable and inoperative parking brake. Mr. Bailey was the owner of the car. He stated that the car shown on page 215 of exhibit 4 is red and was not his car. Mr. Bailey also said that the photograph on page 218 of exhibit 4 shows an amplifier and that his car did not have one. Further, Mr. Bailey said that his car had no body work done and that the photograph on page 219 of exhibit 4 shows a car with gray primer, not his car. Mr. Bailey testified that the emergency brake stopped working one and a half weeks after the safety standards inspection. Mr. Grimaldi said that Mr. Jamil had identified the licensee's signature on the safety standards certificate as his signature. Naseem Jamil told the Tribunal that the signature is not his.

Officer Smith testified that Naseem Jamil had identified the signature on behalf of the licensee on the safety standards certificates at tabs 22 and 23 of exhibit 4 as his own signature. Mr. Smith found rust-perforated holes in the left sub-frame, the right front sub-frame, and the left rear rocker panel on the vehicle at tab 22. He stated that the holes would have been present at the time of the safety standards inspection. Defects found by Officer Smith for the vehicle at tab 23 included an inoperative parking brake and steel brake tubing with heavy corrosion and scaling, both problems that would have existed at the time of the safety standards inspection, in his opinion. Charges against the licensee Naseem Jamil and against the mechanic are pending with respect to the matters at tabs 22 and 23 of exhibit 4.

The Tribunal finds the following facts to be proven on the evidence:

- 1) Contrary to subsection 91(8) of the Act and regulation 611, numerous safety standards certificates were issued by T&R Auto Service Centre Inc. and signed by Naseem Jamil as licensee, for vehicles with defects. Such vehicles did not comply with the inspection requirements and performance standards prescribed by the regulations. Naseem Jamil knew or should have known such was the case.
- 2) Naseem Jamil was properly convicted in his own capacity as well as on behalf of the Corporation and his prior partnership under subsection 90(3)(a) of the Act. Such convictions were not minor. In instances where Naseem Jamil pled guilty, the Tribunal finds that Mr. Jamil did not do so simply as a matter of convenience.
- 3) The licensee's signatures on the safety standards certificates in tabs 19, 21, 22, and 23 of exhibit 4 are those of Naseem Jamil. The vehicles identified in those tabs contained defects and did not comply with the inspection requirements and performance standards prescribed by the regulations.

- 4) Photographs at tab 20 of exhibit 4 show more than one vehicle and the allegations contained in that tab should be disregarded.
- 5) Naseem Jamil was convicted on behalf of his partnership under subsection 92(2) of the Act for making false statements on safety standards certificates. The Tribunal finds no credible evidence that the conviction was improper.

ISSUES:

Should the decisions of the Director of Vehicle Inspection Standards to revoke the Motor Vehicle Inspection Station Licence and the registration of the Motor Vehicle Inspection Mechanic be carried out?

LAW:

The *Highway Traffic Act* states the following:

88. In this section and in sections 89 to 100,

"Director" means the Director of Vehicle Inspection Standards appointed under section 89;

"licensee" means a person who is the holder of a motor vehicle inspection station licence issued under section 91;

"motor vehicle inspection mechanic" means a person who certifies by means of a safety standards certificate that a motor vehicle complies with the equipment and performance standards prescribed by the regulations;

"motor vehicle inspection station" means any premises maintained or operated for the inspection of motor vehicles and the issuance of safety standards certificates or vehicle inspection stickers in respect of motor vehicles;

"registrant" means a person who is registered as a motor vehicle inspection station mechanic under section 92;

....

90.(1) No person other than a licensee or a person authorized in writing by the licensee shall issue a safety standards certificate...

90.(3) A safety standards certificate in respect of a motor vehicle shall not be issued or a vehicle inspection sticker affixed to a vehicle unless,

- (a) the vehicle has been inspected by a motor vehicle inspection mechanic in the motor vehicle inspection station and the vehicle complies with the inspection requirements and performance standards prescribed by the regulations; and
- (b) the safety standards certificate or a vehicle inspection record,

- (i) is made by the motor vehicle inspection mechanic who inspected the vehicle, and

- (ii) is countersigned by the licensee or a person authorized in writing by the licensee.
- 91.(8) The Director may revoke or refuse to renew a motor vehicle inspection station licence where,
- (a) any person has made a false statement in the application for the licence or a renewal thereof or in any safety standards certificate signed by the licensee or a person authorized in writing by the licensee or in any report, document or other information required to be furnished by this Act or the regulations or any other Act or regulation that applies to the motor vehicle inspection station;
 - (b) any inspection authorized by the licence is incompetently performed;
 - (c) the licensee or any motor vehicle inspection mechanic employed in the motor vehicle inspection station has misrepresented the condition of a vehicle with respect to the standards of equipment and performance prescribed by the regulations upon an inspection of the vehicle in the station for the purpose of determining whether or not to issue a safety standards certificate, sign a vehicle inspection record or affix a vehicle inspection sticker;...
 - (e) the licensee does not comply with this Act or the regulations;....
93. The Director may revoke the registration of a motor vehicle inspection mechanic where,
- (a) the registrant or the licensee has made a false statement in the application for registration of the registrant or in a safety standards certificate or in any report, document or other information required to be furnished by this Act or the regulations or any other Act or regulation that applies to the registrant;
 - (b) any inspection performed under the authority of the mechanic's registration is incompetently performed by the registrant; or
 - (c) the registrant does not comply with this Act or the regulations.
- 95.(4) Where the applicant, licensee, registrant or proposed registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and shall hold the hearing and may by order direct the Director to carry out his or her proposal or refrain from carrying out his or her proposal and to take the action that the Tribunal considers the Director ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Director.
- 99.(2) Any person who makes a false statement in a safety standards certificate is guilty of an offence and on conviction is liable to a fine of not less than \$400 and not more than \$20,000.

CASELAW:

In *R. v. Servacar Ltd. (Ont. CA.)* [1983] O.J. No. 190, Dubin J.A. stated the following with respect to the predecessor of section 90(3) of the Act::

In our opinion the statutory requirement for the licensee, for the purposes of this appeal, was to see to it that the vehicle had been inspected by a motor vehicle inspection mechanic, and that was done in this case. The licensee must be satisfied that the motor vehicle inspection mechanic found the vehicle to comply with the inspection requirements and performance standards, and that was also done in this case....Crown counsel, on appeal, seeks a broader interpretation of s. 74 [now s.90] of the statute. It was his submission that if it is determined at a trial that the vehicle did not comply with the

inspection requirements and performance standards of the statute, that the licensee was guilty of an offence and vicariously liable for the failure of the licensed mechanic to perform his duty....In our view the statute does not clearly impose such a liability, and, for these reasons, the appeal will be dismissed.

APPLICATION OF LAW TO FACTS:

On the evidence, the Tribunal finds that the Director of Motor Vehicle Inspection Standards is not in error with respect to revocation of the Motor Vehicle Inspection Station Licence of T&R Auto Service Centre Inc..

The Director may revoke a motor vehicle inspection station licence where any person has made a false statement in any safety standards certificate signed by the licensee. Naseem Jamil was convicted on behalf of his partnership under subsection 92(2) of the Act for making such false statements.

In addition, the Director may revoke a motor vehicle inspection station licence where any inspection authorized by the licence is incompetently performed. The Director may also revoke the licence where the licensee or any motor vehicle inspection mechanic employed in the motor vehicle inspection station has misrepresented the condition of a vehicle with respect to the standards of equipment and performance prescribed by the regulations upon an inspection of the vehicle in the station for the purpose of determining whether or not to issue a safety standards certificate. Further, the Director may revoke the motor vehicle inspection station licence where the licensee does not comply with the Act and regulations.

Naseem Jamil was properly convicted on behalf of T&R Auto Service Centre Inc. under subsection 90(3)(a) for issuing a safety standards certificate for a vehicle that did not comply with the inspection requirements and performance standards prescribed by the regulations. Naseem Jamil knew or should have known this. This is not a case where, as in *R. v. Servacar Ltd.*, the licensee was satisfied that the motor vehicle inspection mechanic found the vehicles to comply with the inspection requirements and performance standards.

Similarly, the Tribunal finds on the evidence that the Director of Vehicle Inspection Standards was not in error in connection with revocation of the registration of the Motor Vehicle Inspection Mechanic Naseem Jamil.

The Director may revoke the registration of a motor vehicle inspection mechanic where the registrant does not comply with this Act or the regulations. Naseem Jamil was properly convicted in his own capacity under subsection 90(3)(a) of the Act.

DECISION:

Accordingly, by virtue of the authority vested in it under section 95(4) of the *Highway Traffic Act*, the Tribunal directs the Director of Motor Vehicle Inspection Standards to carry out his proposal to revoke the Motor Vehicle Inspection Station Licence of T&R Auto Service Centre Inc. and the registration of Motor Vehicle Inspection Mechanic Naseem Jamil.

LICENCE APPEAL TRIBUNAL

John Ort, Member

RELEASED: November 6, 2002

RICHARD AND LINDA MORRIS

APPEAL FROM A DECISION OF THE
CORPORATION DESIGNATED FOR THE
PURPOSES OF THE *ONTARIO NEW HOME
WARRANTIES PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL: JOHN ORT, Member

APPEARANCES: JACKIE E. McGAUGHEY-WARD, Counsel,
representing the Applicants,

DENNIS FAUBERT, Agent, representing the Ontario
New Home Warranty Program,

No-one appearing for the Added Party, Build North
Construction Inc.

DATE OF
HEARING: November 4, 2002 Sudbury

ORDER

WHEREAS the Ontario New Home Warranty Program denied the claim for compensation of the Applicants under the *Ontario New Home Warranties Plan Act* by a decision dated March 5, 2002;

AND WHEREAS the Applicants requested a hearing before the Licence Appeal Tribunal (the "Tribunal") to appeal the above-noted decision;

AND WHEREAS the Tribunal scheduled a hearing of this matter to commence at 9:30 a.m. on November 4, 2002, at the Holiday Inn Sudbury, Suite 134, 50 Brady Street, Sudbury, Ontario;

AND WHEREAS at the commencement of the hearing on November 4, 2002, the Applicants withdrew their request for a hearing before this Tribunal;

NOW THEREFORE this Tribunal orders that the proceedings in this matter are hereby noted as withdrawn at the request of Counsel for the Applicants and are hereby dismissed.

LICENCE APPEAL TRIBUNAL

John E. Ort, Presiding Member

Released: November 18, 2002

METROPOLITAN TORONTO CONDOMINIUM CORPORATION #1101 AND
METROPOLITAN TORONTO CONDOMINIUM CORPORATION #1120

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JOHN ORT, Member

APPEARANCES: IRVING MARKS, Counsel, representing the Applicants,
KEN ROSENBERG, Counsel, and ANDREW LEWIS,
Counsel, representing the Ontario New Home Warranty
Program,
LLOYD D. CADSBY, Counsel, representing the Added
Party, Concorde Square Limited

DATES OF
HEARING: October 21, 22, 23, and 25, 2002 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") by Metropolitan Toronto Condominium Corporation #1101 and Metropolitan Toronto Condominium Corporation #1120 (the "Applicants") under section 14 of the *Ontario New Home Warranties Plan Act* (the "Act") respecting decisions by the Ontario New Home Warranty Program (the "Respondent" and the "Program") dated March 25, 2002, (the "Decisions") denying the Applicants' claims for compensation.

The Decisions, exhibits 1 and 3, described the Applicants' claims as the cost of repair of the construction deficiencies of the exterior caulking and stucco finishes, the air barrier, and the vapour barrier; the cost to replace the safety anchors; past and future engineering costs; and past legal costs.

The reasons set out in the Decisions for denying the Applicants' claims are as follows:

The Condominium Corporation has signed a Technical Audit Agreement and Release on May 28, 1998 in which it has agreed to release and forever discharge the declarant CLS [Concorde Square Limited] and its respective successors and assigns, officers, directors and employees from and against all manners of action, causes of action, suits, debits, duties, accounts, bonds, contracts, damages, claims and demands whatsoever at law or in equity which the Corporation ever had, now has or may hereafter have for or by

reason, in any way arising out of or in any way related to the claim (refer to item 6 of the attached copy of the Technical Audit Agreement and Release document).

The Release Agreement was executed on May 28, 1998 (which date was beyond the expiry date of the 2nd year common element warranty of December 20, 1997) to settle all claims relating to the common element of the building filed with the declarant and with ONHWP [the Ontario New Home Warranty Program] including the technical audit report as outlined in paragraph B of the Release Agreement.

The claim from Robins Appleby & Taub on behalf of M.T.C.C. #1101 [Metropolitan Toronto Condominium Corporation #1101] [and on behalf of M.T.C.C. #1120] was received beyond the 2nd year common element warranty but within the seven year Major Structural Defect warranty. However, the condominium corporation has not satisfied requirements #3 and #5 of the major structural defect warranty. Building Sciences Inc. did not expressly identify the alleged deficiencies as a major structural defect. Rather, they seem to classify these alleged deficiencies as related to active water penetration into the residential suites from the exterior wall assemblies. None of the alleged deficiencies would qualify under the definition of major structural defect.

The pre-hearing order, exhibit 5, states the following:

The issues to be heard by this Tribunal shall be confined to those issues of law contained within the Decisions and the Appeals, and shall include an understanding of the circumstances and intent of the formal release document executed by the Applicants and whether or not such can be relied upon by the Respondent as a bar to any relief sought by the Applicants under the Act or to the compensation fund administered by the Respondent.

EXHIBITS:

- Exhibit #1 - Decision letter from the Program dated March 25, 2002, denying the claim of the Applicant M.T.C.C. #1101;
- Exhibit #2 - Notice of Appeal form received at the Tribunal April 8, 2002, filed by the Applicant M.T.C.C. #1101;
- Exhibit #3 - Decision letter from the Program dated March 25, 2002, denying the claim of the Applicant M.T.C.C. #1120;
- Exhibit #4 - Notice of Appeal form received at the Tribunal April 8, 2002, filed by the Applicant M.T.C.C. #1120;
- Exhibit #5 - Pre-hearing order;
- Exhibit #6 - Applicants' book of documents;
- Exhibit #7 - Claims of M.T.C.C. #1101 and M.T.C.C. #1120 to the Ontario New Home Warranty Program;

- Exhibit #8 - Technical report by Medhurst, Hogg, Sobottka, Leong & Assc. Ltd. dated December 1996;
- Exhibit #9 - Building Sciences Inc.'s drawings and glossary;
- Exhibit #10 - Applicants' supplementary book of documents;
- Exhibit #11 - Book of documents of the Added Party, Concorde Square Limited ("CSL") ;
- Exhibit #12 - Book of documents of the Respondent - volume number 1; and
- Exhibit #13 - Book of documents of the Respondent - volume number 2.

PRELIMINARY MATTER:

At the commencement of the hearing, all parties agreed that the claims are within the two-year common element warranty period.

ISSUES:

Do the Technical Audit Agreements and Releases dated March 28, 1998, tabs 23 and 24 of exhibit 6, preclude the Applicants' claim?

FACTS:

The parties agreed that the wording of the Technical Audit Agreement and Release concerning M.T.C.C. #1101 at tab 23 of exhibit 6 (the "Release") is identical to the wording of the Technical Audit Agreement and Release at tab 24 of exhibit 6 concerning M.T.C.C. #1120. The Release states the following:

WHEREAS:

B. The Corporation [M.T.C.C. #1101] has filed with the Declarant [Concorde Square Limited] and with the Ontario New Home Warranty Program a technical audit report prepared by Medhurst Hogg, Sobottka, Leong & Associates Limited (the "Medhurst Report") setting forth a list of defects in materials and/or workmanship in the original construction of the common elements of the Building [the units and common elements comprising M.T.C.C. #1101 and M.T.C.C. #1120, together known municipally as 18 Concorde Place, Don Mills, Ontario] and the Corporation has identified other defects found during its own inspections (the "Claim");

C. The Declarant and the Corporation, through a series of meetings have resolved all issues related to the Claim;

D. The Declarant has completed all necessary work to satisfy the Claim save and except those matters set out in Schedule "A", as hereinafter described; ...

NOW THEREFORE THIS AGREEMENT WITNESSETH that in consideration of the mutual covenants and agreements herein contained and the sum of Seventeen Thousand, Five Hundred Dollars (\$17,500.00) paid by the Declarant to the Corporation, the receipt of which is hereby acknowledged, the parties covenant and agree as follows:

1. The parties hereto confirm that each of them has relied upon and confirms the accuracy of the aforesaid recitals in entering into this Agreement.

2. The Corporation agrees the work referred to in Recital D hereof has been satisfactorily completed by the Declarant save and except as set out in Schedule "A" attached hereto.

3. The Declarant, at its sole cost and expense, agrees to perform the work and supply the materials to correct the deficiencies described in Schedule "A" to this Agreement.....

6. Upon fulfillment by the Declarant of its obligations pursuant to this Agreement, the Corporation, for and on its own behalf, and for and on behalf of each and every unit owner of Metropolitan Toronto Condominium Corporation No. 1101 insofar as each owner has an undivided interest in the common elements, does hereby remise, release and forever discharge the Declarant, Concorde Square Limited, and its respective successors and assigns, officers, directors and employees (the "Releasees"), from and against all manners of action, causes of action, suits, debts, duties, accounts, bonds, contracts, damages, claims and demands whatsoever at law or in equity which the Corporation ever had, now has or may hereafter have for or by reason, in any way arising out of or in any way related to the Claim.

7. Notwithstanding anything herein contained, it is agreed that this Agreement and Release shall not affect nor shall it be construed to apply to or affect any claim which has, may now or may hereafter be made by or on the behalf of:

- a) a unit owner in Metropolitan Toronto Condominium Corporation No. 1101 arising from the operation of warranties still in effect under the Ontario New Home Warranties Plan Act or at law in respect of his or her own suite or unit; and
- b) any proper and valid claim of a unit owner or the corporation arising from the operation of warranties still in effect under the Ontario New Home Warranties Plan Act including, but not limited to any major structural defect in materials or workmanship in the original construction of the building which defect materially and adversely affects the use of the common elements in accordance with the definition of a "major structural defect" as defined under the said Act in respect of the units and common elements of Metropolitan Toronto Condominium Corporation No. 1101.

10. Upon completion of the work referred to in Schedule "A" to this Agreement, the Corporation will and does hereby release the Ontario New Home Warranty Program from any and all claims, demands, costs, expenses, damages, actions or causes of action solely arising from or pertaining to construction of the Building as disclosed in the Technical Audit Report, except as provided for in Section 7 of this Agreement and Release. The Corporation further acknowledges that it has no further claim against the Ontario New Home Warranty Program nor the Declarant for any item referred to in the Medhurst Report.

13. This Agreement expresses the entire and final agreement between the parties hereto with respect to the matters herein, and the execution of this Agreement has not been induced by, and neither do any of the parties hereto rely upon or regard as material any representations or promises whatsoever not incorporated herein and made a part hereof, and this Agreement shall not be amended, altered or qualified except by separate memorandum in writing signed by all parties hereto.

SCHEDULE "A"

1. Complete the modifications to the driving entrance gates ...
2. With respect to the floor slab in the visitors parking garage, provide an engineering report...and repair or replace the slab as determined to be necessary in the engineering reports.

A letter dated May 28, 1998 from Paul Fortin to Benjamin Lamb and Shil Sanwalka set out at tab 25 of exhibit 6 (the "May 28 Letter") states the following:

Further to our meeting on Tuesday, May 27, 1998, (sic; May 26, 1998) we confirm that Concorde Square Limited undertakes to repair the water leaks identified on the attached schedule 1, which are all leaks known to us at this time.

Considerable work has been done on most of these leaks and, in some cases, the repair work has been flood tested with no further leakage. However, we acknowledge that the leaks cannot be fully tested until there is a severe storm.

If you provide us with a list of any further related leakage occurring after a severe storm, Concorde Square Limited will assign personnel to continue to try to find the cause and repair the leaks.

If you have any questions, please give me a call...

The Applicants' witnesses were Nick Tassone, Beryl Macleod, Ewald Pentzak, Frank Smith, Allan Steven, Bing Kwan, Shil Sanwalka, and Donna Farr. The witness for the Added Party was Paul Fortin. The Program did not call any witnesses.

Beryl Macleod

Ms. Macleod testified that she has been on the board of directors of M.T.C.C. #1101 since July 1995. The boards of directors of the Applicants always met together. A Technical Audit Sub-Committee (the "TAC") was formed in January 1997 by the two boards of directors to examine and understand all recommendations in the Medhurst Report, to interface with Concorde Square Limited ("CSL") as required, to interface with the ONHWP as required, and to report to the Joint Services Committee of the Applicants on arguments or disputes, all as set out at tab 3 of exhibit 6.

The subject of the Releases first came up on October 8, 1997, during a meeting of the Joint Technical Audit Committee of the Applicants (the "JTAC") , as reported at tab 13 of exhibit 6. The JTAC minutes state that it was agreed that a "letter of understanding" shall be sent from CSL to the presidents of M.T.C.C. #1101 and M.T.C.C. #1120 requesting their agreement that CSL's releases will be signed upon satisfactory correction of the deficiencies (as determined by the Courtyards' [Applicants'] TAC).

Legal advice was sought on November 6, 1997, from Mr. Stephen Karr, Barrister and Solicitor, as shown at tab 16 of exhibit 6. The form of the Release was approved by Mr. Karr, as confirmed at tab 20 of exhibit 6.

On May 28, 1998, Ms. Macleod received a memo to the Directors of M.T.C..C. No. 1101 & 1120 from J.T. Valley, shown on the first page of tab 25 of exhibit 6 (the "Varley Memo") together with enclosures such as the May 28 Letter and the May 27 letter from Mr. Fortin set out at that tab. She reviewed the package. The board of directors of the Applicants was divided on the question of deficiencies, especially leaks. The board heard from the TAC that CSL made oral and written commitments to continue to repair the leaks and the board then resolved that the Releases be signed by the presidents of the Applicants, Judge Lamb and Mr. Sanwalka, as stated at tab 27 of exhibit 6.

Ms. Macleod stated that the leaks were an almost separate item since they were ongoing from the start. Some corrected leaks reoccurred. After the Releases were signed, CSL continued to repair leaks. In September 2000, CSL indicated that it would no longer pay to fix water leaks.

The boards of the Applicants were aware of the ONHWP and its warranties. A representative from the ONHWP attended a meeting of the JTAC on September 10, 1997, to describe the role of the ONHWP and various warranties, as set out at tab 12 of exhibit 6. The Applicants had no dealings with the Program regarding the execution of the Releases.

Frank Smith

Mr. Smith joined the board of M.T.C.C. #1101 in the fall of 1996 and served on the board until June 2000. He is an electrical engineer and was a member of the TAC.

In September or October 1997, Mr. Fortin asked the TAC to request that the presidents of the Applicants sign the Releases.

At tab 14 of exhibit 6 appears a letter dated October 20, 1997, to Benjamin Lamb and Shil Sanwalka, the presidents of the Applicants. The letter sets out various deficiencies, excluding water leakage, and states that those items are the only outstanding work related to the Medhurst Report. When Mr. Smith was asked why he signed the letter that does not mention leaks, he stated that he had no idea of the seriousness of the water leaks.

Mr. Smith received the Varley Memo set out on the first page of tab 25 of exhibit 6.

The May 28 Letter was prepared and delivered the same day that the Releases were signed.

Allan Steven

Mr. Steven was the property manager of the buildings of the Applicants from October 1999 to June 2001.

A letter dated October 3, 2000, from Allan Steven to Paul Fortin, tab 9 of exhibit 11, states the following: "At a recent meeting of the Technical Management committee, it was understood that the leaks reported by the residents for which CSL was responsible, have been satisfactorily repaired. R.D.E INC has carried out this work extensively with great care and consideration on behalf of CSL." Mr. Steven stated that he drafted the letter, reviewed it with the boards of directors of the Applicants, and was authorized by the boards to send the letter.

Bing Kwan

Mr. Kwan is an electronics graduate. He was a member of the TAC.

M.T.C.C. #1101 was registered under the Condominium Act on December 21, 1995, as stated in exhibit 1. M.T.C.C. #1120 was likewise registered on May 14, 1996, as set out in exhibit 3.

Mr. Kwan also signed the letter of October 20, 1997 at tab 14 of exhibit 6, which does not mention water leaks among deficiencies and states that there is no other outstanding work related to the Medhurst Report. When asked why water leaks were not mentioned, Mr. Kwan said that the leaks were an ongoing issue, CSL was continually working on the leaks, the problem was being attended to and that they thought that the matter was already in hand.

When Mr. Kwan was asked why water leaks were not mentioned in Schedule "A" of the Releases, he said that they were an ongoing repair job already in hand.

Shil Sanwalka

Mr. Sanwalka was president of M.T.C.C. #1101 from 1998 to 2000. As such, he signed the release. He is a lawyer who has been practicing in Ontario since 1972.

Mr. Sanwalka has prepared releases in his private practice. He stated that Schedule "A" of the Releases does not mention water leaks because there was a separate letter, water leaks were an ongoing problem, and some leaks could not be determined without a storm. The May 28 Letter was not appended to the Releases; it was presented simultaneously with the Releases. There were no meetings with the Program regarding the Releases or the May 28 Letter.

Paul Fortin

Mr. Fortin is a Certified Management Accountant and a Professional Engineer with a degree in electrical engineering. He was vice-president of CSL from 1989 to January 1999.

At a meeting of the TAC in 1997 he requested execution of the releases. Mr. Fortin said, "We proposed it. ONHWP wanted to see a release so they would release our security." CSL had over five million in letters of credit with the Program.

Tab 25 of exhibit 6 is a letter dated May 27, 1998, from Mr. Fortin to Mr. Lamb and Mr. Sanwalka, presidents of the boards of the Applicants. The letter incorrectly refers to a meeting on May 27, 1998. The meeting was held on May 26, 1998. At that meeting, representatives of the condominium boards asked that water leaks be addressed. The May 27 letter states the following: "...we have prepared the following draft documents for your final review: 1. Revised Technical Audit Agreement and Release forms [the Releases] for each of the Condominiums incorporating: a) Payments of \$17,500.00 to each of the Condominium Corporations; b) Changes to sections 6 and 10 to reflect Mr. Sanwalka's comments; and c) Changes to Schedule "A"...2. A side letter in which we undertake to make the necessary repairs to stop the known leaks which are identified in the attachment to the letter [Schedule "1" to the May 28 Letter]." The May 27 and May 28, 1998 Varley Memo and letters were drafted after the May 26, 1998 meeting. There were no communications regarding the meaning of the May 27, 1998 Varely Memo and the May 28 Letter from May 27, 1998 to June 2, 1998. The two items were first sent to the Program when these proceedings started.

CSL sent the Releases to the Program, as set out at tab 3 of exhibit 13. Its security filed with the Program was then further reduced.

After the Releases were signed, water leaks other than those identified on Schedule "1" of the May 28 Letter were dealt with. Mr. Fortin stated that they did not object, that they were trying to maintain their reputation and the work was not costing them a lot of money. They had unsold units and were mindful that most of their sales came from referrals.

LAW:

The *Ontario New Home Warranties Plan Act*, R.S.O. 1990, Chapter O.31, then stated the following:

11.(2) When a vendor enters into a contract for the sale of a home to an owner or for the construction of a home for an owner, the vendor shall deliver to the owner such documentation and notices respecting the Plan as are prescribed by the regulations.

13.(1) Every vendor of a home warrants to the owner,

- (a) that the home,
 - (i) is constructed in a workmanlike manner and is free from defects in material,

- (ii) is fit for habitation, and
- (iii) is constructed in accordance with the Ontario Building Code;
- (b) that the home is free of major structural defects as defined by the regulations; and
- (c) such other warranties as are prescribed by the regulations.

(3) The vendor of a home shall deliver to the owner a certificate specifying the date upon which the home is completed for the owner's possession and the warranties take effect from the date specified in the certificate.

(4) A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed.

(6) The warranties set out in subsection (1) apply despite any agreement or waiver to the contrary and are in addition to any other rights the owner may have and to any other warranty agreed upon.

14.(3) Subject to the regulations, an owner of a home is entitled to receive payment out of the guarantee fund for the cost of the remedial work required to correct a breach of warranty if,

- (a) the person became the owner of the home through receiving a transfer of title to it from a vendor or through the substantial performance by a builder of a contract to construct the home on land owned by the person; and
- (b) the person has a cause of action against the vendor or the builder, as the cause may be, for damages resulting from the breach of warranty.

(7) The Corporation may perform or arrange for the performance of any work in lieu of or in mitigation of damages claimed under this section.

15. For the purposes of sections 13 and 14, a condominium corporation shall be deemed to be the owner of the common elements of the condominium and the warranties take effect on the date of the registration of the declaration and description.

16.(3) Where a person or owner gives notice in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and may by order direct the Corporation to take such action as the Tribunal considers the Corporation ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Corporation.

Regulation 892 under the Act adds the following:

1. In this Regulation,
"major structural defect" means , for the purposes of clause 13(1)(b) of the Act, any defect in work or materials,
(a) that results in failure of the load-bearing portion of any building or materially and adversely affects its load-bearing functions, or
(b) that materially and adversely affects the use of such building for the purpose for which it was intended,...

15. (2) Every vendor of a new home warrants to the owner,
(a) that the home is constructed in a workmanlike manner and is free from defects in materials including windows, doors and caulking such that the building envelope of the home prevents water penetration;
(e) that the home is free of major structural defects.
(3) The warranties described in subsection (2) apply only in respect of claims made within two years after the home was completed for possession, in respect of homes that were enrolled, or should have been enrolled, after the 31st day of December, 1990.

16. Where a home was enrolled after the 31st day of December, 1990, the claim for damages because of a major structural defect may be made within seven years of the date specified in the certificate of completion and possession.

CASELAW:

In *Mandos v. Ontario New Home Warranty Program*, [1995] O.J. No. 3647, the Ontario Court of Appeal stated:

"Subsection 13(6) of the Act is a difficult subsection to construe. However, we believe that the interpretation given to it by counsel for the respondents is a proper one, i.e., that the warranties contained in s. 13(1) continue in force, irrespective of any agreement by the parties to the contrary....When a mutual release is executed between an owner and a builder, it is quite possible, as in the present case, that there may be defects which could only be discovered by reasonable inspection. If it is the intention of the legislature that a release should be a bar to any action by an owner for breach of warranties in s. 13(1), then, in our opinion, the legislation should clearly so provide and owners should be warned of the dangers in entering into a release."

The Divisional Court previously said in the case, [1993] O.J. No. 2090:

"Assuming, without deciding, that the Mandos were competent to contract out of the provisions of s. 13(6) of the Act under the particular circumstances, we are of the view that such contracting out could only be valid if it could be shown that the Mandos were fully aware of the rights afforded to them by s. 13(6) of the Act and equally aware of the potential consequences flowing from their decision to give up those rights. That of course is not the evidence. Indeed, it is apparent that neither Mr. or Mrs. Mandos nor their solicitor were aware of the protection afforded by the Act when the release was executed. No doubt, this lack of knowledge stemmed in large part from the failure of the builder/vendor to comply with the provisions of s. 11(2) of the Act....In this case, the builder/vendor failed to provide Mr. And Mrs. Mandos with the requisite material."

A recital of the facts indicated that in order to vacate a construction lien, the Mandos agreed to pay \$5,000 to the builder.

Similarly, in *Holburn (Re)*, [1996] O.C.R.A.T.D. No. 37, the Tribunal stated:

"In the circumstances of this case, where one of the joint owners of the property did not sign the Release, where the Release was signed without benefit of legal advice and without knowledge that any rights against the Program would be waived and where it was signed under duress due to the 12 inches of water in the basement, it is the Tribunal's view that the Release signed did not extinguish the Applicant's right to claims against the Guarantee Fund."

APPLICATION OF LAW TO FACTS:

This case is distinguishable from *Mandos v. Ontario New Home Warranty Program* ("Mandos"). In this case the Applicants were aware of the warranties under the Act. In

Mandos neither the purchasers nor their solicitor was aware of the protection afforded by the Act when the release was executed. In Mandos the builder failed to provide requisite material under s. 11(2) of the Act. Such was not the case here. In Mandos the purchasers made a payment to the builder. Here there was payment made by CSL to the Applicants. In Mandos there were defects which could only be discovered by reasonable inspection. In this case, the Medhurst report on defects had been completed prior to signing of the release. In addition, the TAC of the Applicants studied the Medhurst report in detail and reported to the boards of the Applicants before recommending to those boards that the release be signed.

Similarly, this case is different from *Holburn (Re)*, where one of the joint owners of the property did not sign the release, where the release was signed without benefit of legal advice and without knowledge that any rights against the Program would be waived and where it was signed under duress due to the 12 inches of water in the basement. In this case, the proper parties signed the Release, legal advice was obtained by the Applicants prior to signing, the Release was approved by the lawyer for the Applicants, a judge and an experienced lawyer were among the signors of the Release, and there was no duress against the Applicants.

Incidentally, the Licence Appeal Tribunal rules encourage parties to settle. Section 13(6) must be read in the context of the entire Act. It would be impossible to properly administer the Act if no disputes could be settled by the parties and all disputes had to be resolved by the Tribunal.

Here the Releases were signed after the two-year warranty under the Act had expired. There was no waiver of warranties signed at the time of purchase.

Thus, the Tribunal finds that the Releases are binding.

The essence of a release is the release of a claim. Since the deficiencies described in Schedule "A" of the Releases were corrected, paragraph 6 purports to release CSL from the Claim, which includes defects identified in the Medhurst Report, including the subject matter of this hearing. If CSL is released then the Program is also released. Paragraph 7b must be read in this context.

The Tribunal notes that paragraph 7b gives an example of a claim that is to remain in effect: "any major structural defect in materials or workmanship in the original construction of the building which defect materially and adversely affects the use of the common elements in accordance with the definition of a 'major structural defect' as defined under the Act." The seven-year warranty for major structural defects had not expired and it makes sense to keep such claims in effect. The Tribunal interprets paragraph 7b as also preserving in effect any major structural defect that is a defect in work or materials that results in the failure of the load-bearing portion of any building or materially and adversely affects its load-bearing function.

This Tribunal interprets "any proper and valid claim ...arising from the operation of warranties still in effect under the Ontario New Home Warranties Plan Act" in paragraph 7b as referring only to claims arising from warranties that have not yet expired. This Tribunal holds that paragraph 7b does not refer to claims still in effect arising under the one- or two-year warranty, which warranties are no longer "still in effect". The Tribunal then reads section 10 of the Releases as releasing the Program from claims under the one- and two-year warranties under the Act.

Paragraph 13 of the Releases is an entire agreement clause. It states that the Releases can be amended by a separate memorandum in writing signed by all the parties to the Release. The May 28 Letter is not signed by the Applicants and is not an amendment of the Releases.

In the event that this Tribunal is wrong and the Releases are not clear and their provisions are ambiguous, this Tribunal makes the following observations on the extrinsic evidence. The Releases do not mention the May 28 Letter. The May 28 Letter does not mention the Releases. The two writings were not sent to the Program together and they are not part of the same agreement. The May 27, 1998, letter found at tab 25 of exhibit 6 states that sections 6 and 10 of the Releases were amended to reflect Mr. Sanwalka's comments at the May 26 meeting. Clearly, the Releases could have been amended to include the water leaks that were discussed at that same May 26 meeting. CSL wanted a reduction in security held by the Program. The effect of the parties including water leaks in the May 28 Letter, excluding water leaks from the Releases, and forwarding only the Releases without the May 28 Letter to the Program was to mislead the Program. After receipt of the Releases, the Program changed its position to its detriment in reasonable reliance on the Releases. As expected by the parties, the Program reduced its security relating to CSL. The Applicants received the benefit of payments under the Releases. Estoppel should be applied against the Applicants.

In summary, the Releases are binding and preclude the Applicants' claim under section 14 of the Act. No continuation of the hearing is necessary.

DECISION:

Accordingly, by virtue of the authority vested in it under section 16(3) of the *Ontario New Home Warranties Plan Act*, the Tribunal directs the Ontario New Home Warranty Program to disallow the Applicants' claim.

LICENCE APPEAL TRIBUNAL

John Ort, Member

RELEASED: November 28, 2002

1145082 ONTARIO LIMITED c.o.b.
BRIDLEWOOD AUTO BROKERS AND
ROBERT VALLERIANI

IN THE MATTER OF the *Motor Vehicle Dealers Act*, R.S.O.
1990, C. M.42 and Regulations, as amended;

AND IN THE MATTER OF the Registration of 1145082
Ontario Limited C.O.B. Bridlewood Auto Brokers

AND IN THE MATTER OF the Registration of
Robert Valleriani

AND IN THE MATTER OF an Application by Robert J.
Valleriani dated June 10, 2002, for a hearing before the
Licence Appeal Tribunal pursuant to Section 7 of the *Motor
Vehicle Dealers Act* appealing the Notice of Proposal to
Revoke Registration of the Deputy Registrar of Motor
Vehicles dated.

TRIBUNAL: Marjorie Hiley, Vice-Chair
Barbara Fraser, Member

APPEARANCES: ROBERT J. VALLERIANI, on his own behalf.
AVIVA HARARI, Counsel, representing the Registrar, *Motor
Vehicle Dealers Act*

DATE OF
HEARING: October 4, 2002 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") respecting a Notice of Proposal to Revoke Registration by the Registrar of Motor Vehicle Dealers Act, dated April 22, 2002. The Registrar proposed the revocation of the registration 1145082 Ontario Limited o/a Bridlewood Auto Brokers (the "Dealer") as a motor vehicle dealer and further proposed to revoke the registration of Robert J. Valleriani ("the Salesperson") as a motor vehicle salesperson under the Act. Since the Salesperson is the sole officer/director of the Dealer, they will be both referred to as the Applicant. The basis of this proposal was that the Applicant lacks financial responsibility and had failed to conduct business in accordance with the law with integrity and honesty.

ISSUE:

Preliminary Issue:

The Applicant requested an adjournment due to his counsel being unavailable. Whereas the hearing was set as peremptory, and whereas the Applicant's counsel advised the Tribunal that he will not represent the Applicant, and whereas some witnesses had traveled in some instances a lengthy distance, and whereas the Applicant had more than five months to retain Legal Counsel, the Tribunal hereby denies the Applicant's request.

Witnesses were excluded as requested by the Registrar.

Have 1145082 Ontario Limited o/a Bridlewood Auto Brokers and Robert Valleriani contravened Section 5 of the Motor Vehicle Dealers Act, (the Act)?

If the Applicant has violated Section 5 of the Act, should the motor vehicle dealer licence and motor vehicle salesperson license be revoked?

REGISTRAR'S PARTICULARS:

The following is the rationale offered by the Registrar for their proposal:

1145082 Ontario Limited (the Dealer) is currently registered as a motor vehicle dealer and has been registered since December 1, 1998.

The Dealer originally operated under the name "Quality Transportation" which was subsequently changed to "Bridlewood Auto Brokers" on November 27, 2001.

Robert J. Valleriani is currently registered as a motor vehicle salesperson since on or before September 30, 1985. He is currently registered as a salesperson to the Dealer.

The Applicant Salesperson is the sole officer/director of the corporation.

The Applicant Salesperson declared bankruptcy on February 15, 2002.

The OMVIC (The Ontario Motor Vehicle Industry Council) has received several complaints with respect to the Applicant not acting with financial responsibility.

The OMVIC was contacted by Dufferin Mazda, a registered dealer in May 2001, due to an NSF cheque provided to them for payment of vehicles purchased by the Dealer.

The OMVIC was also contacted by Toronto E Auto Limited, a registered dealer in Ontario, as a result of the Dealer not paying monies owing to them for vehicles sold on consignment on Toronto E's behalf. The amount of outstanding funds was approximately \$10, 400.00.

THE OMVIC was further contacted by consumer Rui Moniz, concerning a truck (VIN: 1GCVHK392WF054816), which he had left with the Applicant to sell on consignment.

Although the Applicant had sold the vehicle to another consumer, on or about September 26, 2001, Mr. Moniz has not been able to collect the amount of approximately, \$23,500.00 from the Dealer or Salesperson.

The Applicant has made numerous promises to OMVIC staff to repay monies owing to Mr. Moniz, but to date, no payments have been made, and all funds remain outstanding.

The Dealer has failed to comply with the requirements of the Retail Sales Tax Act as to the filing of returns, remitting of tax due and paying of assessments when due.

The Salesperson is an undischarged bankrupt.

EVIDENCE:

Witness John Jamieson, Unionville Motors Dealer, testified that the Dealer, Applicant Mr. Valleriani, gave him a promissory note for \$43,480.50 for receipt of vehicles. (Exhibit 6 tab14) He further stated that he was given NSF cheques, and that a balance is still outstanding.

Witness, Marilyn Blazevic, Ministry of Finance, Field Investigator stated that the Applicant is twenty-nine months in arrears of sales tax. That he had an obligation to file remittances on a monthly basis, which he failed to do. She also stated that he had collected tax monies but did not remit them to the Ministry of Finance. He is indebted to the Ministry of Finance, Ontario, in the amount of \$15,419.87 for the period from June 1998 to June 30, 2002 (Exhibit 5 tab 12). The arrears she stated for tax collected and not remitted is subject to a penalty, and interest resulting in the amount outstanding being \$153,700.00, for the period from October 25, 1995 to June 30, 2002. (Exhibit 8)

Witness, Rui Moniz, stated that he left his 1998 (4x4) Chevy Silverado Pickup with the Applicant to sell on consignment for approximately, \$23,500.00. which he learned had been sold by the Applicant, however Mr. Moniz has not been able to collect the monies owing to him. The witness testified that he received from the Applicant, delays, NSF cheques, a stop payment of a cheque, and excuses for the same. (Exhibit 5 tab7).

Witness, Laura Gordon, Director of Compliance since 1997, and now Field Investigator, reviewed the Applicant's past conduct and stated that there were serious concerns regarding the best interests of the public in this matter.

She stated that there had been no disclosure regarding an odometer problem as had been alleged by the Applicant with respect to Mr. Moniz's vehicle.

Witness, Robert J. Valleriani, for the Applicant stated that he has been licensed since 1985 as a dealer and never had any complaints. He alleged that in 1996, stolen vehicles had been sold to him and he had to pay back the customers \$150,000. He entered the restaurant business, as a shareholder. The business failed, resulting in lost money.

He stated that he suspects that the odometer on Mr. Moniz's pick up truck had been tampered. That was his reasoning for placing a stop payment on one of the cheques he had given Mr. Moniz.

He stated that since he is bankrupt he is working for another dealer for approximately \$3000.00 to \$4000.00, a month, gross.

The Applicant requested that his salesperson's licence not be revoked, because selling cars is all he wants to do for a living.

ANALYSIS AND ORDER

The relevant legislation is the *Motor Vehicle Dealers Act*:

- 5(1) an applicant is entitled to registration or renewal of registration by the Registrar except where,
 - (a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
 - (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law, and with integrity and honesty;
- (2) A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant, imposed by the Tribunal or prescribed by the regulations.
- 7. (4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.
- (5) The Tribunal may attach such terms and conditions to its order or to the registration, as it considers proper to give effect to the purposes of this Act.

Under the Retail Sales Act the relevant sections are as follows:

- s.10 every vendor is an agent of the Minister and as such shall levy and collect the taxes imposed by this Act upon the purchaser or consumer.
- s.15 every vendor shall make returns and shall keep such records in the form and substances as are prescribed by the regulations; any failure so to do constitutes an offence against this Act.
- s.18(1) Where a vendor fails to make a return or a remittance as required under this Act or if the returns are not substantiated by the vendor's records; the Minister may make an assessment of the tax collected by such vendor for which the vendor has not accounted and such assessed amount shall thereupon be deemed to be the tax collected by the vendor.
- s.18(9) every person assessed under this section shall pay to the Minister the amount assessed whether or not an objection to or an appeal from , the assessment is outstanding.
- s.22(1) every vendor who collects any tax under this Act shall be deemed to hold it in trust for Her Majesty in right of Ontario and is responsible for the payment of it in the manner and time provided under this Act and the regulations.

The Motor Vehicle Act s 5 (1) (a) and (b) apply to the following:

1. The Applicant cannot reasonably be expected to be financially responsible. He is an undischarged bankrupt.
2. The Applicant issued NSF cheques to various persons while transacting business, and when approached by the consumer regarding the NSF cheques, he always had an excuse and promised to make good. In most instances the result was the issuance of further NSF cheques.
3. He received vehicles on consignment, and sold them to other consumers while issuing NSF cheques to the original owners. In one instance he placed a stop payment on a cheque for a truck he purchased, stating odometer tampering. Interestingly however, he sold that vehicle.

The Retail Sales Act s.10, 15, 18(1), (9) and s.22(1) apply to the following:

1. The Applicant Dealer is indebted to the Ministry of Finance in the amount of \$15, 419.87 and is in default of filing Retail Sales Tax Returns.

2. The Applicant Salesperson gave the impression that he was unaware that he should file a tax assessment even if he did not realize any sales.

We are of the opinion that the Witnesses' testimony regarding their experiences with the Applicant, i.e. unfulfilled promises and N.S.F. cheques are consistent with the entered Exhibits. Their retelling of their experiences with the Applicant was clear, concise and consistent.

The Applicant however, when attempting to explain why he acted in the manner he did in business transactions, blamed others repeatedly for his actions. He blamed the purchase of stolen vehicles, which he sold and had to make good on to, whomever sold him the vehicles in the first place. He reasoned that he thought that the NSF cheques would somehow be acceptable until he could make them good. He stated that he issued a stop payment on a vehicle he sold because of odometer tampering, although he kept the money realized from the sale. He blamed a restaurant investment that went sour, and that he has been attempting to recover monies from the partner in that venture.

When confronted with the fact that he had not filed or remitted tax collected on sold vehicles for some time, stated that he was unaware that he had to file a tax report. The Applicant all through his testimony failed to accept responsibility for his actions or lack thereof and repeatedly blamed others for his financial behavior.

Considering the above, we do not accept the testimony of Robert J. Valleriani on behalf of the Applicant as credible and trustworthy.

We are instructed by the relevant legislation in the Motor Vehicles Dealers Act, as it applies to the Applicant.

- (a) Having regard to the Applicant's financial position, he cannot be reasonably expected to be financially responsible in the conduct of business.
- (b) The past conduct of the Applicant affords reasonable grounds for belief that the Applicant will not carry on business in accordance with the law, and with integrity and honesty.

The Tribunal has taken into consideration all of the above and is of the opinion that although we feel sorry for the Applicant, we are of the opinion that he is the author of his own misfortune. He exhibited financial irresponsibility in his business dealings. He did not honor his obligations as they pertained to promises, debts or obligations.

The Motor Vehicle Dealers Act is a consumer protection statute, and the Tribunal as well as the Registrar must be assured that the consumer is protected from such irresponsibility.

Accordingly, pursuant to the authority vested in it by section 7(4) of the *Motor Vehicle Dealers Act*, the Tribunal directs the Registrar to carry out his Proposal to revoke the registration of 1145082 Ontario Limited o/a Bridlewood Auto Brokers as a motor vehicle dealer and to revoke the registration of Robert J. Valleriani as a motor vehicle salesperson.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley, Vice-Chair

Barbara Fraser, Member

Released: November 19, 2002

RAYMOND AND MARGUERITE MARTIN

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE *ONTARIO NEW
HOME WARRANTIES PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, Vice Chair

APPEARANCES:

RAYMOND AND MARGUERITE MARTIN, representing
themselves
CAROL STREET, Counsel, representing the Ontario New Home
Warranty Program
PETER MAXWELL, the Added Party, representing himself

DATE OF
HEARING: October 28 and 29, 2002 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") from a written decision of the Ontario New Home Warranty Program (the "Program") dated May 27, 2002 wherein the claim of Raymond and Marguerite Martin (the "Applicants") was denied.

THE ISSUES:

The Applicants' appeal is based upon the provisions of Section 13(1)(a) of the *Ontario New Home Warranties Plan Act* (the "Act") as well as Section 14(3) of that Act.

The Applicants claim that they and Peter Maxwell ("Maxwell") entered into an Agreement of Purchase and Sale regarding a residential home at 25 Hamilton Avenue in the town of Cobourg, Ontario (the "home"). After taking possession of the home, the Applicants became aware of defects in the home which they contend were due to defective workmanship of Maxwell relative to the stucco cladding on the exterior of the home. The defect in workmanship constituted, according to the Applicants, a breach of warranty in terms of Section 14(3) of the Act entitling them to damages. The Program, in

its decision letter of May 27, 2002 denied the Applicants' claim and gave as its reasons for denying their claim the following:

The stucco cladding on the exterior of the building was not installed in accordance with the Ontario Building Code. It has detached from the gypsum backing in numerous locations. Where the stucco has detached the exterior layer of paper on the gypsum board has peeled off leaving the interior gypsum exposed to the elements causing it to deteriorate. The stucco has cracked at most of the junctions between the sheets of gypsum board as well as at all corners. The application of the exterior stucco has not been done in accordance with the Ontario Building Code. Defects in material and work have resulted in detachment, displacement and physical deterioration of the cladding.

The house does not qualify for warranty under the Ontario New Home Warranty Plan Act because it was occupied as a rental unit prior to re-sale to the current owners.

THE EVIDENCE:

Evidence Presented By The Applicants:

Raymond Martin

Applicant Raymond Martin ("Martin") testified that he and his wife, Marguerite, were initially shown through the home on September 8, 2000 by Sherry Wickins a sales representative employed by the real estate agent handling the home's sale. At that time Martin saw no furniture in the home. He did go into the home's basement where he saw some building materials and a bar. The Applicants viewed the home and put in an offer to purchase the home on that day and on September 9, 2000 their offer was accepted by Maxwell. Possession of the home was to be given on November 1, 2000. On October 6, 2000 the Applicants returned to the home accompanied by Sherry Wickins and Mike O'Grady, a home inspector hired by the Applicants to do the home inspection. On this occasion Martin did not observe that the home had been lived in although he did see a mattress on the floor of the main bedroom and a two ring hotplate on top of a counter in the kitchen. Martin further testified that at some later date in October 2000 he and his wife returned to the home together with Sherry Wickins. On that occasion they met with Mrs. Pat Maxwell, Maxwell's mother, who was then in the home. From briefly speaking with Mrs. Maxwell, the Applicants learned that she and her husband were waiting to move into their new home and while so waiting were living in the home of her son at 25 Hamilton Avenue. Martin stated that he and his wife were not informed that the Maxwell's were renting the home from their son. On October 23, 2000 the Applicants moved into the home although the transaction only closed on November 1, 2000 when title passed to the Applicants.

Under cross examination Martin was shown by the Program's Counsel exhibits 5(a) through 5(i) being photographs of the exterior of the home (exhibit 5(a)) and some eight further photographs of the home's interior rooms (exhibits 5(b) through 5(i)). Counsel informed Martin that these photographs were downloaded from the internet on September 7, 2000 and represent a virtual tour of the home. Martin noted the existence

of certain furnishings that appeared on certain of the photographs, notably photograph 5(c) depicting the home's dining area, photograph 5(d) the home's living room area (the dining and living room areas being contained in one large room), and photograph 5(i) being the home's third bedroom. Martin, on being shown the photographs, stated that when he viewed the home on September 8, 2000 the furniture shown in certain photographs was not seen by him or his wife. He also stated that he saw no stove, fridge or microwave in the home when he was in the home prior to taking occupation.

Garry Lynn Liboiron

The next person to testify for the Applicants was Garry Lynn Liboiron ("Liboiron") a real estate broker and owner of Century 21, Real Estate Agents of Cobourg who was the listing agent of the home.

Liboiron testified that the home was initially listed with his agency from May 27 to August 30, 2000 but the listing was extended after the latter date. Liboiron was of the opinion that the home was being used as a residential home and that upon Maxwell's parents, Gerry and Pat Maxwell moving into the home it became a rental. When making appointments to show the home he was obliged to make such appointments with Gerry Maxwell by telephoning the latter. Liboiron further stated that he did speak with Marguerite Martin and he told her that Maxwell did live in the home prior to Maxwell's parents living in the home.

In cross examination Liboiron stated that when he obtained the listing he retained a firm to produce a video of a virtual tour of the home which was then available on Liboiron's firm's web site. He visited the home after the video had been taken and he viewed the home. When he viewed the home he observed it was partially furnished. The video of the home is represented by photographs being Exhibits 5(a) through 5(i). Liboiron upon being shown the above exhibits during cross-examination confirmed that they accurately reflected the furniture in the home when he visited the home after its listing in May 2000. However, he could not attest to what furniture there was in the home as at September 9, 2000 but does recollect that in addition to the furniture shown in the various above photographs there was a telephone in the home and that the garage was full of Maxwell's parents' furniture. There was no question in his opinion that Maxwell's parents were staying in the home prior to its purchase by the Applicants.

In answer to a question put to him by Maxwell in cross examination, Liboiron stated he believed the home was occupied as the listing notice (Exhibit 3, tab 10) shows the home as "owner occupied."

Sherry Wickins

Sherry Wickins ("Wickins") also testified on behalf of the Applicants and stated she was a sales representative with Century 21, Cobourg. She showed the Applicants the home

on September 8, 2000. At that time the home was without furniture other than a mattress on the floor of a bedroom and a hot plate and computer table and computer.

Wickins stated she was never told the home was a rental. She did know that Maxwell's parents were staying in the home and she had met Pat Maxwell, Maxwell's mother, at the home. She knew that Maxwell's parents were using the home while waiting for their home to be completed and she also knew she was selling the home "as a resale home." She also testified that she had been told that Maxwell had himself occupied the home and that, according to what Maxwell's mother had told her, Maxwell had constructed the home for his own occupation.

Mike O'Grady

O'Grady stated he is a registered home inspector who inspected the home for the Applicants on October 6, 2000. His inspection lasted about three hours. He recollected the home was then "sparsely furnished" with a mattress on the floor of a bedroom as well as a 2 burner hot plate. He also recollects seeing a table in a room adjacent to the kitchen but does not recollect seeing a bar in the basement. His interest in doing the inspection was regarding the home itself and not its furnishings.

Evidence Presented By The Program:

Leonard Raymond Dean

Leonard Raymond Dean ("Dean") testified that he is an investigator with the Program and his duties are to look into potential violations under the Act, to ensure compliance with the Act and further ensure that a home qualifies for warranty coverage in terms of the Act. Dean reviewed notes made by him contemporaneously with the events recorded therein and reviewed such notes during his testimony.

On April 12, 2000, in the course of his investigation, he drove by the home and determined the home's construction was incomplete. No for sale sign was posted. There was no indication that the home was then occupied.

On July 7, 2000 he observed from the roadway that a "for sale" sign appeared outside the home and noted the home was then complete. He was uncertain if the home was then occupied. Exterior landscaping was complete. He did take a photograph of the home as it then appeared from the roadway (Exhibit 5(a), top photograph).

On July 24, 2000 he returned to the home and noted that the "for sale" sign was still in place. He met with building inspector Mike Sinclair, who told him that an occupancy permit had been issued that day. Sinclair also told him that he had seen minimal furniture in the home and was uncertain if any person was then in occupation.

Dean continued to testify that he revisited the home on August 14, 2000 and took a photograph of the home from the road. (Exhibit 5(a) bottom.) On September 6, 2000 he again visited the home and made a site inspection, noting that there were two chairs on the deck, flowers in a planter and a hose affixed to a faucet at the rear of the home.

On September 7, 2000 Dean stated that he visited the website of Liboiron and viewed a virtual tour of the home. He downloaded copies of photographs of the virtual tour from the website. These photographs are reproduced at Exhibit 5(a) through 5(i) and show certain rooms in the home and which rooms were furnished and if furnished the nature of the furnishings as seen on the photographs downloaded.

On November 16, 2000 he again went to the home and met with James Martin whom he took to be the new owner. He was informed by James Martin that he had moved into the home on November 9, 2000 and had been told by Maxwell and the real estate agent that Maxwell's father had lived in the home for 7 ½ weeks while his home was being completed. James Martin also informed Dean that he saw a small cot, television set and a couple of pots in the kitchen and not much else.

On January 16, 2001 he met with Gerry Maxwell who confirmed to him that he occupied the home for approximately one to one and a half months during the summer of 2000 and that he paid his son \$1000.00 for rental.

Dean continued to testify that, on his superiors' instructions, he reopened his investigation and spoke with Liboiron on May 21, 2002 who confirmed that he was aware that Maxwell had furniture in the home and garage and did occupy the home prior to the sale. He was also aware that Maxwell's father and mother occupied the home prior to its sale and had also stored furniture in the garage.

On May 22, 2002 Dean also met with one Hendrik Vermeer, a neighbour of Maxwell, who confirmed that Maxwell's father and mother did occupy the home for several weeks in summer 2000. Vermeer thought they were "camping" as opposed to actual occupancy. Vermeer was also aware Maxwell himself "stayed overnight while constructing the house but did not believe he was living in the home." Vermeer had been in the home and did see a small amount of furniture in the home but did not recall seeing kitchen appliances.

Dean testified that he did not pursue charges against Maxwell under the Act as he considered that the chances of a successful prosecution were slim. He also acquired a copy of the Maxwell's parents' cheque for \$1000.00 dated September 18, 2000 payable to Maxwell, their son, which was tendered and accepted in evidence. (Exhibit 7)

On September 3, 2002 Dean spoke with Maxwell who stated, in reply to Dean's queries, that he moved into the home towards the end of December 1999 and remained in the home until about the end of September 2000. He had a New Years Eve party in the home's basement in December 1999. During the time his parents occupied the home Maxwell's furniture remained in the home. Maxwell's parents vacated the home about a

week or two prior to November 1, 2000 and moved to a rented condominium prior to moving to their new premises.

Dean also contacted Mrs. Maxwell on September 3, 2002 who stated that she and her husband moved into her son's home in early September 2000 and vacated the home about the last week of October 2000. She stated that she met the Applicants when they were shown the home. At that time she and her husband were living in the home.

Dean was also told by Maxwell when he spoke with him on September 26, 2002 that "he did not have much furniture to begin with" and it was all in the home including a fridge, stove, microwave and small appliances. All were removed when the home was sold and they have all been sold.

In the course of his investigation Dean called upon Frank Lukes, the chief building officer of the Town of Cobourg who advised Dean that it is not unusual for people to occupy a home prior to closing and that the delay in time between the home's drywalling on November 1999 and the issuing of an occupancy permit in July 2000 was due to Maxwell delaying in having called for a final inspection which would have resulted in the issuance of an occupancy permit.

Dean concluded his testimony by stating that Maxwell's registration enabling him to build homes expired in February 2000.

Evidence Presented By Maxwell:

The builder of the home, Peter Maxwell, who by Notice dated July 26, 2002 was added as a party under Section 16(4) of the Act, had the following persons testify on his behalf.

Gerald Maxwell

Gerald Maxwell testified to being the father of Maxwell and that he and his wife, Patricia moved into the home on approximately September 9, 2000. He was building a new residence and while waiting for it to be completed he and Patricia moved into the home. Their telephone was moved from the residence they had recently left and was reinstalled on September 22, 2000 under the same number in the home. (Exhibit 10, page 2) He also handed in as evidence a cancelled cheque in favour of his son, Peter Maxwell, for \$1000.00 and dated September 18, 2000 which represented Gerald and Patricia Maxwell's rental for the home. There was no notation on the face of the cheque that such payment represented rent. There was no "formal" rental agreement with their son who had been employed by him in his lumber business in Cobourg. His son moved into the home in time for the New Year's Eve party at the end of December 1999 and in May of 2000 listed the home for sale.

Gerald Maxwell was shown the photographs at exhibits 5(b) through 5(i) and stated that the furniture shown in those photographs is consistent with what was in the home when

his son occupied the home. In the summer of 2000 his son commenced working in Waterloo and at the end of summer 2000 when he went to Humber College he moved some furniture out of the home. On August 30, 2000 he (Gerald) had received an offer to purchase his house which offer he accepted with a closing date in September of 2000. He and his wife then moved into the home of their son on September 22, 2000 where they stayed until October 25 that year when they moved out of the home. When he and his wife moved into the home on September 22, 2000 they stored some of their furniture and belongings but moved their double bed into the home and stocked the fridge with groceries.

Sharlene Michele McHolm

Sharlene Michele McHolm testified that during the period December 1999 to November 2000 she and Maxwell were dating each other and during that time she visited regularly with Maxwell and estimated that she visited Maxwell at the home on about fifty occasions. She considered the home to be the home of Maxwell until the end of August 2000 when he vacated the home and moved to Etobicoke in order study at Humber college. She considered Maxwell's style of living to be that of "a typical unmarried male - minimum of possessions and sparse living". She did not reside with Maxwell at the home.

In cross-examination she stated that when Maxwell resided in the home there was a fridge and stove in the home although such appliances were not there when Maxwell's parents occupied the home having already been removed by Maxwell before his parents moved into the home.

She observed that after holding the New Year's Eve party at the end of December 1999 Maxwell moved a small amount of furniture into the home.

Maxwell lived at the home "full time" from January to May 2000 and from May to August 2000 he worked a couple of days per week in Waterloo. While working in Waterloo his possessions and furniture remained in the home.

From about September 22, 2000 to about October 24, 2000 Maxwell's parents were staying in the home but did not move their furniture into the home.

Peter Maxwell

Maxwell stated that during September and October 1999 the requisite building permits were issued by the Town of Cobourg for the home. He had purchased the land in June 1999. (Exhibit 3, Tabs 2 and 4)

On November 10 and 17, 1999 building inspector Sinclair held inspections of the home then under construction. These inspections related to the structural framing of the home and the installation of insulation/vapour barrier in the home. The home passed both the above inspections.

While construction of the home was in progress Maxwell resided with his parents, Gerry and Pat, at 35 Tremaine Terrace, Cobourg and in about Christmas of 1999 he moved into the home where he hosted a New Years Eve party.

By February, 2000 the home was mainly complete other than the rear deck which was completed in May 2000. During February 2000 his father, Garry, sold his lumber business in Cobourg and Maxwell's employment at his father's lumber business came to an end.

An occupancy permit was issued on July 7, 2000. (Exhibit 4)

On November 4, 1999 Maxwell had insured the home with Hamilton Township Farmers Mutual Fire Insurance Company during the home's construction and on February 29, 2000 that cover was changed to a comprehensive homeowner's insurance policy. On July 20, 2000 this policy was extended to September 12, 2001. (Exhibit 3, tab 7)

Maxwell referred to a hydro bill from the Public Utilities Commission of Cobourg addressed to him and covering water and hydro used in the home during December 20, 1999 to February 17, 2000. This bill, entered as evidence, was paid by Maxwell. (Exhibit 3, tab 8)

Maxwell also handed in as evidence a bill addressed to him which he received from Northumberland Cable TV of Cobourg relative to cable TV for the home for the period July 1, 2000 to October 1, 2000. (Exhibit 11)

Maxwell further handed in as evidence certain invoices he received from Union Gas in respect of gas supplied to the home for the period April 17, 2000 to May 16, 2000. (Exhibit 12)

Under cross-examination by the Program's Counsel Maxwell confirmed that photographs shown in Exhibit 5 accurately show the furniture in the home at the time that the photographs were taken.

Insofar as the exterior stucco on the house is concerned, the application thereof was done by Maxwell together with the assistance of a friend. This was the first occasion that he had installed stucco and in applying the stucco he followed the manufacturer's instructions. He did not follow the Ontario Building Code. The exterior stucco was completed in October 1999.

When his father's lumber business was sold in February 2000 and his employment ended Maxwell decided to take employment with his brother in Waterloo. He commenced working in Waterloo in May 2000 and it was at about this time that he decided to sell the home. On May 27, 2000 he listed the home with Century 21, Cobourg. When he entered Humber College as of September 2000 he moved to an apartment in Etobicoke.

Maxwell stated that on August 30, 2000 his parents had accepted an offer on their home and they then commenced to have a new home constructed. On September 9, 2000, the day he (Maxwell) accepted the Applicants' offer for the home, Maxwell's parents commenced moving some of their belongings into the home. On September 18, 2000 his parents gave him a cheque for \$1000.00 for the use of the home. (Exhibit 7)

Maxwell stated that while he had a "full complement" of appliances in the home in the kitchen, the small amount of furniture that is shown in the photographs (Exhibit 5) is indicative of his "style of living" to which he is accustomed.

At the conclusion of Maxwell's evidence, the Program's Counsel informed the Tribunal that Maxwell did not accept the correctness of the Program's decision letter insofar as the installation of the home's stucco was concerned and was disputing the Program's position that it was not installed according to the Ontario Building Code and that there were defects in material and work which resulted in detachment, displacement and physical deterioration of the cladding. Accordingly, the Program's Counsel indicated that the Program was calling one Wendy Skyba to testify on behalf of the Program as to its position on the stucco and the reasons for the Program considering it to be defective or in non-compliance with the Ontario Building Code. With the concurrence of the Tribunal, Wendy Skyba took the stand and gave the following testimony.

Wendy Skyba

Skyba testified that she is a warranty representative with the Program and has been with the Program in that capacity for the past three and one half years. As a warranty representative she inspects, on average, twelve to twenty homes per month. Prior to her present employment with the Program she was a building inspector in Sudbury in which position she was required to be knowledgeable in regard to the Ontario Building Code. Prior to her position in Sudbury she was employed in the building industry as a construction site supervisor. In total she has about fifteen years experience in the industry.

In her present employment with the Program she was assigned to investigate the Applicants' complaint regarding the stucco applied to the home's exterior. She confirmed that the Applicants' claim was received by the Program in the first year after possession of the home. On May 10, 2002 pursuant to a request for conciliation, an inspection of the home was held. Maxwell although notified of the date and time of the inspection, did not attend the conciliation inspection. On inspection she determined that the stucco applied to the home's exterior did not comply with the requirements of the Ontario Building Code (the "Code"). She noted that no lath (galvanized metal) had been used in the application of the stucco as required by the Code.

Skyba further stated that the Code called for the stucco to be applied with at least 2 base coats and one finish coat. The 2 base coats were each to be no less than 1/4" thick and the finish coat was to be no less than 1/8" thick. The three coats in total were to be no less than 5/8" in thickness. From her observations the stucco installed by

Maxwell was less than 1/4" thick "in its entirety." Furthermore the joints of gypsum material used in the stucco construction were observed to be "opened and cracked" and the stucco cladding had detached from the gypsum backing in numerous locations. There was peeling of the exterior layer of paper on the gypsum board resulting in the interior gypsum being exposed to the elements causing deterioration. She considered there were, besides contraventions of the Code, defects in the material used and work done, all of which have resulted in detachments, displacement and physical deterioration of the cladding.

Skyba produced a series of photographs of the exterior stucco cladding in support of her contentions. (Exhibit 13)

She also testified that the Program had received from the Applicants a copy of a quotation dated April 17, 2002 from Sica Masonry and General Contractor (2002 Ltd.) addressed to the Applicants. This quotation for the removal and disposal of the existing stucco, installation of new exterior plywood sheeting and provision and application of 3 coat stucco gave a total contract price of \$43,800.00 excluding G.S.T. She considered this quotation to be reasonable. If the deck needed to be removed and alterations were necessary to the aluminum soffit a further cost of \$10,000.00 was not unreasonable. (Exhibit 3, tab 19)

After speaking with her superior she authored and sent the Program's decision letter of May 27, 2002 to the Applicants in which the Program denied liability as the home did not qualify under the Act for warranty coverage as it was occupied as a rental property prior to its "resale" to the Applicants.

FACTS FOUND PROVEN:

The following are the facts the Tribunal found to have been proven.

1. Maxwell was registered as a builder under the Act until February 15, 2000 when his registration expired.
2. The home was not enrolled by Maxwell under the Ontario New Home Warranties Plan.
3. Maxwell in or about September/October 1999 applied for and received from the Corporation of the Town of Cobourg the necessary building permits in respect of the construction of the home.
4. On September 23, 1999 Maxwell signed and completed a declaration when applying for the issue of building permits for the home in which declaration he declared that he was not acting as a "vendor" or "builder" of the home.

5. On or about New Years Eve 1999 Maxwell held a party in the basement of the home which was then not fully constructed.
6. On July 7, 2000 the Corporation of the Town of Cobourg issued an occupancy permit in respect of the home.
7. During the period January 2000 until May 2000 Maxwell resided at the home. During this period there was a fridge and a stove in the home's kitchen and there was in addition a certain small amount of furniture in the home consisting of:
 - (a) certain 4 chairs and a table, a floor rug, swivel recliner and an ottoman in the dining area;
 - (b) a sofa, two standing lamps, rug and TV set in the living room which is part of the dining room;
 - (c) a wooden book case in the front hall;
 - (d) drapes or blinds and a table in the master bedroom which has wall to wall broadloom;
 - (e) a second bedroom with no furniture therein, no drapes and wall to wall broadloom;
 - (f) a third bed room with a futon, a small standing lamp and side table.
8. In or about March 2000, after Maxwell's father's lumber business was sold and Maxwell's employment in that business terminated, he applied to Humber College to commence studies in September, 2000.
9. At or about the beginning of May 2000 Maxwell took employment in Waterloo and remained in that employment during the summer of 2000.
10. During the period May through August 2000 Maxwell resided during the week in Waterloo returning to the home during some weekends
11. On May 27, 2000 Maxwell listed the home for sale with Century 21, Cobourg.
12. On September 9, 2000 Maxwell entered into an Agreement of Purchase and Sale with the Applicants regarding the home and which sale closed on November 1, 2000.
13. Maxwell's parents lived in the home from September 22, 2000 until October 25, 2000.

14. The stucco cladding to the home's exterior was applied by Maxwell contrary to the requirements of and in violation of the Ontario Building Code and the cladding was not constructed and affixed in a workmanlike manner by Maxwell.

THE LAW:

The Act's relevant portions are:

"builder" means a person who undertakes the performance of all the work and supply of all the materials necessary to construct a completed home whether for the purpose of sale by the person or under a contract with a vendor or owner;

home" means,

- (a) a self-contained one-family dwelling, detached or attached to one or more others by common wall,
- (b) a building composed of more than one and not more than two self-contained, one-family dwellings under one ownership,
- (c) a condominium dwelling unit, including the common elements, or
- (d) any other dwelling of a class prescribed by the regulations as a home to which this Act applies,

and includes any structure or appurtenance used in conjunction therewith, but does not include a dwelling built and sold for occupancy for temporary periods or for seasonal purposes;

"owner" means a person who first acquires a home from its vendor for occupancy, and the person's successors in title;

"vendor" means a person who sells on his, her or its own behalf a home not previously occupied to an owner and includes a builder who constructs a home under a contract with the owner;

14. (3) Subject to the regulations, an owner of a home is entitled to receive payment out of the guarantee fund for damages resulting from a breach of warranty if,
(b) the person has a cause of action against the vendor or the builder, as the case may be, for damages resulting from the breach of warranty.

13. (1) Every vendor of a home warrants to the owner,

- (a) that the home,
 - (i) is constructed in a workmanlike manner and is free from defects in material,
 - (ii) is fit for habitation, and
 - (iii) is constructed in accordance with the Ontario Building Code;

DECISION AND REASONS:

The issues for determination by the Tribunal are twofold.

The first issue, or threshold issue, is whether or not Maxwell was a builder or vendor as contemplated under the Act. If Maxwell is determined not to be a builder or vendor as contemplated and defined by the Act by virtue of the home having been occupied prior to the Applicants' occupation and ownership then the home does not qualify for warranty under the Act.

Only if the Applicants are successful in regard to the first or preliminary issue is it necessary for the Tribunal to decide the second issue which is whether the Applicants are entitled to receive payment out of the guarantee fund for the cost of remedial work required to correct a breach of warranty under the Act.

The onus of proof rests upon the Applicants and failure to prove the preliminary issue will result in the failure of their claim before this Tribunal. Success on the preliminary issue will result in the Tribunal considering the second issue.

Analysis of the first or preliminary Issue:

Although the Tribunal finds that there were discrepancies in the various testimonies that were placed before it, the Tribunal does not attribute such discrepancies to dishonesty of any persons who testified at the hearing but rather attributes such discrepancies to the mists of time having clouded their recollections.

The analysis that follows is divided into three specific time frames or periods in the unfolding of events in this matter.

The first time frame or period is up to December 31, 1999. The second time frame or period is from January 2000 until Maxwell went to work in Waterloo in May 2000 while the third time frame deals with the period from when Maxwell went to Waterloo in May 2000 and November 1, 2000 when the sale transaction closed and title passed to the Applicants.

First Time Frame

During this period Maxwell was registered under the Act as a builder of residential homes. In or about September/October 1999 Maxwell applied to and received from the Town of Cobourg the necessary building permits to commence construction of the home and pursuant to the permits being granted Maxwell commenced building the home. When applying for the building permits Maxwell signed a declaration that he was not acting as a "builder" or "vendor" as defined in the Act.

By the end of December 1999 the home was some way in its construction with the exterior cladding and stucco having been applied by Maxwell assisted by a friend. A bar was moved into the basement of the home and on New Years Eve Maxwell held a party in the home's basement.

The Tribunal finds when commencing building the home Maxwell had the intention of occupying the home himself and residing therein.

During the period ending December 31, 1999 there is no evidence of the home having been occupied by Maxwell or anyone else. In fact Maxwell in his testimony stated that he was staying with his parents in Cobourg in the latter's' home until he moved into the home at the end of 1999.

The Tribunal accordingly finds that in the first time frame neither Maxwell nor any other party occupied the home then under construction.

Second Time Frame

As of the beginning of January 2000 Maxwell continued to work in his father's lumber business in Cobourg. At or about the beginning of January 2000 - or possibly even at the end of December 1999 when Maxwell held the New Years Eve party - Maxwell installed a fridge and a stove in the home's kitchen and commenced residing in the home.

At that stage Maxwell was single and according to the testimony of Ms. McHolm his style of living was that of a "typical unmarried male" which she described as living sparsely and with a minimum of possessions. According to Ms. McHolm, Maxwell moved "a small amount of furniture" into the home in early 2000 and he lived in the home from January 2000 until the beginning of May 2000 when he left for Waterloo.

Circumstances changed in March 2000 when Maxwell's father sold his lumber business in Cobourg. Maxwell's employment in the lumber business was coming to an end with the businesses' impending sale and at this point in time he decided on a career change and enrolled at Humber College in Etobicoke for a course commencing in September 2000. In the meantime he took employment with his brother in Waterloo commencing the beginning of May, 2000. He went not only to work in Waterloo but to live in that town during the week, returning to Cobourg and the home for some weekends. At about the beginning of May he had decided to sell the home and listed the home for sale with Century 21, Cobourg.

During this time frame or period Maxwell contends he continued to reside in the home. His life style was clearly spartan, doing with little furniture and effects. A neighbor of Maxwell, on Hendrik Vermeer, stated in discussion with Dean, the Program's inspector, that he was aware that Maxwell "stayed overnight while constructing the home but did not believe he was living in the home."

However, there were a number of factors the Tribunal finds that indicated Maxwell was occupying the home during the period January 2000 until about the beginning of May 2000. These factors were:

- the uncontraverted evidence of Maxwell himself that he lived in the home during that time frame commencing from the New Years Eve party held in the home at the end of December 1999.
- the uncontraverted evidence of Maxwell and McHolm, his girl friend, that there was furniture in the home until the end of April 2000, albeit minimal, sufficient to support his spartan lifestyle.
- the uncontraverted evidence of Maxwell and McHolm that there was at least a fridge and stove in the home's kitchen during the months of January until the end of April 2000.
- the uncontraverted evidence of McHolm that she visited Maxwell at the home during the months of January until the end of April 2000 on at least 50 occasions.
- the uncontraverted evidence of Maxwell that his personal possessions were in the home during the period January 2000 until he moved to Waterloo in May of that year when he placed some of his personal effects in his parents' home.
- the uncontraverted evidence of Maxwell that there was cable T.V. connected to the home, the invoices in respect whereof were in Maxwell's name and were paid by Maxwell.
- Maxwell's uncontraverted evidence that there were hydro, gas, telephone and water services to the home and the invoices in respect of such services were addressed to Maxwell and paid by Maxwell.
- Maxwell's uncontraverted evidence that there was a comprehensive homeowner's insurance policy in existence regarding the home's contents in which the insured was Maxwell and which policy commenced on February 29, 2000 and was extended in July 2000 until September 12, 2000.

Apart from the above factors there was other evidence placed before the Tribunal that indicated that Maxwell did occupy the home. These additional factors were:

- the listing of the home by Maxwell with Century 21, Cobourg in May 2000 in which listing it was stated that the home was a

"resale" home and which listing information was clearly obtained by the listing agent from Maxwell.

- the evidence of Maxwell that the home was mainly complete by January 2000, except for the deck, and Maxwell's conduct in being in no hurry to complete the home, as one would have expected if it was built by Maxwell for the purpose of sale. It was, after all, only on July 7, 2002 that Maxwell requested and received an occupancy permit.
- Maxwell's actions throughout the period January 2000 to May 2000 indicated that he treated the home as his fixed abode or dwelling and his permanent place of residence.

All the factors above indicate a settled or firm intent by Maxwell to occupy the home as owner of the home and his intention only commenced to change when his father sold his lumber business and Maxwell thereafter in April 2000 enrolled at Humber College.

The Tribunal finds that Maxwell had occupied the home for some four months before offering it for sale and subsequently selling it to the Applicants. When the Applicants purchased the home from Maxwell it had already been occupied for some four months, a not inconsiderable period. The Tribunal finds this prior occupation results in the home not qualifying for warranty coverage under the Act and the Applicants' claim against the Program must therefore fail.

Third Time Frame

During this time frame or period from the beginning of May 2000 to November 1, 2000 when title passed to the Applicants Maxwell was working in Waterloo and subsequent to being in Waterloo he was in an apartment in Etobicoke from approximately the end of August 2000. While he worked in Waterloo he lived there during the week returning to the home on some weekends. From the time the home was listed for sale on May 27, 2000 the only occasional occupant of the home, other than his parents, was therefore Maxwell on his weekend visits to Cobourg.

The period that the home was used by his parents was from September 22, 2000 until October 25, 2000. The use of the home by Maxwell's parents was in fact nothing more than a place to sleep. They had no furniture in the home other than their double bed. Their son had removed what little furniture he had in the home by the time his parents used the home. As Gans J. stated in the *Carreiro* decision "merely sleeping at the house and not much more" does not create a residence for the purpose of the Act. The fact that Maxwell's parents gave him a cheque for \$1000.00 does not in and of itself indicate nor establish a tenancy such that it would remove the home from the operation of the Act.

The Tribunal finds that during the third time frame there was no occupation of the home within the meaning of the Act.

Accordingly, having regard to the first issue to be determined, the Tribunal concludes and finds for the reasons stated under the "Second Time Frame" that the home prior to its sale to the Applicants was occupied and that the home does not qualify for warranty coverage under the Act.

Had it been necessary for the Tribunal to consider the second issue (which the Tribunal repeats, it is not) the Tribunal would have had no difficulty in accepting the evidence of Skyba that the stucco cladding on the home's exterior was not installed in accordance with the Ontario Building Code and that there were defects in material and work, all of which caused detachment, displacement and physical deterioration of the stucco cladding. Maxwell was shown to be inexperienced and unfamiliar with the application of stucco cladding and failed to follow the requirements of the Ontario Building Code. This failure on Maxwell's part led the unhappy state in which the Applicants now find themselves. To rectify the stucco cladding based upon the reasonable and necessary costs of remedying the situation created by Maxwell would cost at least \$43,800.00 plus G.S.T. and could be higher if removal of the deck and alterations to the aluminum soffit are required.

DECISION:

Accordingly, pursuant to the authority vested in it under Section 16(3) of the *Ontario New Home Warranties Plan Act*, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim of the Applicants.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: November 26, 2002

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of
GLOBAL TRAVEL CENTRE ADVANTAGE

AND IN THE MATTER of a decision of the
Travel Industry Council of Ontario

TO DISALLOW A CLAIM
- Decision dated: June 28, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Decision

GLOBAL TRAVEL CENTRE ADVANTAGE

Applicant

- and -

TRAVEL INDUSTRY COUNCIL OF ONTARIO

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on December 3, 2002;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against all parties* to commence at Gillespie Reporting Services, 130 Slatter Street, Suite 200, Ottawa, Ontario, at 9:30 a.m., on Friday, February 28, 2003.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: November 21, 2002

JANE E. BIRDSALL, ARLENE M. BURGETT, ROBERT DELAND, ORVILLE AND PATRICIA DOBSON, MARY JANE FLANNERY, LARRY AND TERESITA HENDRICKS, MILDRED HUGO, EUGENE AND KATHLEEN KENAGA, WILLIAM LAMBERT, ESTHER LOIACANO, ANNETTE McTAGGART, SHEILA SCORSONE, SANDRA ZEESTRATEN AND LEONARD ZYWICKI JR.

APPEAL FROM DECISIONS OF THE TRAVEL INDUSTRY
COUNCIL UNDER THE TRAVEL INDUSTRIES ACT

TO DISALLOW CLAIMS

TRIBUNAL: MICHAEL H. TURK, Vice-Chair

APPEARANCES:

Jane E. Birdsall, Arlene M. Burgett, Robert Deland, Orville, and Patricia Dobson, Mary Jane Flannery, Larry and Teresita Hendricks, Mildred Hugo, Eugene and Kathleen Kenaga, William Lambert, Esther Loiacano, Annette McTaggart, Sheila Scorsone, Sandra Zeestraten and Leonard Zywicki Jr., the Applicants, appeared in person

Trevor Branion, Counsel, representing the Travel Industry Council of Ontario

DATES OF
HEARING: October 10 and 11, 2002 Sarnia

REASONS FOR DECISION AND ORDER

BACKGROUND:

The Applicants appeal to the Licence Appeal Tribunal from decisions of the Travel Industry Council of Ontario (hereinafter "TICO") set out in decision letters dated June 28, 2002. The substance of the decision letters is the same for all Applicants.

The decision letters denied the Applicants' claims for payment from the Travel Industry Council Compensation Fund on the grounds that the Applicants did not qualify for reimbursement in accordance with the requirements and exclusions contained in Regulation 806/93 of the *Travel Industry Act*.

Whereas the specific paragraphs of Regulation 806/93 will be recited in detail further on in this decision, the applicable sections of Regulation 806/93 as referenced in the decision letter required that the Applicants contract with a registered travel agent in Ontario, provide proof of payment to a registered Ontario travel agent and that the cancellation of a trip must not be as a result of any act of the tour participant.

FACTS:

The Applicants were participants in a 16-day tour scheduled to depart on October 26, 2000 to visit Greece, Egypt, Jordan and the Holy Land. The tour was based from the United States and the participants could depart from either Bay City, Michigan or Orlando, Florida. All payments were in the currency of the United States and therefore the reference to amount paid in this decision are in United States' dollars.

Jacques and Grace Lama were to act as tour hosts and Father Bob DeLand would provide spiritual leadership. Tour arrangements were provided by Lama Tours International Inc., (hereinafter "Lama Tours").

All participants in the tour paid the sum of \$3,349.00 per person, save and except Jane E. Birdsall and Orville Dobson who paid the additional sum of \$112.00 to extend their tours.

As tensions in the Middle East increased, the tour scheduled to depart on October 26, 2000 did not take place and was re-scheduled to March 15, 2001. The participants that did not wish to extend the tour to March 15, 2001 were given a full refund less a \$200.00 penalty.

As circumstances in the region did not improve, the tour scheduled for March 15, 2001 was cancelled.

Prior to the tour being cancelled, Jane E. Birdsall provided written notice of cancellation of her trip by letter dated January 16, 2001. Mrs. Birdsall's cancellation was for reasons other than unrest in the region.

Whereas Lama Tours promised the tour participants a full refund less a cancellation fee of \$200.00, it only succeeded in providing the parties with a per person refund of \$1,007.00 prior to it ceasing operations at the end of September, 2001.

During the hearing, TICO acknowledged that the Applicants had paid the appropriate monies for the tour and therefore withdrew the issue of proof of payment as a ground for refusing the Applicants' claim.

The hearing proceeded on the issues of whether TICO was correct in denying the Applicants' claim on the basis of the Applicants not having dealt with a registered Ontario travel agent and/or that the Applicants are not entitled to reimbursement as their

payments were non-refundable, that the travel services were available but not received and the failure to receive the travel services was due to the Applicants' action or failure to act.

THE EVIDENCE:

Whereas all of the Applicants appeared in person or through agents, they essentially relied on the experience and expertise of Mr. Joseph L. Scorsone, an Attorney in Saginaw, Michigan and agent of Sandra Scorsone, to present their position. Individual Applicants were permitted to give evidence and/or cross-examine, as they so desired. Mr. Jacques Lama and Father Bob DeLand gave evidence on behalf of the Applicants.

TICO called Hani Lama of Lama Tours as its only witness.

Hani Lama

Hani Lama testified that he was the president of Lama Tours of Ontario and that Lama Tours specialized in tours to the Holy Land.

Hani Lama testified that he was contacted by Jacques Lama, a distant relative, whom he had never met before, and was advised that he wished to take a tour to the Holy Land. Hani Lama and Jacques Lama ultimately agreed upon an itinerary and a per person price. The tour hosts would receive a complimentary trip.

As it relates to the refund policy of Lama Tours, Hani Lama testified that in accordance with the tour brochure marked as Exhibit Number 4, delivered to Jacques Lama in July 2000, a full refund was available for a cancellation received six weeks or more prior to departure and cancellations received within six weeks of departure would be subject to a \$250.00 cancellation penalty.

With respect to the cancellation of the trip scheduled for October 26, 2000, Hani Lama testified that the tour was postponed to March 15, 2001 with the same itinerary provided that a minimum of 20 passengers participated. Thirteen participants chose to cancel postpone the tour and were given full refunds less a cancellation fee of not more than \$250.00.

As it relates to the cancellation of the March 15, 2001 trip, Hani Lama testified that he was not involved, that the trip was cancelled by the tour hosts, that the trip was available and that all participants received a refund of \$1,007.00.

Hani Lama concluded his testimony by stating that all monies were received by Lama Tours in Ontario and delivered to Lama Tours in Bethlehem. Of the monies received, only \$800.00 was deposited in Lama Tours' Ontario account as a handling fee.

On cross examination, Hani Lama acknowledged that the website for Lama Tours International Inc., shows one company and that none of the participants were told to contact Lama Tours in Bethlehem.

Hani Lama was recalled during the hearing and testified that documents presented and marked as Exhibits Number 13 & 21, being a receipt from United Parcel Service dated July 12, 2000 and Print Shoppe of the same date confirm delivery of the tour brochures to Jacques Lama in July 2000.

In addition, Hani Lama testified that he was certain that the sights in East Jerusalem, Jericho and Bethlehem were closed, that he did not participate in the discussions about canceling the second trip or an alternate itinerary and that until Lama Tours closed, it was always the intention of Lama Tours to provide full refunds.

Jacques Lama

Jacques Lama testified that he contacted Father Bob DeLand with respect to the possibility of hosting a tour to the Holy Land and noted that both he and Father DeLand hosted a similar type of tour in 1984.

Jacques Lama attempted to contact Lama Tours in Tulsa, Oklahoma, the tour company that he used for the 1984 trip. Whereas this office was closed, he conducted research on the Internet and found that Lama Tours' North America office was located at Dundas Tower, Suite 802, 165 Dundas Street West, Mississauga, Ontario. The Website page of Lama Tours confirming the address of the North America office was marked as Exhibit Number. 5.

Jacques Lama testified that he contacted Mr. Hani Lama of Lama Tours in Mississauga, Ontario and that following discussions, Lama Tours agreed to provide travel services for his tour.

An itinerary was prepared through consultations with Lama Tours, which presented a 16-day tour to Greece, Egypt, Jordan and the Holy Land with a cost of \$3,349.00 per person and a departure date of October 26, 2000.

Jacques Lama then proceeded to contact various churches and requested that notice of the trip be inserted into their respective bulletins in order to determine if there was sufficient interest to support the tour. Interested parties provided a deposit of \$200.00. Sufficient interest existed for the tour and on September 8, 2000, Jacques Lama couriered the deposits by Federal Express to Lama Tours in Mississauga, Ontario and sent the balance of the funds to Lama Tours in Mississauga, Ontario on September 27, 2000.

Jacques Lama continued his testimony by stating that a dinner for the tour participants was held on or about October 2, 2000 at which time he provided all present with the formal Ancient Civilization Tour brochure, pamphlets entitled, *Israel Visitor's*

Companion, a Pilgrim's Map of the Holy Land and a pamphlet entitled *Preparing For Your Trip Overseas...The Tour Members Manual*. These documents were marked as Exhibits Number 4, 17, 18 and 19 respectively. Exhibits 4 and 18 specifically refer to Lama Tours International Inc. located at 162 Dundas Street West, Mississauga, Ontario.

In the interim, the political situation in the Holy Land changed and Jacques Lama testified that he maintained constant contact with George Lama, the brother of Hani Lama, of Lama Tours with respect to the situation in Bethlehem and whether it was safe for the tour to proceed as scheduled.

Jacques Lama testified that on the basis of the ongoing discussions and the advice of George Lama he decided to postpone the tour scheduled to depart on October 26, 2000. In further support of this, Jacques Lama provided a copy of an e-mail from George Lama, which refers to the situation in the Holy Land and the possibility and ramifications from a postponement or cancellation of the tour. In addition, Jacques Lama provided a second email that included a form letter, drafted by Joseph Lama detailing the cancellation and penalties thereof. These two emails were entered and marked as Exhibit Number 9 and 10.

As it relates to re-scheduling the tour, Jacques Lama testified that although he was advised by Joseph Lama that a cancellation fee of \$650.00 per person would be imposed, this was reduced by half as the United States State Department had issued a travel warning and he was able to negotiate a further reduction to a penalty of \$200.00 per person for those who wished to cancel. A fax from the Congress of the United States dated October 13, 2000 confirming the travel advisory was entered and marked as Exhibit Number 15.

Jacques Lama testified that 13 participants cancelled and received a full refund less a \$200.00 penalty and the remaining participants agreed to the tour being postponed to March 15, 2001.

Jacques Lama continued his testimony by stating that in the following months he continued to maintain contact with Joseph Lama with respect to the ongoing situation in the Holy Land and that he was advised by Joseph Lama that the situation in the Holy Land had not changed in that the religious sights in Bethlehem, the Old City of Jerusalem and Jericho were closed.

Jacques Lama further testified that he had general discussions with Joseph Lama about an alternate tour that might include Turkey as an alternative to the sights from the itinerary that would be unavailable due to unrest in the region.

Mr. Jacques Lama completed his examination in chief by testifying that an alternate trip was not acceptable as the sights in Bethlehem and the Old City were crucial to the tour and that following discussions with Joseph Lama, it was agreed that the tour scheduled to depart on March 15, 2001 would be cancelled and that all participants would receive a full refund less a penalty of \$200.00.

Although unspecific as to whether the tour was formally cancelled in January or February of 2001, Jacques Lama sent a letter to all participants outlining the cancellation. This letter was filed and marked as Exhibit Number 11.

On cross-examination by Mr. Branion, Jacques Lama was unsure when he had received the formal brochure for the tour and maintained that the brochures were received after the participants had paid for the tour. Jacques Lama denied that it was his decision to cancel the tour and acknowledged that an alternate tour was discussed but that no firm alternative was provided.

On cross examination by Father Robert DeLand, Jacques Lama testified that the discussions of cancellation of the second tour were with Joseph Lama and that he was advised by Joseph Lama that the situation was serious, that Bethlehem was closed, there were tanks in the streets and people were being shot. In addition, Jacques Lama stated that the Old City, Mount of Olives, Dead Sea, Jericho, Tiberias and the Galilee were closed and that there were demonstrations in Egypt and Jordan.

Father DeLand's cross-examination concluded with Jacques Lama testifying that all correspondence and communication were consistent in receiving a refund and that this approach did not change until Lama Tours went out of business.

On cross-examination by Mr. Scorsone, Jacques Lama confirmed that he did not receive any of the pay vouchers for meals on the tour and that he did not receive the airline tickets. In addition Jacques Lama testified that the tour was cancelled in January 2001 and that he was never told that if the tour did not proceed that they would lose their money.

On cross examination by Mr. Dobson, Jacques Lama confirmed that he did not consult with Mr. Dobson regarding a cancellation of the trip and that the cancellation was done with Lama Tours' consent.

Father Bob DeLand

Father Robert DeLand testified that he was to be the spiritual leader and that the logistical arrangements were the responsibility of Jacques Lama. As it relates to the issue of refund and cancellation, Father DeLand testified that just as the first group received a full refund, the second group was to be treated the same.

Father DeLand continued his testimony by stating that in January 2001 he started to receive a number of telephone calls from tour participants pertaining to the situation in the region and whether the tour was to proceed as re-scheduled. Father DeLand testified that he consulted with his Congressman's aide in the State Department and was advised that the State Department's warning was well placed, Bethlehem was closed and the tour scheduled by a Bishop also had been cancelled.

As it relates to the cancellation of the tour Father DeLand testified that he expected a \$200.00 penalty and that he spoke with Joseph Lama once and that in this conversation Joseph advised that it was not a good time to visit and apologized for the \$200.00 penalty.

With respect to an alternate itinerary, Father DeLand testified that an alternate tour was proposed but as this did not involve the Holy Land sights he was not interested.

As it relates to the issue of receipt of the formal brochure, Father DeLand testified that he did not receive the brochure until the group dinner of October 2000.

Father DeLand 's cross examination did not provide any further information other than in response to questions from Mr. Loiacano, Father DeLand testified that had he thought that the monies paid would have been forfeited, he would have consulted with the group prior to deciding to cancel the tour.

As it relates to the issue of when the tour participants received a copy of the tour brochure, aside from Mildred Hugo who received the brochure at the beginning of September, the consensus of the Applicants was that it was received at the dinner of October 2000 and that those who did not attend the dinner received the same within two weeks thereafter.

SUBMISSIONS:

Mr. Branion's submissions were consistent in that they followed the reasons set out on the decision letter.

As it relates to the issue that the Applicants did not deal with a registered Ontario travel agent, Mr. Branion submits that as the cheques were not deposited into an Ontario agent's account that the Applicants did not contract with a registered Ontario travel agent.

As it relates to the cancellation of the October 26, 2000 tour, it was submitted that the tour was otherwise available and that it was extended as a good will gesture by Lama Tours.

With respect to the cancellation of the March 15, 2001 tour, Mr. Branion submits that the trip was available, that it was cancelled by the Applicants and as such, by virtue of Regulation 806/93 Section 50 (3) 4 the Applicants are not eligible for reimbursement.

In addition to the above, it was further submitted that the Applicants are also ineligible as they were provided with an option for alternate travel arrangements as provided in Regulation 806/93 50 (3) 3 and declined.

Lastly, as it relates to the conditions in the tour brochure, Mr. Branion submits that the brochure was in the possession of Jacques Lama and that the tour participants cannot rely on the failure of Jacques Lama to deliver the brochures in a timely manner in order to absolve them of reliance on the terms and conditions contained therein.

Mr. Scorsone, on behalf of the Applicants, submitted that Applicants contracted with a registered Ontario travel agent, they were induced by Lama Tours to cancel the tour and that the Applicants were not told by Lama Tours that they faced the risk of losing their money if the tour did not proceed in March, 2001 and that TICO should not be able to rely on the actions of Lama Tours to its benefit.

Mr. Dobson submitted that he was not consulted with respect to cancellation of the March 15, 2001 tour and that in his view, Jacques Lama and Father Bob DeLand were agents of Lama Tours. Mr. Dobson submits that on the basis that Jacques Lama and Father Bob DeLand were agents of Lama Tours, it was Lama Tours that cancelled the tour.

ISSUES:

There are two issues.

The first is whether TICO is correct in denying the claim of the Applicants on the basis that they did not contract with a registered Ontario travel agent.

The second is whether the travel services were available and not received as a result of the Applicants' action or failure to act.

THE LAW:

The relevant sections of Ontario Regulation 806/93 of the Travel Industry Act are as follows:

50. (1) A customer is entitled to be reimbursed for travel services paid for but not provided if,
 - (a) the customer made payment for travel services directly to or through a registered travel agent,
- (3) 3. For payment to a registrant for any travel services that were provided or for which alternate travel services were provided or made available.
4. For a payment, including a non-refundable payment, for travel services that were available but not received if the failure to receive the travel services is due to the customer's or traveller's action or failure to act.

APPLICATION OF THE LAW TO THE FACTS AND FINDINGS:

Jacques Lama testified that he contracted with Lama Tours of Mississauga, Ontario. This is supported by information published on Lama Tours' website, the address of Lama Tours as printed on Lama Tours' brochure and maps of the Holy Land provided by Lama Tours. These documents were accepted and marked by the Tribunal as Exhibits Number 4 and 18. Exhibit Number 19 is a manual provided by Lama Tours although silent as to address of the company, provides Ontario telephone and fax numbers.

The correspondence from Lama Tours to tour participants contained in Exhibit Number 3 are on the letterhead of Lama Tours International, Inc. Dundas Tower, Suite 802, 165 Dundas Street West, Mississauga, Ontario L5B 2N6.

In addition, Jacques Lama testified that payment for the tour was made to Lama Tours and delivered to Lama Tours, Mississauga, Ontario.

Hani Lama's evidence was clear on the facts that he was working in the Mississauga office, received payment for the tour and save and except \$800.00 that was deposited into the company's Ontario account, the balance of the tour funds were deposited in a clearing account in the United States and transferred to Lama Tours, Bethlehem.

TICO submits that as the funds were not deposited into an Ontario account that the Applicants were not dealing with an Ontario registered travel agent.

As it relates to the issue of contracting and dealing with a travel agent, registered in Ontario, the Tribunal accepts the evidence of Jacques Lama that he was dealing with Lama Tours of Mississauga, Ontario. The correspondence, brochures and pamphlets marked as Exhibits clearly establish that Jacques Lama was dealing with a registered Ontario travel agent.

The Applicants had no knowledge or input into which account Hani Lama would deposit the tour monies. It was the Applicants' understanding that they were dealing with an Ontario travel agent.

The Tribunal does not accept TICO's submission that Hani Lama not depositing the tour funds into an Ontario bank account has the effect of the Applicants not dealing with a registered Ontario travel agent. To do so, would in this Tribunal's view, defeat the protection afforded to consumers by dealing with a travel agent registered in Ontario in accordance with the provisions of the *Travel Industry Act*.

The Tribunal therefore finds that for the purpose of Section 50 (1) of Regulation 806/93, the Applicants made payment for travel services directly to or through a registered travel agent.

With respect to the remaining issue, the Tribunal must determine whether the facts pertaining to the cancellation of the tour brings the Applicants claim within the exception of Section 50 (4) of the Regulation.

Based upon the evidence of Jacques Lama and Hani Lama it is clear to this Tribunal that the parties cooperated fully throughout and attempted to resolve all issues amicably.

As it relates to the rescheduling of the October 26th tour the evidence of Jacques Lama and Hani Lama are not in disagreement. As evidenced by the emails referred to in Exhibits Number 9 and 10, the decision not to proceed with the first tour was made jointly by Jacques Lama and Hani Lama. The email of October 11, 2000, filed as Exhibit Number 10 discusses a postponement of the tour, possible cancellation penalties and the need for a minimum of 20 participants.

The email of October 31, 2000 marked as Exhibit Number 9 contains a letter, prepared by Joseph Lama, explaining the cancellation to the participants, its impact and cancellation penalties.

As noted previously, 13 participants chose not to continue with the tour to March 15, 2001 and cancelled their participation. These individuals received refunds in full.

With respect to the cancellation of the March 15, 2001 tour, Jacques Lama testified that he was in regular contact with Joseph Lama and was advised by Joseph Lama that the situation in Bethlehem had not changed and that the tour would not be able to enter Bethlehem, the Old City of Jerusalem or Jericho. On cross-examination by Father Bob DeLand, Jacques Lama expanded the list of closed sights to include the Dead Sea, Mount of Olives, Tiberias and the Galilee and stated that there were demonstrations in Jordan & Egypt.

Father Bob DeLand testified that commencing in January 2001 he was receiving telephone calls from tour members inquiring as to the status of the tour as some wished to make alternate winter vacation plans if the tour was not going to proceed. Father DeLand further testified that he consulted his Congressman's Aid in the State Department and was advised that the State Department's warning was well placed.

Both Jacques Lama and Father DeLand acknowledged that the topic of revisions to the itinerary were discussed, but that a tour that excluded the holy sights of Bethlehem and the Old City of Jerusalem was not an acceptable alternative.

On February 2, 2001 Jacques Lama sent a letter to the members of the tour with respect to the cancellation of the tour. This letter was marked as Exhibit Number 11. In the second paragraph thereof Jacques Lama writes as follows:

"In addition some of our tour participants have called father Bob and called me as well with their concerns about the safety of travel at this time, and some tour members requested to cancel their participation. Lama Tours will fully cooperate with our decision

to cancel the tour, and are doing their utmost to process your refunds as quickly as possible”.

Hani Lama testified that he did not have any involvement with the cancellation of the tour scheduled for March 15, 2001.

The Tribunal notes that Joseph Lama was not called as a witness and that his evidence would have been of assistance to the Tribunal on the issue of the ultimate cancellation of the trip.

Regulation 806/93 50 (3) 4 states that a customer is not entitled to be reimbursed in a situation where the travel services were available but not received if the failure to receive the travel services is due to the customer's or the traveller's action or failure to act.

In view of the Tribunal's finding that the Applicants dealt with a registered Ontario travel agent, for them to succeed they must be able to establish, in accordance with the above Regulation, that it was not their actions that resulted in the failure to receive the travel services. As such, they must establish that they did not cancel the tour.

The decision to cancel the March 15, 2001 tour was made through consultation with Lama Tours. Whereas the decision was made following consultation, the Tribunal did not hear any testimony or receive any evidence that it was Lama Tours that cancelled the tour.

The evidence indicated that the tour could have taken place with revisions to the itinerary. Whereas Jacques Lama expanded the list of closed sights on Father Bob DeLand's cross-examination, the Tribunal refers to Exhibit Number 15, the travel advisory from the Congress of the United States, which refers to a warning against travel to the West Bank, Gaza, the Old City of Jerusalem, and the Jaffa section of Tel Aviv. The Tribunal notes that the travel advisory does not refer to Tiberias or the Galilee and these locations are not in the West Bank.

As it relates to what sights would not have been available, the evidence of Hani Lama is consistent with the State Department warning and therefore the Tribunal finds that the sights in Bethlehem, the Old city of Jerusalem and Jericho were the only sights that were not available. The itinerary could and would have been revised to delete the scheduled visits to Bethlehem, the Old City of Jerusalem and Jericho and alternate arrangements been made accordingly.

The Tribunal notes that whereas deletion of these sights would have altered the spiritual nature of the tour, these sights comprised a maximum 3 days of a 16-day tour and that the tour, with modifications and/or deletions remained available.

The Tribunal refers back to the correspondence from Jacques Lama marked as Exhibit Number 11 and finds that the said correspondence of Jacques Lama as referred to above accurately presents the facts leading up to the decision to cancel the March 15,

2001 tour and finds that the decision to cancel the tour was made by Jacques Lama and Father Bob DeLand.

Whereas Lama Tours cooperated with the cancellation and promised the participants that they would receive a full refund, it cannot be said that Lama Tours cancelled the tour.

As it relates to the submission that Jacques Lama and Father Bob DeLand were agents of Lama Tours, there was no evidence that these individuals represented themselves to the participants as being agents of Lama Tours and no case law or precedents were presented to the Tribunal in support of the contention that a tour host is an agent at law for the tour operator.

It is clear to this Tribunal through the evidence that at all times Jacques Lama and Father Bob DeLand had the best interests of the participants in mind and this is most evident when it came to their decision to cancel the tour. They negotiated reductions in cancellation penalties and diligently pursued refunds from Lama Tours.

The Tribunal rejects the submission that Jacques Lama and Father Bob DeLand were agents of Lama Tours.

The Tribunal notes that whereas Lama Tours provided the Applicants with every assurance that their monies would be refunded and that Lama Tours did not provide any indication at the time of cancellation that the tour monies were at risk or might not be refunded, there is a distinction between the liability of Lama Tours to the Applicants in contract and the criteria under which a party is entitled to reimbursement from the Travel Industry Compensation Fund.

The Tribunal finds that as the decision to cancel the tour was made by Jacques Lama and Father Bob DeLand on behalf of the tour participants, the travel services were not received as a result of the actions of the traveller's and therefore the Applicants are ineligible for reimbursement in accordance with the exclusion contained in Regulation 806/93 50 (3) 4.

Whereas TICO's decision letter did not specifically refer to Regulation 806/93 50 (3) 3 which provides an exclusion where alternate travel services were provided or made available, the Tribunal finds that the evidence supports the fact that alternate travel arrangements were offered and rejected and therefore the Applicants would have also been ineligible for compensation in accordance with the exclusion in Regulation 806/93 50 (3) 3.

ORDER:

Based upon the foregoing the Tribunal hereby orders as follows:

1. The Tribunal upholds the decision of TICO to disallow the Applicants' claims and therefore the Applicants' Appeals are hereby dismissed.

LICENCE APPEAL TRIBUNAL

Michael H. Turk, Vice-Chair

Released: November 12, 2002

NORBERT ST. DENIS

**APPEL D'UN AVIS DE PROPOSITION DÉLIVRÉE
PAR LE RÉGISTRATEUR, *LOI SUR LES
COMMERÇANTS DE VÉHICULES AUTOMOBILES*,
VISANT À REFUSER UNE INSCRIPTION COMME
VENDEUR DE VÉHICULES AUTOMOBILES**

TRIBUNAL: JEAN-MARC LEFEBVRE, c.r., Vice-Président

COMPARUTIONS: NORBERT ST. DENIS, le requérant

YOVANKA McBEAN, Agente pour le registraire,
Loi sur les commerçants de véhicules automobiles

A. MICHAEL ROTHE, Avocat/procureur,
représentant le registraire, *Loi sur les
commerçants de véhicules automobiles*

TRADUCTEUR /
INTERPRÈTE JEAN-PIERRE POULIOT, bilingue (français-anglais)

DATE DE L'AUDIENCE: 3 octobre 2002 OTTAWA

MOTIFS DE LA DÉCISION ET ORDONNANCE

LE FOND DE L'AFFAIRE:

Le requérant a soumis une demande d'appel à ce Tribunal constitué en vertu de la *loi de 1999 sur le Tribunal d'appel en matière de permis*.

Son appel a pour objet la révision d'un avis de proposition délivré par le registraire, *Loi sur les commerçants de véhicules automobiles* ("la loi") visant à refuser son inscription comme vendeur.

L'avis de proposition en question est daté du 27 juin, 2002.

L'avis de proposition de refuser délivré par le registraire est fondé sur les stipulations de l'article 6(1) de la loi lue conjointement avec celles de l'article 5(1)(b) de la même loi.

Le registrateur maintient que la conduite antérieure de l'auteur de la demande d'enregistrement, les détails qu'il a divulgués lorsqu'il a rempli son formulaire de demande d'inscription et les informations subséquentes qu'il a soumises permettant d'établir qu'il y a motif raisonnable de s'inquiéter qu'il n'exercera pas ses activités commerciales conformément à la loi et avec intégrité et honnêteté.

LES FAITS SAILLANTS:

Le Tribunal a entendu la preuve de l'agente du registrateur. Nulle autre preuve n'a été soumise pour le registrateur sauf le document 3, en liasse, qui est accepté par les parties. Ce dernier (un volume à reliure avec index) comporte 5 onglets pour divers documents pertinents à l'affaire, sauf que les traductions qui accompagnent deux documents, en français, sous deux onglets différents, ne sont pas acceptées par le Tribunal comme traductions fidèles et ces dernières ne font donc pas partie de la preuve. Le requérant a témoigné en sa propre faveur et nulle autre preuve a été soumise par lui sauf les documents 1 et 2, qu'il avait soumis au Tribunal au préalable.

Après étude de la preuve, le Tribunal reconnaît les faits suivants:

Le requérant, âgé de 41 ans, est directeur commercial attitré au financement et aux assurances pour un concessionnaire de véhicules automobiles à Hawkesbury, Ontario, et ce, depuis juillet, 2001. Il détient un diplôme collégial (option finance) d'un CEGEP de la province de Québec, ainsi qu'un certificat en administration obtenu de l'Université du Québec, à Montréal. Il a suivi plusieurs cours de perfectionnement par l'entremise des Caisses Populaires Desjardins où il occupa jadis le poste de gérant adjoint d'une succursale de la Caisse Populaire de l'ouest du Québec. Il s'exprime uniquement en français et il écrit très bien le français, tel qu'en fait foi une lettre qui fut introduite devant le tribunal (le document 2). L'audience fut entièrement traduite par un interprète qui relayait ses propos du français à l'anglais et qui lui relayait les propos du registrateur et du procureur du registrateur de l'anglais au français. Le Tribunal accepte sa prétention à une difficulté au niveau linguistique pour expliquer une omission à fournir son dossier judiciaire (exigé par la loi) lorsqu'il a soumis sa demande d'inscription comme vendeur de véhicules automobiles et pour établir le bien fondé de sa demande de révision: le présent appel. Cependant, le Tribunal doit aussi considérer l'ensemble de la preuve avant de trancher la question, puisque le registrateur maintient sa position, laquelle est fondée à la fois sur une omission à fournir de l'information ainsi que sur d'autres motifs que celui auquel le requérant fait allusion.

Lors de la soumission de sa demande d'inscription comme vendeur de véhicules automobiles, l'auteur de la demande a omis de révéler l'existence de son dossier judiciaire. Lorsque le Conseil ontarien de commerce des véhicules automobiles, ci-après nommé ("conseil") a, par la suite, transmis une lettre de vérification au concessionnaire de véhicules automobiles pour qui le requérant travaille et qui endossait la demande d'inscription, le requérant a ultimement dévoilé au conseil certains détails très imprécis de son casier judiciaire (mentionnant simplement qu'il avait "été accusé d'abus de pouvoir qui au sens de

la loi est de la fraude") par une lettre explicative (le document 2) dont le texte complet est le suivant:

"Mme Nabat Alibhai

OBJET: DOSSIER NORBERT ST-DENIS

En 1995, j'ai déclaré faillite personnelle laquelle faillite a été libérée en janvier 1996.

De 1991 à 1994, j'étais employé de la Caisse Populaire de Masson-Angers à titre de directeur adjoint. Durant cet emploi j'ai contracté un emprunt pour faire l'acquisition d'un terrain que je n'ai jamais acheté car quelque semaine après que l'argent a été déposé dans mon compte, j'ai payé d'autres choses. La Caisse aurait dû contrôler les déboursés mais étant donné mon poste de directeur, ils m'ont fait confiance en déposant les sous dans mon compte.

Après ma faillite, la Caisse a découvert que je n'avais pas de terrain donc ils m'ont poursuivie au criminel. J'ai perdu ma cause car même si la Caisse n'a pas fait son travail correctement en déposant l'argent sans faire de contrôle interne, j'ai été accusé d'abus de pouvoir qui au sens de la loi est de la fraude.

J'ai éclopé de 1ans1/2 de sursis de sentence, suivi de 1ans de probation. Toute ces accusations sont terminées depuis quelque années déjà et ces pour cette raison que je n'ai pas cru bon d'en parler car au moment où Nicole (contrôleur ici) me posait vos questions, je n'avais aucun dossier ouvert au criminel.

En espérant que vous saurez comprendre ce malentendu et que je pourrai quand même obtenir ma licence.

Merci

Norbert St.Denis"

Tel que mentionné au préalable, la lettre donnait réponse au conseil parce que le conseil avait raison de croire que l'auteur de la demande d'inscription comme vendeur de véhicules automobiles avait omis de révéler son casier judiciaire.

Le conseil est un organisme qui rassemble les renseignements qui lui sont transmis par une personne qui veut s'inscrire comme vendeur de véhicules automobiles; par la suite, le conseil vérifie les données pour ensuite acheminer le tout au registrateur à qui incombe la tâche de, soit accorder l'enregistrement ou de délivrer un avis de proposition de refus d'enregistrement.

La partie pertinente du texte de la lettre de vérification du conseil au concessionnaire est le suivant et il reproduit aussi, en caractère gras, une partie importante de la question 9 du formulaire de demande soumise à l'origine par le requérant.

Le texte en question est tiré du document 3, onglet 5:

"We understand that you have sponsored an application for the above-noted individual.

An individual of the same name and date of birth as this applicant has a record of convictions and/or charges not disclosed in response to the question which states:

"Have you ever been found guilty or convicted of an offence under any law or are there any charges pending? If yes, attach full particulars on a separate signed and dated statement. "

PLEASE NOTE THAT CRIMINAL RECORD CHECKS CAN RESULT IN FALSE "POSITIVES". DO NOT ASSUME THAT THE APPLICANT HAS A CRIMINAL RECORD UNTIL THIS INFORMATION IS CONFIRMED BY THE APPLICANT.

Kindly discuss this matter with your salesperson. If there are any charges pending and/or convictions of any offence under any law which were not disclosed, the applicant will need to explain **in writing** why they were not disclosed and the circumstances surrounding each charge and/or conviction. If you have not already done so with the original application, please provide us with a copy of the applicant's driver's license, for identification purposes.

...

...

... Kindly provide us with the applicant's response, co-signed by you, within ten days. ..."

La question 9 du formulaire de demande d'enregistrement en question (document 2, onglet 3) se lit comme suit:

"9. Have you ever been found guilty or convicted of an offence under any law or are any charges pending ? (This includes those instances where a conditional or absolute discharge has been ordered). If yes, list all charges and/or convictions, and the circumstances surrounding each (attach additional sheets if necessary).

...
Note: Applicants are subject to background and criminal record searches. Submitting a false or incomplete disclosure is an offence under the MVDA and will result in disqualification. Do not assume that convictions are automatically deleted from your record. If you have any questions about the information you must disclose please call OMVIC. "

Une traduction approximative de la question serait:

"9. Avez-vous déjà été trouvé coupable ou été condamné d'un délit sous n'importe quelle loi ou êtes vous présentement sous inculpation ? (La question inclue même les instances de sursis ou une ordonnance de libération conditionnelle ou absolue a été rendue). Si oui, veuillez dresser la liste des accusations et/ou des condamnations et les circonstances qui les entourent (annexer des pages additionnelles si nécessaire)

...
Note: Les demandeurs feront l'objet de recherches quand à leurs antécédants et à leurs dossiers criminels. La soumission comportant une divulgation fausse ou incomplète est un délit sous la *loi des concessionnaires de véhicules automobiles* LCUM et aura pour effet la disqualification de l'auteur de la demande. Vous ne devez pas présumer que vos condamnations ont été automatiquement radiées de votre dossier. Si vous avez des incertitudes au sujet de l'information à fournir veuillez vous référer au conseil. "

À l'endroit indiqué à la droite du texte, l'auteur de la demande devait cocher la réponse. La coche indiquée sur le formulaire est : Yes _____ No ã

La question 6 du formulaire en question se lit comme suit:

"6. Are you engaged now or have you been involved in personal bankruptcy proceedings? If yes, attach copy of the Assignment in Bankruptcy or proof of discharge."

Une traduction approximative de la question serait:

"6. Êtes-vous présentement ou avez-vous déjà été impliqué dans des procédures de faillites personnelles ? Si oui, annexer une copie de votre soumission en faillite ou une preuve de votre libération. "

À l'endroit indiqué à la droite du texte l'auteur de la demande devait cocher la réponse La coche indiquée est : Yes à No sauf qu'il y a une bavure visible sur la réponse No ou la personne qui remplissait le formulaire a évidemment radié une coche encore légèrement visible même si un effort évident pour radier l'erreur est encore visible. La réponse est quand même évidemment Yes à .

Le requérant prétend que le texte de sa demande d'inscription fut rempli la main par l'employée du concessionnaire pour qui le requérant travaillait et travaille toujours. Elle occupe le poste de contrôleur et elle a signé la demande au nom du concessionnaire qui endosse la demande, tel qu'exigé par le formulaire en question.

Le requérant témoigne que l'employée en question avait inscrit la réponse, au poste 6, avant de lui demander la question. Il lui aurait révélé le fait qu'il avait été libéré d'une faillite en l'an 1996 lorsqu'elle lui a fait part de la nature de la question. C'est alors que la radiation de la réponse erronée s'est effectuée. Une copie du certificat de libération de la faillite en question fut annexée au formulaire par l'auteur de la demande, et acheminée au conseil en même temps que la demande.

Cependant, l'auteur de la demande n'a pas alors demandé à l'employée de corriger la réponse négative qui avait été inscrite au poste 9 du formulaire d'inscription.

La preuve établit que, malheureusement, le formulaire de demande sous la *Loi des concessionnaires de véhicules moteurs* n'existe qu'en anglais.

Le requérant prétend que l'avis de proposition du registrateur est fondé sur sa réponse négative erronée lorsqu'il a répondu à la question. Il prétend qu'il y avait confusion dans son esprit en ce qui a trait à la teneur du texte de la question 9 du formulaire d'inscription. Il maintient que son explication par lettre en réponse à la vérification qui suivit, bien que tardive, a eu pour effet de corriger une bévue non intentionnée de sa part.

Il demande au Tribunal de statuer en sa faveur en rendant une décision à l'effet que le registrateur a commis une erreur en décidant de lui délivrer un avis de proposition visant refuser son permis comme vendeur automobile. Le requérant prétend que l'avis de proposition du registrateur est fondé uniquement sur une erreur de traduction. Selon lui, vu qu'il est unilingue francophone, il ne devrait pas être pénalisé par une telle erreur.

Le registraire, par ailleurs, prétend que la loi en vertu de laquelle les vendeurs de véhicules automobiles sont régis est une loi visant la protection des membres du public et qu'il doit veiller à s'assurer que les vendeurs sont des personnes honnêtes, intègres et qui exerceront leur activités conformément à la loi.

Il est vrai que le registraire appuie partiellement son avis de proposition sur le fait que l'auteur de la demande n'a pas immédiatement divulgué son dossier criminel. N'eusse été le seul motif de proposition de refus, le tribunal devrait donner raison au requérant. Cependant, les motifs du registraire pour son refus sont multiples. Il attire l'attention du Tribunal au texte même du requérant (le document 2) et il souligne que le requérant ne dévoile toujours pas exactement et au complet l'entièreté de son casier judiciaire. Les délits criminels que révèle le dossier judiciaire du requérant (le document 3, onglet 4) sont très sérieux:

Le 20 février 1998

1) contrefaçon: *article 367 du Code Criminel du Canada* et

2) fraude, montant en excès de 5,000.00\$: *article 380(1)(a) du Code Criminel du Canada*.

Il prétend que ce sont là des indices évidents de malhonnêteté fondamentale chez l'auteur de la demande.

De plus, le registraire attire attention aux propos du requérant dans sa lettre explicative:

"Après ma faillite, la Caisse a découvert que je n'avais pas de terrain donc ils m'ont poursuivi au criminel. J'ai perdu ma cause car même si la Caisse n'a pas fait son travail correctement en déposant l'argent sans faire de contrôle interne, j'ai été accusé d'abus de pouvoir qui au sens de la loi est de la fraude.

Le registraire maintient que ces propos font foi d'un manque de jugement de la part du requérant. Il voudrait prétendre que son délit émane d'un manque de surveillance de la part de ses collègues de travail. Cette prétention est une preuve évidente du manque d'intégrité du requérant. Ses paroles expriment clairement un défaut fondamental chez lui et une incompréhension des mots "intégrité et honnêteté". Le registraire souligne le fait que ce n'est que suite à sa faillite que les syndic en faillite et les gens de l'institution financière pour qui le requérant avait travaillé ont compris qu'il avait fait preuve de supercherie comme travailleur et, une telle supercherie est preuve tangible que le requérant n'est pas une personne intègre de nature.

Lorsque le procureur du registraire contre-interroge le requérant, durant l'audience, on apprend que le concessionnaire pour qui il travaille n'avait jamais été avisé, auparavant, de l'existence de son casier judiciaire. Le procureur persiste et ultimement le requérant admet qu'il n'a pas encore informé son employeur, malgré le fait qu'il sait fort bien que son employeur est l'endosseur de sa demande d'inscription. Il prétend qu'il est possible que son employeur soit au courant de son dossier, parce qu'un de ses amis de travail peut

possiblement avoir révélé l'information. Cependant, il nie savoir si, oui ou non, son employeur est effectivement au courant. Le Tribunal, de plus, constate que ni son employeur, ni le contrôleur du concessionnaire pour qui il travaille n'a contresigné sa lettre explicative au conseil, en réponse à la demande de divulgation, malgré que la lettre du conseil exigeait clairement que la réponse soit contresignée par l'endosseur. Le Tribunal comprend que ni l'employeur ni le contrôleur n'a été mis au courant du dossier criminel.

LA QUESTION À TRANCHER:

Le registraire a-t-il des motifs suffisants pour refuser d'accorder à l'auteur de la demande son inscription comme vendeur de véhicules automobiles ?

Y a-t-il raison de craindre que le requérant, dans l'exercice de ses fonctions de vendeur d'automobiles, n'agira pas automatiquement conformément aux exigences de la loi, avec intégrité et honnêteté ? La protection du public exige intégrité et honnêteté. Y a-t-il raison de craindre que le requérant ne se conformerait à la lettre de la loi que si constamment surveillé ?

LA LOI:

Les stipulations pertinentes de la loi dans cette instance sont les articles 5(1)(b) et 6(1). Les deux stipulations énoncent les circonstances selon lesquelles le registraire peut proposer un refus d'inscrire l'auteur d'une demande. Le Tribunal a le pouvoir de réviser cette question en appel et statuer en vertu de l'article 7(4) de la loi.

Les articles en question :

5. (1) L'auteur d'une demande a le droit d'être inscrit ou réinscrit par le registraire, sauf dans les cas suivants:

- a) compte tenu de sa situation financière, il n'y a pas raisonnablement lieu de croire que l'auteur de la demande est financièrement responsable dans l'exercice de ses activités commerciales;
- b) la conduite antérieure de l'auteur de la demande offre des motifs raisonnables de croire qu'il n'exercera pas ses activités commerciales conformément à la loi et avec intégrité et honnêteté;
- c) s'il s'agit d'une personne morale:
 - (i) compte tenu de sa situation financière, il n'y a pas raisonnablement lieu de croire qu'elle est financièrement responsable dans l'exercice de ses activités commerciales,
 - (ii) la conduite antérieure de ses dirigeants ou administrateurs offre des motifs raisonnables de croire qu'elle n'exercera pas ses activités commerciales conformément à la loi et avec intégrité et honnêteté;
- d) l'auteur de la demande exerce des activités qui sont ou seront, s'il est inscrit, en

contravention avec la présente loi ou les règlements.

6. (1) Sous réserve de l'article 7, le registraire peut refuser d'inscrire l'auteur d'une demande s'il est d'avis que l'article 5 prive ce dernier du droit à l'inscription.

7. (4) Si l'auteur de la demande ou la personne inscrite demande une audience devant la Commission, conformément au paragraphe (2), celle-ci fixe la date et l'heure de l'audience et la tient. Elle peut, à la requête du registraire présentée à l'audience, ordonner à ce dernier de donner suite à son intention ou de s'en abstenir et de prendre les mesures que la Commission estime qu'il devrait prendre, conformément à la présente loi et aux règlements. La Commission peut, à cette fin, substituer son opinion à celle du registraire.

Dans l'instance *Re Brenner*, 19 C.R.A.T. 58, la cour divisionnelle a émis une formule pour guider le Tribunal:

"The effect of section 7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner has genuinely reformed and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself. "

La cour veut que le Tribunal détermine si le registraire s'est trompé lorsqu'il a conclu que la conduite antérieure du requérant offre des motifs raisonnables de croire qu'il n'exercera pas ses activités commerciales conformément à la loi ainsi qu'avec intégrité et honnêteté.

Le Tribunal ne doit pas être préoccupé par des motifs de sympathie pour le requérant et son désir de gagner sa vie et ne doit pas s'arrêter sur un seul motif avancé par un requérant (dans le cas présent, un motif fondé sur une incompréhension de la teneur d'un texte), mais doit plutôt se pencher sur tous les motifs avancés par les intervenants afin de décider du bien fondé de la décision du registraire.

DÉCISION:

Le Tribunal statue que le registraire n'a pas fait erreur en concluant comme il l'a fait. Le Tribunal est convaincu que les antécédents du requérant, sa divulgation biaisée lorsqu'il fournit les détails les plus minces relatifs à son casier judiciaire, son désir de porter le blâme sur d'autres que lui, dans la soumission de sa demande, sa tendance cachottière et l'ensemble de ses propos durant l'audience sont inquiétants. Le Tribunal s'inquiète au sujet de son intégrité et de son honnêteté et le Tribunal reconnaît l'importance de la

protection du public à ce niveau. Comme tel, et en vertu des pouvoirs qui lui sont accordés par l'article 7(4) de la *loi sur les commerçants de véhicules automobiles*, le Tribunal autorise le registrateur à donner suite à son avis de proposition de refuser l'inscription du requérant.

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

Jean-Marc Lefebvre, c.r., Vice-Président

ÉMISE : le 6 novembre 2002

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
X L KARS INC. AND CHARLES PETER TWIGG

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATIONS
- Proposal dated: July 10, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

X L KARS INC. AND CHARLES PETER TWIGG

Applicants

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by X L Kars Inc. and Charles Peter Twigg, Applicants, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: November 8, 2002

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
789 Don Mills Road, Suite 800
Toronto, ON M3C 1T5

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: X L Kars Inc.
1000A Langs Drive
Cambridge, ON N1R 7K7

Charles Peter Twigg
12 – 235 Bishop Street South
Cambridge, ON N3H 2L3

In accordance with Section 4.1 of the *Statutory Powers Procedure Act*, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereinafter the “Act”) the parties to the proceeding, XL Kars Inc. (hereinafter referred to as the “Dealer”) and Charles Peter Twigg (hereinafter the “Salesperson”), and the Registrar, *Motor Vehicle Dealers Act* (hereinafter the “Registrar”) waive the requirement of a hearing and hereby consent to an Order of the Licence Appeal Tribunal based on the following terms and conditions:

1. The Dealer and Salesperson agree to enter into repayment arrangements with the Ministry of Finance within 30 days of the date of this order with respect to monies owing by the dealer to the Ministry of Finance. The Dealer shall provide confirmation to the Registrar, *Motor Vehicle Dealers Act*, within 30 days of the date of this order that repayment arrangements have been entered into between the dealer and the Ministry of Finance.
2. The Dealer and Salesperson agree to comply with all aspects of the *Retail Sales Tax Act*, and with regards to filing, will ensure all future tax collections are accurately reported and remitted to the Minister of Finance when due and with payment.
3. The Dealer and Salesperson acknowledge and understand that the Dealer will not retain the services of a salesperson unless the salesperson is registered as a salesperson to the Dealer.
4. The Dealer and Salesperson further acknowledge that the restrictions concerning the activities of a salesperson referred to in these terms and conditions applies to buying, selling and leasing on behalf of a dealer. “Buying, selling and leasing” refers to showing a vehicle to a prospective purchaser or any form of negotiation concerning the purchase, sale or lease of a motor vehicle and is not limited to the signing of contracts. This further includes attendance at auctions on behalf of the Dealer.
5. The Dealer will ensure that any vehicle sold is registered in the name of the purchaser in the records of the Ministry of Transportation before releasing the vehicle to the purchaser.
6. The Dealer will not purchase a vehicle without ensuring that the vehicle is registered to the seller in the records of the Ministry of Transportation.
9. The Dealer agrees to register all vehicles purchased within 6 days in accordance with the *Highway Traffic Act*.

10. The Dealer will comply with the Ontario Motor Vehicle Industry Council's Code of Ethics and Standards of Business Practice.
11. The Dealer and Salesperson agree to maintain a garage register in accordance with the Highway Traffic Act and will maintain all books and records as required by the *Motor Vehicle Dealers Act*. The Dealer and Salesperson further agree to provide free access to the books and records of the Dealer to any authorized representative of the Registrar.
12. The Dealer and Salesperson agree that they will not be involved in the process of buying, selling and leasing motor vehicles without the benefit of registration.
13. The Dealer and Salesperson acknowledge that the Registrar may take administrative action, including a proposal to revoke their registrations as a motor vehicle dealer and/or salesperson arising from any matters that have occurred in the past or that may occur in the future related to their financial circumstances and their honesty and integrity.
14. The Dealer and Salesperson acknowledge that the Registrar may take legal action, including Provincial Offences prosecution arising from actions related to the purchase, sale or lease of motor vehicles that may have occurred in the past or that may occur in the future.
15. The Dealer and Salesperson agree and acknowledge that should they breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
16. The Dealer and Salesperson hereby consent to an Order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
17. The Dealer and Salesperson hereby withdraw their appeals to the Licence Appeal Tribunal.
18. The Dealer and Salesperson hereby acknowledge that they have obtained or have had the opportunity to obtain independent legal advice with respect to the their consent to the terms and conditions set out in this document.

Signed in the City of _____ this _____ day of _____ 2002.

XL Kars Inc.
I have the Authority to bind the dealership.
(Signature)

Charles Peter Twigg (Signature)

These Terms and Conditions are accepted by the Registrar, *Motor Vehicle Dealers Act*.

Carl Compton, Registrar *Motor Vehicle Dealers Act*

Date:

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
Dean McFadyen o/a Cruise Connoisseurs.
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: July 11, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

Dean McFadyen o/a Cruise Connoisseurs.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on October 23, 2002;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the parties* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Friday, December 13, 2002.

LICENCE APPEAL TRIBUNAL

CARL F. DOMBEK.
Chair

Released: November 1, 2002

DEREK SCANLAN

**APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*
TO REFUSE REGISTRATION**

TRIBUNAL: CARL DOMBEK, Chair, presiding

APPEARANCES: JAMES N. AITCHISON, Counsel, representing the Applicant

AVIVA HARARI, Counsel, representing the Registrar, *Motor Vehicle Dealers Act*

DATE OF
HEARING: November 5, 2002 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") from a notice of Proposal issued by the Registrar under the Motor Vehicle Dealers Act (the "Registrar"), pursuant to section 7 of the Motor Vehicle Dealers Act (the "Act"). The Proposal dated the 9th day of May 2002, seeks to Refuse the Registration of Derek Scanlan.

DECISION

Derek Scanlan wants to continue his career as a salesman of used cars. He has been in the car sales business for approximately 18 years. During this period he has held a number of different positions from being a dealer, a service adviser, a salesman and a service manager. In this latter capacity he was named Service Manager Of The Year for Canada by Hyundai Canada in 1990. However, the Registrar under the *Motor Vehicles Act* (Registrar) now wants to curtail his career. The Registrar issued a Notice of Proposal to Refuse the Registration of Mr. Scanlan under the Act in May of 2002. The reason for this Proposal was that "On March 26, 2002 Scanlan was convicted of fraud over \$5000.00. The conviction related to industry specific conduct." After Mr. Scanlan appealed that Proposal the Registrar issued Further Particulars dated

October 1, 2002. These amounted to additional reasons to refuse the registration. These reasons follow:

1. Derek David Scanlan (hereinafter "Scanlan") was originally registered as a motor vehicle dealer from on or about September 4, 1984 until September 22, 2000.
2. Scanlan has declared bankruptcy three times.
3. Scanlan has received a suspended discharge on his last two bankruptcies.
4. Scanlan is currently the subject of a commercial proposal to creditors.
5. Scanlan failed to disclose his bankruptcies on his most recent applications submitted to the Registrar.
6. Scanlan has failed to act with financial responsibility.

Before setting out the Tribunal's analysis of the issues and its findings and conclusions it is necessary to review the leading case of *Brenner 19 CRAT SCO Decisions and Orders (1971-1989)* page 95.

In the *Brenner* decision, Southey J. stated that "the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty."

Southey, J. then added, in referring the matter back to the Tribunal for rehearing, that "The proper question at the rehearing remains, however, whether the past conduct of the applicant afforded reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal."

Accordingly, it is the Registrar's belief that is the issue in these proceedings, and not the belief of this Tribunal. If the Tribunal believes that the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for the belief that such an applicant would not carry on business in accordance with law and with integrity and honesty, this Tribunal should direct the Registrar to refrain from carrying out his proposal. The analysis of a similar fact situation by Vice-Chair Israel also was very helpful in this case (see Re: Adiyaman [2002] O.L.A.T.D. No. 63)

Mr. Scanlan first attracted the attention of the Ontario Motor Vehicle Industry Council (OMVIC) on or about September 25, 2000 when Wayne Bolahood contacted OMVIC

about some financial difficulties he was having with Mr. Scanlan. Mr. Bolahood had entered into a financial arrangement with Mr. Scanlan in relation to the financing of used vehicles purchased by Mr. Scanlan. The details of this financial arrangement are not entirely relevant. Suffice it to say that Mr. Bolahood paid for the vehicles after they were purchased and expected a return of his capital plus a fee when the vehicles were sold. While originally successful, this arrangement began to fall apart when there was a downturn in the market for used vehicles. When he did not receive his money Mr. Bolahood contacted OMVIC.

OMVIC is responsible for overseeing the *Motor Vehicles Dealers Act* (the Act). The Act is a public protection statute which deals with the registration and regulation of motor vehicle dealers and salespeople. OMVIC, which is a non-profit organization, has a number of tools which it uses to meet this mandate. It can conduct investigations into infractions of the statute. It has a compliance unit which enforces adherence to the Act or its Regulations. It can resolve public complaints by reaching an agreement achieved by consensus with the parties; and, of course, it can do background checks on potential registrations. Section 5 of the Act entitles applicants to registration, except where their past conduct affords the Registrar with reasonable grounds for belief that that such applicants will not carry on business in accordance with law and with integrity and honesty:

5. (1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

- (a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
- (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or
- (c) the applicant is a corporation and,
 - (i) having the regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, or
 - (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or
- (d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

(2) A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant, imposed by the Tribunal or prescribed by the regulations. R.S.O. 1990, c. M.42, s. 5 (2).

At the time of the complaint filed by Mr. Bolahood, Mr. Scanlan was registered as a dealer under the Act. There was no evidence presented to the Tribunal as to what action, if any, OMVIC took in relation to this complaint. Neither was there any

explanation offered to the Tribunal as to why OMVIC did not pursue this complaint. It seems that nothing was done. Mr. Scanlan then filed a document with OMVIC entitled Notice of Registration Change which was received by OMVIC on December 18, 2000 (Exhibit 11). In effect, Mr. Scanlan wanted to change his registration as a dealer to become registered as a salesperson. On this Notice he indicated that he would be working for Feeney Car Sales Inc. and would be starting his employment on December 7, 2000.

This request was approved without conditions and Mr. Scanlan has continued to work for this company as a used car salesperson to this date. There was no evidence presented as to the reasons for allowing Mr. Scanlan to continue working without conditions. Presumably, he met all the criteria for registration.

In the meantime Mr. Bolahood decided to seek other forms of redress. He began the process to seize assets belonging to both Mr. Scanlan and his common-law partner Kathryn Parsons through the vehicle of the chattel mortgage. This resulted in voluntary Minutes of Settlement being finalised in early June of 2001 in which Mr. Bolahood recovered assets and cash worth over \$115,000.00. OMVIC was unaware of this settlement. It is important to note that Mr. Bolahood's civil claim could have been "fought out to its bitter end" but instead it was voluntarily settled.

While there is no direct evidence on this point the Tribunal surmises that Mr. Bolahood also contacted the Durham Regional Police Department as criminal charges for committing fraud over \$5,000.00 and making false statements in writing were laid against Mr. Scanlan. The total amount defrauded was alleged to amount to \$93,000.00. There was no evidence presented to the Tribunal about the action, if any, OMVIC took once it was apprised of these criminal charges.

Mr. Scanlan continued to work as a salesperson at Feeney Car Sales Inc. He continued to make monthly payments of \$1200.00 to support his two children from his first marriage. He has arranged with his creditors to make monthly payments of \$500.00 under his current bankruptcy proceedings. His uncontradicted evidence is that he has never reneged on any of these payments. His ex-wife Karen Scanlan provided an undated letter (Exhibit 6) which states in part: "Derek was given a monthly obligation of \$1,200 to support his children, he has not failed me for our kids, even through hard times in the past few years Derek has never missed a payment."

The next major event occurred March of this year. Mr. Scanlan pled guilty to one count of fraud over \$5,000.00. He received a suspended sentence with 24 months of probation. The probation order was a nonreporting type i.e. Mr. Scanlan was not required to report to a probation or parole officer. In addition to the standard conditions contained in a probation order Mr. Scanlan was ordered not to apply for or possess a Car Dealership Licence under the Act. He also testified that at that time of the commission of the crime he did not know that his actions were criminal but he fully understands "that what I did was criminal". He also took full responsibility for his actions

and expressed remorse for them. Mr. Scanlan also testified that there are no other criminal charges pending against him.

Shortly after this conviction the Registrar issued the first Notice of Proposal to refuse Mr. Scanlan's registration due to the conviction which related to industry specific conduct.

Failure to Disclose

The above findings are generally not disputed; and generally speaking nor were the particulars numbered 1, 2, 3, 4, and 6 found above in the Notice of Further and Other Particulars. However, particular number 5 in that document states that "Scanlan failed to disclose his bankruptcies on his most recent applications submitted to the Registrar." The issue to be determined is whether Mr. Scanlan made full disclosure of his bankruptcies to OMVIC.

Laura Gordon is the Director of Compliance at OMVIC and has been in this position since April 1997. She testified that the application form for a registration imparts the consequences for failing to disclose certain information. She also stated that OMVIC regards full disclosure as a test of the applicant's honesty and integrity. Therefore, it is important to have the full particulars from "day one". Ms. Gordon testified that Mr. Scanlan had been in bankruptcy three times and was currently involved in a further Commercial Proposal involving his finances. These bankruptcies occurred in 1978, 1981, 1992 and 2001 (Exhibit 5, Tab 6). In Mr. Scanlan's 1996 Application for Registration/Reinstatement (Exhibit 10) she indicated that she did not believe that there was full disclosure since Mr. Scanlan only forwarded information in relation to his 1992 bankruptcy. She did concede on cross-examination that the 1992 information appeared to be sent by facsimile the day following the date of his Application. She also agreed that this facsimile indicated that it was "page 2". She was unaware whether the missing "page 1" contained information on his previous bankruptcies or whether it was just a cover sheet.

Ms. Gordon testified that Mr. Scanlan received a Registration in 1984. At that time background checks were done by the Ministry of Consumer and Commercial Relations (as it was then known). While Ms. Gordon was unaware of whether a bankruptcy check was done on Mr. Scanlan at that time she knew that the Ministry did request such information on their application forms. Thus, unless Mr. Scanlan lied on his 1984 Application, information about his 1978 and 1981 bankruptcies would have been in the Ministry's files. In 1996, when OMVIC was created, the Ministry gave OMVIC its old files in which the data was recorded on microfiche. Ms. Gordon testified that for the purposes of the present Proposal the old microfiche files on Mr. Scanlan were not reviewed. This is unfortunate. If OMVIC had researched these old files it would have proven one of two suppositions. One that Mr. Scanlan had lied on his application when he received his 1984 Dealership or that he was truthful and had disclosed the bankruptcies. In either event the Registrar did not have some very important

information before him or her when the decision was made to buttress the first Notice of Proposal by adding nondisclosure of the bankruptcies to the list of Particulars.

Ms. Gordon further testified that as part of the inspection function of OMVIC Mr. Scanlan's business would have been inspected by the organization. There was nothing negative in these inspection reports that came to her attention as the Director of Compliance.

She also agreed that there was only one other complaint regarding Mr. Scanlan. This was a complaint regarding a consumer whose warranty on his used car had expired. This complaint had been resolved. Ms Gordon stated that except for the criminal conviction and the lack of full disclosure regarding the bankruptcies there was nothing in Mr. Scanlan's record which "stood out".

Mr. Scanlan testified that he had disclosed the 1978 and 1981 bankruptcies in his application for a Dealership Registration in 1984. While he disclosed his 1992 bankruptcy in his 1996 Application, he did not disclose the previous two bankruptcies for two reasons. First, it was his belief that OMVIC already had the information and did not require it again. Secondly, he received advice from Robert Beatty, who was with the Used Car Dealers Association, that previously disclosed bankruptcies need not be disclosed in subsequent applications. Of course, this advice was incorrect.

Mr. Scanlan further compounded the impression that he was withholding information when he submitted a Request to Reinstate a Business dated August 11, 2000 (Exhibit 5, Tab 8) and an Individual Application for Registration dated December 20, 2000 (Exhibit 5, Tab 7). In both cases he once again stated "no" to the question of whether he ever had been involved in bankruptcy proceedings. He testified that his rationale for answering in the negative in relation to the reinstatement document was that since it was only a reinstatement, the information regarding his bankruptcies was already on record. He testified that individuals at OMVIC to whom he spoke regarding this reinstatement agreed with him that the information was already on record and did not need to be supplied again. Similarly, in relation to the Registration Application he testified that he had spoken to officials at OMVIC; that he had explained that the registration was urgent; and that since he had previously disclosed the bankruptcies; he was advised that he did not have to provide the information again. Mr. Scanlan stated that between August and December of 2000 he spoke to officials at OMVIC between 15 to 20 times. Unfortunately, except for recalling speaking to Ms. Gordon, Mr. Scanlan did not recall the names of individuals he spoke to OMVIC nor did he make any notes about those conversations. He agreed on cross-examination that the discussions with Ms. Gordon were in relation to the transfer of his licence and not about disclosure.

OMVIC did not rebut Mr. Scanlan's evidence regarding the information he received from OMVIC officials about his previously disclosed bankruptcies. It would have assisted the

Tribunal to have evidence on this point. For example, Ms. Gordon could have testified as to OMVIC's policies in providing oral advice to the Applicant regarding disclosure. Or perhaps there are documents such as a Frequently Asked Questions and Answers that guide OMVIC staff which could have been tendered as an exhibit. Failing that, the Tribunal accepts Mr. Scanlan's testimony. The Tribunal found Mr. Scanlan to be forthright and credible and that it finds he did receive bad advice on this issue.

As Counsel for Mr. Scanlan submitted rhetorically, he disclosed his 1992 bankruptcy and obtained his licence why would he not disclose it again in 2000 when the bankruptcy was eight years old unless he was told that it was not relevant and he believed it was not relevant? Once again a search of Mr. Scanlan's files would have alerted officials at OMVIC that something was amiss and that he could have been contacted in order to determine why the information was missing. Also the Registrar did not have important information before him as to the rationale for Mr. Scanlan disclosing bankruptcy information on one occasion but not on a subsequent Application. Thus, the Registrar lacked two vital pieces of information when the decision was made not to register Mr. Scanlan due to his non disclosure. An important decision as in the instant case requires the Registrar to have as much information before him as is possible. Otherwise, the Registrar's decision or belief is in error. The Tribunal finds in this instance the Registrar's belief to be in error.

Accordingly, the Tribunal finds the Registrar was in possession of Mr. Scanlan's bankruptcy information when the Registrar considered not only his 1984 and 1996 application but also his 2,000 applications. For the Registrar to imply that Mr. Scanlan had not disclosed his bankruptcies in his most recent applications is both incorrect and unjustified. The Tribunal finds that there was no justification for the Registrar to imply that there was an intent on Mr. Scanlan's part to mislead the Registrar for he already disclosed the fact of his bankruptcies in previous applications.

Financial Responsibility

Despite the fact that Mr. Scanlan had declared his bankruptcies to the Ministry in 1984 he was registered as a Dealer under the Act. Furthermore, in 1996 when he applied for a reinstatement of his Dealers licence he disclosed a further bankruptcy. Once again he was granted a licence as a Dealer. The bankruptcies indicate a lack of financial acumen on the part of Mr. Scanlan in operating a used car sales business. This would be important in determining whether to continue the registration of Mr. Scanlan if he were operating as the Dealer or Salesperson as the Act requires (amongst other things) that Registrants be financially responsible in the conduct of business.

Terry Feeney owns and operates Feeney Car Sales Inc. since 1983 now in the City of Toronto. The company sells about 28 vehicles per month. He employs five people, three of whom are salespersons including Mr. Scanlan. Mr. Scanlan has been

employed with him for a number of years. Mr. Feeney and his accountant/bookkeeper handle all the financial obligations of the company. Sales staff are not involved in the financial operations of the dealership. Before he retained Mr. Scanlan, Mr. Feeney had placed an advertisement for the position of salesperson in a newspaper. He received a large number of applicants and after checking references which were quite favourable he decided to hire Mr. Scanlan. He also had known the Applicant previously as he had done business with him over the years. In terms of financial responsibility, Mr. Feeney testified that if as a condition of Mr. Scanlan's registration there was a requirement that he not handle any money; it would not affect their employer/employee relationship.

On cross-examination by Counsel for the Registrar Mr. Feeney was asked as to whether he would consider guaranteeing Mr. Scanlan's employment through a Letter of Credit or a Bond. The witness, after thinking about the question, stated unequivocally that if this was a term or a condition of Mr. Scanlan's registration he would consider supplying the financial guarantee. This is an important piece of evidence as it shows that Mr. Feeney who employed Mr. Scanlan for over two years has complete trust in him.

Consequently the Tribunal finds that the Registrar, while correct in having some concerns about Mr. Scanlan's financial ability to operate the dealership, did not have the following facts before him:

1. that Mr. Scanlan has been employed by Mr. Feeney as a *salesperson* in the motor vehicle business for two years and has not been financially irresponsible in this position;
2. that his position with Mr. Feeney does not require him to handle money;
3. that he has continued to make support payments to his children without failure despite going through times of financial difficulty;
4. that he has entered into an arrangement to repay his creditors for his outstanding debts; and
5. that he made full and voluntary restitution to Mr. Bolahood.

By not being aware of these facts, and in the absence of any evidence to the contrary, the Registrar was in error in concluding that the past financial conduct of Mr. Scanlan afforded reasonable grounds for believing that he was not financially responsible.

The Criminal Conviction

After pleading guilty to one criminal charge of Fraud over \$5,000 Mr. Scanlan was convicted and placed on two years probation. The guilty plea admits every element of the offence including knowledge. Furthermore, the case law currently provides that the Tribunal cannot look behind the guilty plea and must accept the criminal conviction as it stands.

This conviction was recorded in March of 2002 approximately six months ago; however the criminal act upon which the conviction is based occurred over two years ago in the period commencing May 2000 and terminating in September 2000. Mr. Scanlan has an unblemished record since the commission of the crime and his subsequent conviction. In fact this single conviction is the only criminal blemish on an 18-year career in the industry. He has made full restitution to the victim. He pleaded guilty to the crime of which he stands convicted. While this Tribunal will not compare sentences for similar offences it can take judicial notice of the fact that the sentence received by Mr. Scanlan was very lenient. This usually means that the Criminal Court found some mitigating factors in the accused's behaviour which resulted in a lighter sentence.

The Tribunal found Mr. Scanlan forthright in his evidence. He did not colour his testimony or offer excuses for his past conduct, and he seemed remorseful. He has since October 2000 been employed by Feeney Used Car Sales Inc. as a used car salesperson. There is no evidence whatsoever to show that consumers have been jeopardised by his conduct. Any complaints about Mr. Scanlan were minor in nature and actually were the responsibility of Mr. Feeney. Mr. Scanlan is 49 years old and has two children from a previous marriage. He is currently in a common law relationship which he freely admits is under some strain due to his current predicament.

All the above are important factors in predicting the future behaviour of Mr. Scanlan should he continue to be registered under the Act.

In opposition to the above mitigating facts there is the conviction. The crime resulting in the conviction is industry related. The nature of the crime is serious and the amount of money involved was large. The conviction cannot be lightly disregarded. The question to be dealt with by the Tribunal is whether the actual conviction of Mr. Scanlan is indicative that he will, in the future, not carry on business in accordance with the law and with integrity and honesty. The Registrar bases his decision to deregister Mr. Scanlan on his past conduct, which the Registrar believes afforded reasonable grounds to conclude that Mr. Scanlan will not carry on business in accordance with the law and with integrity and honesty.

The Registrar has not placed any evidence before the Tribunal that Mr. Scanlan's behaviour since September of 2000 is indicative of conduct that would afford the Registrar reasonable grounds for the belief that Mr. Scanlan will not carry on business in accordance with the law and with integrity and honesty. Opposed to the Registrar's lack of evidence in the above regard are of the uncontested mitigating factors to which Mr. Scanlan and Mr. Feeney testified. The one blemish over the last 18 years does not

support the Registrar's belief that Mr. Scanlan should not be registered. Furthermore, the Registrar allowed Mr. Scanlan to continue as a Salesperson without terms or conditions for over two years and without negative result.

In Ontario (Registrar of Real Estate and Business Brokers) v. Faccenda (Ont. Div. Ct.) [1994] O.J. No. 9541 Adams J. in considering s. 6 of the *Real Estate and Business Brokers Act* R.S.O. 1990, c.R.4. which is essentially the same as s. 5 of the Act before this Tribunal stated:

Given the test set out in s. 6(1) of the *Real Estate and Business Brokers Act*, R.S.O. 1990, c.R.4, all past conduct is potentially relevant, notwithstanding that it was the subject of a previous proposal. It is the totality of that past conduct, considered in the light of more current circumstances, which form the basis for the relief.

He further added:

Clearly, s. 6(1)(b) requires a more qualitative assessment of the entire conduct of an applicant to determine whether past conduct affords reasonable grounds for belief that he or she will not carry on business in accordance with law and with integrity and honesty.

In applying this test to Mr. Scanlan's past conduct, the Tribunal finds the Registrar to be in error in believing that Mr. Scanlan's past conduct indicated that he will not act with honesty and integrity. As Ms. Gordon for OMVIC testified there was nothing in his background which "stood out".

The penalty sought by the Registrar is too severe and the Tribunal believes that registration, subject to terms and conditions, is appropriate in this case.

ORDER

Accordingly, the Tribunal pursuant to the authority vested in it by section 7(4) of the *Motor Vehicle Dealers Act*, directs the Registrar to refrain from carrying out his proposal dated May 9, 2002 to refuse the Applicant's registration subject to the Applicant complying with the following five terms and conditions.

1. If the Applicant at any time in the future shall be charged with, found guilty of or convicted of any offence under any law he shall forthwith advise the Registrar.
2. If the Applicant at any time in the future is convicted of any charge under the Criminal Code of Canada, the Registrar shall be entitled to forthwith revoke the Applicant's registration as a motor vehicle salesperson under the Act.

3. The Applicant shall at no time in the future, unless with the Registrar's prior written consent, become an officer, director or partner in a motor vehicle dealership.
4. The Applicant shall not transfer his registration as a motor vehicle salesperson without the prior written consent of the Registrar.
5. The Applicant shall abide with all the provisions of the Act, the Regulations made under the Act and OMVIC's Standards of Business Practice issued in November 2000.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair, presiding

Released: November 26, 2002

PREHEARING

NICOLA AND ANGELA IOZZO

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE *ONTARIO
NEW HOME WARRANTIES PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL: WILLIAM McINTOSH, Vice-Chair

APPEARANCES: TONY SANTINI, Agent for Nicola and Angela Iozzo ("The
Applicants)
NETANUS RUTHERFORD, Counsel, representing the Ontario New
Home Warranty Program ("The Respondent")
PAUL STARKMAN, Counsel, representing Braderic Holdings Inc.
("The Added Party")

DATE OF
PREHEARING: November 1, 2002 Toronto

ORDER

Following the attendances on November 1, 2002 before the Licence Appeal Tribunal of Tony Santini representing Nicola and Angela Iozzo ("The Applicants"), Netanus Rutherford, Counsel, representing the Registrar, Ontario New Home Warranty Program ("The Respondent") and Paul Starkman representing Braderic Holdings Inc. ("The Added Party").

And whereas the parties agreed among themselves to a settlement of all of the issues in the matter;

The Tribunal makes the following order:

The hearing scheduled for December 2, 2002 is cancelled.

LICENCE APPEAL TRIBUNAL

William McIntosh, Vice-Chair

Released: November 6, 2002

PREHEARING

KERRY AND WANDA PSUTKA

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: CARL DOMBEK, CHAIR

APPEARANCES:

JOHN D. NANASON, Counsel, representing the Applicant
NETANUS RUTHERFORD, Counsel, representing the Ontario New
Home Warranty Program

DATE OF

PRE-HEARING: November 6, 2002,

Toronto

ORDER

Following the attendance before the Licence Appeal Tribunal (the "Tribunal") on November 6, 2002 at a pre-hearing of Wanda and Kerry Psutka (the "Applicants") with Netanus Rutherford for the Ontario New Home Warranty Program (the "Program");

1. The parties to the hearing are Wanda and Kerry Psutka (Applicants) and Ontario New Home Warranty Program, the Respondent, hereinafter referred to as ONHWP (Respondents).
2. The hearing will commence on Tuesday February 4, 2003 at 10:30 a.m. at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, and will continue if necessary on February 5, 2003 and February 6, 2003 at 10:30 a.m. The Parties are put on notice that the hearing days may extend past 5:00 p.m.
3. The applicants will provide ONHWP with a chronology of the leakage with dates and locations and any experts' reports in their possession on or before 4:00 p.m. November 20, 2002.

4. The Parties shall agree upon a date for an inspection of the premises by ONHWP's expert as soon as practicable. The inspection shall be conducted during normal business hours (9:00 a.m. to 5:00 p.m.)
5. ONHWP's experts' report whether written or oral shall be disclosed to the applicants in accordance with the Tribunal's Rules of Practice.

LICENCE APPEAL TRIBUNAL

Carl Dombek, Chair

Released: November 8, 2002

MAXWELL O. NSAFOAH O/A K&K FINE CARS

**APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT***

TO REFUSE REGISTRATION

TRIBUNAL: ANTOINE AOUAD, M.D., Presiding Member
DONALD BENNINGER, Member

APPEARANCES: YOVANKA MCBEAN, Agent, representing the Registrar, *Motor Vehicle Dealers Act*

DATE OF
HEARING: November 07, 2002 **Toronto**

REASONS FOR DECISION AND ORDER

PRELIMINARY MATTERS

The Applicant failed to appear. A thirty-minute grace period was extended. During the interval the clerk for the Tribunal called the Applicant's home. As there was no reply, Mr. Leslie, the Applicant's solicitor of record was called, at both his office and his pager.

The hearing resumed at 10:00 a.m. without a reply from either the Applicant or his solicitor being received by the Tribunal.

The Tribunal being satisfied that the necessary notices had been properly sent out, and that all efforts were made to contact the Applicant and his solicitor, proceeded *in absentia*.

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") from a notice of Proposal issued by the Registrar under the Motor Vehicle Dealers Act (the "Registrar"), pursuant to section 7 of the Motor Vehicle Dealers Act (the "Act"). The Proposal dated the 1st day of

August 2002, seeks to Refuse the Registration of Maxwell O. Nsafoah o/a K&K Fine Cars.

The Proposal sets out the Registrar's reasons for seeking an order to refuse the registration. The reasons are stated as follows:

The intention and objective of the Act is to protect the public interest. The requirements of the Act include that Registrants be financially responsible in the conduct of business and that Registrants carry on business in accordance with the law and with integrity and honesty. The Applicant's past conduct is inconsistent with the intention and objective of the Act, and therefore warrants disentitlement to registration under the Act. Therefore, the Registrar is unwilling to register of Maxwell O. Nsafoah o/a K&K Fine Cars press (sic) under the Motor Vehicle Dealers Act.

The particulars in the Notice of Proposal dated the 1st day of August 2002, are:

1. Maxwell O. Nsafoah o/a K&K Fine Cars (hereinafter referred to as the "Applicant") is a sole proprietorship, which applied for registration as a motor vehicle dealer under the Act on or about April 16, 2002
2. On the individual application for registration submitted by the Applicant, question 9 asks:

"Have you ever been found guilty or convicted of an offence under any law or are any charges pending? (This includes those instances where a conditional or absolute discharge has been ordered)"

The Applicant said, "Yes", and provided the following disclosure:

"Was convicted of posinging (sic) stolen computer in 1999 (Was not aware that co-worker had soled (sic) me a stolen PC. I was given probation for a year. Please know that I am a person with good integrity, although my record my (sic) question my credibility. Please just give me a chance to prove that I can successfully operate a dealership with no problems. You have the power to revoke my licence if I don't operate in accordance with OMVIC. "Please give me a chance at least."

3. A criminal record search shows that Maxwell Nsafoah has the following criminal conviction:
August 19, 1999: Possession of Property Obtained by Crime
4. A criminal record search shows that Maxwell Nsafoah engaged in conduct that resulted in the following charges:
March 22, 2002: Possession for the Purpose
Possession Proceeds of Crime
Possession Controlled Substance (x2)
February 12, 2002: Breach of Recognizance
5. The Applicant has failed to provide full disclosure on his application for registration submitted to the Registrar.

By Notice of Further and Other Particulars dated the 18th day of October 2002, the

Registrar further alleged as follows:

1. On June 7th, 2002 the Maxwell Nsafoah was convicted of "Possession for the Purpose."

By written Notice of Appeal Mr. Maxwell Nsafoah informed the Tribunal in term of section 7 (2) of the Act that a hearing was requested regarding an appeal to the proposal.

THE EVIDENCE:

The evidence presented to the Tribunal by the Registrar consisted of documentary evidence as well as the oral testimony of Ms Laura Gordon.

The evidence presented by Maxwell Nsafoah consisted of his statement in the Notice of Appeal dated August 17th, 2002.

A summary of the evidence follows:

WITNESSES FOR THE REGISTRAR

Testimony of Ms Laura Gordon

Ms. Laura Gordon, testified that she is currently the Director of Compliance for the Ontario Motor Vehicle Industry Council ("OMVIC"). Ms Gordon has been employed by OMVIC since April 1997 and held the position of Director of Compliance since September 1997. As Director of Compliance, Ms. Gordon has the duty of overseeing the Complaint and Mediation Team and also the Inspection Team. Prior to 1997, Ms Gordon was an investigator for the Ministry of Consumer and Commercial Relations and prior to that held various administrative positions within the Registrar's Office.

Ms. Laura Gordon explained that OMVIC is a non-profit corporation which has been delegated the responsibility to administer the *Motor Vehicle Dealers Act* which is a public protection statute to ensure compliance, by dealers and salespersons, with Section 5 of the Act. Section 5 requires that individuals and corporations registered under the Act meet standards of honesty, integrity, compliance with law, and financial responsibility.

The decision to refuse the registration of Maxwell O. Nsafoah o/a K&K Fine Cars, was based on the grounds that Maxwell O. Nsafoah, contravenes the criteria of Section 5 of the Motor Vehicles Dealers Act. Mr. Maxwell O. Nsafoah engaged in conduct, which resulted in charges being laid against him. Further, Mr. Maxwell O. Nsafoah failed to make full disclose of his criminal record and of the pending charges against him.

Ms. Gordon proceeded to identify and comment on the documents filed in the Respondent's Book of Documents, entered as Exhibit # 4

Mr. Maxwell Nsafoah's application for registration is dated April 16th, 2002, as per copy

found in Tab # 5 of Exhibit # 4. Ms Gordon noted that the Applicant does not mention the pending charges as is mandatory. Ms Gordon further emphasized that the line directly above the Applicant's signature clearly obliges the Applicant to "*certify that the information provided ...is to the best ...knowledge and belief true...*"

Ms Gordon pointed out that the completion of the application is the first indication of "*...honesty and integrity...*" and that an applicant intends to work in accordance with the law. Mr. Maxwell Nsafoah's lack of full disclosure caused concerns to the Registrar.

Referring to Tab # 7 of Exhibit # 4, Ms Gordon paraphrased the Applicant's comments with respect to the financing which read as follows:

"...I am aware of the financial costs of the dealership. I will be accessing funds from a joint account with my mother Margaret Nsafoah who has also acquired a \$15,000 line of credit along with the \$10,000 that we have saved in the bank. Attached is a bank statement of the savings with the balance that is my mothers name due to her being the principle account owner. I have also attached a hand written affidavit from my mother stating her knowledge of my intentions and plans with the savings..."

Ms. Gordon pointed out that the account owner is, ambiguously named "M. Nsafoah". Further, the balance in the account was \$5,000.00 a \$5,000.00 deposit was made on the date of the statement, bringing the balance to \$10,003.50.

For the record, Ms Gordon quoted relevant passages of the Applicant's reply letter, found in Tab # 11 of Exhibit # 4. According to the Applicant he failed to disclose pending criminal court proceedings as he: "*...knew that ...would be presumed guilty before innocent...*" and his "*...lawyer ...advised ...that due to the moral nature of ...alleged crime, it would not be in ...best interest ...to voluntarily disclose this information unless found guilty...*"

Ms. Gordon referred to the Applicant's Notice of Appeal and stressed that this explanation conflicts with the Applicant's reason's for appeal as set out in the Notice of Appeal.

Ms. Gordon alluded to Tab # 12 of Exhibit #4, which is a letter dated August 26th from the Ontario Provincial Police establishing that the Applicant was convicted, on June 7th, 2002, of the previously pending charges against him.

Ms. Gordon concluded her testimony by summarizing that the Applicant's contradicting statements clearly demonstrate his intent to misrepresent. Ms Gordon rationalizes that if at the onset the Applicant does not act in accordance with the law, he cannot be trusted to work honestly in future.

Of particular alarm to the Registrar is the fact that the Applicant was involved with possession of a controlled substance. The Registrar is concerned that drug convictions often are connected with money laundering.

Applicant's evidence

The Applicant's only evidence is contained in his statements in the Notice of Appeal:

- 1 *"...Did not fully understand the phrase "Charges Pending". Thought they only wanted CRIMINAL CONVICTION.*
- 2 *All outstanding charges withdrawn except possession of controlled substance. I have changed my life style & I am trying to provide a good environment on my family."*

Submissions by Ms. Yovanka McBean

Ms. McBean quoted sections of Section 5 of the Act, and argued that the Registrar does not come to a decision based on future intentions but rather on past behaviour. The Applicant does not meet the standards required under the Act and it is in the public's best interests that he not be allowed to work within the motor vehicles sales industry.

According to Ms. McBean the Registrar did not err in law, but had a reasonable belief that the Applicant if issued a licence, would not act with honesty and integrity. As a sole proprietorship, the Applicant would have access to the personal and confidential financial information of his clients. It is reasonable to assume, given the Applicant's past conduct that the information collected would not be used in accordance with the law.

In support of her argument Ms. McBean, presented the Tribunal with copies of precedent decisions.

FACTS FOUND PROVEN:

The following are the facts found by the Tribunal to have been proven.

1. K & K Fine Cars, a business classified as "Sole Proprietorship" submitted a Business Application for Registration under the Motor Vehicles Dealers Act, on April 16, 2002.
2. The sole operator of K & K Fine Cars is Maxwell Owusu Nsafoah.
3. Maxwell Owusu Nsafoah, submitted an Individual Application for Registration under the Motor Vehicles Dealers Act, on April 16, 2002.
4. The Applicant, Maxwell Owusu Nsafoah, failed to disclose pertinent information on his application, more particularly the pending charges against him.
5. The Applicant, Maxwell Owusu Nsafoah, was convicted of "*Possession of Property*

obtained by Crime” and “ Possession for the Purpose.”

THE LAW:

Section 5.(1) of the *Motor Vehicle Dealers Act* states:

5(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

(a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law, and with integrity and honesty; or

APPLICATION OF LAW TO FACTS:

The issue for consideration by this Tribunal is, whether the Applicant's past conduct affords reasonable risk to the public to refuse his registration as a Sole Proprietorship and Salesperson, as per Section 5 b of the Act.

Having found as a fact that the Applicant failed to disclose pertinent information to the Registrar, and that the Applicant was convicted of: “ *Possession of Property obtained by Crime*” and “ *Possession for the Purpose*,” the Tribunal also finds that the Registrar was justified in refusing the registration of Maxwell Nsafoah o/a K & K Fine Cars and Maxwell Nsafoah.

The Applicant petitions for “...a chance to prove that...” he “...can successfully operate a dealership with no problems...” He goes on to acknowledge that the Registrar has “...the power to revoke ...licence...” in the event of non-compliance with the law. Unfortunately, the Tribunal cannot heed the Applicant's plea. The intent of the Motor Vehicle's Dealers Act is preventative not reactive. The Tribunal concurs with Ms Gordon that the application and the information therein provided is crucial in assessing the intent and honesty of an Applicant. In this case, the Applicant shattered any possibility for trust that could be afforded him, by failing to mention in his application for registration the outstanding charges against him.

Further, it is the Registrar's mandate and this Tribunal's responsibility, in interpreting the law, to protect the public. Motor vehicle dealers and salespersons, are privy to credit card information as well as personal financial information of their clients. The Registrar must have full confidence that registrants will not misuse the information entrusted to them. The Applicant's previous convictions certainly offer no reassurance.

DECISION:

Therefore by virtue of the authority vested in it under section 7(4) of the Motor Vehicle

Dealers Act, the Licence Appeal Tribunal directs the Registrar to carry out the proposal to refuse the registrations of Maxwell Nsafoah o/a K & K Fine Cars and Maxwell Nsafoah.

LICENCE APPEAL TRIBUNAL

DONALD BENNINGER,
Member

ANTOINE AOUAD, M.D.
Presiding Member

Released: November 25, 2002

DONALD R. SCOTT

**APPEAL FROM A PROPOSAL OF THE REGISTRAR OF THE
MOTOR VEHICLE DEALERS ACT**

TO REFUSE REGISTRATION

TRIBUNAL: ANTOINE AOUAD, M.D., Presiding Member

APPEARANCES: TOM ZITEK, Agent, representing the Applicant
A. MICHAEL ROTHE, Counsel, representing the Registrar, *Motor
Vehicle Dealers Act*

DATE OF
HEARING: October 31, 2002 Toronto

ORDER

PURSUANT to the provisions of the *Motor Vehicle Dealers Act* R.S.O., 1990, chapter M.42, as amended, Mr. Donald R. Scott appealed a Proposal of the Registrar, Motor Vehicles Dealers Act (the "Registrar") as per Notice of Proposal dated July 24, 2002;

WHEREAS the Applicant filed an appeal with the Tribunal requesting a hearing;

AND WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter on October 31st, 2002, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th, Floor, Toronto, Ontario;

AND WHEREAS at the commencement of the hearing the Applicant in this matter was not present, but was represented by Mr. Tom Zitek who requested an adjournment on the Applicant's behalf. The basis of the request was that Mr. Scott had to attend Superior Court on another matter therefore could not appear at the Tribunal at this time. Mr. Zitek emphasized that both the Tribunal and the Registrar's office had been previously notified that an adjournment would be sought.

AND WHEREAS the position of the Registrar was that the application for adjournment should be refused by this Tribunal, Mr Rothe argued as follows: The Registrar had originally consented to an adjournment but consent was withdrawn, as there appeared to be some confusion concerning the authority of the individual requesting the adjournment on behalf of the Applicant; further, Mr. Rothe maintained that the Applicant must have known in ample time of his impending Court hearing but failed to make adequate provisions. Mr. Rothe asked the Tribunal, to consider awarding the sum of \$800.00 to the Registrar, as full costs, in the event the Applicant's request for adjournment was granted.

AND WHEREAS the Applicant's agent agreed to an adjournment with costs to be incurred by the Applicant.

AND WHEREAS the Tribunal finds that the Applicant was not apparently absent by choice, and that the Applicant demonstrated interest and respect for the proceedings by sending an agent on his behalf.

AND WHEREAS Section 14.4 2 (a) of the Licence Appeal Tribunal Rules of Practice provides that:

2 "...the amount of the order shall not exceed,
 (a) where the Tribunal has not commenced a hearing, the
 sum of \$400.00..."

NOW THEREFORE, the Tribunal orders that:

1. the hearing in this matter be adjourned peremptory against the Applicant, to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th, Floor, Toronto, Ontario, at 9:30 A.M. on Tuesday, January 14th, 2003 and
2. unless, verifiable proof from the appropriate court, confirming the Applicant's court appearance, is received by this Tribunal, with a copy to the Respondent, by end of day Wednesday November 6th, 2002, the Applicant shall pay the Respondent costs in the amount of \$400.00, by certified cheque or bank draft, no later than the 29th day of November 2002.
3. In the event the sum of \$400.00 becomes due and payable, but the Applicant fails to meet the payment date of November 29th, 2002, the Tribunal reserves the right to suspend proceedings of the Applicant's appeal until said costs are paid in full to the Respondent.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.
Presiding Member

Released: November 1, 2002

MARC T. SCHMIDT

**APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT***

TO REVOKE REGISTRATION

TRIBUNAL: ANTOINE AOUAD, M.D., Presiding Member

APPEARANCES: MARC T. SCHMIDT, representing himself

AVIVA R. HARARI, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: November 13, 2002

London

ORDER

PURSUANT to the provisions of the Motor Vehicle Dealers Act R.S.O., 1990, chapter M.42, as amended, Mr. Marc T. Schmidt, appealed a Proposal of the Registrar, Motor Vehicles Dealers Act (the "Registrar") as per Notice of Proposal dated August 22, 2002;

WHEREAS the Applicant filed an appeal with the Tribunal requesting a hearing;

AND WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter to commence at 9:30 a.m. on November 13th, 2002, at the Middlesex County Building, 399 Ridout Street, London, Ontario;

AND WHEREAS at the commencement of the hearing the Respondent's Counsel in this matter advised the Tribunal that an agreement had been reached between the Registrar and the Applicant;

AND WHEREAS Minutes of Settlement were prepared by the Respondent's Counsel and given to the Applicant at the hearing, and filed herein;

AND WHEREAS the Applicant hereby acknowledges that he has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

AND WHEREAS the Applicant having refused the suggestion to take a thirty-minute recess, to consult with either a solicitor or his agent, agreed to and executed the Minutes of Settlement in front of the Tribunal, and has therefore waived independent legal advice;

NOW THEREFORE, the Tribunal orders on consent as follows:

1. The Salesperson shall not transfer his registration as a Salesperson under the *Motor Vehicles Dealers Act* to another dealer without the prior consent of the Registrar.
2. The Salesperson shall not be an officer, director, owner or partner in a dealership.
3. The Salesperson shall provide proof, within 30 days of the date of this order, that satisfactory repayment arrangements have been made with the Ministry of Finance in regards to 1096450 Ontario o/a Gainsborough Motors.
4. The Salesperson shall honour any outstanding judgements against the Salesperson or his former dealership 1096450 Ontario o/a Gainsborough Motors.
5. The Salesperson shall not invite the public to deal at a place other than his employer's registered premises.
6. The Salesperson shall register for and complete the OMVIC certification course within 60 days of the date of this order.
7. The Salesperson shall not be involved in the process of buying, selling or leasing motor vehicles without the benefit of registration.
8. The Salesperson shall provide a copy of this order to his employer forthwith.

Now therefore, the Tribunal orders that the appeal in this matter is hereby noted as withdrawn on the conditions noted in the Minutes of Settlement filed herein.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

Released: November 25, 2002

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
MICHAEL PUCHTA

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

MICHAEL PUCHTA

Applicant

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

VILLA LOMAS RESORT CLUB LTD.

Added Party

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter
on December 19 and 20, 2002;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing
peremptory against all parties to commence at the Tribunal's Chambers, 1 St. Clair
Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Wednesday, December 18,
2002 and to continue December 19, 2002, if necessary.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: November 1, 2002

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
MARIO N. PACIONE

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: August 19, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

MARIO N. PACIONE

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Mario N. Pacione, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: November 28, 2002

TO: The Registrar
Motor Vehicle Dealer Act
Ontario Motor Vehicle Industry Council
789 Don Mills Road, Suite 800
Toronto, Ontario M3C 1T5

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Mario Pacione
174 Bellamy Road North
Scarborough, ON M1J 2L5

Pursuant to subsection 5(2) of the *Motor Vehicle Dealers Act*, Mario Pacione (hereinafter referred to as “the Applicant”) and the Registrar, *Motor Vehicle Dealers Act*, (hereinafter referred to as “the Registrar”), in accordance with section 4.1 of the *Statutory Powers Procedure Act*, do hereby waive the requirements of a hearing and consent to an Order of the Licence Appeal Tribunal based upon the following Terms and Conditions:

1. The Applicant agrees, if he is charged in the future with an industry-specific offence or an offence under the Criminal Code of Canada he shall immediately notify his employer in writing and to give the Registrar a copy of this written notification.
2. The Applicant agrees not to transfer his registration as a salesperson under the *Motor Vehicle Dealers Act* to another dealer without the prior written consent of the Registrar.
3. Within one year from the date of this order, the Applicant shall have entered into an arrangement with the Minister of Finance, satisfactory to both the Applicant and the Minister of Finance, with respect to outstanding obligations of 669607 Ontario Limited O/A Carrera Fine Cars in respect of Retail Sales Tax, failing which the Registrar shall be at liberty to serve a Notice of Proposal to Revoke the Applicant’s registration.
4. The Applicant shall not be an officer, director, owner or partner in a dealership until the arrangement referred to in paragraph 3 above has been made.
5. The Applicant agrees not to be involved in the process of buying, selling or leasing motor vehicles without the benefit of registration.
6. **The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred in the past, save for those matters giving rise to this proceeding, or that may occur in the future related to his financial circumstances and his honesty and integrity.**
7. **The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past, save for those actions giving rise to this proceeding, or that may occur in the future.**
8. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, or if he is convicted under the Criminal Code or convicted under any law of an industry-specific offence, the Registrar shall be at liberty to serve a Notice of Proposal to Revoke the Applicant’s registration.

9. The Applicant will provide a copy of this order to his employer forthwith.
- 10. The Applicant hereby consents to an Order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.**
- 11. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.**
- 12. The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.**

Signed in the City of Toronto this day of November, 2002.

Mario Pacione (signature)

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Date:

Carl Compton
Registrar Motor Vehicle Dealers Act

Draft - November 15, 2002

PREHEARING

CEDAR HOLIDAYS INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
TRAVEL INDUSTRY ACT, R.S.O. 1990, CHAPTER T.17 AS
AMENDED

TO REVOKE REGISTRATION

TRIBUNAL: WILLIAM McINTOSH, Vice-Chair

APPEARANCES: JEHAD KADRI, Agent, representing the Applicant
TREVOR BRANION, Counsel, representing the Registrar, *Travel
Industry Act*

DATE OF
HEARING: November 5, 2002 Toronto

ORDER

Following attendances on November 5, 2002, at a prehearing by teleconference before the Licence Appeal Tribunal (the "Tribunal") of Jehad Kadri, representing Cedar Holidays Inc. ("Applicant"), and Trevor Branion, Counsel, representing the Registrar, *Travel Industry Act* (the "Respondent");

AND WHEREAS the Applicant volunteered to surrender his licence granted under the Act to the Registrar and to withdraw its appeal to this Tribunal.

AND WHEREAS the Registrar found such surrender and withdrawal satisfactory;

The Tribunal makes the following Order:

The Appeal from the Notice of Proposal of the Registrar dated September 14, 2002 to Revoke the Registration of the Applicant is withdrawn and the hearing of the matter is cancelled.

LICENCE APPEAL TRIBUNAL

William McIntosh, Vice-Chair

RELEASED: November 5, 2002

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF
1475141 Ontario Limited o/a Eaglebay Estates

AND IN THE MATTER OF PROPOSAL by
the Registrar, *Ontario New Home Warranties Plan Act*
TO REVOKE REGISTRATION
- Proposal dated: August 26, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

1475141 ONTARIO LIMITED O/A EAGLEBAY ESTATES
- Applicant
- and -

REGISTRAR, *ONTARIO NEW HOME WARRANTIES PLAN ACT*
- Respondent

CONSENT ORDER

Upon the application to the Tribunal by, 1475141 Ontario Limited o/a Eaglebay Estates, Applicant, and the Registrar under the *Ontario New Home Warranties Plan Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Ontario New Home Warranties Plan Act* as to the disposition of this proceeding which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: November 19, 2002

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
WHOLESALE AUTO CENTRE INC. AND AVI WAICHENBERG

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATIONS
- Proposal dated: September 4, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

WHOLESALE AUTO CENTRE INC. AND AVI WAICHENBERG
- and -

Applicants

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on December 4 and 5, 2002;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against all parties* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Tuesday, March 4, 2003 and to continue March 5, 2003, if necessary.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: November 18, 2002

PREHEARING

BFC RESIDENTIAL SERVICES

APPEAL FROM A PROPOSAL OF THE DIRECTOR
UNDER THE *CHILD AND FAMILY SERVICES ACT*

TO REFUSE TO RENEW A LICENCE

TRIBUNAL: STUART CORK, Member

APPEARANCES:

ARIF RAZA, Counsel, representing the Applicant
KATHARINE RENISON, Counsel, representing the Director under
the *Day Nurseries Act*

DATE OF

PREHEARING: October 31, 2002

Toronto

ORDER

A Pre-hearing between the parties was held on October 31, 2002 in Toronto at 1 St. Clair Avenue West, 12th Floor as set forth in the Tribunal's Notice of Pre-hearing Conference dated October 17, 2002.

The Tribunal makes the following Order:

1. The hearing dates have been set for 9:30 a.m. commencing on Monday, Tuesday, Wednesday and Friday, the 9th, 10th, 11th and 13th days of December, 2002, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.
2. It was determined that the filing dates with the Tribunal of submissions and documents to be used in the hearing by both parties would occur on or before November 28, 2002. Both parties will file three copies with the Tribunal and deliver one copy to all parties. It was confirmed that the Tribunal requires full disclosure 10 days prior to the hearing as required by Rule 6 of the Tribunal's Rules of Practice.
3. It was also confirmed at this pre hearing that should either party be calling an expert witness before the Tribunal at the hearing, the disclosure date as per the Rules of the Tribunal for expert witnesses is November 8, 2002.
4. The Respondent will present evidence and testimony from seven witnesses, and undertook to deliver a complete witness list to the Applicant by November 1, 2002. Among the witnesses for the Respondent will be the Director, program advisors,

police officers, Children's Aid Society personnel, members of the public, and possibly an expert witness specializing in behavioral and restraint matters.

Among the evidence that will be presented by the Respondent, will be the corporate records of the Ministry, Children's Aid Society, and personal observations.

5. Mr. Raza, counsel for the Applicant, indicated to the Tribunal that he had just been retained by the Applicant the day before this Pre Hearing, and that he had not had sufficient time to review the case, and to generate a list of possible witnesses for the Applicant. Mr. Raza undertook to provide the Respondent with a complete witness list on or before the disclosure date for the hearing.
6. Among the issues to be examined by the Respondent will be the criminal charges and bail terms against the owner of BFC Residential Services, Mr. Magdi Taros, the lack of support for the Applicant from Children's Aid Services, breaches of regulations and the terms of the licence by the Applicant, the Applicant's operating contrary to the health, safety, and welfare of children.
7. Among the issues to be raised by the Applicant, will be to disprove the allegations made by the Respondent, and that the Notice should not be sustained.
8. Mr. Raza agreed to provide the Respondent with a letter, on or before November 4, 2002, listing which allegations in the Notice of Intention that the Applicant can agree to, if any, and thereby establishing preliminary facts in this matter.
9. The parties recorded that there had been no resolution of any of the issues in this matter.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Member

RELEASED: November 12, 2002

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
GEORGE WILLIAM BEDELL

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATION
- Proposal dated: September 10, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

GEORGE WILLIAM BEDELL

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on December 12, 2002;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against all parties* to commence at the Holiday Inn Select, Tecumseh "A" Room, 1855 Huron Church Road, Windsor, Ontario, at 9:30 a.m., on Monday, December 2, 2002.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: November 5, 2002

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
GEORGE WILLIAM BEDELL

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATION
- Proposal dated: September 10, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

GEORGE WILLIAM BEDELL

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by George William Bedell, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: November 21, 2002

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
789 Don Mills Road, Suite 800
Toronto, Ontario M3C 1T5

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Robert C. Seaborn
111 Taggart Lake Road, P.O. Box 964
Mattawa, ON P0H 1V0

In accordance with section 4.1 of the *Statutory Powers Procedure Act* and pursuant to subsection 5(2) of the *Motor Vehicle Dealers Act*, Robert Seaborn (hereinafter referred to as "the Applicant") and the Registrar, *Motor Vehicle Dealers Act* (hereinafter referred to as "the Registrar"), do hereby waive the requirements of a hearing and consent to an Order of the Licence Appeal Tribunal based upon the following Terms and Conditions:

1. The Applicant agrees, if he is charged in the future, to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.
2. The Applicant agrees not to transfer his registration as a salesperson under the *Motor Vehicle Dealers Act* to another dealer without the prior written consent of the Registrar.
3. The Applicant shall not be an officer, director, owner or partner in a dealership.
4. The Applicant agrees to satisfy any outstanding debts not included in the bankruptcy of Robert Colin Seaborn.
5. The Applicant agrees to repay the Motor Vehicle Dealers Compensation Fund (MVDCF), within 10 days of receiving written notice from the MVDCF of any claims being paid out against his former dealership, Robert Colin Seaborn o/a Lakeshore Motors.
6. The Applicant agrees not to invite the public to deal at a place other than his employer's registered premises.
7. The Applicant agrees not to be involved in the process of buying, selling or leasing motor vehicles without the benefit of registration.
8. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.
9. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.
10. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, or if he is convicted under the Criminal Code or convicted under any law of an industry-specific offence, the Registrar is directed to and shall carry out the proposal.
11. The Applicant will provide a copy of this order to his employer forthwith.

12. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
13. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
14. The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____ this _____ day of _____ 2002.

Robert Seaborn (signature)

These Terms and Conditions are accepted by the Registrar, *Motor Vehicle Dealers Act*.

Date:

Carl Compton
Registrar

PREHEARING

**BRANDER TRUCKING LTD
SAM BISIGNAMI**

IN THE MATTER OF an application by Brander Trucking Ltd Sam Bisignami dated September 24, 2002 for a hearing before the Licence Appeal Tribunal pursuant to section 50(1) of the *Highway Traffic Act*, to consider the appeal of the Suspension and Seizure Order of the Registrar of Motor Vehicles dated September 23, 2002;

AND IN THE MATTER of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8 as amended;

AND IN THE MATTER of the Commercial Vehicle Operator's Registration CVOR certificates 080-952-466 and 093-195-199 issued to Brander Trucking Ltd. and Sam Bisignani;

AND IN THE MATTER of the Notice of Suspension and Seizure issued to Brander Trucking Ltd. and Sam Bisignani on the 4th day of July, 2002;

AND IN THE MATTER of the safety record of Brander Trucking Ltd.;

AND IN THE MATTER of unpaid fines;

TRIBUNAL: STUART CORK, Presiding Member

APPEARANCES: PATRICK MOORE, Counsel for the Respondent
SAM BISIGNAMI, President, Brander Trucking Ltd.

DATE OF
PRE-HEARING: November 5th, 2002 Toronto

ORDER

A Pre-hearing between the parties was held on November 5th, 2002, 2002 in Toronto at 1 St. Clair Avenue West, 12th Floor as set forth in the Tribunal's Notice of Pre-hearing Conference dated October 17, 2002.

The Tribunal makes the following Orders respecting the hearing:

1. The hearing dates have been set for 9:30 a.m. commencing on January 8, 9 and 10, 2002, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

2. It was determined that the filing dates with the Tribunal of submissions and documents, including any court documents relating to the unpaid fines that the Applicant wishes to rely upon, which are to be used in the hearing by both parties would occur **on or before December 27th, 2002**. Both parties will file one copy with the Tribunal and deliver one copy to all parties. It was confirmed that the Tribunal requires full disclosure 10 days prior to the hearing as required by Rule 6 of the Tribunal's Rules of Practice.
3. It was also confirmed at this pre hearing that should either party be calling an expert witness before the Tribunal at the hearing, the disclosure date as per the Rules of the Tribunal for expert witnesses is December 10, 2002.
4. The Respondent will present evidence and testimony from one witness, Carrier Safety Rating Administrator Bernadette McKenna. Ms. McKenna will provide evidence of all the Applicant's records and information, including, the Applicant's history and safety records, MTO correspondence, CVOR, analysis, audit report, wheel separation reports, interventions, overdue fine and ICON system reports. The evidence presented by the Respondent will include the last five years, with some historical material presented that dates to the mid 1990's.
5. The Applicant will present evidence and testimony from up to three witnesses. Among the witnesses anticipated, will be Leonard Mason, company maintenance manager, and Ron Spicer, company mechanic, and Sam Bisignami, company president.

The witnesses for the Applicant will present evidence of the initiatives and programs that the Applicant companies have taken to improve the safety record of the company. They will also explain how the nature of the companies business (scrap haulage) involves a high degree of wear and tear on its vehicles.

6. Among the issues to be raised by the Applicant will be that the sanction being imposed upon it is overly harsh and inappropriate. The Applicant contends that the sanction would mean the Applicant companies would be put out of business, and would be final. Other issues to be raised by the Applicant are the circumstances surrounding the accidents and the vehicle drivers, the accuracy of the CVOR, and the application of the Cancellation to all three of the Applicant companies.
7. At the time of this pre hearing the Applicant had yet to retain counsel and was contemplating the possibility. The Applicant was reminded that should he ultimately decide to be represented, it is his responsibility to make sure that his counsel is available on the dates for the hearing.
8. It was outlined at the Prehearing Conference that:

The Registrar has issued a Suspension and Seizure Order dated September 23rd, 2002, pursuant to section 47 and 47(1) of the *Highway Traffic Act*, Brander Trucking Ltd..

9. The parties present at the pre hearing recorded that there was no resolution of the issues between the parties.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

RELEASED: November 21, 2002

PREHEARING

TORONTO INSTITUTE OF TECHNOLOGY INC.

APPEAL FROM A PROPOSAL OF THE
SUPERINTENDENT UNDER THE *PRIVATE CAREER
COLLEGES ACT*

TO REFUSE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

ANCHUAN JIANG, Agent, representing Toronto Institute of
Technology Inc.

ANITA L. LYON, Counsel, representing the Superintendent,
Private Career Colleges Act

DATE OF

PRE-HEARING: November 7, 2002

Toronto

ORDER

At a prehearing before this Tribunal heard this day, Anchuan Jiang, Agent, appeared on behalf of Toronto Institute of Technology Inc. (the "Applicant") and Anita L. Lyon, Counsel, appeared on behalf of the Superintendent, *Private Career Colleges Act* (the "Respondent");

The Tribunal makes the following order respecting the hearing scheduled to commence at 9:30 a.m. on Tuesday, December 17, 2002 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto and to continue, if necessary, on December 18, 19 and 20, 2002 at the Tribunal's above address;

1. The Parties to the hearing are the Applicant Institute and the Respondent Superintendent.
2. It was agreed that the Applicant's correct legal name is Toronto Institute of Technology Inc.
3. At the prehearing, Counsel for the Superintendent served on Anchuan Jiang, Agent for the Applicant, volumes 1 through 10 of the documents the

Superintendent intends to refer to or tender as evidence at the hearing. Copies of such volumes 1 through 10 shall be filed with the Tribunal by no later than December 6, 2002. The Agent of the Applicant was also served with a four-page index of items contained in volumes 1 through 10.

4. By no later than November 15, 2002 Counsel for the Superintendent shall provide written disclosure to the Applicant at 4580 Dufferin Street, Suite 600, Toronto, and shall identify what copies of the advertisements that appear in volumes 1 and 2 referred to in paragraph 3 hereof Counsel requires as true copies of the original of such advertisements.
5. By no later than November 18, 2002 the Applicant shall deliver a response to Counsel's letter referred to in paragraph 4 above and shall identify in such response which copies of advertisements are true copies of the original advertisements.
6. By no later than November 15, 2002 Counsel for the Superintendent shall deliver a letter to the Applicant at the address in paragraph 4 above, which letter shall contain translations into the English language of all advertisements that appear in volumes 1 and 2 above and that the Superintendent intends to tender as evidence at the hearing.
7. By no later than November 18, 2002 the Applicant shall deliver a letter to the Superintendent setting forth which translations it accepts as true and accurate translations and which translations it disputes as to their truth and accuracy, together with the reasons for so disputing.
8. Without derogating from what is stated in the above paragraphs both parties shall fully comply with the disclosure requirements as set forth in Rule 6 of the Tribunal's Rules of Practice.
9. Any advertisement that either party wishes to tender in evidence at the hearing shall be accompanied by a translation of a sworn translator of such advertisement into the English language.
10. The Applicant identified the following persons who, at this stage, it proposes to call to testify at the hearing:
 - (a) Charles Wang, who will testify in corroborating the testimony of Anchuan Jiang.
 - (b) Olga Fedorenko who will testify as to, but not confined to, the courses to be offered by the Applicant.

(c) Robert Lin, advertising agent, who will testify as to advertisements that appeared in Sin Tao Daily News which related to the Applicant's business.

(d) Anchuan Jiang who will testify as to the issues raised in the Proposal and issues raised in the Applicant's letter of September 26, 2002, addressed to Helmut Zisser, Superintendent of Private Career Colleges.

11. The Superintendent's Counsel identified the following persons who at this stage, it is proposed to call to testify at the hearing:

(a) Phil Rajnauth will testify as to, but not confined to, records as contained in books of disclosure as well as the appeal process under the *Private Career Colleges Act* (the "Act").

(b) George Chong will testify regarding, but not confined to, his visit to 4580 Dufferin Street, Toronto on June 24, 2002.

(c) Mary Landshu will testify as to, but not limited to, her visit to 1220 Sheppard Avenue, Toronto on June 20, 2002.

(d) Helmut Zisser, the Superintendent under the Act.

(e) Jim Sebastian.

(f) Donald Baker.

(g) A witness from the Federal Government as to the operations of the Applicant and representations allegedly made by or on behalf of the Applicant.

(h) A further four to five persons who were associated with the Applicant and whose full names shall be disclosed to the Applicant by no later than December 6, 2002 as well as a brief description of the nature of their anticipated testimony.

12. There were no facts or evidence that were identified to the Tribunal as having been agreed upon by the parties.

13. There was no settlement of any or all of the issues.

14. The Applicant's agent, Anchuan Jiang, having informed the Tribunal at the prehearing that the Applicant intends to retain the services of Legal Counsel at the hearing of this matter was advised by the Tribunal and had

his attention drawn to the "practice direction" under Rule 15.1(1) of the Rules of Practice of the Tribunal as well as Rule 15.1(2) of those Rules.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: November 18, 2002

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
GEORGE APOSTOLIDIS

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: September 12, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

GEORGE APOSTOLIDIS

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by George Apostolidis, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: November 19, 2002

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
North York, ON, M2P 2E9

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON, M4V 1K6

FROM: George Apostolidis
630 Crimson Court
Oshawa, ON L1J 8C7

In accordance with Section 4.1 of the *Statutory Powers Procedure Act*, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereinafter the "Act") the parties to the proceeding, George Apostolidis (hereinafter referred to as "the Applicant"), and the Registrar, *Motor Vehicle Dealers Act* (hereinafter the "Registrar") waive the requirement of a hearing and hereby consent to an Order of the Licence Appeal Tribunal (hereinafter the "Consent Order") based on the following terms and conditions to their registrations as a motor vehicle salesperson:

1. The Applicant agrees that if he is criminally charged or convicted in the future, he will immediately notify his employer in writing of the charges or convictions against him and provide a copy of the notification signed by his employer to the Registrar, giving the particulars of the charges or convictions.
2. The Applicant agrees that if he is convicted under the Criminal Code of any offence committed after the date herein or convicted of any industry specific offences under any Statute in the future, his registration shall be revoked upon reasonable notice and after giving him an opportunity to be heard.
3. The Applicant agrees to provide full and accurate disclosure on any applications, documents, statements or other form of communication/information provided to the Registrar or his authorized representatives regardless of previous disclosure.
4. The Applicant acknowledges that the Registrar is relying upon the accuracy of the disclosure provided in entering into these terms and conditions.
5. The Applicant agrees that he will provide written notification from his employer forthwith, stating that the Applicant has disclosed to them the circumstances of his pending charges.
6. The Applicant agrees that his explanation of the circumstances of his pending charges, are substantially as set out in the disclosure provided to the Registrar.
7. The Applicant agrees to provide written notice, to the Registrar, of the final disposition of his pending charges for obstruct justice & breach of recognizance (X3) as soon as said disposition has been made.
8. The Applicant agrees not to transfer his registration as a motor vehicle Salesperson to another dealer without having first obtained the prior written consent of the Registrar, such consent not to be unreasonably withheld.
9. The Applicant agrees not to be involved in the process of buying or selling motor vehicles without the benefit of registration.

10. The Applicant acknowledges and understands that his registration will not be used to buy or sell motor vehicles where the Applicant knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
11. The Applicant acknowledges that his registration as a motor vehicle Salesperson will not prevent the Registrar from taking legal action, including a Provincial Offences prosecution, arising from matters that may have occurred or that may occur in the future.
12. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal after giving the applicant reasonable notice and an opportunity to be heard.
13. The Applicant will provide a copy of this order to his employer forthwith.
14. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
15. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
16. The Applicant acknowledges that he has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____, this _____ day of _____ 2002.

(Signature) George Apostolidis

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Date:

Carl Compton
Registrar
Motor Vehicle Dealers Act

DEBBIE JANE STEWART

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: NIVES MONTANO
Presiding member

APPEARANCES: LUBA NEUWIRTH
Representative for the Registrar of Motor Vehicles

DEBBIE STEWART, Applicant
unrepresented

DATE OF HEARING: November 1, 2002

DECISION RELEASED: November 8, 2002 Toronto

REASONS FOR DECISION

A hearing was held on November 1, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the

Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Debbie Stewart (the "Applicant")
Motor Vehicle:	Mercury Sable, plate ALV H023 (the "vehicle")
Date of Appeal:	October 11, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on October 15, 2002 and proceeded as electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

I own 3 vehicles –1 my mother drives as she has had knee sugery. 2nd Vehicle my daughter drive back & forth to College & work. 3rd Vehicle is mine as I just had back surgery & now just starting back to work. I have 2 jobs in which I need a vehicle to get back & forth to two

jobs. I also have 16 year old in school & involved in a number of sports. I am not to be walking long distances or riding the bus.

The following is a summary of the Applicant's affirmed testimony.

The Applicant is married and a mother of 2 children, a 19 year-old daughter who attends college in Sault Ste. Marie and a 16 year-old son who attends high schools and resides at home.

The Applicant is employed at a hospital in Sault Ste. Marie in housekeeping. She is currently working 5 days a week from 7 p.m. to 11 p.m. She returned back to work on gradual re-entry on September 9, 2002 after she underwent back surgery in April, 2002.

Mr. Stewart, the driver at the time the vehicle was impounded, is employed full time at Praxair from 6 a.m. to 6 p.m.

In her testimony, the Applicant owns 2 other vehicles. Her mother is the primary driver of a Ford Taurus and her daughter is the primary driver of a Nissan Stanza.

The following is the Applicant's testimony regarding the circumstances surrounding the impoundment. Mr. Stewart's daughter, from his first marriage, arrived in Sault Ste. Marie from Alberta at the start of October. On or about the day his daughter was to return to Alberta, Mr. Stewart received documentation from his ex-wife regarding unpaid child support which was in excess of \$95,000. Before his daughter boarded a 12:30 p.m. Westjet flight back to Alberta, Mr. Stewart wanted his daughter to see a lawyer in town to swear an affidavit regarding the aforementioned documentation. In her testimony, the Applicant was "aware he took the car" because she was working at her second job, a car clean-up shop (which job she held for only 2 weeks), and could not leave work. While Mr. Stewart was driving, he noticed that police had set up a seat belt check further up the road. He pulled over, got out of the vehicle and he and his daughter walked away until a police officer stopped them.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows (Exhibits 3 & 4):

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Randy James Stewart;

3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until March 28, 2003.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different

persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,

- (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Tribunal must determine whether it should set aside the Registrar's order to impound the vehicle on the basis that the owner of the impounded vehicle will suffer exceptional hardship.

The Applicant has appealed on the grounds of "exceptional hardship" under section 55.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the criteria the Applicant must meet to determine if in fact "exceptional hardship" will

result from the impoundment. The Applicant in this case has argued that the impoundment will result in hardship as described in section 22(2). In order for her appeal to be considered under section 22(2), she must have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulations provides the criteria for demonstrating that every reasonable option has been considered respecting an alternative vehicle.

The Tribunal's consideration of subsections 22(3)(a), (b) and (c) follows:

(a) **"no alternative to the impounded motor vehicle is available"**.

The Applicant in her testimony and in her written submissions (Exhibit 2) indicated that she owns 2 other vehicles. One vehicle is driven by her mother, who is the primary driver. The second vehicle is driven by her daughter. They each pay their own insurance.

Her mother is employed full-time at a doctor's office from 8:30 a.m. to 4:30 p.m., which is a 10 minute drive from her home. The Applicant stated in her Owner's Position (Exhibit 2), that her mother fell on March 17, 2002 wherein she hurt her knee cap. She wore a cast for 8 week and then a brace until September, 2002. Her mother has not had surgery as yet, but will be scheduling an appointment in which the doctors will be scoping her knee to determine what further steps can be taken. The Applicant could not tell the Tribunal with certainty which knee was injured.

The Applicant lives 1 ½ hours on foot from her mother's residence.

The Applicant's daughter lives on her own. She is a 10 minute drive to the Applicant's home. She is enrolled in a nursing program at the community college in Sault Ste. Marie which is accessible by public transit. She is also employed part-time at Wendy's.

The Applicant's father, his spouse and her 2 brothers also live in Sault Ste. Marie. They all own their own vehicles and are aware of the circumstances. The Applicant's father drove the Applicant to one of her physiotherapy appointments.

The Applicant testified that: (i) since the impoundment, she has walked 1 ½ hours each way to and from work; (ii) her mother has driven her to work on a few occasions (iii) she has taken public transit, but there is no service after 11 p.m.; (iv) she has not taken any taxis or rented any vehicles because she cannot afford them (v) there are no other co-workers that work the same shift as her in order to obtain a ride to work or home (vi) she has moved into her neighbourhood in July, 2001 and does not know any of her neighbours.

(b) **"the loss will be immediate, significant and lasting"**

The Applicant testified that (i); she has missed 3 work shifts not because of medical reasons or because of the vehicle's impoundment, but due to being "upset with the situation", "angry" and "mad"; (ii) she has not had nor has missed any doctor's appointments; (iii) the Applicant has attended 1 or 2 physiotherapy appointments per week wherein she should be going for 3 appointments each week; (iv) the Applicant's residence

is 911 accessible in the event of an emergency.

(c) **"the impact of loss will be upon a person ordinarily transported by the motor vehicle"**

The Applicant's son received a concussion during a football game approximately 3 weeks ago and has currently suffered a swollen ankle from falling down the stairs at school. Since the impoundment, the Applicant has made arrangements for her son to get to and from school.

After considering the above requirements, the Tribunal finds that the Applicant has alternatives to the impounded vehicle and has managed to date. The impact of the loss will only be inconvenient and immediate, but not significant and lasting. Although the Tribunal is sympathetic with the Applicant's situation, the medical conditions and financial losses pre-existed the vehicle impoundment.

Accordingly, after considering the criteria set out in section 22(3) and (4) of Regulation 340 as amended by Ontario Regulation 632/98, the Tribunal finds the Applicant has not established exceptional hardship as set out in section 50.2(3)(d) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Nives Montano, Presiding Member

RELEASED: November 8, 2002

RICHARD RITCHIE

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR
VEHICLE ISSUED BY THE REGISTRAR OF MOTOR
VEHICLES

TRIBUNAL: TERRENCE LORETTE
Presiding member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

RICHARD RITCHIE, Applicant
unrepresented

DATE OF HEARING: November 1, 2002

DECISION RELEASED: November 6, 2002 *by teleconference*

REASONS FOR DECISION

A hearing was held on November 1, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Richard Ritchie (the “Applicant”)
Motor Vehicle: 2000 Yamaha YF4, plate # TC 727 (the “vehicle”)
Date of Appeal: October 18, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence to determine that the driver's licence was not suspended as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on November 1, 2002 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

In May 2000, I was convicted of refusing to provide a breath sample. My license was suspended for 2 years as a result of this conviction. This suspension ended in May 2002. I applied to take the remedial course to get my license back. Because of the OPSEU strike in

May of 2002, I have been put on a waiting list and cannot complete the necessary requirements to get my licence back. However, since May 2002, I have not been notified that my license had been further suspended by the Registrar pursuant to s. 41.1(3) of the Highway Traffic Act. Therefore, as a result of s. 41.1(4) of the Highway Traffic Act, my licence was not suspended on July 30, 2002 and therefore the police officer had no grounds to impound my vehicle.

The Applicant testified that on July 30, 2002 he was driving his ATV (All terrain vehicle) alongside a country road near his home when he saw two other vehicles stopped on the road ahead. Thinking that it may be a friend needing assistance he crossed over the road and approached the stopped vehicles. The Applicant stated that at this point he was approached by a man who identified himself as a Police Officer and was told to get off his vehicle and wait until the officer finished what he was doing. After some thirty minutes the officer informed the Applicant that he had information that the Applicant's license had been suspended under the *Criminal Code of Canada* ("C.C.C.") for failure to provide a breath sample and that he was going to be charged with driving while disqualified and dangerous driving.

The Applicant then stated that a few days later he received a telephone call from the same police officer asking that they meet that evening in a parking lot at a local Tim Horton's donut shop. They did meet and the Applicant was told by the police officer that he had established that the Applicant was no longer disqualified under the C.C.C. but that his licensed remained suspended under the *Highway Traffic Act* of Ontario. The Applicant then stated that the Officer recommended that he appeal the impoundment of his vehicle as it was actually impounded in error.

Under cross examination by the Tribunal member, the Applicant testified that he was aware that at the time of the incident he knew that his driving license was in fact suspended, however, he was confused as to when the suspension started and when it was over and could not remember what month he was in court where he was convicted. He also stated that he had not made any recent effort to confirm his license status.

Under cross examination by the Representative for the Registrar the Applicant's testimony became more confused about the circumstances surrounding the incident leading to the impoundment of his vehicle and what was actually said by the police officer(s).

It is the view of the Tribunal that the Applicant's testimony lacked certain credibility relative to the actual events that took place on afternoon of July 30th 2002. The Applicant seemed to know that his vehicle was legally impounded because he was driving while under suspension but wanted his appeal upheld because of a technicality.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Richard Ritchie;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Fail to Provide Breath or Blood Sample under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until February 11, 2003.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(c).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. *Law.* The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

APPLICATION OF LAW TO FACTS:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the his driver's licence at the time in respect of which the order was made was not then under suspension?

The Applicant admitted in his testimony that he was aware that his license was under suspension and further stated that he had made no attempt to contact the Ministry of transportation to question when in fact his suspension was over.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Terrence Lorette, Presiding Member

RELEASED: November 6, 2002

TARGET AUTO SALES INC.

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: NIVES MONTANO, Presiding member
DONALD BENNINGER, Member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

EDWARD ZAVALKOVSKY, Agent for Applicant

DATE OF HEARING: November 8, 2002

DECISION RELEASED: November 14, 2002 Toronto

REASONS FOR DECISION

A hearing was held on November 8, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. The owner has appealed that

order. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Target Auto Sales Inc. (the "Applicant")
Motor Vehicle:	1998 Dodge Durango, plate 085 DHK (the "vehicle")
Date of Appeal:	October 21, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on November 8, 2002 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

My name is Edward Zavalkovsky. I am President of Target Auto Sales Inc. I've known Mr. G. Boulaievsky as a used car dealer for a number of years, I've sold and bought vehicles from this gentleman a lot of times. On 10.15.02 at about 4 pm he picked up my 1998 Dodge Durango (listed in this document) to show it to the potential buyer. I had no idea that Mr. Gershon Boulaievsky had his driver licence suspended at this point of

time.

Could you please review this claim and have the vehicle released back to me as soon as possible.

I've got a lot of money invested in this car (about \$20,000) and without having this car in my position (sic) I can not sell it. That makes my whole business (sic) operation very difficult due to the very limited amount that I'm operating my business (sic) with.

The Applicant is the president and owner of Target Auto Sales Inc., a wholesale used car business which usually has fifteen vehicles on the lot and by his own admission, on average, sells twenty to twenty-five vehicles per month.

With respect to the circumstances surrounding the impoundment, another dealer, the driver at the time the vehicle was impounded, whom the Applicant has known for many years, made arrangements to show the vehicle to a prospective buyer. He was driving on a 400 series highway when he was stopped by the police who thought he had a white licence plate on the front and a yellow dealer plate on the rear of the vehicle. In fact, only the dealer plate was on the vehicle. The police checked the driver's licence and found the dealer was driving while his licence was suspended. The Applicant stated he knew the dealer/driver had some previous possible problems with his licence but he did not know he was a suspended driver.

The Applicant advised the Tribunal that the impounded vehicle is valued around \$20,000.00. This amount is more than one-half his operating fund. Without the cash flow from this vehicle he is experiencing hardship but he can still carry on business without the impounded vehicle. He further stated that once the end of November arrives it is very difficult to sell vehicles of this value as customers do not buy cars before Christmas and sales are slow then.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Gershon Boulaievsky;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Fail to Provide Breath or Blood

Sample under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until August 23, 2003.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(10) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

The prescribed period referred to in subsection 55.1 is two years pursuant to Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of exceptional hardship per subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or

- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Tribunal must determine whether it should set aside the Registrar's order to impound the vehicle on the basis that the owner of the impounded vehicle will suffer exceptional hardship.

The Applicant has appealed on the grounds of "exceptional hardship" under section 55.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the criteria the Applicant must meet to determine if in fact "exceptional hardship" will result from the impoundment. The Applicant in this case has argued that the impoundment will result in hardship as described in section 22(2). In order for his appeal to be considered under section 22(2), he must have demonstrated that all of the criteria in section 22(3) have been met. Furthermore, section 22(4) of the Regulations provides the criteria for

demonstrating that every reasonable option has been considered respecting an alternative vehicle.

The Tribunal's consideration of the Applicant's evidence relating to subsections 22(3)(a), (b) and (c) follows:

(a) "no alternative to the impounded vehicle is available."

The Applicant testified that he does have other vehicles available for sale to his customers and other dealers.

(b) "the loss will be immediate, significant and lasting."

The Applicant testified that "he will continue in business and the impounded vehicle when released will be going to an auction centre for resale." The funds realized from this sale will be distributed to resolve other issues that arose as a result of the dealer/driver's previous business transactions.

(c) "the impact of the loss will be upon a person ordinarily transported by the motor vehicle."

The Applicant testified that he has a used car dealership and therefore has other vehicles available for transportation. This was not his personal vehicle but was for commercial resale purposes.

None of the claims presented by the Applicant have been substantiated with sufficient evidence. None of the losses presented by the Applicant's submissions have been proven and/or have met the criteria required by the Regulation.

After considering the above requirements, the Tribunal finds that the Applicant has an alternative to the impounded vehicle and the impact of the loss will be inconvenient and immediate, but the financial implications are not a significant equivalent to exceptional hardship and are not lasting. The Applicant has failed to meet the criteria set out in subsection 22(3) of the Act.

Accordingly, after the criteria set out in sections 22(3) and (4) of Regulation 340 as amended by Ontario Regulation 632/98, the Tribunal finds the Applicant has not established exceptional hardship as set out in section 50.2(3)(d) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle for forty-five days.

LICENCE APPEAL TRIBUNAL

Nives Montano, Presiding Member

Donald Benninger, Member

RELEASED: November 14, 2002

1340-ADLS-PULD

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding Member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF
HEARING: November 5, 2002 **London**

DECISION
RELEASED: November 7, 2002

REASONS FOR DECISION

A hearing was held on November 5, 2002, at London, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on November 5, 2002, with Reasons to follow.

THE TRIBUNAL RULED TO SET ASIDE the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated October 1, 2002, and was received by the Tribunal on October 22, 2002, together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

Prior to the commencement of the hearing, the Representative of the Ministry provided the Tribunal with original certified copies of Ministry of Transportation documents on file.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice to Registrar dated September 7, 2002 – issued by the Registrar of Motor Vehicles
- b) Exhibit # 2 Notice of Appeal Form – Received September 22, 2002-11-06
- c) Exhibit # 3 Applicant's submission's – 19 pages – includes Medical Reports, Laboratories results, Human Resources correspondence, Medical Note - received October 22, 2002.

By the Respondent:

- a) Exhibit # 4 Ministry of Transportation submissions – 13 pages – received October 31, 2002.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

- 50.1(1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
 - (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
 - (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

- 15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
 - (a) the name, telephone number and address, with the postal code, of the medical practitioner;
 - (b) the name, date of birth and address of the person who is the subject of the report;
 - (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the

subject of the report; and

- (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

The Applicant's Driver's Licence was suspended "Sept 7/2002" as per Notice of Appeal (Exhibit # 2)

Applicant's Evidence:

Page two of Notice of Appeal is blank and refers to attached medical reports.

A medical report prepared by Physician #1 dated February 11, 2002, prepared for Human Resources Development Canada, in support of an application for Disability Benefits, diagnoses the Applicant with "Dilated Cardiomyopathy Syncope NYD".

Physician #1 described the Applicant's relevant medical history as follows: "Onset of Symptoms Nov 1994: Gradual Improvement until 1999 when reversal occurred: Now stable on medication but LVEF – 15%"

In a prescription pad note, dated October 15th, 2002, Physician #2 writes: "...*was unable to give breath sample because of auto defibrillator. It has been activated several times in the past few months and often will activate with increased heart rate. He was legitimately refusing to prevent the defibrillator from going off...*"

Attached to the Notice of Appeal, the Applicant submitted several documents in support of his case.

At the hearing the Applicant testified both in examination in chief and in cross examination, that on the evening in question he had been drinking. Prior to the breath test sessions, the Applicant told and showed the officers proof of his heart condition. At the time of the breath test session, the Applicant felt his heart rate increase and became afraid that he "...*would get shocked...*". The Applicant explained: "...*I knew I was going to get it pretty soon ...you get to know after a little while, when you can feel it rise...*"

The Applicant emphasized that being in Chatham in the early morning, augmented his fears as what could happen in the event his defibrillator activated.

The Applicant confirmed that after the breathalyzer test session, he was taken to the hospital by two officers. The Applicant made the decision to go to a hotel before going home. He chose not stay in the hospital as he was told that there was no cardiologist on the premises. The Applicant is sufficiently knowledgeable about his condition and the implanted device to realize that there would be nothing a physician could do.

In his closing remarks, the Applicant stressed that he did not refuse to provide a breath sample but that he was unable to do so due a medical condition. The Applicant re-iterated his previous remarks regarding his fears of activating his defibrillator.

Respondent's Evidence:

The Respondent provided the following Documents:

1. Certified Copy of Notice to the Registrar, certified October 29th, 2002
2. Driving Record of the Applicant, certified October 28th, 2002
3. Copy of Vehicle Record Search, certified October 28th, 2002

The Applicant's driving record obtained from the Ministry of Transportation is attached to the Respondent's submissions.

The Respondent called Constable #1, a member of the Chatham-Kent Police Service, who has been a police officer since September 2001 as a witness.

Constable #1 described the events that led to the Applicant being stopped, and transported to the division for a breathalyzer test. According to Constable #1 the Applicant was cooperative at all times.

The Applicant informed Constable #1 of his heart condition, but at no time did Constable #1 observe the Applicant in any apparent physical discomfort.

After Constable #2 was through with the breathalyzer test, the Applicant was returned to the care of Constable #1, who subsequently drove the Applicant to the hospital as a precautionary measure. Constable #1 noted that the Applicant tried to ascertain whether a cardiologist was in attendance at the hospital.

Also called, as a witness by the Respondent's Representative, was Constable #2, the Breath Technician who administered the breathalyzer test. Constable #2 is employed with the Chatham-Kent Police Service, and has been a police officer since October 1994. In November 2001, Constable #2 became a qualified breath technician to operate the Intoxylzer 5000.

Constable #2 minutely described his dealings with the Applicant as well as the mechanical workings of the instrument.

According to Constable #2 the Applicant was cooperative “...*up until the testing...*”. The Applicant was given approximately 10 or 11 opportunities to provide a breath sample but failed to comply. Constable #2 determined that the Applicant was blowing air out of the side of his mouth and therefore formulated the opinion that he was refusing to provide a breath sample.

Constable #2 was aware that the Applicant had a heart condition but at no time did he observe the Applicant in physical distress.

In closing the Respondent’s Representative reminded the Tribunal that the onus is on the Applicant to substantiate the medical grounds for appeal. Ms. Beintema acknowledged that the Applicant has a medical condition. Nonetheless, Ms Beintema emphasized that neither officer, both of whom are trained observers, noticed the Applicant to be in medical distress.

The Respondent’s Representative, asserts that because the Applicant knew he was intoxicated, he had no intention of providing a breath sample. Ms. Beintema contends that Tribunal cannot make a decision based on assumption, and claims that there is very limited medical information to support the Applicant’s “...*speculation and presumption...*” that the defibrillator could become activated. Ms. Beintema quoted the last sentence of Physician #2’s report “...*He was legitimately refusing to prevent the defibrillator from going off...*”, pointing out that the report lacks detail as to exactly how the defibrillator could be triggered. Also missing from the report according to Ms Beintema is: “...*what happens when it shocks him ...what happens to the Applicant and what kind of an effect would it have on him...*” “ if the defibrillator went off.

Citing insufficient information, in conclusion, the Respondent’s Representative asked that the Tribunal uphold the Registrar’s decision.

APPLICATION OF THE LAW TO FACTS:

Although the totality of the evidence presented was considered, the preceding reflects a summary of the proceedings. Evidence introduced not directly germane to the issue was not transcribed.

An appeal was brought by the Applicant under Section 50.1 (2) (b) of the Highway Traffic Act, which prescribes:

“...person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason...”

The Applicant's state of impairment is not at issue for this Tribunal. The subject of this appeal is whether the Applicant had a medical condition that at the time could cause the Applicant to fail or not comply with the breath demand.

Based on medical reports and on the viva voce presented at the hearing, the Respondent's Representative concedes that the Applicant does have an existing medical condition. The issue as presented to the Tribunal by the Respondent is whether the Applicant's medical condition prevented him from providing an adequate breath sample.

The Respondent's Representative maintains that there were no visible observations by either officer that the Applicant was suffering from any physical distress. In most cases, the Tribunal would tend to agree that the officers on site observations are essential to the decision making process. Not in this case. The Applicant is not afflicted with lung disease or breathing difficulties where symptoms commonly associated with respiratory distress would be exhibited. The Applicant has been diagnosed with "Dilated Cardiomyopathy Syncope NYD", he has been implanted with a pacemaker-defibrillator. Unless the Applicant was in the throes of a myocardial infarction, his condition would present no visible symptoms.

The Applicant testified that as he attempted to provide a breath sample he noticed an increase in his heart rate. Having experienced the "shock" of his defibrillator being activated, the Applicant feared the rapid heartbeat would set it off again. Ms Beintema, the Respondent's Representative, contends that there is insufficient medical evidence to support the Applicant's claim that his defibrillator might be activated. Further Ms Beintema pointed out that there is no information before the Tribunal as to the exact conditions that might cause a defibrillator to activate.

The Tribunal disagrees with Ms Beintema's comment regarding the medical report. It is the Tribunal's view that Physician #2's hand written note strongly substantiates the Applicant's claim *"...was unable to give breath sample because of auto defibrillator. It has been activated several times in the past few months and often will activate with increased heart rate. He was legitimately refusing to prevent the defibrillator from going off..."*

Although the Applicant did not articulate his fear to the officers, the Tribunal accepts that the Applicant's ingrained apprehension resulting from his fear of activating the defibrillator contributed to his inability to provide a breath sample.

Based on the evidence before the Tribunal, and on a balance of probabilities, the Tribunal finds that the Applicant meets the criteria of Section 50.1 (2) (b), in that he was able to demonstrate that at the time of the breath demand, he was suffering from a medical condition which would prevent him from providing a breath sample.

DECISION:

Upon the application by The Applicant to appeal the suspension order dated September 07,

2002 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal orders the suspension **set aside**.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: November 7, 2002

PREHEARING

EASY 2000 AUTO REPAIRS AND ROQUES FERNANDES

**APPEAL FROM A NOTICE OF THE DIRECTOR OF VEHICLE
INSPECTION STANDARDS ISSUED PURSUANT TO
CLAUSES 91(3)(a) AND CLAUSE 92(4)(a) of the *HIGHWAY
TRAFFIC ACT***

**TO REFUSE EASY 2000 AUTO REPAIRS LICENCE AS A
MOTOR VEHICLE INSPECTION STATION AND ROQUES
FERNANDES'S REGISTRATION AS A MOTOR VEHICLE
INSPECTION MECHANIC**

TRIBUNAL: STUART CORK, Member

APPEARANCES: SAEED BOKHARI, Agent, representing the Applicants

PATRICK MOORE, Counsel, representing the Director of
Vehicle Inspection Standards

DATE OF
PRE-HEARING: November 13th, 2002 Toronto

ORDER

Following attendance on November 13th, 2002, at a pre-hearing before this Tribunal via teleconference, of Saeed Bokhari, Agent on behalf of Easy 2000 Auto Repairs, and Roques Fernandes (the "Applicants") and Patrick Moore, Counsel, on behalf of the Director of Vehicle Inspection Standards ("the Director");

The Tribunal makes the following Orders respecting the hearing:

1. The hearing is scheduled to commence at 9:30 a.m. on February 5th and 6th, 2003, at Gillespie Reporting Services, 130 Slater Street, Suite 200, Ottawa, Ontario.

2. It was determined that the filing dates with the Tribunal of submissions and documents to be used in the hearing by both parties would occur **on or before 5:00 p.m., January 27th, 2002.**

Both parties will file one copy with the Tribunal and deliver one copy to all parties. It was confirmed that the Tribunal requires full disclosure 10 days prior to the hearing as required by Rule 6 of the Tribunal's Rules of Practice. It was also confirmed that should either party be calling an expert witness before the Tribunal at the hearing, the disclosure date as per the Rules of the Tribunal is December 6th, 2002.

3. The Respondent will present evidence and testimony from two witnesses, Ontario Ministry of Transportation ("MTO") Inspectors: Officers Robert Riddell, and Officer Graeme Cook. Both Officers will testify about past occurrences and Ministry involvement with the Applicants, including specific instances regarding past non-compliances.
4. The Applicant will present evidence and testimony from two witnesses: Mr. Gamal Hajali, an owner of the Company and Mr. Roques Fernandes, mechanic. A third possible expert witness could also testify, and would lead evidence regarding minimum standards for the licencing of inspection stations, and analysis of enforcement.
5. It was confirmed at the Prehearing Conference that the Director has issued a Notice to Refuse the (Easy 2000 Auto Repairs) application of licence as a Motor Vehicle Inspection Station pursuant to clause 91(3)(a) of the *Highway Traffic Act* (the "Act") and Mr. Roques Fernandes's registration application as a Motor Vehicle Inspection Mechanic pursuant to clause 92(4)(a) of the *Highway Traffic Act*, with the Notice to Refuse being dated September 25th, 2002.
6. The parties present at the prehearing recorded that there was no resolution of the issues between the parties.
7. The Applicant will provide, at its own expense, a Certified Court Interpreter who has previously been accredited through the Provincial Court System, to provide translation services in the English language.
8. At the hearing of this matter, the Tribunal will be asked to review in detail a time period of approximately three years prior to the Notice to Refuse dated September 25, 2002, until the date of the Notice.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

RELEASED: November 26, 2002

MARLENE NORMA TRUDEAU

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: CHARLES SANDIFORD
Presiding member

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles

MARLENE NORMA TRUDEAU, Applicant

DATE OF HEARING: November 14, 2002 *by teleconference*

DECISION

A teleconference hearing was held on November 14, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

LICENCE APPEAL TRIBUNAL

Charles Sandiford,
Presiding Member

RELEASED: November 21, 2002

MARLENE NORMA TRUDEAU

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: CHARLES SANDIFORD
Presiding member

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles

MARLENE NORMA TRUDEAU, Applicant
unrepresented

DATE OF HEARING: November 14, 2002

DECISION RELEASED: November 21, 2002 *by teleconference*

REASONS FOR DECISION

A hearing was held on November 14, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. The owner has appealed that order. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Marlene Norma Trudeau (the "Applicant")
Motor Vehicle:	1990 Chevrolet GM4 pick-up, plate # 1359HW (the "vehicle")
Date of Appeal:	October 28, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that she as the vehicle owner exercised due diligence to determine that the driver's licence was not suspended as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on November 14, 2002 and proceeded as an electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

Licence Appeal Tribunal:

Please accept this information as my appeal to retrieve my vehicle from impoundment.

On October 6, 2002, I asked Rodney G. Trudeau if he had a driver's licence and that if he did that he be my designated driver, after he informed me that he had not been drinking any alcohol. Rodney showed me his driver's license, however, failed to inform me that his license have been suspended.

A few hours later, Rodney returned to pick me up where I was and we were pulled over by the police shortly thereafter, on our way home. It was then that I learned that Rodney's licence had been under suspension prior to that day.

In addition, I requested that the information and application for appeal be sent to me on October 9, 2002 and have just received it today October 22nd and did not have much time to prepare my case. I did not know that I needed a lawyer and would have liked to collect a support letter from on witness who was with me at the time of the impoundment order. Also the police did not give me any information other than the document enclosed and stated that they gave all information to Mr. Trudeau. Mr. Trudeau informed me that he has no other information other than what the police gave to me.

Thank you in advance for considering this information and I look forward to hearing from you. For more information you can contact me at <phone number>.

Sincerely,

Marlene Dokum - Trudeau

ATTENTION: License Appeal Tribunal

I am writing in support to the return of Marlene Dokum's vehicle from my own bad judgement. I apologize to Marlene Dokum and to all occupants in the vehicle knowing now the danger I have involved them in and that my class "G" license was suspended.

I met Marlene at my Uncles place of residence and failed to tell her that my license was suspended and showed her my license at that time. I am at fault on this matter and I hope that Marlene Dokum does not have to pay for my actions.

Once again, I apologize for my actions and hope that you will consider the return of Marlene Dokum's vehicle.

Sincerely,

Rodney G. Trudeau

During the Applicant's testimony she claimed to have seen the driver's licence of the operator of her car, Rodney Trudeau, but did not observe any expiry date or address. Although the driver and the Applicant have the same name she claimed there was no relationship. She therefore had no reason to suspect that his licence had been suspended.

The driver, Rodney Trudeau, has had six previous driving convictions. The most recent was

failure to surrender his driver's licence. His licence is currently under suspension until April 2003.

The Applicant asked Rodney Trudeau to be a designated driver that evening as she knew she was to continue drinking after she left Rodney Trudeau's uncle's place for a local bar. In view of the nephew's extensive licence problems it is difficult to understand why Rodney Trudeau's uncle would not have cautioned the Applicant in respect to her choice of a designated driver. It would seem to be a questionable decision to allow a person that you do not know to drive your car under these circumstances. The police report was dated October 7th, 2002 at 0250 Monday morning.

The Applicant, Marlene Norma Trudeau, maintained throughout her testimony that she saw the driver, Rodney G. Trudeau's driver's licence.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Rodney G. Trudeau;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Blood /Alcohol Content in Excess of .08 under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until April 3, 2003.

In response to questions addressed to the Applicant it was determined that the Applicant has purchased another vehicle to replace the impounded truck.

She stated that she had no reason to suspect that during the absence of her designated driver, Rodney G. Trudeau, he would drink nor did she believe he had been drinking when he picked her up to drive her home. This in spite of the fact Rodney G. Trudeau had a blood alcohol level in excess of 80 mgs. at 0250 Monday morning October 7, 2002, when the vehicle was pulled over by the OPP.

The Respondent noted that the driver failed to produce his driver's licence as requested by the OPP officer of record, even though the Applicant said she saw this document when she

appointed Rodney G. Trudeau her designated driver.

The Applicant, Marlene Norma Trudeau, had no idea how a driver's licence can be verified as valid and this process was explained to her by the Respondent.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(c), that due diligence was exercised.

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. Law. The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

APPLICATION OF LAW TO FACTS:

The evidence in this case suggests the Applicant, Marlene Norma Trudeau, was about to go out for an evening that would include her consumption of alcoholic beverages that might exceed the legal limit for driving an automobile. She therefore appointed a designated driver, Rodney G. Trudeau, whose licence she said she witnessed. No further verification of the validity of Rodney G. Trudeau's licence was attempted by the Applicant, Marlene Norma Trudeau. She made no inquiries of an independent party, such as the uncle, to ascertain whether the proposed driver held a valid driver's licence. Indeed, in the view of

this Tribunal, no credible evidence was provided to support the Applicant's claim that she saw the driver's licence at the residence of the driver's uncle.

Diligence that is due is dependant on the individual circumstances. In the view of this Tribunal, the Applicant did not exercise diligence at the level required in these circumstances.

The Applicant, Marlene Norma Trudeau, in this case has failed to supply evidence to support her grounds for Appeal as defined in 50.2(3)(c) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Charles Sandiford, Presiding Member

RELEASED: November 26, 2002

PREHEARING

WARREN FAMILY HOMES INC.

APPEAL FROM A NOTICE OF INTENTION OF THE DIRECTOR
UNDER THE *CHILD AND FAMILY SERVICES ACT*

TO REFUSE TO RENEW A LICENCE

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

DON PAZARATZ AND BILL MORTON, Agents, representing the
Warren Family Homes Inc.

KATHARINE RENISON, Counsel, representing the Director for the
purposes of the *Child and Family Services Act*

DATE OF

PREHEARING: November 21, 2002

Toronto

ORDER

Following attendances on November 21, 2002 at a pre-hearing before this Tribunal of Don Pazaratz and Bill Morton, Agents, appearing on behalf of Warren Family Homes Inc. (the "Applicant") and Katharine Renison, Counsel, appearing on behalf of the Director for the purposes of the *Child and Family Services Act* (The "Director");

The Tribunal makes the following order respecting the hearing scheduled to commence at 9:30 am on December 16, 2002 and to continue on December 18, 19 and 20, 2002 and thereafter, if necessary, on January 8, 9 and 10, 2003 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario;

1. The parties to the hearing are the Applicant and the Director.
2. By not later than Wednesday, November 27, 2002 the Director's Counsel shall deliver to the Applicant at 110, Dunlop Street West, Whitby, Ontario L1N 1TG nine volumes of documents which the Director proposes to refer to or tender as evidence at the hearing of this matter.
3. By not later than 5 p.m. on December 9, 2002 the Applicant shall deliver to the Director's Counsel at the Ministry of Community, Family and Children's Services, Legal Services Branch, 17th Floor, 56 Wellesley Street West, Toronto, Ontario M7A 1E9, a letter stating which allegations contained in the Director's Notice of Intention dated October 28, 2002 are admitted and conceded as true and correct

by the Applicant and which will not be necessary for the Applicant to prove at the hearing.

4. The Applicant shall by no later than December 5, 2002 make full disclosure of all documents or things that it intends to use, tender as evidence or refer to at the hearing and shall deliver by that date copies of such documents to the Director's Counsel.
5. In the event that either party intends to rely at the hearing on the evidence of an expert witness or witnesses and does not intend to rely on or refer to a written report of that expert or experts, then such party shall comply with Rule 6.4(1)(a)(b) and (c) by no later than December 2, 2002.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: November 25, 2002

HIGHWAY TRAFFIC ACT
R.S.O. 1990, Chap. H.8 as amended

IN THE MATTER of the ORDER to IMPOUND a MOTOR VEHICLE Order # 2502740 OWNED BY: Jason Goodbrand, 77 Lyndhurst Street, Brantford, Ontario, N5J 4N1 made pursuant to section 55.1 of the *Highway Traffic Act*, effective on: November 3, 2002.

AND IN THE MATTER of a requirement for a hearing respecting an appeal of the said Order to Impound, pursuant to section 50.2 of the *Highway Traffic Act*.

JASON GOODBRAND

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

CONSENT ORDER

Upon the application to the Tribunal by the Jason Goodbrand, Applicant, and by the representative for the Registrar of Motor Vehicles, for the issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22, and having reviewed the written settlement signed by the Applicant and the Registrar of Motor Vehicles as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the facts and on the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: November 8, 2002

ADE TAITLBAUM

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
MOTOR VEHICLE DEALERS ACT

TO REVOKE REGISTRATION

TRIBUNAL: CARL F. DOMBEK, Chair

APPEARANCES: SIMON ZUCKER, Counsel, representing the Applicant
A. MICHAEL ROTHE, Counsel, representing the Registrar under the
Motor Vehicle Dealers Act

DATES OF
HEARING: December 9, 2002 Toronto

ORDER

The application for an Order granting a stay of the decision of Vice-Chair Derek Israel dated November 7, 2002 is granted upon the following conditions:

1. The Applicant undertakes to commence the courses ordered by Vice-Chair Israel by January 31, 2003. The English as a second language course may be commenced at any other community college in addition to Humber College. The Applicant shall send copies of his course registration documents to OMVIC to the attention of Mary Jane South.
2. The Applicant shall continue to work for Royal Fine Cars owned by Mr. Barry Sherman. The Applicant cannot move his registration from this dealership without submitting another application for registration to the Registrar for his consideration.
3. The Applicant shall not deal directly with the public i.e. the retail consumers.
4. The Applicant shall inform the Registrar immediately of any change in his circumstances including any charges pending under Provincial or Federal legislation.
5. Any failure to abide by conditions #1 through #4 will result in the Registrar having the ability to forthwith cancel the registration of the Applicant as a motor vehicle salesperson under the Act.

6. These conditions shall be in force until such time as the Divisional Court has issued its decision on the Applicant's appeal.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek, Chair

Released: December 11, 2002

CARMEN DI PAOLA

IN THE MATTER OF THE PROPOSAL OF THE
REGISTRAR, *REAL ESTATE AND BUSINESS BROKERS ACT*

PROPOSAL DATED FEBRUARY 21, 2002

TRIBUNAL: MARJORIE HILEY
VICE-CHAIR

APPEARANCES: APPEARANCES: RICHARD HOWELL, Counsel,
representing the Applicant with KORI KIM, Counsel, and
Barbara Henke, law student
GEORGE DRAMETU, Counsel, representing the Registrar,
Real Estate and Business Brokers Act

DATE OF HEARING: JUNE 27 and 28, 2002 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

The Registrar issued a Notice of Proposal dated February 21, 2002 to revoke the registration of Carmen Di Paola as a salesperson under the Act. The Proposal outlines a lengthy chronology of events. In summation the Registrar alleged that the Applicant had a number of unsatisfied judgments against him. There were some years of negotiation between the Registrar and the Applicant regarding these judgments. Ultimately the Applicant surrendered his registration as a broker but continued to work as a salesperson under a registration with terms and conditions. There was negotiation again between the Applicant and Registrar as to the settlement of the existing judgments in accordance with the terms and conditions. The Applicant filed a Notice to make a Proposal in September 2001. The Proposal was rejected and in November 2001 the Applicant made an assignment into bankruptcy. The Applicant continued to be an undischarged bankrupt at the time of the hearing.

The Registrar wished to revoke the registration of the Applicant under section 6 of the Act for the following reasons:

1. Having regard to the Registrant's financial position, the Registrant cannot reasonably be expected to be financially responsible in the conduct of business.

2. The past conduct of the Registrant affords reasonable grounds for belief that the Registrant will not carry on business in accordance with law and with integrity and honesty.

The Applicant filed his Notice of Appeal dated March 11, 2002 requesting a hearing before the Tribunal. A prehearing was held on May 24, 2002. At that time there was agreement by the parties to a number of matters stated in the Notice of Proposal. Following that prehearing the Registrar issued a Notice of further and other particulars on June 4, 2002. In it the Registrar detailed further particulars as regards the Participative Dynamics Inc. judgment, the Nesbitt Thomas Inc. judgment also referred to as Newbitt Thomson Inc. (hereinafter Nesbitt) and judgments relating to Revenue Canada, Ministry of Finance Ontario and Worker's Compensation Board.

The hearing commenced on June 27th and continued on June 28th, 2002.

Issue:

Did the Registrar have reasonable grounds to form the conclusions in his Notice of Proposal that the Applicant failed to meet the standards as set out in section 6 of the *Real Estate and Business Brokers Act* and therefore the registration of the Applicant as a salesperson should be revoked?

Evidence:

Counsel for the Registrar stated in his opening statement that the Applicant had a number of business related judgments since 1993. He had been permitted to be registered on condition that he deal with these judgments. Then the Registrar learned of another judgment that was related to the real estate industry. After a series of meetings the Registrar and Applicant reached an understanding whereby the Applicant would renounce his broker registration and would pay off his outstanding judgments. The Applicant was then registered as a salesperson on terms and conditions. The Registrar determined that the Applicant had not met his obligations and he gave the Applicant until September, 2001 to settle his debts. This was not accomplished and the Registrar issued his Proposal in February, 2002 based on financial irresponsibility.

Counsel for the Applicant stated that the Applicant has worked in the real estate business for thirty-six years. During that time there has been one industry related complaint whereby a judgment was issued against the Applicant. Attempts to settle that judgment and an appeal of it were unsuccessful. By 1998 the Applicant and the then Registrar were in negotiations as the Applicant had a number of unsatisfied judgments as a result of the early 1990's crash of the real estate market, deficiencies in mortgage transactions and the personal guarantees of the Applicant on these transactions. The Applicant informed the Registrar of efforts to settle the PDI judgment, which was industry, related. The Applicant renounced his broker's registration and continued to be registered as a salesperson under terms and conditions. The Applicant discussed the issue of bankruptcy with the Registrar and understood that his salesperson

registration would not be affected if he went bankrupt.

The Proposal to the creditors was unsuccessful and the Applicant made an assignment into bankruptcy. The issues before the Tribunal in the opinion of Counsel for the Applicant were:

1. Should the Registrar be permitted to revoke his agreement with the Applicant?
2. If so, are the matters stated in the Proposal and the subsequent bankruptcy grounds for revocation of the salesperson registration of the Applicant?

Testimony of Yvonne Nandalall:

Ms Nandalall has been a registration officer with the Real Estate Council of Ontario (RECO) since November, 1997. Prior to that time she had worked in a similar position with the government for over ten years. It is her responsibility to review all the complex applications to see if they are in compliance with the requirements of the Act.

There were a number of judgments against the Applicant, which totaled \$7,611,801.56. Of these the important ones were the PDI judgment as it was real estate industry related and the Nesbitt judgment as the Registrar had not known of these judgments. The Registrar had asked for particulars on these judgments. The Applicant provided some additional information with his application for registration in July, 1997. It was not until October, 1997 that the Registrar learned of the PDI judgment, which was related to a real estate deal of the Applicant. The Registrar had known of a complaint by counsel for PDI back in early 1993.

Ms Nandalall followed up with letters to all creditors of the Applicant in order to learn of the status of the judgments. There were a series of meetings between the Registrar and the Applicant. The Applicant had stated to the Registrar in the May 7, 1998 meeting that he hoped to have satisfied all judgments within two to three months. A further meeting was held on August 18, 1998. Then on October 2, 1998 there was another meeting at which time a draft of the terms and conditions was discussed. Then at the December 9, 1998 meeting the terms and conditions document was revised. Ms Nandalall recalls Mr. Di Paola stating that his lawyer felt he should go bankrupt but he wanted to satisfy his creditors. The last meeting was held on February 28, 2001. At that meeting the Registrar wanted confirmation that the Applicant would satisfy the PDI and Nesbitt judgments. But the Registrar never received any confirmation.

Ms Nandalall stated that it is the policy of the office not to give advice to applicants on whether or not they should go bankrupt or what would happen to their registration if they were to go bankrupt. The Registrar has to look at each situation and see how it affects the public interest.

In Ms Nandalall's opinion she did not think Mr. Di Paolo was taking the registration process seriously. He knew since 1997 that administrative action could happen due to the unsatisfied judgments yet he made no progress with satisfying those judgments. He would ask for extensions of deadlines at the last minute or give his responses to inquiries at the last minute.

Testimony of Allen Taylor Johnston:

Mr. Johnston is the Registrar, *Real Estate and Business Brokers Act*. He has held that position since January, 2002. Prior to that time he has held a number of senior positions within the industry.

Mr. Johnston stated that he issued the Notice of Proposal on the basis of lack of financial responsibility of the Applicant and that the Applicant would not act in accordance with law, with integrity and honesty.

Regarding the issue of financial responsibility Mr. Johnston stated that upon his review of the documents he noted that there were a number of judgments issued over a large span of years. This fact caused him concern. Rather than these judgments being satisfied the amounts in question appeared to increase over time. Though he thought all of the judgments were of importance he did place a little more importance on those that deal with consumers and real estate transactions.

Mr. Johnston stated that he was concerned about the insufficient disclosure of the judgments. Over time there appeared to accumulate more judgments. He felt that going bankrupt is an important factor. In this case he had some reservations about the desire of the Applicant to meet his financial obligations as a bankrupt when one reviewed the particulars of the Proposal to the creditors. Mr. Johnston had reviewed the draft Proposal to Revoke Registration that had been initiated by the former Registrar and he agreed with its content.

Regarding the issue of honesty and integrity Mr. Johnston felt it was important that applicants answer the questions on the application form honestly. In this case Mr. Johnston felt that the Applicant either failed to state clearly that there were outstanding judgments against him or failed to state all of those judgments. Mr. Johnston felt that the former Registrar had been sympathetic to the Applicant initially as it was hoped that the Applicant would deal with the outstanding judgments in a satisfactory manner. When that did not happen terms and conditions were imposed. Then there was the demand that the Applicant use his best efforts to deal with these outstanding judgments. Finally there was the issuance of the Proposal.

Mr. Johnston stated that there is a higher standard applied to real estate brokers as they are dealing with consumer trust assets. But the consumer also puts a high degree of trust in the real estate salesperson. The deposit cheque is given to the salesperson who then provides it to the real estate company.

In this matter Mr. Johnston was concerned about the PDI judgment as it was real estate industry related. As well he was concerned that the Applicant was indicating that there had been a settlement of the Nesbitt judgment but there had been no payments or any agreement to settle this judgment. Finally Mr. Johnston was concerned about the debts owing to the Federal Government for source deductions and GST payments. The lack of consumer complaints was a positive indication to the Applicant in this case.

Mr. Johnson was also impressed by the reference letters for the Applicant, many of which are updates of the 1998 reference letters.

Regarding terms and conditions Mr. Johnston stated that the Applicant was under such conditions on two occasions. Despite being required to use his best efforts to settle judgments he failed to meet the time lines. Then he went into bankruptcy. That in itself is not an absolute bar.

Under cross-examination Mr. Johnston stated that he formed his conclusions after reviewing the long list of creditors. He did not speak to the Trustee in Bankruptcy. He was concerned about the consumers after reviewing the contents of his file. Mr. Johnston stated that he formed his opinion based on the materials before him. He had concerns about the reasonableness of the Proposal before the creditors. Mr. Johnston was satisfied that the Applicant had been given a number of opportunities to satisfy existing judgments.

Testimony of Jerrald Gaertner:

Mr. Gaertner is a licensed Trustee in Bankruptcy. He has the carriage of Mr. Di Paola's bankruptcy proceeding. He evaluated the past financial history of Mr. Di Paola and his ability to pay his creditors. He thought that the Proposal submitted to the creditors was fair and reasonable and in good faith. Mr. Porteous disagreed with the Proposal. He was elected as the sole inspector and ordered an investigation. Mr. Gaertner contacted the major creditors who disagreed with the position of Mr. Porteous. The results of his investigation were negative. He had investigated the disposition of certain commercial property and the transfer of various racehorses.

Under cross-examination Mr. Gaertner stated that the large creditors wanted to write off the debts. Much of the indebtedness of Mr. Di Paola was from the late 1980's into the early 1990's. Mr. Gaertner did not feel the cost justified any further examination of the financial position of Mr. Di Paola.

Testimony of Archibald Porteous:

Mr. Porteous testified that he got judgment against Mr. Di Paola and the appeal by Mr. Di Paola was dismissed. He recovered approximately eighty four hundred dollars from the bond forfeiture. Mr. Porteous testified that he handled the case in court personally and then hired a lawyer to collect on the judgment. When his lawyer did a judgment debtor examination Mr. Di Paola refused to answer questions. His second lawyer entered into negotiations with Mr. Di Paola. There was some confusion if the offer by Mr. Di Paola to settle was ten thousand over five years or twenty five thousand over two years. The actual debt in 2000 was \$455,000.00 inclusive of interest.

When the debt was not paid Mr. Porteous appealed to government authorities and put pressure on RECO and the Ministry. It was only during the bankruptcy proceedings that Mr. Porteous found out about the extent of the other debts owed by Mr. Di Paola.

Mr. Porteous was suspicious of the Notice of Proposal as the wife of Mr. Di Paola is a broker of the company and operated out of the same building.

He had invested in two units in the Woodbine Business Centre. When he did not close Mr. Di Paola sued him. Mr. Porteous had counter sued and was successful.

Under cross-examination Mr. Porteous stated that during the course of litigation he has used four lawyers. He would only accept the amount of the judgment (that being about \$320,000,00) and would forego interest but Mr. Di Paola was not receptive to that offer. Despite his suspicions about Mrs. Di Paola 's interest in the building Mr. Porteous has not searched title.

Testimony of Tom Wright:

Mr. Wright has been the President of RECO since January, 2002. Prior to that time he was the Registrar of REBBA from November, 1997 to January, 2002. He had been the Information and Privacy Commissioner for the Province of Ontario from 1991 to 1997.

Mr. Wright explained that there were a series of outstanding debts and various executions, which totaled over seven million dollars. As well as a considerable length of time during which, Mr. Di Paola had these outstanding debts. There has been a judgment, which related to trading in real estate. These were all concerns of Mr. Wright.

Mr. Wright recited the history of negotiations between Mr. Di Paola and the Registrar's office. In the spring of 1998 he had a meeting with Mr. Di Paola to get an idea of the status of the outstanding judgments. In October, 1998 there was a further meeting to discuss terms and conditions. A further meeting on these terms and conditions occurred in December, 1998.

Mr. Wright stated that the purpose of the terms and conditions was to address the outstanding judgments. He wanted measures to protect the public. Following these meetings there was the forfeiture of the bonds of the company and Mr. Di Paola. The proceeds of the bonds forfeiture was applied to the PDI judgment.

Mr. Wright recalls the Applicant asking for time to resolve this PDI judgment. A meeting was held in February, 2001 to get an update on this situation. At that time Mr. Wright stated Mr. Di Paola was given a time frame of September, 2001 to resolve the matter or there could be administrative action. He recalled that Mr. Di Paola had mentioned bankruptcy as an option at several of the meetings.

Mr. Wright testified that in each case of bankruptcy the merits need to be reviewed. The outstanding debts are considered particularly any relating to real estate consumers.

In Mr. Wright's opinion there was no progress by Mr. Di Paola from 1993 to 1997. Though Mr. Di Paola did make some efforts regarding the PDI judgment there was difficulties in obtaining specifics. Two sets of terms and conditions were necessary to monitor the situation. Mr. Wright stated that he must balance the protection of the public against the interests of the

registrant.

Mr. Wright found there were a number of factors that influenced his decision to issue the Notice of Proposal to revoke the registration of Mr. Di Paola. Firstly he found out the extent of the indebtedness of Mr. Di Paola once the Notice of Proposal was issued. Instead of seven million Mr. Di Paola owed upwards of seventeen million dollars to his creditors. Secondly there had been a substantial length of time of the judgments being unpaid, from five to seven years. Thirdly he considered the nature of the interaction of Mr. Di Paola with his office. There had been two sets of terms and conditions. In the second set of terms and conditions Mr. Di Paola was to use his best efforts to deal with his outstanding obligations. Mr. Wright expected Mr. Di Paola to deal with his office in good faith. When he did not see any best efforts to deal with the indebtedness he then issued the Notice of Proposal. Fourthly it is quite unusual to have the two bonds forfeited. Fifthly there was a real estate related judgment.

Mr. Wright stated that he considered that Mr. Di Paola has been a long time registrant and that he had numerous letters of reference. But he had to protect consumers. Salespersons do get deposit cheques from consumers. Financial responsibility is equally important as the way they interact with the public.

Under cross-examination Mr. Wright agreed that normally cheques are not made out in the name of the salesperson. He was aware that the judge in the PDI matter found Mr. Di Paola guilty of a technical breach. He agreed that he had not asked for a personal financial statement. He did not know why Mr. Di Paola and his lawyer had the impression that if Mr. Di Paola went bankrupt it would not affect his registration as a salesperson.

Mr. Wright explained that the letter from his office dated March, 2001 shows what are the expectations for administrative action and that there existed the option to take away his sales registration. Mr. Wright stated that his decision was based on the failure of Mr. Di Paola to satisfy the outstanding judgments. He did not contact the Trustee in Bankruptcy to obtain information on the indebtedness of Mr. Di Paola. He had no further meeting with Mr. Di Paola after September, 2001. Mr. Wright stated that the bankruptcy caused him to re evaluate the situation.

Testimony of Carmen Di Paola:

Mr. Di Paola testified that he is fifty-eight years of age and has been working in the real estate industry since 1966. Between 1975 and 1999 he worked at his company Carmen Di Paola Real Estate Inc. The registration on that brokerage was terminated in 1999. He stated that Mr. Porteous is the only complaint against him in his real estate career.

Mr. Di Paola stated that in the Fall of 1989 he borrowed three million dollars against his family home. He also borrowed five million dollars on properties that he owned. This money went towards maintaining the commitments he had previously made. But the recession lasted longer than he anticipated and the buildings were sold by power of sale after the mortgage companies obtained judgments against them. Mr. Di Paola had signed on these properties as

a guarantor. For instance Nesbitt was a half partner in the development of a 25-acre property into a plaza. But it was not completed and the five million in equity became a five million dollar mortgage. There had been three principals on that deal. One of them died. The second made a settlement by paying out \$250,000.00 on the 5 million dollar mortgage. Mr. Di Paola stated that he was also offered that deal but could not find the monies to make that commitment. He lost his farm as it had 2.3 million mortgage on it. Manufacturers Life sold it for \$620,000.00. The Royal Trust got an execution against a mortgaged property after the tenant defaulted. Mr. Di Paola owed \$250,000.00 on his personal assignment.

Mr. Di Paola stated that he owed Revenue Canada \$600,000.00. He made \$400,000.00 in 1988/89. The remainder was interest owing on the principal. It was written off as a fairness issue.

Regarding the Porteous matter, it went to judgment in 1993. Mr. Di Paola took it to the Ontario Court of Appeal but lost the appeal. There were settlement negotiations and Mr. Di Paola went to a judgment debtor examination. Mr. Di Paola made a settlement offer of \$20,000.00, which was not accepted by Mr. Porteous. Then Mr. Porteous stated he wanted the full principal amount but would waive interest. Mr. Di Paola did not have the funds to do that. Finally Mr. Di Paola made an offer of \$50,000.00 over five years. This was at a time when the Registrar was pushing that he settle this outstanding judgment. But Mr. Porteous refused that offer.

Mr. Di Paola stated he had a number of meetings with the Registrar. In May, 1998 he had sold some properties and took care of some of the judgments. In August, 1998 they were concerned with the draft terms and conditions. Then in the October, 1998 meeting he and the Registrar again discussed the terms and conditions and the need for a settlement with PDI. There had been ongoing discussions as to settlement of the outstanding judgments. Mr. Di Paola did mention how he did not want to go into bankruptcy. He wanted to continue to be a real estate salesperson so he could support his family.

Mr. Di Paola had a further meeting with the Registrar in December, 1998. Mr. Di Paola told the Registrar how humiliating it would be to go into bankruptcy. Then in February, 2001 Mr. Di Paola asked the Registrar what would happen to his real estate registration if he did go bankrupt. He understood that the Registrar wanted him to try to settle and then go for a Notice of Proposal. But if he did go bankrupt despite these efforts then Mr. Di Paola understood that the Registrar would permit him to keep his registration.

Under cross-examination Mr. Di Paola stated that he is registered with CDP Real Estate and does mainly sales and gives some management advice. In the last four months he has concluded a number of leases and one conditional sales agreement. Mr. Di Paola thought that the wording in the terms and conditions, particularly clause 8, pertained to any new matters that could lead the Registrar to revoke the registration. He thought that the termination of his registration as a real estate broker was his punishment for the Porteous judgment. He thought the impetus of the second set of terms and conditions was for him to settle the Porteous judgment. He did make his best efforts but could not make a deal with Mr. Porteous.

Testimony of Joseph Virgilio:

Mr. Virgilio has been a barrister and solicitor for twenty-six years. He has a practice in real estate development, corporate and commercial law. He is the councillor for ward 3 in Unionville. He attended the October, 1998 meeting with Mr. Di Paola and Mr. Wright. The issue was Mr. Di Paola's real estate broker's registration. Mr. Wright wanted that registration terminated and Mr. Di Paola wanted to keep it. The Registrar was concerned with the Porteous judgment. It was agreed that Mr. Di Paola would resign his real estate broker's registration but would keep his salesperson registration. The main issue then was allowing Mr. Di Paola to work at his wife's real estate brokerage. There were further meetings to finalize the terms and conditions.

Mr. Virgilio did not remember the Registrar's exact answer to his question about the significance of Mr. Di Paola going bankrupt. He did feel there was no problem with it.

Testimony of Character Witnesses:

Mr. Mario Giorgio is a businessman who has known Mr. Di Paola since 1979. He has done business with Mr. Di Paola and as volunteered with Mr. Di Paola in such organizations as the United Way and Doctor's Hospital. He has found Mr. Di Paola to be honest and have integrity.

Mr. Brian McFarlane is the president and CEO of Kensington Health Centre. He was affiliated with Doctor's Hospital for thirty years. He has known Mr. Di Paola for eleven years in doing fundraising events for the Hospital. He has done business dealings with Mr. Di Paola. He has found Mr. Di Paola to be an honest and trustworthy person.

Dr. Abraham Liebermass has had a personal and business relationship with Mr. Di Paola for thirty-five years. He wrote a reference letter on behalf of Mr. Di Paola.

Frank D'Andrea is a barrister and solicitor. He has known Mr. Di Paola for six years. He knows Mr. Di Paola from their charitable work together with the Board of Governors of Holy Trinity School. He has found Mr. Di Paola to be a person with honesty and integrity.

Paul Durigon is the president of Perlane Construction. He has known Mr. Di Paola for fourteen years. He knows Mr. Di Paola both socially and from a business perspective. They own property together. He has found Mr. Di Paola to be a straightforward person.

Richard Crispi is the president of Robben Industries. Mr. Di Paola has been his real estate broker. As well they have worked together on many charitable causes. He has found him to be professional in his conduct and knowledgeable about real estate.

Closing Statements:

The Registrar

In his closing statement Counsel for the Registrar relied upon a number of cases:

Brenner v Registrar of Motor Vehicle Dealers and Salesmen (1983) O.J. No.1017 (Ont. Div.Ct) states the test to be used by the Tribunal in determining whether the proposal by the Registrar should have been carried out. Mr. Justice Southey states "The effect of s.7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty."

669607 Ontario Ltd. (c.o.b Carrera Fine Cars) (Re) (1998) O.C.R.A.T.D. 45 states that the inactivity of the applicant to repay his debts "goes directly to the issues of honesty, integrity and in accordance with the law".

Auciello (Re) (1999) O.C.R.A.T.D. no. 56 states that the Tribunal attached significance to the fact that the applicant had not engaged in any meaningful discussions with the creditors to look at future repayment plans.

Winston W. LaRose v Registrar of Real Estate and Business Brokers (1992) C.R.A.T. 590 states that the applicant faces temptation if he has access to trust funds when he has little expectation of repaying his judgments.

Twin Towers Realty Ltd. (Re) (1997) O.C.R.A.T.D. no 91 states that the public should be protected at the expense of the applicant particularly if there are any issues as to the handling of trust monies.

Paul Stephen Kash v Registrar of Real Estate and Business Brokers (1990) CRAT vol. 21, p.253 deals with the impossibility of the applicant to satisfy his creditors and the need to protect the public.

Melnyk (Re) (1997) O.C.R.A.T.D. no 15 deals with the impact of the applicant acting in bad faith with the Registrar. The applicant had bad debts since the 1991 recession and she continued to state she could pay off these debts while not providing the Registrar with information on her current income.

Vogelsberg (Re) (1994) O.C.R.A.T.D. no. 135 deals with an applicant who was unwilling and unable to make significant efforts to pay off his debts.

Josef Reznicek v Registrar of Motor Vehicle Dealers and Salesmen (1990) CRAT vol. 20 p. 65 deals with the applicant having outstanding judgments.

Registrar v Griesse (1993) CRAT vol.25 p.765 deals with the Tribunal needing to consider the cumulative effect of the misconduct of the applicant

Gilford Garage Service Limited and Theodore Ambury v Registrar of Motor Vehicle Dealers

and Salesmen (1982) CRAT vol. 11 p.52 deals with the importance of full disclosure being given to the Registrar

Chopra v Registrar of Real Estate and Business Brokers (1993) CRAT vol. 25 p. 514 stresses the importance of non disclosure and its weight upon the assessment of the relevant past conduct.

Ontario (Registrar of Real Estate and Business Brokers) v Faccenda (Ont. Div. Ct.) (1994) O.J. no. 954 states that all past conduct is potentially relevant

Evaniuk v Registrar of Real Estate and Business Brokers Act April 24/25, 2001 states that the conduct of the applicant in relation to civil judgments is important.

Counsel for the Applicant also cited a number of decisions.

Re Jervis (c.o.b Dave's Car and Truck Sales and Service) (1999) O.C.R.A.T.D. no. 285 stresses the need for the Registrar to review all of the past conduct of the applicant in making his decision on registration.

4-x4 Headquarters Ltd. (re) (2000) O.L.A.T.D. no. 149 cites the Re Jervis case

Re Coates et. Al and Registrar of Motor Vehicle Dealers and Salesmen (1988) 65 O.R. (2d) 526 (Ont. Div. Ct.) states at page 7 " In revoking a registration the tribunal is interfering with a right to make a living that has been equated to a property right: see Evans, Janisch, Mullan and Risk, Administrative Law, 2d ed. (Toronto, Emond-Montgomery Publications, 1984), at p. 80. While the grant or refusal of a licence may be regulated as a matter of privilege, rather than right, the revocation of an existing licence has always been regarded as an interference with a right, not a privilege."

At pg 9 the court states "This message is clear and has been consistently adopted by this court. Nothing short of clear and convincing proof based upon cogent evidence will justify an administrative tribunal in revoking a licence to practice medicine or to gain a livelihood in business."

Hunt (c.o.b. Garys) (re) (2001) O.L.A.T.D. no. 450 finds that the applicant's failure to answer a question in the application form correctly is not the basis to refuse registration when the applicant has been registered under the Act for 24 years with no major problems.

Re Faccenda (1994) O.C.R.A.T.D. no. 139 deals with the proposition that the Tribunal needs to look at the totality of the past conduct in light of more current circumstances.

Re Boboros (2000) O.L.A.T.D. no. 133 deals with the Registrar considering all conduct of the applicant including his dealings with the Registrar's office

Legislation:

The relevant legislation is the *Real Estate and Business Brokers Act*.

Section 6 (1) an applicant is entitled to registration or renewal of registration by the Registrar except where,

- (a) having regard to the applicant's financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
- (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty;...

- (2) A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant, imposed by the Tribunal or prescribed by the regulations.

Section 9 (4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

- (5) The Tribunal may attach such terms and conditions to its order or to the registration as it considers proper to give effect to the purposes of this Act.

Analysis:

This is a complex situation, which has been in progress for over ten years. Mr. Di Paola ran into financial difficulties when the recession of the early 1990's continued for a number of years. He was guarantor on a number of buildings that were sold by power of sale. Ultimately he was left owing many millions of dollars. There was one deal in which he sued Mr. Porteous. Mr. Porteous counter sued and Mr. Di Paola was ultimately found responsible on a technical breach to Mr. Porteous and a judgment was issued which was upheld on appeal.

During this time frame the Tribunal understands that Mr. Di Paola was in negotiation with the Registrar's office. The Registrar had known of the complaint of Mr. Porteous since 1993 though it learnt of the judgment only after it was upheld on appeal. For a period of time Mr. DiPaolo kept both his broker and salesperson registration. After a series of meetings in 1998 it was agreed that Mr. DiPaolo would resign his broker's registration. Mr. DiPaolo had continued to work as a salesperson and was registered with his wife's real estate broker's company. In the fall of 2001 a Proposal was made by his Trustee to his creditors. It was not accepted and Mr. DiPaolo went into bankruptcy. He was an undischarged bankrupt as of the date of his hearing in late June, 2002.

The Registrar now wishes to revoke the salesperson licence of Mr. DiPaolo on the grounds that he failed to fully disclose his financial position and he is not financially responsible, lacks

integrity and honesty and will not carry on business in accordance with the law. The Applicant states that the Registrar misled him as to the consequences of going into bankruptcy and the Registrar should be stopped from revoking the salesperson registration. The Applicant states that there is a higher proof required for the revoking of registration.

The Tribunal is not convinced that the actions of Mr. DiPaolo are such that he has breached the standard as set out in section 6 of the *Real Estate and Business Brokers Act*. The Registrar has known that Mr. DiPaolo suffered serious financial losses due to the early 1990's recession. Whether the losses amount to seven million or seventeen million is of no significance. Either figure is an indication that Mr. DiPaolo was and continues to be in an extremely poor financial position. It would have been wise in hindsight if Mr. DiPaolo had recognized the futility of his financial position at an earlier time. Mr. DiPaolo did manage to deal with some of his debts such as those owed to Revenue Canada. He has testified and his testimony is collaborated by his creditor, Mr. Porteous, that there had been negotiations to settle the judgment that issued from the lawsuit, particularly after it was upheld on appeal. Both Mr. Porteous and Mr. DiPaolo agreed that despite negotiations no settlement could be realized as Mr. Porteous wanted the principal on the debt and Mr. DiPaolo did not have sufficient financial resources to make such a large repayment.

Ms Nandalall, registration officer, testified that the Registrar's office knew of the client, Mr. Porteous' complaint since 1993. They did not know of the judgment until the fall of 1997. That matter had been under appeal and it had taken some years before the appeal was refused. The Registrar's office knew of a number of the judgments, which spanned a number of years. The Registrar did not know the full extent of the indebtedness until he received information relating to the Proposal and ultimately the application for bankruptcy. But Mr. Johnston did testify that he did not seek any further information from the Trustee. Mr. Wright testified that he did not ask for a personal financial statement though he did allow the Applicant to continue to be registered under terms and conditions for a number of years. The Tribunal agrees with the comment made by Ms Nandalall that she did not think Mr. DiPaolo was taking the registration process seriously. Mr. DiPaolo should have listened to the advice of his lawyer back in 1998 as to the need to go into bankruptcy. He was deluding himself by thinking he could manage to repay debts of such a magnitude. But the Tribunal does not think Mr. DiPaolo willfully misled the Registrar. He tried to negotiate for some period of time with Mr. Porteous. He sold some properties and repaid some of the debts. Finally he sought the assistance of a professional Trustee and tried to work out a Proposal. It could be that the Registrar's Office was caught off guard by the magnitude of the debts as stated in the Proposal and bankruptcy proceedings but the Registrar's office was not proactive to fully investigate the finances of the Applicant prior to that time.

The Registrar's office knew since the fall of 1997 that there was a client judgment. There was pressure put on Mr. DiPaolo to relinquish his broker's registration. When that occurred the Registrar's office agreed to terms and conditions, which remained in place for several years. There was little followup on the terms and conditions until early in 2001 when pressure was put on Mr. DiPaolo to settle the PDI judgment. The Tribunal finds it significant that a Proposal did not issue until after the commencement of the bankruptcy by Mr. DiPaolo. Indeed Mr. Wright

testified that the bankruptcy made him re-evaluate the position of the Registrar towards the continuing registration of the Applicant as a salesperson. While it would have been prudent of Mr. DiPaolo to have kept the Registrar's office aware of the lack of progress with his negotiations for settlement with Mr. Porteous the Tribunal cannot find that his actions were in violation of the terms and conditions by which he was to use his best efforts to deal with outstanding judgments. The Tribunal does not find that the act of bankruptcy by itself is sufficient for the revocation of an existing registration. All of the circumstances, both past and present including the circumstances, which led to the bankruptcy, must be considered and weighed prior to issuing a Notice of Proposal.

The Tribunal attaches great significance to the history of the Applicant in the real estate industry and the support of his local community leaders, many of whom chose to testify personally on his behalf. This is an Applicant who has been a salesperson and then a real estate broker for thirty-six years. There is one client judgment, PDI, during that time frame. It was not contested that that judgment was based on technical reasons. Efforts were made to settle but with no success. It was evident that Mr. Porteous has been rigorous in his pursuit of Mr. DiPaolo since the failure of his investment in the Woodbine Business Centre. Mr. Porteous has displayed overzealous suspicions of the current situation of Mr. DiPaolo, though he has taken no reasonable steps to validate his suspicions. He remains active in the bankruptcy proceedings of Mr. DiPaolo. It is evident that he would not be prepared to engage in any realistic settlement proposals. This factor should have been of some significance to both Mr. Johnston and Mr. Wright when assessing what weight to be given to the PDI judgment.

But Mr. DiPaolo must share some blame for this situation. He was not realistic in assessing his ability to repay such large debts. He should have kept the Registrar's office fully apprised of the futility of his quest for settlement with Mr. Porteous. He should have insisted on further meetings with the Registrar's office after acceding to the professional advice of his Trustee in Bankruptcy. The Tribunal attached significance to the testimony of Mr. Gaertner. He testified that he felt the Proposal to the creditors was fair and reasonable and in good faith. Where his opinion clashed with that of Mr. Johnston on the issue of the Proposal to the creditors the Tribunal has accepted the opinion of Mr. Gaertner.

Mr. DiPaolo allowed himself to be lulled into a false sense of security about the reaction of the Registrar to the issue of going into bankruptcy. The Tribunal accepts the testimony of both Mr. Wright and Ms Nandalall that it is the policy of the office not to give advice to applicants on whether or not to go into bankruptcy and on how that would affect their registration. Even his lawyer Mr. Virgilio did not remember the exact response of the Registrar to that issue. While Mr. Virgilio felt there was no problem it is not evident on what basis he arrived at that conclusion. Mr. DiPaolo convinced himself that by relinquishing his broker's registration he had faced his punishment. Those who wish to be employed in a regulated industry need to understand that the Registrar has a duty to be alert to the protection of the consumer. There needs to be a balance between the right to earn a livelihood and the need to protect the public.

I have reviewed and considered all of the cases mentioned by counsel for the parties and I find that the Coates case, a decision of the Ontario Divisional Court applies in this situation. It

states that it takes clear and convincing proof based upon cogent evidence to revoke an existing registration. The Tribunal does not find that such is the case here. Nor does the Tribunal find that there is a need for terms and conditions. There is no evidence before the Tribunal that Mr. DiPaolo has abused trust funds. Nor is there evidence that the Applicant would not carry on business in accordance with law and integrity and honesty.

Now that he has filed for bankruptcy the Applicant is under the supervision of his Trustee for Bankruptcy for some period of time. His major creditors and the Trustee differ from the views of Mr. Porteous and saw no need for any further investigation of his financial affairs. There is no evidence that his conduct as a salesperson with CDP is of concern to the Registrar. Terms and conditions would serve no meaningful purpose in these circumstances.

Order:

Accordingly, pursuant to the authority vested in it by section 9(4) of the *Real Estate and Business Brokers Act* the Tribunal directs the Registrar not to carry out his Proposal.

LICENCE APPEAL TRIBUNAL

Marjorie Hiley
Vice Chair

Released: December 20, 2002.

LOU AND ROSE CAVALERI

IN THE MATTER OF THE DECISION
OF THE ONTARIO NEW HOME WARRANTY PROGRAM

DECISION DATED MARCH 19, 2002

TRIBUNAL: MARJORIE HILEY
VICE-CHAIR

APPEARANCES: LOU and ROSE CAVALERI, Applicants
KAREN JONES, Counsel, representing the Ontario New
Home Warranty Program
LOUIA GREGORIS, Agent, representing the Added Party,
Baycliffe Homes Inc.

DATE OF HEARING: JULY 25 & 26, 2002 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

The Ontario New Home Warranty Program ("The Program") had by its letter of March 19, 2002 dismissed the Applicants' claim for compensation based on major structural defect. The Program stated that water penetration is excluded from the definition of major structural defect. The limitation period for building code violations has expired. The issue of mold is excluded under section 13 (2)(e) of the Ontario New Home Warranties Plan Act, ("the Act") and the definition of major structural repair in the Act excludes dampness not arising from a failure of a load-bearing portion of the building.

The Applicants filed a Notice of Appeal dated March 27, 2002. In it they allege that their basement cannot be used for recreational purposes; that water is seeping up through the grout in the tiles on the basement floor; and that mold growth is present in the basement and presents a serious health hazard to the use of the basement.

There was no prehearing. The hearing proceeded on July 25, 2002. At that time the Applicants stated that their expert could not attend on July 25, 2002. The Tribunal permitted the testimony of this witness to be heard out of order on July 26, 2002.

The Program brought a motion at the commencement of the hearing on July 25, 2002 to permit the filing of the expert report of Mr. Paul Duffy. This report was outside of the twenty-day time

period as stated in the Rules of Procedure of the Tribunal. The Applicants objected to the filing of this report. The Tribunal heard argument from both parties on this matter. As well there was filed the Notice of Motion, Affidavit in support of motion and the response by the Applicants and Affidavit of Rose Cavaleri.

Counsel for the Program stated that there had been a delay in retaining an expert due to settlement negotiations between the parties. Finally an expert was retained on June 21, 2002. The Applicants were contacted and the expert viewed their home on July 3, 2002. The report was prepared by July 10, 2002 and served on the Applicants on July 10, 2002, which was fifteen days prior to the hearing rather than the required twenty days. Counsel for the Program stated that there was no prejudice to the Applicants. They had ample time to review the report which was not complex or of a technical nature. If necessary an adjournment was requested to permit the filing of this report.

The Applicants stated that they had concerns as they only received the Notice of Motion on the evening of July 15, 2002. They had agreed to the date of July 3, 2002 for the inspection by Mr. Duffy. They felt it unfair to permit this report when the Program had known of the hearing date since late April 2002. They opposed the adjournment.

The Tribunal allowed the expert report. Though it was submitted outside of the time frame under the Rules of Procedure the Tribunal found that there was no prejudice to the Applicants. They had time for the review of this report by their own expert. The Tribunal determined that it was important to have all relevant evidence before it. In so concluding the Tribunal wished to make it known that the Program should not conclude that its actions were acceptable to the Tribunal. The Program is knowledgeable as to the Rules of Procedure of the Tribunal. It is expected that in future the Program will hire and instruct its expert well enough in advance of a hearing date that there will be no breach of the Rules of Procedure.

ISSUE:

Was the Program correct in denying the major structural defect claim of the Applicants?

EVIDENCE:

Opening Statement:

Applicants:

The Applicants took possession on July 15, 1996. By December 2000 they had problems with water on the basement floor. There was a crack and water seepage. In 2001 the Program was given written notice of the major structural defect. They are relying on the second part of the definition of major structural defect, which deals with the use of the building. The water penetration is not due to dampness nor the work by the Applicants nor due to ventilation issues. It is due to surface water as there is a high water table under the grade of the house. The basement is unsafe and not used by the family. There are violations of the Ontario Building Code.

Testimony of Rose Cavaleri:

Mrs. Cavaleri testified that the floor plans provided for a sink in the future recreational area and rough in bathroom. The interlocking patio was installed in the summer of 1997. The basement was finished in 2000. There is a gas fireplace, large recreational room, entertainment centre and cold cellar. There is ceramic tile in the finished area of the basement. There was no moisture penetration in the area from 1997 to 2000 nor was there mold found in the basement during construction.

In December 2000 Mrs. Cavaleri noticed one to two inches of water in the grout underneath the work out machine. There were patches of moisture throughout the basement though mainly in the middle of the room, not at the perimeter. After this discovery the family and particular the children were not permitted to use the basement. The oldest daughter is sensitive to all molds.

Mrs. Cavaleri feels that the mold problem has contributed to her daughter's asthma attacks. She remembers that when her daughter used to go into the basement that she would complain that she could not breathe.

Mrs. Cavaleri stated that she would mop up the grout and the water would be back within the hour. She noticed the water in front of the cold cellar. There would be a sticky substance in the patches and it would come up through the tiles. She did not see any such patches on the perimeter walls. There is a crack on the west/north wall. She has two dehumidifiers working, one on each side of the room.

Mrs. Cavaleri stated that they complained to the Program via their letter of November 17, 2001 of the water seepage through the tiles in the ceramic floor, the water underneath the foundation, the mold growth and how all this affects the health of the family. The photographs attached to Mr. Fisher's report showed the water seepage and the visible mold on the fiberglass.

Though Mrs. Cavaleri would clean up the water every day it would seep back into the basement within hours. She now has a dehumidifier with a hose attached to the drain so she does not need to be constantly emptying the reservoir of the dehumidifier.

Mrs. Cavaleri submitted a claim to her insurance company. They had an inspector from Leda come and investigate the matter. There is a report by Mr. Matthew Molson of Leda dated July 17, 2001 stating that there moisture detection equipment indicated moisture is present in the drywall and the exterior ground surface is saturated with moisture close to the house. They concluded that the damage "is occurring due to some type of hydrostatic pressure causing water to flow below the home and enter the floor due to capillary action." " The insurance company did not pay for damages to their furniture and home due to the water seepage. They had the sprinkler system checked and it was found to be fine. Despite that they shut down the sprinkler system for the summer of 2001 and that did not help with the water seepage.

It was the testimony of Mrs. Cavaleri that in July 2001 they had a company called RCC fix the

crack in the west/north wall. The weeping tile was checked and it was clear. The water by the wall cleared up after the crack was repaired but the patches of water on the floor continued. By their report of November 15, 2001 RCC suggested installing an internal drainage system around the inside perimeter of the house. They submitted an estimate of \$10,800.00 for that work.

The building inspector attended at the house on November 7, 2001. A report dated November 16, 2001 from Randy Chalmers, Building inspector supervisor, City of Vaughan, was submitted. It stated that the building inspector observed moisture in the grouting of the ceramic tiles and that he suggested that the cause of the moisture could possibly be a high water table. Further investigation would be required.

RCC bored two core holes in the basement of the home. Mr. Molson from Leda reattended on November 16 2001 and observed that the concrete at the site of the core holes was approximately 1¾ inch thick and there was evidence of the presence of moisture below the concrete slab.

Mrs. Cavaleri testified that she understood that the Ontario Building Code requires the concrete in the basement floor to be 3 inches thick. Her basement floor was measured at the core openings to be 1¾ inch thick.

She stated that she would put a paper towel into the core opening and it would be completely saturated with water. She obtained materials from CMHC, which stated when investigating a damp basement to check the condition of the water table near the house. She obtained the reports on the boreholes done by the developers. Their house is on lot 35 and thereby is closest to borehole # 10. That borehole level as of April 1987 showed the water table to be at ground level.

Mrs. Cavaleri stated that her oldest daughter, Giulia, has allergies to mold. She submitted a medical report from Dr. Hamat, her child's pediatrician dated July 4, 2002. That report indicated that the child is seen by the specialist Barry Zimmerman regarding her asthma. It is the opinion of Dr. Hamat that the mold in the basement is contributing to the instability of the child's asthma condition.

It was the testimony of Mrs. Cavaleri that the basement is not now used as a storage area. They removed the door from the furnace room to help with air circulation. She opens the windows in the basement in the winter to get better circulation of the air but that does not help with the water seepage problem.

Mrs. Cavaleri stated that Mr. Northcott inspected the basement in January 2002. Regarding his decision letter she states that she used to clean the floors with a water and vinegar solution. Unlike his report she had observed water on top of the tiles. She has suffered emotionally from this situation, as she fears for the health of her family. As well she had two real estate agents tell her that the problem would have to be fixed before they could sell their house.

Under cross-examination Mrs. Cavaleri stated that her knowledge of the building code came from discussions with her expert. She did not think her daughter Guilia was diagnosed with environmental allergies until after the move into the home. She was diagnosed with asthma in 1996. There is nothing in the Agreement of Purchase and Sale to indicate any concern for Guilia's health issues. There had been a number of one-year warranties and mildew in the basement, which had been resolved by the builder, and they had not proceeded with the conciliation process. Between 1998 and 1999 they put ceramic tiles on the basement floor, did some partitioning and drywall of basement walls and ceiling. They used an architect for the plans for the basement and then used different contractors to implement those plans. Her husband did the interlocking brick patio in about 1997/98. They had an underground sprinkler system installed but Mrs. Cavalier could not remember when that occurred.

Mrs. Cavalier remembered noticing some water in the grout in November 2000. She cleaned it up with a paper towel. That occurred in the southwest corner of the basement. It was after their trip in December, 2000 that she saw a puddle of water in the Northeast and North to South quadrants plus a third patch by the cold cellar. She could see water on the grout and a whitish material. The patches would be about a foot by a foot in size. She would wipe up the water but it would be back in a short time frame. They tried using dehumidifiers and then called in RCC who found a crack in the north wall on the outside of the house. This crack was near the window on the northwest wall and went down the wall from the window to the weeping tile. RCC fixed the crack from the outside. The weeping tile was checked and it was clear.

Mrs. Cavaleri stated that there was no water on the perimeter of the walls. The entertainment centre was installed in the basement after completion of the basement room in 1999. She did find white patches in the furnace room after the carpet there was lifted.

Mrs. Cavaleri was there when Mr. Northcott from the Program inspected the house. He thought she was putting some cleaning material on the tile but she only used vinegar and water solution as per the direction of the tile people. She pointed out to him two different patches of water but in his report Mr. Northcott did not mention any surface water on the tiles.

Mrs. Cavaleri stated that starting in November or December 2000 she noticed a musty smell in the basement. They stopped using it as a recreational area and she told that to Mr. Northcott when he inspected the house. She had not noticed any mold on walls or the plastic over the insulation prior to doing the renovations nor was there any water on the basement floor prior to installing the ceramic tiles.

Mrs. Cavaleri stated her laundry room is on the main floor of the house. There is a sink in the basement but it is not used for laundry. There is a cold cellar, which holds wine. The canned goods were moved upstairs. She can remember having to empty the dehumidifiers at least twice a day as their containers would be full of water. If she left boxes on the utility floor the bottom of the boxes would be wet.

Since the boreholes were done she has noticed the sand underneath is saturated and she regularly pulls out wet paper towels from that area. She notices that the sand is wet though

there is no standing water.

Mrs. Cavaleri testified that the municipality stated that she needed a sump pump.

Testimony of Mr. Northcott:

Mr. Northcott has an architectural technology degree from Mohawk College in 1987. He has taken courses offered by the Ministry of Housing and the Ontario Building Officials Association. As well he is certified in the design and installation of heating, refrigeration, and air conditioning units. He initially worked as a survey technician, then as an inspector of subdivisions and since May 1999 as a warranty representative with the Program.

Mr. Northcott inspected the home of the Cavalier's on January 18, 2002. He observed damp proofing on the outside of the foundation. He did not notice any odor while inspecting their basement. He saw the drill holes in the basement floor.

Mr. Northcott noticed furniture in the basement. He was told the husband uses the exercise equipment but the children do not use the basement. There is a wine cellar there and a prefabricated plastic laundry tub in the furnace room.

He agreed with the sketch by Mrs. Cavaleri as to the site of the approximately ten patches of water seepage. There is nothing on the perimeter of the basement walls. There are no such patches near the boreholes. He did not see water sitting on the grout of the tiles. There is a white substance on some of the tiles and on the grout areas. He saw no standing water in the boreholes. He tested by pouring water on the floor and saw where the water darkened the grout differently. He could not recall if there was any calcite on the floor of the furnace room. The concrete floor in the furnace room was dry and had been painted.

Mr. Northcott testified that Mrs. Cavaleri had stated there was mold in the insulation behind the television. He did not see the mold, as the television was not pulled out during his inspection. He saw no mold elsewhere in the basement. There was a single cold air return in the unfinished basement but none in the finished area of the basement. Mr. Northcott stated the cold air returns provide proper air ventilation. The Building Code stated that the cold air return should not be in the furnace area. There were heat vents in the ceiling of the basement.

Regarding the area behind the entertainment centre Mr. Northcott through his observation of the photographs felt that there should have been some ventilation from that area to the other parts of the house.

Mr. Northcott stated that the data collected from the boreholes done by the developer in 1987 reflected the water table at that time. Since then there has been regrading of the soil, installation of sewers and other work. It is not helpful to look at such data in 2002. There was no indication that the house was on a high water table.

He explained that hydrostatic pressure means water being forcibly taken out of the ground. He looked for water coming in through the boreholes or at the perimeter of the walls but that was not happening. He did not feel the interior drainage system recommended by RCC would be of any assistance in this situation.

Regarding the thickness of the basement floor Mr. Northcott stated that the Ontario Building Code states that the concrete needs to be three inches thick. The Ontario Building Code also stated the structural adequacy of the concrete and the size of footings. The Code sets out when a moisture barrier is required and it is related to the strength or mpa of the concrete. Mr. Northcott was not aware if the mpa of the concrete in the basement floor of the Cavaleri home had been tested.

Though the thickness of the concrete of the basement floor of the Cavaleri house was a defect by the Code Mr. Northcott did not see any correlation between the thickness of the slab and the problems being experienced by the Applicants. There was no failure of the load bearing portion or displacement or heaving of the floor.

Under cross-examination Mr. Northcott stated that no testing was done of the water seepage from the grout nor were any air measurement tests done. He felt that there was no single thing that impacted on water being on the floor. He stated that different construction methods were to be used if the footings were within one meter of the water table. Then you would use a sump pump. The Code does not specify that the sump pump has to be inside the house. He agreed that the basement was one third of the house and constituted a major portion of the house.

Testimony of J. Paul Duffy:

Mr. Duffy received his Master in Civil Engineering in 1983. He has been designated to be a consulting engineer by the Consulting Engineers. He worked at mold remediation at the Newmarket Courthouse and at other courthouses in the Province plus office buildings and townhouse projects. He has done research for CMHC on mold remediation in homes. His expertise is in locating mold and diagnosing the repair of buildings with mold problems. He is familiar with the testing techniques for molds. The Tribunal stated he was an expert in building sciences/building envelope and mold remediation.

Mr. Duffy had observed the areas of the grout and the ceramic tiles as shown in the photographs. He felt that the ceramic tile was acting as a moisture vapor. He did not feel that the problem was one of water being under the slab. Otherwise he would have expected to see water in the boreholes or coming through the perimeter of the walls at any crack locations.

He excavated the area shown by photographs 12 A & B. There was green growth on the exterior wall, which shows that it is a wet area. As shown by photograph 14B there was a drainage barrier on the outside of the foundation. There is an eight-inch band at the top of the wall without damp proofing. But he did not see that translating into a problem with the south wall. As shown by photographs 7 A & B that the furnace room floor is painted and there is no

lifting of that paint. The moisture is not coming through from that floor. In the area shown by photographs 21 A & B Mr. Duffy did not see any standing moisture but he did see evidence of moisture in the polyethylene sheet. He would have thought the moisture problem would have been on the south wall not the east wall. He did not do any excavations of the east wall. It had the interlocking patio. There is a possibility that the soil was compacted under the interlocking patio and that could have damaged the drainage system there.

Mr. Duffy did not feel that the moisture problem was due to the construction of the house. He took off the baseboard at the north wall and took off a piece of tile as shown by photographs 17B and 20B. He found no moisture there. He could not find a source of moisture on the north wall nor on the west wall. He did not see mold in the cold cellar but it is a good candidate for the development of mold.

Mr. Duffy felt that there was water in the grout. The water on the tiles was due to splashing of the water in the grout. There was no condensation of water on the tiles. The areas of grout discoloration were discrete and distinct.

Though the concrete slab floor was less than three inches thick it met its intended purpose and there was no cracking. Water wicks up through concrete but Mr. Duffy did not feel the difference in the thickness of the concrete slab was significant. He stated that there is a risk of moisture through grout if there is moisture on the concrete. He questioned what was the additional mix used in the mortar or the grout. He felt perhaps that could be an issue. On the balance of probabilities he did not feel the problem was due to a running water issue. It would be helpful to test the water in the grout to see if it had chlorine. If so then it was municipal water.

Regarding the mold issue Mr. Duffy felt it was important to test the mold to see what type of species. That would indicate if it is a mold that would normally be found in a house. He felt that samples should be taken from the air in the basement and the main floor as well as from the cold cellar in order to look for issues of cross contamination. Mr. Duffy stated that after looking at the entertainment centre area as shown by photograph B there would have been heat generated by the equipment, which should have dried up the excess moisture. In his opinion the defect was not caused by the work of the builder.

Cross-examination of Mr. Duffy was interrupted for the testimony of Mr. Fisher, expert witness for the Applicants. When Mr. Duffy was cross examined he stated that as shown by photograph 10 A he could see that there was a defect in the way the membrane was installed on the top edge. It could have let water in so he checked the south wall but did not find a problem.

Mr. Duffy stated that grout is a porous substance and can be a path for the wicking of water. Some manufacturers of grout and mortar add mixtures, which can change the characteristics of the mix. He could see as shown by photographs 7B, 8 A & B and 3 B that there was a mixture of sand and stones in the boreholes.

In summation Mr. Duffy felt that the worst area should have been the south wall, which is the higher wall, and the photographs show it is wet outside of the wall. But the problem was the water on the east wall and the patches in the middle of the floor. The north wall had a crack but it was repaired some time ago.

Testimony of David Fisher:

Mr. Fisher has a degree in chemical engineering and he is a chemistry engineer. He is accredited as a professional chemist and has been found to be a consulting engineer by Association of Professional Engineers of Ontario. Since 1990 he has operated Fisher Environment, which is an engineering consulting firm that does lab testing, and air testing. It has a department for mold testing. The company consults on environmental matters, does drilling and analysis of soil. Prior to that time he was a manager of a refinery. The Tribunal found him to be an environmental engineering specialist.

Mr. Fisher stated that he found black/green colour mold in the basement of the Cavaleri home when he investigated the home on January 25, 2002. As well he observed efflorescence in the leaching of calcite into grout. He observed that the air in the basement had a moldy odour, particularly when he came close to the plastic behind the entertainment centre.

It was the opinion of Mr. Fisher that there was moisture channelling through the basement floor and that resulted in the calcite deposit. There needs to be pressure for the water to come through the floor and into the grout. He did not feel the water was going through the grout due to the composition of the grout. If the concrete was thick enough and have sufficient density then the channelling of water would be prevented. Photograph A attached to his report showed the greenish and black mold. If insulation is placed on a wet basement the mold will grow due to the moisture being contained within the insulation.

Mr. Fisher stated that if a person is allergic to mold then they could have sensitivity at 25 cfu. Most people are considered safe at 300 cfu. Normally one does not identify the species of the mold.

Mr. Fisher testified that he had observed water in the boreholes. That does not mean that there would necessarily have been water in the boreholes in July when Mr. Duffy observed the boreholes. Mr. Fisher felt that the borehole drilling by the developer in 1987 shows that the area had been part of a swamp. In that case if the drainage is not done correctly than moisture could remain. The composition of the soil was glacial till which is like concrete. The harder the soil the more chance of water pooling into the top area.

Mr. Fisher felt that the sump pump solution offered by RCC would be of assistance to the problem. He did not feel that the interlocking brick patio had an impact on the moisture problem. He stated that it was not an unusual procedure to put ceramic tiles on a mortar base. It would be beneficial to have ventilation in the cold cellar.

Under cross-examination Mr. Fisher stated that he could not tell the elevation of the water table

after the subdivision had been constructed. He stated that with the glacial till type of soil there was a greater likelihood of having wetness around the envelope of the house.

Though Mr. Fisher knew that three inches was required for the concrete slab for the basement floor by the Ontario Building Code he was not aware of the Code requirements for its density.

Mr. Fisher stated that the house is suffering from its weeping tile system not being able to take away the water. In a hydrostatic pressure situation the water enters through the perimeter and in the boreholes. Mr. Fisher did not recall seeing any cracks in the concrete. He did not see heaving of the concrete. He saw no mold in the furnace room or water on the floor of the furnace room.

Though Mr. Fisher agreed that the New York State and Ontario guidelines ask for the species of mold he felt it was too expensive to do that analysis. He did a visual inspection of the nooks and crannies of the basement and did not find mold in any other area. He described his procedures for doing the air samples; two were taken at about fifteen minute intervals. They were contained in a room temperature non-air device and after three days the spores were counted. Though it would be helpful to take the air samples from inside and outside of the house it was twenty below on January 25 so that was not possible. Mr. Fisher stated that both test results were within the range acceptable to a non-allergic person.

It was the opinion of Mr. Fisher that the thickness of the concrete floor was very important to the proportion of water coming through the floor. As well the more dense the concrete (mpa) the better for prevention of capillary action of the water.

Closing argument:
Applicants:

Mr. Cavaleri stated that the slab floor was not containing the water. It was the intent of the Applicants to use the basement as a recreational area. The Applicants had done a number of investigations. As well the medical report suggests that their daughter's health problems can be attributed to the mold. The basement cannot be used for what it was intended. There is no evidence to suggest that the Applicants contributed to the problem.

Program:

Counsel stated that the Applicants took possession in July of 1996. Over the next few years they did a significant amount of work consisting of an interlocking patio in 1997/98 and the basement being refinished 1998/99 plus the installation of an underground sprinkler system. There is mold behind the east wall and water on the floor. There are no problems with the other walls and the crack on the outside of the north wall was repaired. Though there is green algae on the outside of the south wall there is no water penetration there. Counsel stated that the mold and floor water is in the areas where the homeowner has done work.

Counsel stated that Mr. Duffy's report should be given more weight than that of Mr. Fisher. Mr. Duffy stated that the thickness of the concrete slab should have no bearing on the water

penetration. He found no standing water in the boreholes so there is no high water table.

Counsel pointed to the exclusions found in section 13 (2) (a), (e), (f), (g) of the Act. Counsel stated that one looks at what are the requirements of a reasonable person, not at the thin skull arguments. There was no problem with the home prior to the renovations.

Counsel quoted the following cases:

Catherine Balfour CRAT released June 29, 2000 - that the basement floor was not load bearing.

R.K.Brimacombe CRAT released Nov. 19, 1991 – that there is an onus on the homeowner to prove that the exclusions do not apply

RE Galko (1997) O.C.R.A.T.D. no.111 deals with case law on definition of major structural defect.

After the completion of the hearing Counsel for the Program sent to the Tribunal and the Applicants a copy of the case of Anastasia Noel Pare LAT released July 31, 2002. In it the Tribunal found that the test in the definition of major structural defect is objective, not subjective.

The Applicants objected to this case being sent by the Program after the date of hearing. They countered with the case of Rodger James a CRAT decision of Nov.16, 1998 in which it was held that the basement constitutes one third of the residence and the Courts have in the past upheld the belief that the loss of such a large area is material and adverse.

It should be pointed out to both the Program and the Applicants that prior case law at the level of the Tribunal is not precedent setting. Often such cases involve unique factual situations, which are not helpful to the case at hand. Unlike a court of law an administrative tribunal is not bound by precedent. Such decisions are merely persuasive.

Legislation:

The relevant legislation is the *Ontario New Home Warranties Plan Act*.

Section 13 (1) every vendor of a home warrants to the owner:

- (b) that the home is free of major structural defects as defined by the regulations; and
- (2) A warranty under subsection (1) does not apply in respect of,
 - (a) defects in materials, design and work supplied by the owner;
 - (e) damage caused by dampness or condensation due to failure by the owner to maintain adequate ventilation;
 - (f) damage resulting from improper maintenance;

(g) alterations, deletions or additions made by the owner;

Section 14 (1) Where:

- (b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty; or
 - (c) the owner suffers damage because of a major structural defect as defined in the regulations for the purposes of section 13, and the claim is made within four years after the warranty expires or such longer time under such conditions as are prescribed, the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.
- (2) In assessing damages, the Corporation shall take into consideration any benefit, compensation or indemnity payable to the person or owner from any source.
- (3) The Corporation may perform or arrange for the performance of any work in lieu of or in mitigation of damages claimed under section (1).

Regulation 892

Section 1 "major structural defect" means for the purposes of clause 13 (1) (b) of the Act any defect in work or materials

- (a) that results in failure of the load bearing portion of any building or materially and adversely affects its load bearing function, or
- (b) that materially and adversely affects the use of such building for the purpose for which it was intended, including significant damage due to soil movement, major cracks in basement walls, collapse or serious distortion of joints or roof structure and chemical failure of materials, but excluding floor damage, dampness not arising from failure of a load bearing portion of the building, damage to drains or services, damage to finishes and damage arising from acts of God, acts of the owners and their tenants, licensees and invitees, acts of civil and military authorities, acts of war, riot, insurrection or civil commotion and malicious damage;

Section 14 (2) every vendor of a new home warrants to the owner;

(e) that the home is free of major structural defects.

Section 16 Where a home was enrolled after the 31st day of December, 1990, the claim for damages because of a major structural defect may be made within seven years of the date specified in the certificate of completion and possession.

Analysis:

The homeowners took possession of their home on July 15, 1996. There were a number of problems which came to the attention of the Program but which were resolved with the builder without the need for the conciliation process or recourse to the then Commercial Registration

Appeals Tribunal. The Tribunal was told that one of those problems dealt with mildew but it was resolved to the satisfaction of the homeowners. Accordingly there is no prior history of unresolved matters, which would permit the current complaint to be considered under the one year, or two-year warranties as stated in the Act. The Applicants are compelled to rely upon the warranty of major structural defect as it allows for a complaint within seven years from the date of possession.

The definition of major structural defect is quite specific as to what can and cannot fall under that type of warranty. It is unfortunate that many homeowners are not aware of the limitations as stated in the Act and in particular in Regulation 892 of the Act which contains the definition of major structural defect and its exclusions. This claim and its unique factual situation are determinative by the specifics of that definition.

The Tribunal has the greatest sympathy to Mr. and Mrs. Cavaleri and in particular to the health issues of their oldest daughter, Guilia. The Tribunal does not doubt that as stated by the child's paediatrician Guilia's allergies and the flare-ups of her asthma are worsened by being in an environment where mold is present. The Applicants are quite correct to be concerned about the presence of mold in the basement. But that situation cannot be viewed in isolation. The results of the mold testing are inconclusive, as there was no analysis of the species of mold. If there was only one species of mold than there could be a situation whereby the home is not suitable to all members of the family. The Tribunal cannot speculate and the results of the air testing do not by themselves permit this conclusion. The builder was not put on notice of any specialized health requirements of the family and there is no such requirements written in the Agreement of Purchase and Sale.

There are two problems with the claim of the Applicants. The major one is in the definition itself. Problems with dampness such as observed by Mrs. Cavaleri are excluded under the definition of major structural defect unless the dampness is the result of a failure of a load bearing portion of the building. Here there is no evidence that the floor slab has shifted or heaved. There is no evidence of any major cracks in the floor slab or in the foundation walls. There is no evidence that the foundation walls have shifted resulting in water flowing in through the links in the perimeter between the foundation walls and the floor slab. The Applicants did not base their case on failure of a load bearing portion of the house but on subsection (b) of the definition that there is a defect, which affects the use of the house in a material and adverse way. The Tribunal notes with approval the case of Anastasia Noel Pare quoted by the Applicants. The loss of a basement, which comprises one third of the space of a home, is material and adverse and within the Act. But the legislators in drafting this definition have listed a number of exclusions to it. The Applicants are caught by the exclusion "but excluding ...dampness not arising from failure of a load bearing portion of the building". There is no evidence that the water, which has been observed, by Mrs. Cavaleri and Mr. Fisher in the grout of the tiles and in the boreholes can be attributed to any failure of a load-bearing portion of the building.

There is discussion by the parties as to the type of soil found in the subdivision and to the

height of the water table near the home of the Cavaleri's but there are no specific investigations on how that relates to the water that started to seep onto the basement floor of the Cavaleri home starting in November, 2000. The Tribunal has no basis on which to relate the porosity or lack thereof of the soil and the height of the water table at the site of this home. There is the evidence of Mr. Northcott that if the home had been constructed within one meter of the water table the builder is obliged to use different construction methods including the use of an exterior sump pump. No one has stated that there has been a violation of the building code as regards the lack of a sump pump.

As well though there is a violation of the building code regarding the thickness of the basement slab the Tribunal accepts the evidence of Mr. Duffy over the opinion of Mr. Fisher on this point and finds that the defect in the thickness of the floor does not by itself account for the moisture and mold problems observed in the Cavaleri's basement. Mr. Duffy states in his report that the problem spots are isolated and random in location and "the pattern of moisture is not easily explainable as general efflorescence and moisture passing through the floor by capillary action." The Tribunal was quite impressed with Mr. Duffy's testimony. He was quite forthright in his puzzlement over the problems experienced by the Cavaleri's and tried to offer some ideas for solutions to this problem. His report was detailed and contained information on previous investigations as well as on his own observations and testing methods. The problem of moisture can not be linked to failure of a load bearing portion of the building.

The second problem deals with the timing of the discovery of the moisture and mold problems. Mrs. Cavalier testified that she first noticed the moisture in November 2000 prior to the family going on vacation. She also states that prior to that time but after completion of the basement renovations her daughter Guilia had complained of breathing problems if she spent any period of time in the basement portion of the house. In the opinion of the Tribunal Mrs. Cavaleri is a credible witness and the Tribunal was impressed with the clarity of her evidence. The problems now complained of by the Applicants only came to light after some major renovations were completed by them such as the interlocking patio, the sprinkler system and the major basement renovations. There is no evidence that the renovations themselves are grossly defective. But it is suspicious that there was no mold or moisture seepage when the basement was unfinished and yet such problems were detected within a short time frame after the renovations were completed. Mr. Duffy's report provided some analysis of this issue. The Tribunal accepts his analysis and finds that his comments are relevant to this matter. The Tribunal strongly recommends to the homeowners that they consider his observations and recommendations in making any further decisions on how to correct these problems. In light of the health problems of Guilia it is advisable that the homeowners eliminate the mold now existing on the east wall. Both experts have stated the likelihood that mold can grow in a cold cellar. Both experts have testified that the cold cellar smelled musty. Further investigation of mold growth in the cold cellar is advisable.

In conclusion the Tribunal agrees with the homeowners that they are experiencing problems with moisture seepage and mold in their basement. Unfortunately these problems cannot be linked to the definition of major structural defect since they are excluded from the definition of "major structural defect" in section 1 of Regulation 892 and therefore the homeowners do not

have a claim for compensation under the Act.

Order:

Accordingly, by virtue of the authority vested in it under section 16(3) of the *Ontario New Home Warranties Plan Act* the Tribunal directs the Ontario New Home Warranty Program to disallow the claim of Mr. and Mrs. Cavaleri.

LICENCE APPEAL TRIBUNAL

Marjorie Hiley
Vice Chair

Released: December 18, 2002.

KAMAL KILLU

**APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE *ONTARIO NEW
HOME WARRANTIES PLAN ACT***

TO DISALLOW A CLAIM

TRIBUNAL: MARJORIE L. HILEY, Vice Chair

APPEARANCES: MICHAEL YOUNG, Counsel, representing the Applicant

Marcus Knapp, Counsel, representing the Ontario New Home
Warranty Program

DAVID MISURKA, Agent, representing the Added Party,
Aspen-Glen Homes (Richmond Hill) Inc.

DATE OF
HEARING: July 15, 2002

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

The Ontario New Home Warranty Program issued its decision by letter dated March 20, 2002. It denied the Applicant compensation for the hardwood floor in the living room and family room on the basis that partial repairs are only required and the homeowner refused the builder access to complete such repairs. The Program relied on section 14(6) of the *Ontario New Home Warranties Plan Act*. The Program also relied upon the exclusion clause in section 13 (2) (d) of the Act on the basis that the separation is consistent with normal shrinkage of materials caused by drying after construction.

By Notice of Appeal dated April 5, 2002 the Applicant requested a hearing before the Tribunal. The Applicant stated in his Notice of Appeal that the builder knew of the problems with the hardwood floor since the date of possession. The Applicant claimed that the cost of the floor totaled \$7,558.99.

ISSUES:

Is the floor warrantable under the Act?

Can the Program rely upon section 14(6) of the Act?

Is this an issue of exclusion under section 13 (2) of the Act?

Evidence:**Opening statements:**

The Counsel for the Applicant stated that the hardwood floor has been an outstanding issue for over three years. The Applicant is reluctant to allow the builder access as he has no assurance that such access will lead to reasonable results.

Counsel for the Respondent stated that the Applicant took possession on January 20, 1999. The gaps and chips in the floor are warranted and the builder wished to replace some board. But the Applicant did not agree with the proposed manner of repair by the builder and refused access. Accordingly the Applicant is not entitled to compensation from the Fund. As well it was the improper humidity levels which have resulted in gaps to the floor.

Testimony of Kamal Killu:

Mr. Killu stated that he is a registered engineer who has worked on construction projects in Iraq. He took possession of his home on January 20, 1999. The Pre Delivery Inspection was done on January 18, 1999. The PDI sheet dated January 18, 1999 and signed by him and Mr. Misurka states "fill gaps on floors". Mr. Killu stated that the family room and living room are basically one large area. At the time of the PDI the floor was approximately one half completed.

Mr. Killu stated that during February and March, 1999 Mario from the builder and Sandro from the builder saw the condition of the floors. As well Chris from Pine Valley Flooring came and found that you could fit a loonie in the gaps in the floor. At that time Chris checked the nailing of the floor via the basement and checked the humidifier. By April, 1999 the subcontractor, Pine Valley Flooring and David Misurka for the builder were concerned about the manufacturing process. Someone came from the manufacturer, Mirage, at the middle or end of May, 1999. A report was supposedly completed but such report was never provided to Mr. Killu. There is a report by Dennis Coles from Mirage dated June 4, 1999 stating that basically the installation is good but some cosmetic repairs are required.

In July, 1999 a representative from the subcontractor came to do repairs. After several hours this person caused damage to the good boards while trying to take out the damaged boards. This worker nailed down the boards and then put in filler. There was an uneven floor as a result of these repairs. The floor was damaged in a number of areas.

Mr. Killu referred to his letter of January 17, 2000 which outlined the problems with his floor. These problems according to Mr. Killu were the same from the date of the PDI to the date of that letter.

Mr. Killu referred to the report of Mr. Sharko from Mirage dated February 24, 2000 which spoke of Mr. Sharko's observations following his inspection on that date. Mr. Sharko spoke of the gaps between the boards being due to environmental conditions at the time of installation which then led to the wood shrinking as it dried out. Mr. Sharko felt that entire sections of the floor had to be replaced.

As well Mr. Killu referred to the report of L.R. Wells of Wathdene Holdings Ltd. dated May 18, 2000. In it Mr. Wells stated that the installation of the floor exceeds industry standards. It speaks of optimum conditions for the preservation of wood floors. Mr. Killu was not present during this inspection and he contests its findings.

Ms. Lumley from the Program came to the house on July 3, 2001 to deal with the issue of a steel beam. Her conciliation report dated July 26, 2001 speaks of some repairs being required for the hardwood floors. Mr. Killu testified that the hardwood floors were deteriorating due to an increased number of chips from nails popping out.

After this conciliation report Mr. Killu checked with the subcontractor and found out that the repairs would be done in accordance with the method used in July, 1999. Mr. Killu had concerns about this method of repair which he conveyed verbally and in writing to Ms. Lumley. Mr. Killu referred to his letter of September 16, 2001 which stated his dissatisfaction with the previous repair work on his floor and the need to replace the entire floor.

There was no written response from the Program but the builder wrote to him to complain about lack of cooperation regarding these repairs.

Mr. Killu then asked Carson Dunlop and Associates to inspect the basement beam and the condition of the main floor hardwood flooring. This report found that the installation of the hardwood floor was defective, the damage is extensive and represents significant cosmetic deficiencies.

Mr. Killu testified that there was a site inspection by Ms. Lumley on February 19, 2002. She took photographs of the floor at that time and said she would contact the builder. Ms. Lumley stated that the cost of the floor was four thousand dollars. Mr. Killu disputes that figure as he felt that the \$2,500.00 bonus for appliances was used towards this floor. He has no invoice on the cost of replacement of the floor.

Mr. Killu stated that he wants the floor replaced as over fifty per cent is damaged. He found chips on forty strips, gaps on the long side of 20% and many gaps on the short side. He maintained that the floor is in the same condition as what he received on the date of possession.

Under cross-examination, Mr. Killu stated that the Agreement of Purchase and Sale shows the cost of the flooring to be \$4,564.70. He stated that Mr. Misurka had not mentioned any significance with the humidity when he initially checked the flooring. He disagrees with the analysis of Mr. Sharko that it is environmental conditions that have

caused the gaps. He stated that there had been no discussion of the method of repair at the time of the conciliation inspection. He agreed that he questioned the method of repair in his response to the builder in late August, 2001 and asked that the repairs be postponed. In his letter to the Program dated September 16, 2001 he disagreed with the method of repair. He did receive the letter of November 5, 2001 from the builder in which it was stated that the builder could not obtain access to do the repairs to the hardwood floor. His lawyer sent a letter dated November 9, 2001 confirming his opposition to the method of repair. He agreed that he was not prepared to allow the builder to perform the repairs in the same fashion as previously.

Testimony of Gerard Gransaul:

Mr. Gransaul from Carson Dunlop inspected the hardwood floors on December 5, 2001 and prepared a report on December 11, 2001. Mr. Gransaul stated that he is a professional engineer who has seen thousands of hardwood installations over the past five years. He is a registered home inspector and an inspector and teacher at Seneca College. He found chips and cracks in the edges of the boards at random locations throughout the floor. It would not be cost effective to repair the floor. It needs to be replaced. He felt that further repairs would not be effective.

Mr. Gransaul stated that wood does not shrink at its length. The gaps lengthwise or at the butt end are due to installation. There can be shrinkage on the width of the boards. He felt the chips are due to stresses in the wood from improper installation. Environmental conditions are not an issue. He disagrees with Mr. Sharko's report from Mirage. He disagrees with Mr. Wells report from Wathdene Holdings and feels that the installation does not meet industry standards. He disagreed with the statement in the decision letter that the excessive gaps are due to fluctuating moisture levels. That is not a reasonable statement in his opinion. While some gaps can be the result of environmental conditions other gaps are not due to this issue.

Under cross-examination Mr. Gransaul stated that his inspection of the hardwood floor was a visual inspection and there were no tests conducted on the floor. He did no quantification of the size of the gaps. He felt it was not necessary as the only solution was to replace the floor. Mr. Gransaul agreed that the floor was structurally sound and his recommendation was due to cosmetic considerations.

Testimony of Christopher Obelnycki:

Mr. Obelnycki is the President of the subcontractor Pine Valley Flooring. He has been in the business since 1988 and does about one thousand homes per year. He bought the hardwood flooring from the manufacturer, Mirage. He had work orders in March and April, 1999 to repair the floor. The manufacturer was prepared to give him 20 square feet of product for repairs. The total floor area of the hardwood floor was about 500 square feet.

Mr. Obelnycki did the repairs in July, 1999. The industry standard is that you can fit a dime within the gaps. There is no distinction made between the butt end gaps and the horizontal gaps.

There were some excessive gaps and some sections needed to be repaired. Mr. Obelnycki felt that three boards by ten feet and three boards by one foot could be considered as sections. He agreed that he would have to pay for the cost of such repairs. He saw some chips in the boards in July, 1999 which could be the result of error by the installer. It affected maybe twenty boards.

Mr. Obelnycki stated that in open concept areas when doing the buffer from the family room to the kitchen you would have to nail into the grain of the board and put putty over the top of the nail.

He stated that the hardwood was kept at the warehouse at about 18 degrees which is the same as a house in the winter. It would only have been transported by truck from the warehouse to Mr. Killu's house for about twenty minutes.

Under cross-examination Mr. Obelnycki felt that the environment was responsible for 80% of the gaps and the rest was due to the floor installer. He felt that the repairs should be allowed to be done. There would be an additional warranty for one year from the date of repair. He agreed that he did not know the humidity at the time that the floors were installed.

Testimony of David Misurka:

Mr. Misurka is the representative for the Added Party. He is the customer service manager. He did the pre delivery inspection with Mr. Killu on January 18, 1999. At that time the flooring in the living room and dining room was complete and the installers were working in the family room area. He remembered that there was gapping by the staircase. He did not notice chips or gouging. The wording in the PDI report is not specific. When he inspected the flooring with Mr. Wells and Chris Obelnycki he noticed sporadic chipping and some gapping at the butt ends.

Mr. Misurka testified that he told Mr. Killu to invest in a humidifier. He tells all of his customers to do that and use it with a monitoring device. He tells his customers to vary the humidity according to the outside temperature.

Mr. Misurka recalled Mr. Killu showing the hardwood floor to Ms. Lumley in February 2002. She took two pictures of it. Mr. Killu said the problem had been ongoing since he took possession of the house.

Under cross examination, Mr. Misurka stated that it was the position of the builder that they should do the repairs. If the repairs are not correct then they will do what is necessary. If necessary they would get in an independent contractor to assess the

work. The repairs are warranted for one year. He did not feel that the floor needed to be completely redone.

Testimony of Sherri Lumley:

Ms. Lumley has been the warranty representative for three years. She has worked as a customer service representative on condominium projects. She has done approximately three hundred inspections since being employed by the Program.

Ms. Lumley found the gaps between the planks to be 1.25 mm to 2 mm. There are gaps at the head of boards. There are cracks due to nailing. The Applicant had not been happy with the top nailing of some boards.

It is the position of the Program that the builder should be given the chance to do the repairs. There was a need to replace about thirty boards but Mr. Killu wanted to have the whole floor replaced.

Ms. Lumley agreed that there were some repair problems with top nailing and fill being added. The builder was prepared to rectify the problem.

Mr. Killu wants a new floor. The Program is not prepared to do that. The claim was denied under section 14 (6) of the Act. If the repairs by the builder are not satisfactory then the Program can look at whether or not to replace the floor.

Under cross examination Ms. Lumley stated that she was aware of the reports submitted by Mr. Killu as well as those from the builder. She agreed that she did not respond to Mr. Killu in writing but she did telephone him.

Concluding Statements:

Applicant:

Counsel felt that Mr. Killu was justified after three years to refuse to allow the builder to do the repairs. The report of Carson Dunlop shows that over fifty per cent of the floor required repairs. The homeowner has rights and does not need to have a problem of constant repairs. The refusal of Mr. Killu was based on the problem with the previous repairs. Counsel felt that the cases relied upon by the Program can be distinguished on the facts.

Program:

Counsel stated that this case falls under section 14 (6) of the Act. The builder was willing to do repairs but was denied access by Mr. Killu. The following cases were noted:

Re. Migliano (1994) O.C.R.A.T.D. no.137 - there is no warranty claim when the builder is prepared to repair or compensate the homeowner.

Re. Wilkinson (1998) O.C.R.A.T.D. no 78 - no damages because the homeowner did not allow the builder to make repairs.

Re. Schollenberg (1999) O.C.R.A.T.D. no. 65 - no reason for refusing to allow the builder to do the repairs

Re. Saporita (1999) O.C.R.A.T.D. no.166 - Applicants seeking unrealistic standards of perfection

Legislation:

The relevant legislation is the *Ontario New Home Warranties Plan Act*.

13. (1) Every vendor of a home warrants to the owner,

(a) that the home,

(i) is constructed in a workmanlike manner and is free from defects in material,

(ii) is fit for habitation, and

(iii) is constructed in accordance with the Ontario Building Code;

(b) that the home is free of major structural defects as defined by the regulations; and

(c) such other warranties as are prescribed by the regulations.

(2) A warranty under subsection (1) does not apply in respect of,

...

(b) secondary damage caused by defects, such as property damage and personal injury;

(d) normal shrinkage of materials caused by drying after construction;

14. (1) Where,

(b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty;

The person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

(2) In assessing damages, the Corporation shall take into consideration any benefit, compensation or indemnity payable to the person or owner from any source.

(3) The Corporation may perform or arrange for the performance of any work in lieu of or in mitigation of damages claimed under section (1).

Analysis:

This is a claim by Mr. Killu for the replacement of his hardwood flooring in his living room, dining room and family room. He alleges that it is defective due to chipping and gaps between the butt end of boards and between the horizontal sides of boards. He alleges that the repairs previously done by the builder were incompetent. He has refused to allow the builder to do any more repairs. Despite a conciliation report by the Program which states that there are some problems with the hardwood floor he has not agreed with the Program to allow the builder to repair what the Program sees as the warrantable repairs.

Mr. Killu has stated that as a professional engineer in Iraq he did have experience with construction. He is not qualified as an expert in construction nor is there any history of his experience with flooring issues.

Mr. Killu has a report by Mr. Gransaul of Carson Dunlop, home inspectors, which states that his flooring is damaged in several areas and that it would be more cost efficient to replace the existing floor. There are no estimates of what that replacement floor would cost in 2002. There is a dispute between the parties as to what exactly is the cost of the existing floor. Mr. Killu states it is over \$7,000.00 when you add the bonus funds. The Program and Added Party state it is approximately \$4,500.00.

The Tribunal has some problems with the report by Carson Dunlop. It does not show any quantification of the gaps. The only measurement of the gaps was by the warranty representative, Ms. Lumley. It does not give the exact measurement of the boards that are defective. It does not give specifics as to why it would be better to replace the existing floor than repair it. Such specifics should include a comparison of the cost of labour and materials for replacement versus repairs. It does not give any explanations for the reason the floor has chips and gaps. There is no measurement of humidity levels nor any research in how the floor was originally installed and under what type of moisture conditions.

Ms. Lumley has provided some measurements on what are the extent of the repair issues. She feels about thirty boards need to be replaced. Both the Program and the Added Party have been quite forthright that there are some problems with the hardwood flooring. They wish the opportunity to do further repairs to see if they will rectify the situation. But Mr. Killu is adamant that further repairs are not the solution. Unfortunately Mr. Killu has not made a case for his position.

The Tribunal understands the importance from a cosmetic viewpoint that there not be obvious defects in the flooring. This type of flooring is white and significant defects would mar its appearance. But Mr. Killu did not allow the Program to make the repairs it felt were necessary. It could be that after the repairs were done the floor would still be found to be flawed but that is mere speculation. Until the repairs are completed no one is sure what will be the appearance of the floor. No one has suggested there is a structural issue involved with this floor.

Mr. Killu has not provided any expert evidence to substantiate his opinion that the method of repairs as provided by the builder and agreed to by the Program would necessarily fail. Mr. Killu is not an expert on flooring. He should have permitted the Program and the builder to have carried out the required repairs. If he had a problem after the repairs were completed he still had a one-year warranty period to try to have the matter resolved.

The Tribunal is sympathetic that the homeowner has felt his flooring has not been satisfactory for a period of years. But there is nothing in the history of the matter which leads the Tribunal to consider that the homeowner has been in any fashion victimized by the builder or that the builder cannot carry out the repairs in a workmanlike fashion. There were repairs done on the floor on one occasion only. That was in July, 1999. The Program agrees that further repairs are necessary. The builder has in writing and verbally at the hearing stated their willingness to try to put this matter right. The homeowner has denied the builder that opportunity.

It is the opinion of the Tribunal that Mr. Killu has suffered no damages compensable under the *Ontario New Home Warranties Plan Act*. Section 14 (1)(b) states that there must be damages resulting from a breach of warranty. The refusal to allow access to the builder to make the necessary repairs has led to this legal consequence. Mr. Killu has to realize that the Act has limitations on its warranties. The homeowner must act within the boundaries as established by the legislators who drafted this legislation. Hopefully Mr. Killu can come to some terms with his builder to allow the necessary repairs as stated in the conciliation report by the Program.

ORDER:

Therefore, by virtue of the authority vested in it under section 16(3) of the *Ontario New Home Warranties Plan Act* the Tribunal upholds the decision of the Program to deny the claim of the Applicant.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley,
Vice-Chair

Released: December 19, 2002

JAMES FREDRICK WHITTEN O/A NIAGARA INVESTMENT MOTOR CARS

**APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT***

TO REFUSE REGISTRATION

TRIBUNAL: MARJORIE L. HILEY, Vice-Chair

APPEARANCES: No one representing the Applicant

MARY JANE SOUTH, Agent, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: September 16, 2002

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This matter was commenced by a Notice of Proposal dated May 14, 2002. The Registrar seeks to revoke the registration of James Fredrick Whitten O/A Niagara Investment Motor Cars as a Dealer under the *Motor Vehicle Dealers Act*. The particulars dealt with Mr. Whitten's actions with consumers, with the purchase of vehicles from other dealers and with odometer disclosure complaints by consumers. The Applicant filed a Notice of Appeal dated May 31, 2002. Attached to that Notice of Appeal was a letter dated December 7, 2001 to Mr. Whitten by Mr. Vandermeer of Manheim Automotive Financial Services with some handwritten notes in the top right hand corner of the letter. Also filed was an invoice from Classic Transmission dated January 31, 2002 and a promissory note for ten thousand dollars dated May 30, 2000.

At the commencement of the hearing on September 16, 2002 at 9:30 am there was no one there representing the Applicant nor was the Applicant present. The Tribunal called upon Ms. Dominique Yeung, an employee of the Tribunal, to testify as to the hearing notice in this matter. Ms. Yeung stated that as the Hearing Co-ordinator for the file, she had telephoned the parties on September 13, 2002. She had left a message for Mr. Whitten. There had been no messages from Mr. Whitten in the morning of September 16, 2002. Ms. Yeung testified that there was a note dated June 18, 2002 on the file in the handwriting of Stacy Murphy,

Supervisor, stating that the purolator tracking system shows the hearing notice was signed for on June 18, 2002 by Whitten.

Following the testimony of Ms. Yeung at 9:55 a.m., a Ms. Marlene Peters entered the hearing room. She stated that she had been asked by Mr. Whitten to attend and request an adjournment for thirty days. She stated that Mr. Whitten was undergoing tests for kidneys and diabetes. Mr. Whitten wished the Tribunal to know that he was fighting a number of lawsuits at this time.

Ms. South, on behalf of the Registrar, *Motor Vehicle Dealers Act*, stated her opposition to the adjournment request. Mr. Whitten had not contacted the Registrar on the adjournment request prior to the hearing date. Mr. Whitten had been well enough to attend another court hearing the week prior the hearing. He had been seen on the weekend working at his gas station. As well a number of witnesses had travelled some distance to testify at the hearing. Ms. South stated that Mr. Whitten had known of the hearing date by mid-June, 2002 and had sufficient time to hire a lawyer.

The Tribunal made the decision to continue with the hearing. There was no consent to the adjournment request. It was made at the last moment. There was insufficient evidence before the Tribunal as to the seriousness of the health issues of Mr. Whitten. There was evidence that Mr. Whitten had been properly served with the Notice of Hearing some months prior to the hearing date. There would be prejudice to the Registrar who had subpoenaed a number of witnesses to attend at the hearing. These witnesses had travelled considerable distances in order to testify at the hearing. It was in the public interest to proceed with the hearing.

The Tribunal ordered the exclusion of witnesses. Ms. South was acting as agent for the Registrar and Ms. Cameron was acting as her principal on behalf of the Registrar.

The Registrar was withdrawing paragraph 8 of the Notice of Proposal dealing with allegations under the Retail Sales Act.

Issue:

Did the Registrar have reasonable grounds under the *Motor Vehicle Dealers Act* to revoke the registration of the Applicant as a motor vehicle dealer?

Evidence:

Testimony of Alfred Griese:

Mr. Griese stated that he had purchased a 1986 Mustang GT from the Applicant in early September, 2001. A deal was reached between the parties. Mr. Whitten was to perform a number of repairs on the vehicle and conduct a safety check. When Mr. Griese picked up the car he discovered that the front headlight and rear seatbelt did not work; the blower for defrost did not work and the gas tank leaked. These were all safety items in the opinion of Mr. Griese.

Despite Mr. Whitten having the vehicle on three separate occasions most of these repairs were not completed. He had obtained the safety standards certificate dated October 3, 2001 which had an odometer reading of 165,231. Mr. Whitten refused to give him the warranty certificate as stated in the Bill of Sale due to the expenses covered by Mr. Whitten in installing a new transmission.

Mr. Griesse stated that Mr. Whitten had telephoned him on September 15, 2002. Mr. Whitten wanted to settle the matter prior to the hearing. Mr. Whitten told him not to attend for the hearing on September 16th as it was going to be adjourned.

Testimony of Mark Milner:

Mr. Milner had purchased a 1991 Honda Accord from Mr. Whitten. He was looking for a car with low mileage as he was travelling to Toronto. Mr. Whitten knew of this requirement and had telephoned him to say he had found a low mileage Honda for him. The day following his purchase of the vehicle the brakes failed him on the QEW. The master cylinder had failed. They made a deal to split the cost of repairs. Then Mr. Milner found a rust proof warranty in the glove compartment of the car. It was dated in July, 1994 and showed an odometer reading of 75,900 km. Mr. Milner had purchased the car in June, 2001 with an odometer reading of 92,500 km on the Bill of Sale.

Mr. Milner stated that Mr. Whitten called him on September 15, 2002. Mr. Whitten told him not to come to the hearing the next day as Mr. Whitten would be asking for an adjournment. Mr. Milner saw Mr. Whitten three weeks ago playing tennis. As well a friend of Mr. Milner had his car filled up with gas on September 14, 2002 by Mr. Whitten at Mr. Whitten's gas station.

Testimony of Thomas Anthony Morgan:

Mr. Morgan is a motor vehicle dealer. He has run Morgan Equipment for the past twelve years. He knows Mr. Whitten. Mr. Morgan sent a letter to OMVIC on March 14, 2002 to complain about the actions of Mr. Whitten. He had provided Mr. Whitten with a loan of ten thousand dollars at the time in May, 2000 when they were contemplating going into business together. Mr. Morgan would consign his vehicles to Mr. Whitten who was to sell them. They would split the profits. Mr. Whitten sold two vehicles but did not provide Mr. Morgan with the full proceeds of the sale. Instead of \$18,000.00 Mr. Morgan received \$7,500.00. The remainder was used by Mr. Whitten to pay for a gas delivery to his service station. During 2001 despite numerous demands Mr. Morgan only received three cheques for a total of \$4,100.00. Mr. Morgan felt that now Mr. Whitten owed him \$19,487.92. There was a default judgment against Mr. Whitten but it was set aside on September 11, 2002. Mr. Whitten had attended at court on that date. As of the date of the hearing Mr. Morgan had not received any of the outstanding monies.

Testimony of Stephen Byron:

Mr. Byron testified that he purchased a Toyota 4 runner from Mr. Whitten in early November, 2001. He left his Ford Explorer to be sold by Mr. Whitten. Shortly after the purchase of the

vehicle the transmission failed. Despite a repair by Mr. Whitten it failed again and the transmission had to be rebuilt. Mr. Byron did not receive the vehicle until January, 2002. During this time Mr. Byron did not have the vehicle registered in his name and Mr. Whitten had the possession of the Ford Explorer. Finally in December, 2001 Mr. Whitten paid him for the sale of the Ford Explorer.

Mr. Byron found out that the Toyota truck had a lien on it from the repair shop. The lien was in favour of Manheim Automotive Financial Services.

Testimony of Roy Vandermeer:

Mr. Vandermeer is the manager, Finance Department at Toronto Auto Auctions. This is a wholesale auction whereby dealers buy and sell vehicles. They will establish lines of credit for dealers. Mr. Vandermeer was familiar with the account of Mr. Whitten. In June of 2000 Mr. Whitten had signed a general security agreement with TAA. It dealt with short term financing. It was the responsibility of the dealer to get the ownership from TAA by seeking permission for a duplicate ownership paper.

TAA hires a company to do inventory checks on the vehicles financed through it. In December 2001 this company did an audit of Mr. Whitten's inventory. The vehicles were not found at the dealership site. When Mr. Vandermeer tried to determine the location of a particular Grand Prix vehicle Mr. Whitten told him that the location of that car was none of his business. An employee of Mr. Whitten had told him that the Grand Prix was sold. This contradicted the listing with the Ministry of Transportation. Mr. Vandermeer attended at the dealership lot of Mr. Whitten. He could not find Mr. Whitten nor were his calls being returned. When Mr. Vandermeer tried to get certified the cheque that had been left as collateral with TAA on the Grand Prix the bank said there were insufficient funds.

Mr. Vandermeer was uncomfortable with this situation. He picked up the other vehicles that were at the Whitten dealership lot. He left his business card with Mr. Whitten's employee. Later it was discovered that one of the vehicles, a Honda Civic, did not belong to TAA but to a customer. That vehicle was returned to Mr. Whitten. There is an outstanding vehicle, a 1993 Jetta which Mr. Whitten said was being driven by his daughter. Mr. Vandermeer found the 1993 Toyota at the transmission shop in St. Catharines. He told the manager of the shop that his company had a lien on it. Mr. Byron then telephoned him and told Mr. Vandermeer that he had paid in full for the vehicle to Mr. Whitten but he had never received the registration. Mr. Vandermeer discharged the lien to allow Mr. Byron to transfer the ownership. Mr. Vandermeer has a general security agreement in place on that vehicle.

It was determined by Mr. Vandermeer that Mr. Whitten owed TAA \$13,330.85. A judgment was obtained on June 24, 2002. It was not defended. Nothing has been collected on it.

Testimony of Jean Cameron:

Ms. Cameron is an inspector with OMVIC. She has held that position for five years. She testified that the *Motor Vehicle Dealers Act* is a public protection statute. Under section 5 those registered under the Act must show financial responsibility, honesty and integrity.

Ms. Cameron testified that she received a telephone call from Steve Byron. Based on that complaint she attended at the dealership of the Applicant on February 11, 2002. She found that the Applicant had changed premises and was now the owner of Virgil Service Station. She found that the Applicant had been doing consignment deals using improper documentation. She found that there was lack of disclosure on the retail bills of the odometer readings from the wholesale bills. For instance on the Griese wholesale bill it states that the speedometer is not working and has the figure of 236,000 km. But the Griese retail bill of sale had the distance travelled left blank and had no disclosure of the speedometer not working or the true km not known. For the Griese vehicle the safety certificate showed 165,231 km. The Milner wholesale bill said true kilometres. unknown and had 92,111 km on it. The Milner retail bill of sale had 92,501 km and no disclosure that the true kilometres were unknown to the consumer. This is important as Mr. Milner specifically wanted a vehicle with low kilometres. As well the odometer disclosure is important to consumers as it often determines the price of a vehicle and whether or not a consumer wishes to buy the vehicle.

Ms. Cameron testified that despite telephone calls to Mr. Whitten she never got any resolution of the Byron situation. She never got the documents that she had requested from Mr. Whitten. Mr. Byron purchased a vehicle from Mr. Whitten without knowing it had a lien on it. Mr. Whitten could not provide clear title for the vehicle.

Mr. Whitten had not repaid Mr. Morgan for the consignment deals. In so doing Mr. Whitten was not acting with financial responsibility.

Legislation:

The relevant legislation is that of the *Motor Vehicle Dealers Act*:

5. (1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

- (a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
- (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or

(2) A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant, imposed by the Tribunal or prescribed by the regulations.

7. (4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the

Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

(5) The Tribunal may attach such terms and conditions to its order or to the registration as it considers proper to give effect to the purposes of this Act. R.S.O. 1990, c. M.42, s. 7 (5).

9. (1) Where the Registrar receives a complaint in respect of a motor vehicle dealer and so requests in writing, the motor vehicle dealer shall furnish the Registrar with such information respecting the matter complained of as the Registrar requires. R.S.O. 1990, c. M.42, s. 9 (1).

(2) The request under subsection (1) shall indicate the nature of the inquiry involved.

(3) For the purposes of subsection (1), the Registrar or any person designated in writing by him or her may at any reasonable time enter upon the business premises of the motor vehicle dealer to make an inspection in relation to the complaint.

Regulation 801

16. (2) Where a used motor vehicle is sold, the sales or purchase order shall show,

(o) the distance travelled by the vehicle at the time of sale; and

19. (1) Except in the case of an exchange or repair of an odometer and subject to subsection (2), no motor vehicle dealer or salesperson shall alter, adjust or permit any alteration or adjustment to the odometer on any motor vehicle in the dealer's or salesperson's possession or control in such a manner that as a result of the alteration or adjustment the total distance indicated on the odometer is other than the total distance travelled by the motor vehicle.

Analysis:

Mr. Whitten did not attend to give evidence in this matter. The Tribunal did give consideration to his Notice of Appeal and the documents so attached to them. It is to be noted that in his Notice of Appeal Mr. Whitten made a number of allegations against other dealers which have not been substantiated by any evidence at the hearing.

It is quite clear that a number of consumers have either been inconvenienced or even would have lost their vehicles due to the actions of Mr. Whitten. Mr. Griesse purchased a vehicle that was not repaired in accordance with the Bill of Sale. Indeed Mr. Whitten unilaterally changed the conditions of sale and denied him a warranty on his transmission. Mr. Milner bought a vehicle whose master cylinder failed the next day. He had considerable trouble getting Mr. Whitten to agree to any responsibility for repairs on this matter. He expressly wished to have a car with low mileage. He did not receive such a car and was misled by Mr. Whitten as to what exactly was the distance travelled on his vehicle at the time of sale. Both these witnesses were

contacted by Mr. Whitten the day prior to the hearing and advised falsely not to attend as an adjournment was to be granted. There had been no assurances by anyone to Mr. Whitten that an adjournment would be granted and the Registrar was not even aware that Mr. Whitten did not plan to attend at the date of hearing nor was the Registrar asked for consent to an adjournment as is outlined in the Rules of Procedure for the Tribunal.

Mr. Byron waited a number of months to receive payment of the sale price on his trade-in vehicle. The vehicle he purchased from Mr. Whitten was never properly registered with the Ministry of Transportation. Indeed Mr. Whitten had no authority to register that vehicle on behalf of Mr. Byron due to an outstanding lien. Mr. Byron had no knowledge of this lien and could have lost the use of this vehicle if the Toronto Auto Auctions had wished to rely upon their clear legal right to claim that vehicle. Fortunately TAA relinquished that lien in order to allow Mr. Byron to register the vehicle. As well Mr. Byron had to have extensive repairs done on the vehicle after the repairs by Mr. Whitten were not successful.

Mr. Vandermeer of Toronto Auto Auctions testified that his company was owed a substantial amount due to Mr. Whitten not complying with the legal agreement he had signed with TAA. Ultimately TAA got a judgment in June of 2002 for over thirteen thousand dollars. Nothing has been paid on that judgment. TAA still cannot locate one vehicle which Mr. Whitten has stated is in the possession of his daughter. Mr. Whitten has not been of any assistance to TAA in locating this vehicle.

Mr. Morgan trusted Mr. Whitten. He had lent him ten thousand dollars on a promissory note. He had gone into business with him. Mr. Whitten was not honest in his business dealings with Mr. Morgan. He with-held money on vehicles he had sold on consignment for Mr. Morgan. He consistently made false promises on when he would repay the monies owed. He abused his position of trust with Mr. Morgan.

Mr. Whitten was not cooperative in his dealings with Ms. Cameron when she attempted to deal with customer complaints. He failed to provide her with the required documentation on these matters despite his obligations under the Act and Regulations to cooperate with the staff of the Registrar who are investigating complaints from the public. Despite being told by Ms. Cameron of the complaint of Mr. Byron, Mr. Whitten did not assist Ms. Cameron to resolve this matter.

It is clear to this Tribunal that Mr. Whitten has over the past couple of years taken actions that are not law abiding nor are they honest and with integrity. He has cheated on his customers. He has failed to abide by his legal obligations. He has misled a customer as to distance travelled on the vehicle at time of sale which is in direct contravention of the Act and its Regulations. Not only did he fail to attend and present his case but he attempted to stop important witnesses from attending the hearing through false statements as to the adjournment of the hearing. The Tribunal finds that the Registrar has reasonable grounds to revoke the registration of Mr. Whitten. The Registrar and this Tribunal have a duty to protect the public from those in the motor vehicle industry who fail to act with honesty and integrity. All past conduct of the Applicant must be considered and the right of the Applicant to work in a

regulated industry must be balanced against the right of the public to have trust in those who sell or repair motor vehicles.

ORDER:

Accordingly, pursuant to the powers given to it under section 7(4) of the *Motor Vehicle Dealers Act* the Tribunal directs the Registrar to carry out its Proposal and revoke the registration of James Fredrick Whitten O/A Niagara Investment Motor Cars.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley
Vice-Chair

Released: December 19, 2002

STAR VAN SYSTEMS INC. AND ANDRIES VAN-ES

IN THE MATTER of the Highway Traffic Act,
R.S.O. 1990, c. H.8 as amended;

AND IN THE MATTER of the Commercial Vehicle Operator's Registration (CVOR) Certificates 101-137-620 issued to Star Van Systems inc. and 066-126-385 issued to Van-Es, Andries dated June 6, 2002;

AND IN THE MATTER OF the Notice of Suspension and Seizure issued to Star Van Systems Inc. and Van-Es, Andries;

AND IN THE MATTER OF the safety record and record of unpaid fines of Star Van Systems Inc;

AND IN THE MATTER OF an Appeal from the Deputy Registrar of Motor Vehicle's Order dated July 8, 2002 pursuant to s. 50 (1) of the Highway Traffic Act, R.S. O. 1990, Chapter H. 8 as amend.

TRIBUNAL: Michael H. Turk, Vice Chair
Malcolm Fealing, Member
Clarke Wallace, Member

APPEARANCES: Robert B. Warren and Carole McAfee Wallace, Counsel
representing the Applicants;
Patrick Moore, counsel, representing the Respondent

DATE OF
HEARING: October 29, 30, 31, November 1 and 7, 2002 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

The Applicants appeal to the Licence Appeal Tribunal from an Order of the Deputy Registrar of Motor Vehicles dated July 8, 2002 issued pursuant to Section 47 (1) of the *Highway Traffic Act*.

The Deputy Registrar ordered a suspension for seven (7) days of CVOR certificates 101-137-620 and 066-126-385 and plate portion of permits for all commercial motor vehicles and trailers issued to Star Van Systems Inc. and Van-Es, Andries and that the plate portion of permits be seized.

FACTS:

The Show Cause Hearing

The Show Cause Meeting was held on June 27, 2002 for the purpose of providing the Applicants with an opportunity to present information that may impact the decision of the Deputy Registrar to Suspend and Seize the CVOR of the Applicants for a period of 30 days.

Mr. Warren, Counsel for the Applicants at the Show Cause, as well as this Appeal, presented an 18 page submission. This submission is contained at Tab 21 of Exhibit Number 7 and details the operations of Star Van Systems, provides an analysis of accidents, out of service incidents and convictions and an 8 point action plan in order to address the concerns of the Deputy Registrar.

The action plan provided for the following:

- (a) enhance the driver training program and to improve re-training programs for pre-trip inspections and book logs;
- (b) institute a discipline system for all drivers;
- (c) develop and implement a new tracking system for all incidents giving rise to CVOR points, with a focus on taking the measures necessary to prevent a recurrence;
- (d) develop and implement a new CVOR tracking system;
- (e) hire a full time driver trainer;
- (f) institute a system of random driver and vehicle spot checks;
- (g) equip all vehicles with brake adjustment indicators;
- (h) require all drivers to complete a brake adjustment course.

The notes from the Show Cause Hearing at Tab 20 of Exhibit Number 7 disclose that the Applicants were extremely candid in accepting responsibility for past failures and that they were optimistic that the implementation of the above noted systems would improve their CVOR record within six months.

Registrar's Decision

On July 8, 2002 the Deputy Registrar issued a decision wherein he states that "I have considered your submissions, your payment of fines, and your safety record including

your record of convictions, accidents and vehicle inspections, I remain concerned for highway safety".

The Deputy Registrar ordered that the CVOR be suspended for 7 days. The Tribunal notes that this Order had the effect of reducing the original suspension from 30 days to 7 days.

It is this Order that is the subject of this Appeal.

Evidence of John Miller

John Miller is an employee of the Ministry of Transportation and is currently employed in the position of safety ratings administrator.

The CVOR of the Applicants which is contained at Tab 7 of Exhibit Number 6 indicates that during the period from April 30, 2000 through April 29, 2002 the Applicants had an overall violation rate of 101%. This overall rate is composed of 75.9% of threshold for accidents, 204% of threshold for convictions and 51% of threshold for inspections.

Mr. Miller testified that an overall violation rate over 100% would put the Applicants in the worst 5% of all carriers in the CVOR system and that once a carrier is in this percentile sanctions are the appropriate remedy.

Mr. Miller prepared an analysis of the Applicants' safety record which is found at Tab 6 of Exhibit Number 6. This analysis contained a summary of Ministry interventions from 1990 to the present which identifies 6 audits, two warning letters, two interviews and safety ratings of conditional (2) and satisfactory.

Mr. Miller noted that most carriers resolve their difficulties with the Ministry at the interview & audit phases and that it is only a small percentage of carriers that go to the stage of a sanction.

On cross-examination by Mr. Warren, Mr. Miller acknowledged that the proposals put forth by the Applicants at the show cause hearing were appropriate and should have been in place by now. Mr. Miller continued by stating that he was concerned about the Applicants' track record of non-compliance, however, at no time did he advise the Applicants that he was concerned that in light of past interventions that they would not carry out the plan.

Mr. Miller further testified that he did not tell the Applicants that the reason why they would be suspended was due to the belief that they would not fulfill the action plan.

Motion to Admit Current Record

During the cross examination of Mr. Miller, Mr. Warren sought to examine Mr. Miller on the Applicants' record for a two year period from September 3, 2000 through September

2 2002 and for the 6 months from March 3, 2002 through September 2, 2002. These documents are found at Tab 3 of Exhibit Number 5, in the Applicants Book of Documents.

Mr. Moore objected to the introduction of the more current data on the grounds that the Tribunal should only look at the statistics contained in the CVOR contained at Tab 7 of Exhibit Number 6 as this was the CVOR used in connection with the Order that is being appealed.

Mr. Warren submits that the updated information should be admitted as the Tribunal should make its decision based upon the information as of the date of the hearing and that it was not until this hearing that the Applicants were advised that their credibility was in issue and therefore they are entitled to lead evidence in that regard.

Both counsel submitted cases and advised the Tribunal that the cases support both positions.

The Tribunal reviewed the cases submitted and followed the decision of the Tribunal in the case of Transport Provost Inc./Provost Bulk Transport Inc. v. Deputy Registrar of Motor Vehicles, whereby it was held that evidence of current conduct was relevant for the purpose of determining whether the sanction was appropriate. On that basis, the Tribunal ruled that the current statistics of the Applicants shall be admitted for the purpose of determining whether the sanction was appropriate.

On the basis of this ruling, Mr. Miller's cross-examination continued with the presentation of a CVOR from the period of September 24, 2000 to September 23, 2002. This CVOR was admitted and marked as Exhibit Number 9.

Exhibit Number 9 provides an overall rating of 94.2% which can be broken down to 63.5% of threshold for accidents, 192.7% of threshold for convictions and 56.9% of threshold for inspections.

Evidence of Ken Simpson

Ken Simpson testified that he has been the Vice-President of the corporate Applicant since December 2001 is responsible for safety & compliance and gave evidence of the measures that the company has taken in order to improve its CVOR.

Mr. Simpson testified that in March 2002 he retained the services of Melanie Ethridge, an industry consultant that the company had used for its audit with the Department of Transportation in the United States. The analysis concluded that 70% of the company's problems were driver related and she recommended implementation of a system of driver discipline, driver incentive program, revised driver's manual, installation of brake indicators, retraining of drivers and random spot checks. Ken Simpson testified that these recommendations had been implemented.

In addition to retaining the services of Melanie Ethridge, Ken Simpson testified that the company had also retained the services of Blair Gough to undertake an assessment of fleet maintenance.

Mr. Simpson concluded his testimony by stating that in the past, the senior management of the company had placed too much reliance on hired personal and that these problems had been rectified.

On cross-examination by Mr. Moore, Mr. Simpson stated that although having been employed by the company in dispatch prior to his promotion to Vice-President, he was unaware of the CVOR record and relied upon the advice of the then safety manager and consultant and that all problems were under control.

Mr. Simpson further testified that the company had since hired Mark McElroy as a safety director and that since July 2002, the company had established a CVOR committee which meets monthly in order to review the status of the CVOR.

Evidence of Mark Stanley McElroy

Mark McElroy testified that he has been employed as Safety Director since September 26, 2002 and has been employed in this industry since 1979. Mr. McElroy's testified that his experience started as a driver and has expanded to being a consultant on training and safety compliance systems. He is certified as a brake instructor, served on the Ontario Safety League and is a charter member of the Council for Driver Trainers.

Mr. McElroy continued his testimony by detailing his responsibilities for the discipline policy, accidents, preventative maintenance, convictions and implementation of a system of random spot checks.

Mr. McElroy testified that the action plan proposed by the Applicants is a good one and will reduce the company's out of service & conviction rates. In addition, he has implemented revisions to the training program, changed the discipline process and has developed his own tracking system.

The cross-examination of Mr. McElroy did not disclose any new or significant information.

Evidence of Andries Van-Es

Andries Van-Es testified that he is the President of the corporate Applicant and a CVOR holder as well.

Mr. Van-Es testified that in the past he had relied upon the experience & expertise of two employees, Randall Birch & Dave Duern to ensure compliance and that these individuals failed to keep him apprised of Ministry interventions and that he was unaware that an action plan had been signed by Messrs. Birch & Duern.

Mr. Van-Es testified candidly, that he did not supervise the company the way he should have and that he accepts full responsibility for the situation that the company finds itself in today. He continued his testimony by stating that it was not until March 2002, when the company could not licence plates, that he realized that something was wrong.

Mr. Van-Es continued by confirming the evidence given by Ken Simpson & Mark McElroy outlining the personnel & policy changes that have been implemented by the company.

Mr. Van-Es concluded his testimony by detailing that a closure of the company for 7 days would be devastating in that the company would suffer losses of gross revenue of \$700,000.00 - \$800,000.00, independent operators would not return and customers would be lost.

On cross-examination by Mr. Moore, Mr. Van-Es maintained that he placed too much reliance on others and admitted that he did not obtain an analysis of the impact of a work stoppage on his business but he believed that he would lose a great majority of his good customers.

ISSUES:

There are two issues.

The first is whether the Tribunal has the authority to vary or substitute the decision of the Deputy Registrar.

The second is whether the decision of the Deputy Registrar is correct.

THE LAW:

The relevant sections of the *Highway Traffic Act* are as follows:

- 47. (1) Subject to section 47.1, the Registrar may suspend or cancel,
 - (a) the plate portion of a permit as defined in Part II;
 - (b) a driver's licence; or
 - (c) CVOR certificate, on the grounds of,
 - (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other law relating to highway safety;
- 50 (2) The Tribunal may confirm, modify or set aside the decision of the Minister or Registrar.

APPLICATION OF THE LAW TO THE FACTS & SUBMISSIONS:

Mr. Moore presented the Tribunal with various cases in support of the Respondent's position that the Tribunal should affirm the decision of the Deputy Registrar and dismiss the Applicant's appeal.

Mr. Moore relies on the case *Brenner v. Ontario (Registrar of Motor Vehicle Dealers and Salesmen)*, a decision of the Mr. Justice Southey of the Divisional Court of Ontario for the proposition that the Tribunal's review should focus on whether the Deputy Registrar was in error in his conclusion that on reasonable grounds the Applicants would not operate the commercial vehicles safely or in accordance with law.

The *Brenner* decision is referred to and relied upon in the decision of 1226795 and 1383546 *Ontario Limited vs. Deputy Registrar of Motor Vehicles*. In this case the Tribunal stated that in accordance with *Brenner* the powers of the Tribunal are circumscribed in that it is only if the Tribunal finds that the registrar was in error in his conclusion that an order can be made directing the Registrar to refrain from carrying out his proposal.

Mr. Moore submits that the past record of the Applicants provides abundant reason for the Deputy Registrar's Order and when considered with the above-referenced cases, the decision of the Deputy Registrar should stand.

Mr. Warren submits that the *Brenner* case is not applicable to this case for the reasons that the Deputy Registrar did not provide adequate reasons and the manner in which the Deputy Registrar made his decision. Of primary significance is Mr. Warren's submission that the Deputy Registrar did not advise the Applicants that he was concerned that the Applicants would not carry out the remedial measures as the first time that the Applicants heard this position was at this hearing, through the evidence of Mr. Miller.

As Mr. Moore submits that this Tribunal should follow *Brenner* and Mr. Warren submits that *Brenner* is not applicable to this case, let us now review *Brenner* in order to determine its application to this Appeal.

Mr. *Brenner's* application for registration as a motor vehicle salesman was refused due to concerns by the Registrar that his past conduct afforded reasonable grounds for belief that he would not carry on his business in accordance with law, honesty and integrity.

Mr. *Brenner* had an extensive criminal record with 17 convictions, with the most recent crime of fraud having taken place in Detroit, Michigan, 2 years prior to his application and a crime for which he was sentenced to 3 years in prison. Mr. *Brenner* spent 22 months in custody until he was paroled and deported to Canada.

The Tribunal heard evidence that Mr. Brenner had turned over a new leaf and that Brenner had the possibility in the future of being a person of honesty and integrity and that he should upgrade himself. On this basis, the Tribunal directed the Registrar to grant Mr. Brenner a registration on terms & conditions.

The Divisional Court was critical that the Tribunal was preoccupied with sympathetic concerns as to whether Mr. Brenner had genuinely reformed and decided to give Mr. Brenner a second chance.

On this background the Divisional Court held that the Tribunal should have only refused to direct the Registrar to carry out his proposal if it thought that the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty.

The Divisional Court found that the past conduct of Mr. Brenner afforded the Registrar with reasonable grounds as required by the legislation.

The Divisional Court concluded its decision by noting that at the time of the hearing of the Appeal in Divisional Court, almost a year had passed since the decision of the Tribunal and that as the Registrar did not seek a stay of the Tribunal's decision, Mr. Brenner had maintained his employment as a car salesman during the intervening time.

The Court stated that it would be unjust to set aside the order of the Tribunal and direct the Registrar to carry out his proposal which is based upon the facts as they existed when the Registrar made his decision. The Court continued by stating that it may be that if the Tribunal heard matters afresh and gave effect to the principles laid out in the reasons, it may now be able to conclude that the past conduct of Brenner no longer afforded reasonable grounds for the belief that he will carry on business in accordance with law and with integrity and honesty.

This Tribunal heard evidence from Ken Simpson, Mark McElroy and Andries Van-Es with respect to the action plan, implementation thereof and all steps that the corporate Applicant has undertaken to improve its CVOR. The Tribunal was impressed by the candour and bona fides that these individuals displayed in their evidence and their collective goal of ensuring the improvement of the company's CVOR.

Similarly, Mr. Miller testified that he agreed that that the action plan presented by the Applicants was a good one and did not suggest any revisions or amendments to the action plan.

The Tribunal notes that at the time of this hearing the Applicants had implemented the proposed action plan and had taken the necessary steps to improve its CVOR record. The updated CVOR shows an improvement as does the Applicants' records for the last six month period.

It is the view of this Tribunal that the steps taken by the Applicants as of the date of this hearing are positive, that these steps were not rejected or contradicted by the Respondent and that these steps are wholly consistent with the ultimate goal of ensuring highway safety. On this basis the Tribunal finds the Deputy Registrar was in error in concluding that he had reasonable grounds to remain concerned for highway safety.

It is this Tribunal's further view based upon the Applicants actions the Deputy Registrar should have deferred his decision on sanction for a period of six months and conduct a further audit as this would ensure that the Applicants had maintained their action plan and improved compliance to an acceptable level.

ORDER

Based upon the foregoing the Tribunal hereby orders as follows:

1. The Tribunal hereby suspends the decision of the Respondent for a period of six months from the date hereof.
2. Following the six months referred to above, the Respondent shall conduct an audit of the Applicants.
3. In the event that the Respondent is not satisfied with the result of the audit the Respondent shall be at liberty to implement the suspension.

LICENCE APPEAL TRIBUNAL

Malcolm Fealing,
Member

Michael H. Turk,
Vice-Chair

Clarke Wallace,
Member

RELEASED: December 23, 2002

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
DEAN McFADYEN a/o CRUISE CONNOISSEURS
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: July 11, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

DEAN McFADYEN o/a CRUISE CONNOISSEURS

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by Dean McFadyen o/a Cruise Connoisseurs, the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule 'A';

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule 'A'.

LICENCE APPEAL TRIBUNAL

Carl Dombek, Chair

Released: December 11, 2002

CLAUDIA COORE

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE *ONTARIO NEW
HOME WARRANTIES PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, Vice-Chair, Presiding
ALBERT LONGO, Member

APPEARANCES: CLAUDIA COORE, Applicant, who was not represented nor
present
KAREN R. SPECTOR, Counsel, representing the Ontario New
Home Warranty Program

DATE OF
HEARING: November 26, 2002 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") from a written decision of the Ontario New Home Warranty Program (the "Program") dated August 1, 2002 wherein the claim of Claudia Coore (the "Applicant") was denied by the Program.

The Applicant was neither personally present nor represented when this matter was called on November 26, 2002. The Tribunal noted that by Notice of Hearing dated September 10, 2002 the Applicant and the Program were notified of the hearing set down for hearing for November 26, 2002. Nothing was heard from the Applicant until the Tribunal received a letter from her on November 19, 2002. In this letter the Applicant requested the hearing be adjourned to a later date stating that due to circumstances beyond her control she was unable to attend at the Tribunal on November 26, 2002. On November 20, 2002 the Tribunal's Registrar replied by letter to the Applicant as follows:

We are not in a position to make a decision with regard to your request unless the following information is provided to us in writing:

- . the reasons why you are unavailable to proceed on the scheduled hearing dates;
- . the written consent of the other party; and
- . if the other party consents, the new dates that both parties have agreed to and can attend.

Unless we receive the above information, in writing **by no later than 9:30 a.m. on Friday, November 22, 2002**, the hearing will proceed as scheduled on November 26 and 27, 2002, at 9:30 a.m., at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

If you wish to present your arguments for an adjournment, you may do so at the onset of the hearing. However, if the panel does not consent to an adjournment, the hearing will proceed and the parties are to prepare themselves accordingly.

This letter was delivered by courier to the Applicant. By letter dated November 25, 2002 the Applicant wrote to the Registrar stating that her supervisor had denied her request "for time off" to attend the hearing and that she had been unsuccessful in finding someone to appear on her behalf. On receipt of the Applicant's letter, a Clerk at the Tribunal telephoned the Applicant and although unable to speak with her did leave a message on the Applicant's voicemail advising her that her letter had been received by the Tribunal and that she "will need to present" her adjournment request at the commencement of the hearing and that in the event of her not being present on November 26, 2002 the hearing would proceed in her absence.

Nothing further has been heard from the Applicant. When the matter was called the Program's Counsel opposed the adjournment request, maintaining that neither she nor her client had been informed by the Applicant of a request for an adjournment. The Program had witnesses present and was fully prepared to proceed with the hearing.

The Tribunal refused to grant an adjournment noting that the Applicant has had ample opportunity since early September of this year to seek and obtain her employer's consent to her taking leave; further the Applicant had not supported her request for an adjournment by furnishing the Tribunal with any form of letter from her employer in which the employer confirms its objection to granting leave to the Applicant and the reason for the employer's refusal. The requested adjournment would prejudice the Program as it had been put to not inconsiderable expense in retaining Counsel and arranging for the presence of witnesses. The Applicant had paid no heed, by requesting the adjournment at the eleventh hour, to the additional costs that would have been incurred by the Program.

Accordingly, the adjournment requested by the Applicant was denied and the matter proceeded.

THE EVIDENCE:

One witness Ms Wendy Skyba testified for the Program and she stated as follows:

She is currently employed by the Program as a warranty representative. She has held this position for the past three and one half years and prior thereto was employed as a building official with the Town Council, Sudbury, Ontario. Prior to working in Sudbury she was employed by a large building contracted as a site supervisor.

Skyba stated that she is familiar with the file relating the Applicant's claim. The original warranty representative involved in dealing with the Applicant's complaints was requested by the Applicant to be replaced. Skyba was appointed by the Program as the replacement warranty representative and she was asked to attend at the home of the Applicant to carry out an inspection relating to complaints the Applicant had in regard to the construction of her home (the "home") at 33 Apollo Road, Markham, Ontario. Accordingly, Skyba attended at the home on July 29, 2002 to conduct an inspection. Skyba stated that the home was completed for possession on February 25, 1999, the inspection of July 29, 2002 related to three complaints or issues raised by the Applicant, and the first notification to the Program of all such three claims was received by the Program on June 28, 2002

Pursuant to Skyba's inspection on July 29, 2002 she authored the Program's decision letter dated August 1, 2002 addressed to the Applicant in which letter the Program denied all three claims of the Applicant. Skyba then dealt with the three claims in her testimony and stated as follows.

FIRST CLAIM

This claim related to a crack approximately three feet in length in the home's west foundation wall. The crack was from the top of the foundation wall to the basement floor slab. On her measuring the width of this crack, Skyba noted that it was 0.010 inches wide and showed evidence of dampness from water penetration. A second crack was also noted on the west foundation wall at a point where the garage foundation back wall meets the foundation wall. This crack showed no sign of leakage, dampness or water penetration and was also measured by Skyba to be 0.010 inches wide. The finishes to the interior and exterior of this basement wall showed no damage or evidence of movement.

During her inspection, Skyba took a number of photographs of the cracks and presented such photographs when testifying. These photographs were entered as exhibits (Exhibits 4 and 5).

The first photographs tendered by Skyba (Exhibit 4) showed the exterior of the west foundation wall between the brick cladding and the ground.

The second photographs (Exhibit 5) show the interior surface of the west foundation wall shown. This interior surface shows water dampness on the interior surface and on the concrete floor. Skyba stated that this dampness was due to water penetration from the exterior soil. There was no "water running on the floor" according to Skyba and "no ponding" of water on the floor. Skyba noted that there was no shifting or movement of the foundation wall and the height of the wall was the same on both sides of the cracks. No cracks were seen in the brick cladding on the wall's exterior nor were cracks observed in the mortar. No damage was noted to the wall's interior finish.

Skyba continued to testify that the cracks that she observed in the west foundation wall were minor hairline cracks and were caused by the shrinkage of the concrete which is typical of a long concrete wall such as the west foundation wall.

Skyba further stated that there was no major structural defect as defined in section 1 of Regulation 892 of the *Ontario New Homes Warranties Plan Act* (the "Act"). There was also no failure in the load bearing portion of the building nor was there any defect in work or materials that materially and adversely affected the use of the home and for which it was intended.

Skyba also stated that although there was water penetration noted, a claim in respect thereof had to be made to the Program in writing within two years after the home was completed for possession. This was not done by the Applicant as the home was completed for possession on February 25, 1999 and the Applicant's written claim to the Program was only received by the Program on June 28, 2002 which was outside the two year period.

SECOND CLAIM

This claim related to a cracked window pane in the basement window of the house.

Skyba stated that there is a double pane thermal window installed and the broken pane is the interior pane. Applicant had stated to Skyba that the previous interior pane had also cracked and had been replaced by the builder. It was this replacement pane that was the subject of this claim.

On inspection Skyba noted the cracked pane (Exhibits 7) was the inside slider pane. The outside pane was neither cracked nor damaged. There was no evidence noted of structural movement. The brick and wall surrounding the window was found by Skyba to be in order and no cracks or damage were seen. The interior dry wall surface around the window showed no damage. Skyba could not explain the reason for the cracked window pane and speculated that it could be due to something having struck the window pane.

Skyba also stated that this claim was brought to the Program's attention for the first time when the Applicant reported this claim to the Program in writing on June 28, 2002.

Skyba stated that this claim was not reported to the Program within the one year after the home had been completed for possession on February 25, 1999. Further, that this claim was not documented by the Applicant on the predelivery documents. She stated this broken pane is not a major structural defect within the definition as contained in Regulation 892 to the Act.

THIRD CLAIM

This claim relates to cracks at the southeast corner of the home's foundation.

During the inspection of the home on July 29, 2002, the Applicant pointed out cracks on the south and east exterior foundation walls approximately 12 inches from the southeast corner of the home. No cracks were observed in the brick cladding above the cracks nor in the mortar surrounding the bricks. The interior drywall in the home's basement at the southeast corner was inspected and found to be undamaged and no water penetration was seen or pointed out to Skyba. When Skyba inspected the home she noted that the basement was being used as a finished living area (Exhibits 8 and 9).

Skyba further stated that during the inspection of the home the Applicant asked her to look at these exterior cracks although she had never before reported these cracks to the Program in writing. Skyba went on to state that the cracks noted in the outside are typical shrinkage cracks caused by normal contraction and expansion of concrete. The cracks do not constitute a major structural defect and the normal use of the home was not affected by these shrinkage cracks. Skyba further stated that apart from this claim not constituting a major structural defect, the shrinkage cracks caused by the drying out of the concrete were excluded from warranty coverage by virtue of section 13(2)(d) of the Act. Additionally, this claim was denied by the Program as the Applicant had not complied with section 13(4) of the Act in reporting the claim to the Program within one year after taking possession of the home.

FACTS FOUND PROVEN:

The following are the facts found by the Tribunal to have been proven:

1. Pursuant to a written Agreement of Purchase and Sale, the Applicant took possession of the home on February 25, 1999.
2. In respect of the Applicant's first and second claims, written notice in respect thereof was delivered by the Applicant to the Program in writing for the first time on June 28, 2002.

3. In respect of the Applicant's third claim, no written notice of such claim was delivered to the Program at any time although verbal notification was given to the Program's warranty representative on July 29, 2002.
4. There are not, and at no stage were there, any construction defects in the home within the meaning of "major structural defect" as defined by section 1 of Regulation 892 of the Act.
5. In relation to the Applicant's first claim there was minor water penetration into the home's basement caused by water penetrating through a hairline shrinkage crack in the homes west foundation wall.
6. The Applicant's written notification of claim to the Program relative to water penetration into the home's basement was made beyond the two year period after the home was completed for possession on February 25, 1999.
7. In relation to the Applicant's second and third claims the Applicant has failed to prove that such claims arose from the home having been constructed in an unworkmanlike manner and with defects in material, nor has the Applicant proven that the home was not fit for habitation or that it was not constructed in accordance with the Ontario Building Code.
8. The Applicant first reported the second claim to the Program in writing on June 28, 2002 and at that time such notice was received by the Program beyond the two-year period after the home's completion for possession on February 25, 1999.

THE LAW:

The Act's relevant portions are:

Section 13(1)(a) of the Act states:

13. (1) Every vendor of a home warrants to the owner,
 - (a) that the home,
 - (i) is constructed in a workmanlike manner and is free from defects in material,
 - (ii) is fit for habitation, and
 - (iii) is constructed in accordance with the Ontario Building Code;

Section 13(2)(d) of the Act states:

- (2) A warranty under subsection (1) does not apply in respect of,
 - (d) normal shrinkage of materials caused by drying after construction;

Section 13(4) of the Act states:

- (4) A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed.

Regulation 892's relevant sections are:

"major structural defect" means, for the purposes of clause 13 (1) (b) of the Act, any defect in work or materials,

- (a) that results in failure of the load-bearing portion of any building or materially and adversely affects its load-bearing function, or
- (b) that materially and adversely affects the use of such building for the purpose for which it was intended,

including significant damage due to soil movement, major cracks in basement walls, collapse or serious distortion of joints or roof structure and chemical failure of materials, but excluding any defect attributable in whole or in part to a Year 2000 compliance problem, flood damage, dampness not arising from failure of a load-bearing portion of the building, damage to drains or services, damage to finishes and damage arising from acts of God, acts of the owners and their tenants, licensees and invitees, acts of civil and military authorities, acts of war, riot, insurrection or civil commotion and malicious damage;

Section 16 of Regulation 892 states:

16. Where a home was enrolled after the 31st day of December, 1990, the claim for damages because of a major structural defect may be made within seven years of the date specified in the certificate of completion and possession. R.R.O. 1990, Reg. 892, s. 16.

Section 4 of Regulation 892 states:

- 4. (1) Each person with a claim under the Plan shall give written notice of the claim to the Corporation

Section 15.(2) and (3) of Regulation 892 state:

- 15. (2) Every vendor of a new home warrants to the owner,
 - (a) that the home is constructed in a workmanlike manner and is free from defects in materials including windows, doors and caulking such that the building envelope of the home prevents water penetration;
- (3) The warranties described in subsection (2) apply only in respect of claims made within two years after the home was completed for possession, in respect of homes

that were enrolled, or should have been enrolled, after the 31st day of December, 1990.

REASONS FOR DECISION:

There are three issues for consideration in this matter and the onus of proof regarding those three issues rests with the Applicant.

An analysis of the three issues follows together with the Tribunal's reasons for its decision.

1. FIRST CLAIM

The evidence of Skyba was that she observed minor hairline cracks in the west foundation wall. These cracks measured no more than 0.010 inches in width. Some minor water penetration did exist as was evident from both the evidence of Skyba as well as the photographs she took during the inspection. There was no ponding of water on the floor nor did she find shifting or movement of the foundation wall. Skyba attributed the cracks to shrinkage of the concrete in the drying out process.

The Tribunal finds no evidence to indicate that there was a major structural defect in the house resulting from these cracks. There is no evidence that a load-bearing portion of the building has been materially or adversely affected nor has the use of the building been adversely affected for the purpose for which it was intended.

The Tribunal finds therefore that there is no major structural defect existing in the home as defined by Section 1 of Regulation 892 to the Act.

While there has been water penetration into the building through the minor hairline cracks, the Tribunal finds the warranty under section 15.(2)(a) of Regulation 892 has no applicability in this instance as the Applicant failed to make written claim to the Program within two years after the home was completed for possession as required by section 15.(3) of Regulation 892. Occupation and possession of the house took place on February 25, 1999 while the Applicant reported this claim on June 28, 2002.

Accordingly, the Tribunal finds that this claim must fail due to the Applicant's failure to report the claim within the time limit imposed by the Regulation and for the reason that there is no major structural defect in the home.

2. SECOND CLAIM

This claim related to a cracked window pane in the basement's window as described in the evidence of Skyba.

There was no evidence to suggest that this broken pane was caused by a defect in work or materials supplied by the builder. There was also no evidence to suggest that

the broken pane has been caused by the failure of a load bearing portion of the home or that the use of the home has been adversely affected by the broken pane. The evidence of Skyba was that there was no evidence of movement in the wall in which the window containing the pane was situated. No damage was present or seen on the brickwork or wall surface surrounding the window. Accordingly, the Tribunal finds that this window pane did not fail due to a major structural defect in the home's construction.

Furthermore, the Tribunal finds written notice of this claim, as required by section 13.(4) of the Act, was not given to the Tribunal within one year after the Applicant took possession of the home on February 29, 1999. Written notice was only received by Program on June 28, 2002 considerably outside the one year period in which the Program should have received written notification.

Accordingly, the Tribunal finds that this claim fails.

3. THIRD CLAIM

This claim related to cracks on the exterior concrete foundation wall situated at the home's southeast corner.

The evidence of Skyba was that these are minor cracks due to normal shrinkage of the concrete due to the contraction and expansion of the concrete. The Tribunal finds that these cracks did not constitute or result in a major structural defect within its defined meaning. There was no evidence of any defect in work or materials that resulted in failure of the load-bearing portion of the home or materially or adversely affected the home's load-bearing function. There was also no evidence to suggest any defect in work or material that materially or adversely affected the use of the home for the purpose for which it was intended.

The Tribunal finds that these minor cracks are due to normal shrinkage and are excluded from warranty coverage by section 13.(2)(d) of the Act.

Finally, the Tribunal finds that this claim was at no time reported to the Program in writing. This claim was only raised verbally by the Applicant when she spoke with Skyba at the July 29, 2002 inspection of the home. The Tribunal finds therefore that this claim was not reported in writing to the Program as required by section 4(1) of Regulation 892 nor was it reported within one year after the Applicant took possession of the home as required by section 13.(4) of the Act.

For all the above reasons the Tribunal finds this claim must fail.

DECISION:

Accordingly, by virtue of the authority vested in it under Section 16(3) of the *Ontario New Home Warranties Plan Act*, the Tribunal directs the Ontario New Home Warranty Program to disallow the claims of the Applicant.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Albert Longo, Member

Released: December 4, 2002

ASTRA TRAVEL AND SERVICES INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *TRAVEL INDUSTRY ACT*

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: There was no appearance by the Applicant or on its behalf.

TREVOR BRANION, Counsel representing the Registrar,
Travel Industry Act

DATE OF
HEARING: November 19, 2002 Toronto

REASONS FOR DECISION AND ORDER

This is a hearing before the Licence Appeal Tribunal (the "Tribunal") arising out of a Notice of Proposal issued by the Registrar under the *Travel Industry Act* (the "Registrar", and the "Act" respectively). The Notice of Proposal dated August 12, 2002 proposed to revoke the registration of Astra Travel and Services Inc. under the Act.

BACKGROUND:

The grounds relied upon by the Registrar for the Proposal are set out below:

- (i) the failure by the Applicant to comply with provisions of Section 24 of Regulation 806/93, as amended, under the Act (the "Regulation") relating to the filing of financial statements with the Registrar.
- (ii) the failure by the Applicant to comply with the provisions of Section 25 of the Regulation relating to the maintenance of sufficient working capital by the Applicant; and
- (iii) The failure by the Applicant to comply with the provisions of Section 36 of the Regulation relating to the maintenance of a trust account.

The Applicant was not present nor represented when the matter was called at 9:30 a.m.

and in accordance with the Rules of Practice of the Tribunal the matter stood down for 30 minutes. At the end of the 30 minutes the matter proceeded in the absence of the Applicant who was not present or represented and after the Tribunal had satisfied itself that the Notice of Hearing had been received by the Applicant.

THE EVIDENCE:

The first witness to testify to the Registrar was Pamela Lavinia Stout ("Stout") who testified that she is employed by the Travel Industry Council of Ontario (TICO) as financial inspections coordinator and has been employed in that capacity for the last twelve years. Her duties entail ensuring compliance by Registrants with the Act and Regulation.

Stout stated that the Applicant is a registered travel agent. She reviewed the Proposal and stated that the Applicant has persistently been in violation of the Regulation insofar as the filing of financial statements are concerned. Commencing in July 1998 the Applicant failed to file the annual financial statement with the Registrar when such statements were due for filing.

Financial statements, when received, repeatedly reflected a shortfall in working capital. During an inspection of the Applicant by an inspector it was revealed that the Applicant was not properly maintaining its trust account as required by the Regulations and customer deposits were being incorrectly processed through the Applicant's general account. The inspector reviewed the trust account guidelines with the Applicant.

In May of 2001 when asked by the Registrar for evidence that it was correcting its working capital shortfall it furnished the Registrar with unacceptable evidence.

During a further visit by an inspector to the Applicant it was ascertained that in contravention of Section 36 of the Regulation pertaining to trust accounts, the Applicant was using trust funds irregularly in that overhead expenses were being passed through the trust account. Information was also hard to come by from the Applicant despite repeated requests for such information. Documentation in support of the Applicant's financial statements were omitted from letters addressed to the Registrar by the Applicant. There were constant and recurring shortfalls in working capital and insufficient or no supporting documents or details sent by the Applicant to enable the Registrar to ascertain whether or not the shortfall in working capital, as reported by the Applicant, was either correct or in any way accurate.

In June 2002 the Registrar ascertained that the Applicant was operating its trust account with frequent overdrafts and that there was a trust deficit of \$11,507.00 as at April 30, 2002. The Applicant was asked for further information in order to allay the growing fears of the Registrar.

When In July 2002 an inspector paid a visit to the Applicant to further the Registrar's investigations, it was revealed that the trust account of the Applicant was overdrawn in May and June 2002 and it was impossible to ascertain the current customer deposit information.

Bank statements were not available nor was information available in order to determine whether the working capital of the Applicant was in place or sufficient. No business records by way of books of account were being maintained by the Applicant as is required by Section 37 of the Regulation.

To date the Applicant has not addressed the working capital deficit of \$11,507.00 and has not furnished the Registrar with information sufficient to satisfy the Registrar as to the current customer deposit position. Due to the failure of the Applicant to cooperate with the Registrar the latter cannot determine the true current working capital of the Applicant.

Linda Lee Gilbert also testified on behalf of the Registrar. She stated that she is employed by TICO as a financial inspector and is an accountant by profession.

Ms. Gilbert testified that in the course of the Registrar's investigation she attended at the Applicant's offices on July 9, 2002. She noted that there were no books of account being maintained by the Applicant and from the few incomplete documents made available to her by the Applicant she could not ascertain whether the working capital of the Applicant complied with the requirements of the Regulation. As there were no books of account available but only some cheque stubs, bank statements and deposit slips, she could not successfully reconcile the Applicant's trust account nor could she confirm the amount or correctness of the shortfall in the Applicant's trust account. The lack of records was in contravention of Section 37 (3) of the Regulation.

FACTS FOUND PROVEN:

The following are the facts found proven by the Tribunal

- 1 The Applicant is presently registered as a travel agent under the Act.
- 2 The Applicant has failed to comply with section 24(2) of the Regulation in that it has failed on numerous occasions to timeously file its annual financial statements with the Registrar.
- 3 The Applicant has failed to comply with Section 25 (2) of the Regulation in that it has failed to maintain a minimum amount of working capital as required by the aforementioned section of the Regulation.
- 4 The Applicant has failed to comply with section 36 (6) of the Regulation in that it has disbursed or withdrawn from money held in its trust account prior to a supplier or suppliers of travel services having received payment from the Applicant for such travel services.
- 5 The Applicant has failed to comply with section 37 (3) of the Regulation in that it has

failed to maintain written business and accounting records of, inter alia, all payments made by or to the Applicant respecting the purchase or sale of travel services.

The Law

The *Travel Industry Act* states as follows:

- a. (1) No person shall act or hold himself, herself or itself out as being available to act as a travel agent unless the person is registered as a travel agent by the Registrar.
- b. (1) An applicant is entitled to registration or renewal of registration as a travel agent or travel wholesaler by the Registrar except where,
 - (a) having regard to his, her or its financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of his, her or its business; or
 - (b) the past conduct of the applicant affords reasonable grounds for belief that he, she or it will not carry on business in accordance with law and with integrity and honesty; or
 - (c) the applicant is a corporation and,
 - (i) is incorporated without share capital, or
 - (ii) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, or
 - (iii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or
 - (d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.
5. (1) Subject to section 6, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 4.

(2) Subject to section 6, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 4 if he, she or it were an applicant, or where the registrant is in breach of a term or condition of the registration.

APPLICATION OF LAW TO FACTS:

In terms of Section 5 of the Act, the Registrar is entitled to revoke a registration for any reason that would disentitle an Applicant to registration under Section 4 of the Act. Section 4.(1) (c) of the Act requires that an Applicant, having regard to its financial position, be financially

responsible in the conduct of its business and that its business be carried on in accordance with law and with integrity and honesty.

In the leading case of *Brenner 19 CRAT SCO Decisions and Orders* (1971-1989) page 95 Southey J. held that a Tribunal should only refuse to direct the Registrar to carry out his proposal if it thinks the Registrar was in error in concluding that the past conduct of an Applicant afforded reasonable grounds for belief that such Applicant would not carry on business in accordance with law and with integrity and honesty.

To overrule the decision of the Registrar, the Tribunal must therefore conclude that he was wrong in his decision and that the conduct of an Applicant does not afford reasonable grounds for the Registrar's belief that the Applicant will in the future carry on business in contravention of the Act and its Regulations.

The Applicant did not appear nor was it represented before the Tribunal at the hearing of this matter. It had been duly served with the Registrar's Notice of Proposal as well as supporting documents as contained in the Registrar's Book of Documents. The evidence adduced by the Registrar through its two witnesses who testified at the hearing was uncontraverted by the Applicant and the Tribunal accepts their testimony without reservation.

Section 24 (1) and (2) of the Regulation places an obligation on the Applicant to file with the Registrar financial statements for each fiscal year within three months of the end of the Applicant's fiscal year. The financial statements due on March 31, 1998 were only filed on July 24, 1998. The applicant's financial statements due on March 31, 1999 were only filed on April 29, 1999. The financial statements due on March 31, 2001 were only filed on April 23, 2001. The Applicant's financial statement due on March 31, 2002 were only filed on April 24, 2002. There were ongoing breaches of the aforesaid section of the Regulation by the Applicant for the years 1998, 1999, 2001 and 2002.

Section 25 of the Regulation requires that a certain minimum working capital shall be maintained by travel agents. The working capital that should have been maintained by the Applicant was not in fact maintained and there were repeated shortfalls discovered by the Registrar in 1998, 1999, 2001 and 2002.

Section 36 of the Regulation requires the Applicant to maintain a trust account so as to protect customer funds and the Applicant was required to hold all customer funds in such trust account.

The Applicant, in terms of Section 36 (6) of the Regulation, was not entitled to withdraw monies held in the trust account until payment has been made to a supplier of travel services by the Applicant. This requirement was breached by the Applicant.

In May 2001 an investigation by the Registrar revealed that customer deposits were processed not through the trust account but through the Applicant's general account. Despite investigation by the Registrar, it was ascertained in November 2001 that this issue of the trust account continued and that customer deposits processed through the Applicant's trust account

were subsequently transferred to the Applicant's general account or personal account from which latter account travel suppliers were paid. The Applicant was again reminded of the necessity to conform and operate according to the Act and the Regulation. However, the Applicant did not cooperate with the Registrar and repeatedly failed to submit documentation and financial information as requested.

In June 2002 the Registrar ascertained that the Applicant's trust account revealed frequent overdrafts during April 2002 and a deficit in that account of \$11,507.00. This deficit has not been dealt with by the Applicant who has not furnished to the Registrar any or sufficient information or documentation in order to assess the true and actual amount of the deficit. Additionally, the Applicant has not furnished the Registrar with information or documentation so as to enable the Registrar to determine the current customer deposit position or the current working capital position of the Applicant.

The total evidence indicates that the financial affairs of the Applicant are in chaos and its keeping of records as required by the Act, to be practically non-existent. The consumer is at risk in dealings with the Applicant and the Travel Industry Compensation Fund is also at risk in permitting the continued operation by the Applicant as a travel agent. The Registrar is correct in proposing the revocation of the Applicant's registration and would be derelict in his duties if he failed to act and were to allow the present situation to continue.

During the Registrar's counsel's closing submissions he moved for an award of costs against the Applicant. The Tribunal finds that an award of costs against the Applicant is appropriate based on Rule 14.1 and 14.2 of the Rules of Practice of this Tribunal. The Applicant was served with the Notice of Hearing for November 19, 2002 at 9:30 a.m. and a telephone call was made to the Applicant by an employee of the Tribunal on the day prior to the hearing. While the employee did not manage to speak personally with the Applicant's representative, she did leave a voicemail message reminding the Applicant that the hearing was due to take place on November 19, 2002 at 9:30 a.m. at the Tribunal's Chambers in Toronto. Despite the service of the Notice of Hearing and the voice message, the Applicant neither appeared nor was represented before the Tribunal on November 19, 2002.

The Applicant has shown a total lack of respect for the Tribunal in failing to appear before it on November 19, 2002 and failing to give an excuse or reason for not doing so.

The evidence presented by the Registrar was convincing and reflected serious allegations which the Tribunal has found proven and which justifies the Registrar in arriving at his decision to propose the revocation of the Applicant's registration. The Tribunal finds the Applicant acted frivolously and vexatiously in failing to attend before the Tribunal or send a representative and failing to communicate with the Tribunal and the Registrar.

Although the Registrar, when his Counsel moved for an order for costs, had not given Notice to the Applicant the Tribunal accedes to the request and waives the necessity of notice by virtue of Rule 2.7 of the Rules which gives the Tribunal the discretion to waive any Rule.

The Tribunal therefore orders the Applicant to pay the sum of \$800.00 to the Registrar in terms of Rule 14.4 (2) (b) of the Rules of Practice of this Tribunal.

DECISION:

Accordingly, by virtue of the authority vested in it under section 6 (4) of the Travel Industry Act, the Tribunal directs the Registrar to carry out his proposal to revoke the Registration of the Applicant.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: December 3, 2002

MOHAMAD (MICHAEL) BASHIR ALMAWI

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*
TO REFUSE REGISTRATION

TRIBUNAL: ANTOINE AOUAD, M.D., Presiding Member

APPEARANCES:

A. MICHAEL ROTHE, Counsel, representing the Registrar, *Motor Vehicle Dealers Act*
MOHAMAD (MICHAEL) BASHIR ALMAWI, Applicant
unrepresented

DATE OF
HEARING: November 22, 2002 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") from a Notice of Proposal issued by the Registrar, pursuant to section 7 of the Motor Vehicle Dealers Act (the "Act"). The Proposal dated the 1st day of August 2002, seeks to refuse the Registration of Mr. Mohamad (Michael) Bashir Almawi.

The Proposal sets out the Registrar's reasons for seeking an order to refuse the registration. The reasons are stated as follows:

The intention and objective of the Act is to protect the public interest. The requirements of the Act include that Registrants be financially responsible in the conduct of business and that Registrants carry on business in accordance with the law and with integrity and honesty. The Applicant's past conduct is inconsistent with the intention and objective of the Act, and therefore warrants disentitlement to registration under the Act. Therefore, the Registrar is unwilling to register of Mr. Mohamad (Michael) Bashir Almawi under the Motor Vehicle Dealers Act.

The particulars in the Notice of Proposal dated the 15th, day of August 2002, are:

1. The Applicant applied for registration as a motor vehicle salesperson on or about May 24, 2002. He proposes to work for Nadine Bayoun o/a Motorway Auto Detailing and Accessories.
2. On the application to become a registered salesperson, question 9 asks:

“ Have you ever been found guilty or convicted of an offence under any law or are any charges pending? (This includes those instances where a conditional or absolute discharge has been ordered)”

The Applicant said, “Yes”, and provided a letter outlining certain convictions.
3. A criminal record search shows that the Applicant has the following criminal convictions:

February 2, 1990:	Public Mischief False Statement
March 2, 1993:	Fraud under \$1,000
October 13, 1993:	False Pretenses Under \$1,000
June 13, 1997:	Fraud Under \$5,000
May 28, 1998:	Possession of Property Obtained by Crime over \$5,000 (x2)
November 5, 1998:	Fraud Under \$5,000 (x3)
4. The Applicant has failed to make full disclosure on his application for registration submitted to the Registrar.

By written Notice of Appeal Mr. Mohamad (Michael) Bashir Almawi informed the Tribunal in term of section 7 (2) of the Act that a hearing was requested regarding an appeal to the proposal.

THE EVIDENCE

The evidence presented to the Tribunal by the Registrar consisted of documentary evidence as well as the oral testimony of Ms Louise Gingras.

The evidence presented by Mr. Mohamad (Michael) Bashir Almawi consisted of his statements in the Notice of Appeal dated August 22nd, 2002 and his viva voce testimony at the hearing.

A summary of the evidence follows:

WITNESSES FOR THE REGISTRAR

Testimony of Ms Louise Gingras

Ms Louise Gingras began her testimony by describing for the Tribunal her current position as a Senior Inspector with OMVIC and reciting prior job experience as an investigator.

Ms Gingras explained that OMVIC is a non-profit corporation which has been delegated the responsibility to administer the Act. The Motor Vehicle Dealers Act is a public protection statute regulating dealers, and salespersons in the trade of buying and selling motor vehicles. The criteria for entitlement to registration is set out in Section 5 of the Act which, requires that individuals and corporations registered or applying to be registered under the Act meet standards of honesty, integrity, compliance with law and financial responsibility.

Ms Gingras continued testifying by identifying and commenting on the documents filed in the Respondent's Book of Documents, filed as Exhibit # 3.

The decision to refuse the registration of the Applicant was based on the grounds set out in the Notice of Proposal dated August 15th, 2002, found at tab # 1 of Exhibit # 3, that in not responding to question 9 of the Application for Registration under the Act, the Applicant failed to make full disclosure of his criminal record.

A copy of the actual Application for Registration under the Motor Vehicles Dealers Act, filed at tab # 3 of Exhibit #3, indicates that the application was signed May 21, 2002, and that the Applicant proposes to work for Motorway Auto Detailing. Ms Gingras referred to the letter, written by the Applicant, and attached to the Applicant's Application for Registration under the Motor Vehicles Dealers Act, detailing the convictions against him. Ms Gingras pointed out that the Applicant *"...has a record of fraud going back to 1988..."*, which he explains as: *"...issuing bad cheques in 1988, for \$198.00; and in 1996 he was charged and found guilty of buying stolen goods..."*

The Applicant came to the attention of the Registrar during a new dealer's inspection of Motorway Auto Detailing; wherein it was uncovered that it appeared the Applicant was involved in the buying and selling of motor vehicles for the dealership. At the time, the Applicant was given ten days to submit an Application for Registration under the Act as a Salesperson.

Ms Gingras clarified for the Tribunal, that the completion of the application is the first indication of *"...honesty and integrity..."* that an applicant for registration, intends to work in accordance with the law. The Applicant failed the honesty test by his failure to fully disclose the extent of convictions against him.

Filed as Exhibit # 3, at tabs 4 & 5, identified by Ms Gingras, are a copy of the criminal record ran on the Applicant. The Applicant was requested to provide more information and did so by e-mail dated June 19th, 2002, as per copy contained at tab # 5 of Exhibit # 3. Ms Gingras summarized the Applicant's e-mail response *"...it appears ...that he took responsibility for someone backing into a vehicle in a parking lot..."*

The Registrar also requested and obtained a copy of the information outlining the 1990 charge of Mischief laid against the Applicant, which is entered as exhibit # 3, at tab # 6. Ms Gingras noted that the charge arose out of the Applicant making a false statement to the police, *"...which led police to believe that someone had committed an offense which they had not committed..."* Ms Gingras concluded that there is a vast difference between the explanation proffered by the Applicant, and the reality of the charge.

The nature of the convictions against the Applicant together with the fact that it appears that the Applicant deliberately misled the Registrar is of particular significance and concern to the Registrar.

In cross-examination by the Applicant, Ms Gingras conceded that Motorway Auto Detailing is registered as a Wholesaler operation rather than as a Retailer. As such the Applicant would deal mainly with other dealers and, not essentially with the public unless leasing of a vehicle was involved.

Applicant's evidence

The Applicant confirmed for the Tribunal that Motorway Auto Detailing has been in operation since 1997. Since that time the business has been successful, has established a good relationship with the bank and has earned the trust of dealers.

The Applicant expressed regret and remorse for his past indiscretions. By way of explanation, the Applicant briefly commented on the circumstances surrounding the convictions and remarked that he had been young and ignorant of the process. Rather than challenging the charges he plead guilty to expedite a resolution.

The Salesperson's licence is necessary to allow the Applicant to attend auctions restricted to dealers only.

In cross-examination by the Respondent's Counsel, the Applicant was asked to review each conviction. Due to his previous criminal record, in 1997, the Applicant's solicitor advised him to plead guilty after he was charged with fraud. The Applicant was charged after a purchaser reported the tampering of an odometer.

With respect to the 1998 conviction of Possession of Property Obtained by Crime, the Applicant was found guilty, after buying stolen vehicles from a dealer, which, he subsequently exported overseas. The Applicant admitted that *"greed"* got the better of him, as he purchased the vehicles in question for \$5,000 under market value, therefore, he ought to have known better.

The Applicant emphasized that he had no intention to withhold information from the Registrar, but he felt that since the 1998 charges of Possession and Fraud were related, there would be no need to specify each one.

In reply to questions posed by Mr. Rothe, the Applicant recanted his previous statement and elucidated that he does not buy cars at auction but does consign cars to auction houses for sale.

Submissions by Mr. Michael Rothe

In support of his argument Mr. Rothe, presented the Tribunal with copies of precedent decisions.

Mr. Rothe reminded the Tribunal that the Motor Vehicles Dealers Act is a public protection Statute. As such the Registrar had a duty to consider an Applicant's past conduct.

The Applicant's criminal record indicates that over a span of eight years the Applicant was convicted of ten offenses. More importantly each of the convictions demonstrate that the Applicant has not operated with honesty and integrity. The circumstances surrounding the 1997 and 1998 convictions are of particular concern to the Registrar, since the charges are related to purchase and sale of motor vehicles.

Mr. Rothe contends that the Applicant's ability to deal with the public is questionable, particularly since he has not complied with the full disclosure requirement. Furthermore, the Applicant has not only attempted to conceal the evidence from the Registrar, but offered explanations, which are contrary to the facts. For the past years the Applicant has been carrying on business as a salesperson for Motorway Auto Detailing, knowingly being unlicensed to do so. The Registrar has no assurance that the Applicant, if granted a licence will not abuse his privilege in dealing with the public.

According to Mr. Rothe the Registrar did not err in law, but had a reasonable belief that the Applicant if issued a licence, would not act with honesty and integrity.

The Registrar has not entered into an agreement with the Applicant and feels that the seriousness of the convictions does not warrant conditional licensing.

APPLICANT'S SUBMISSIONS

The Applicant re-iterated the fact that he does not deal with the public, and emphasized that he can provide letters from dealers attesting to his character.

Since the dealership is in his wife's name, the Applicant asserted that he would not do anything to jeopardize her name.

The Applicant stated that he is willing to enter into an agreement with OMVIC that he will not in any way put the public at risk.

FACTS FOUND PROVEN:

The following are the facts found by the Tribunal to have been proven.

1. The Applicant applied for registration as a motor vehicle salesperson on or about May 24, 2002, proposing to work for Nadine Bayoun o/a Motorway Auto Detailing and Accessories.
2. The Applicant has the following criminal convictions:
 - February 2, 1990: Public Mischief
False Statement
 - March 2, 1993: Fraud under \$1,000
 - October 13, 1993: False Pretenses Under \$1,000
 - June 13, 1997: Fraud Under \$5,000
 - May 28, 1998: Possession of Property Obtained by
Crime over \$5,000 (x2)
 - November 5, 1998: Fraud Under \$5,000 (x3)
3. The Applicant failed to make full disclosure on his application for registration submitted to the Registrar by failing to disclose his criminal record.
4. The Applicant was less than forthcoming in providing explanations to the Registrar regarding the circumstances of his convictions.

THE LAW:

Section 5. (1) of the *Motor Vehicle Dealers Act* states:

- 5(1) an applicant is entitled to registration or renewal of registration by the Registrar except where,
- (a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
 - (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law, and with integrity and honesty; or

APPLICATION OF LAW TO FACTS:

The issue for consideration by this Tribunal is, whether the Applicant's past conduct affords reasonable risk to the public to refuse his registration as a Sole Proprietorship and Salesperson, as per Section 5 (b) of the Act.

Having found as a fact that the Applicant failed to disclose pertinent information to the Registrar, and that the Applicant was convicted of: "*Possession of Property obtained by Crime*" and "*Fraud*," the Tribunal also finds that the Registrar was justified in refusing the registration of Mr. Mohamad (Michael) Bashir Almawi.

The Applicant petitioned an opportunity to prove that he has turned his life around, and insists that he would not damage his wife's reputation. He goes on to suggest that he is willing to pledge his home as collateral to cover the eventuality of a possible claim. Unfortunately, the Tribunal cannot heed the Applicant's plea. The intent of the Motor Vehicle's Dealers Act is preventative not reactive. The Tribunal concurs with Mr. Rothe that the application and the information therein provided is crucial in assessing the intent and honesty of an Applicant. In this case, the Applicant shattered any possibility for trust that could be afforded him, not only by failing to mention in his application for registration his full criminal record, but also by misleading the Registrar as to the circumstances surrounding the convictions.

The Tribunal further agrees with Respondent's Counsel, Mr. Rothe, that this is not a matter where terms and conditions imposed on a registrant's licence would suffice. It is the Registrar's mandate and this Tribunal's responsibility, in interpreting the law, to protect the public. The fact that Motorway Auto Detailing is a Wholesaler and not a Retailer is of no comfort to the Tribunal. The Applicant's latter convictions relate to, tampering with an odometer, and the purchasing of stolen vehicles, which were subsequently exported over seas. This concerns the Tribunal, as the automobile detailing business is rife with the possibilities for continued misconduct. The Registrar must have full confidence that registrants will not misuse the privileges entrusted to them. The Applicant's previous convictions certainly offer no reassurance.

DECISION:

Therefore by virtue of the authority vested in it under section 7(4) of the Motor Vehicle Dealers Act, the Licence Appeal Tribunal directs the Registrar to carry out the proposal to refuse the registration of Mr. Mohamad (Michael) Bashir Almawi.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.
Presiding Member

Released: December 5, 2002

FARSHAN SEAN MALAEKEH

**APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT***

TO REVOKE REGISTRATION

TRIBUNAL: ANTOINE AOUAD, M.D., Presiding Member

APPEARANCES:

FARSHAN SEAN MALAEKEH, Applicant
BILL AKLEH, Agent for the Applicant

A. MICHAEL ROTHE, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: November 18, 2002

Toronto

ORDER

PURSUANT to the provisions of the Motor Vehicle Dealers Act R.S.O., 1990, chapter M.42, as amended, Mr. Farshan Sean Malaekkeh, appealed a Proposal of the Registrar, Motor Vehicles Dealers Act (the "Registrar") as per Notice of Proposal dated August 15, 2002;

WHEREAS the Applicant filed an appeal with the Tribunal requesting a hearing;

AND WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter on November 18th, 2002, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario;

The Applicant not being present at the duly scheduled time, a 30 minutes grace period was granted.

AND WHEREAS at the commencement of the hearing the Respondent's Counsel in this matter advised the Tribunal that an agreement had been reached between the Registrar and the Applicant;

AND WHEREAS minutes of settlement were submitted by the Respondent's Counsel and given to the Applicant, and filed herein;

AND WHEREAS the Applicant and the Applicant's Agent Mr. Bill Akleh acknowledged consent to the terms and conditions set out in the document of settlement.

AND WHEREAS the Applicant agreed to waive the requirement for a hearing and to abide by the terms in conditions set forth in the minutes of settlement;

NOW THEREFORE, the Tribunal orders on consent as follows:

- 1 The Applicant shall, if he is charged or convicted in the future immediately notify his employer in writing of the charges or convictions against him and provide a copy of the notification signed by his employer to the Registrar, giving the particulars of the charges or convictions.
- 2 The Applicant shall, if he is charged or convicted in the future of an industry specific offence, immediately notify his employer in writing of the charges or convictions against him and provide a copy of the notification signed by his employer to the Registrar, giving the particulars of the charges or convictions.
- 3 The Applicant's registration shall immediately be revoked in the event that the Applicant is charged or convicted of any industry specific offences under the any Statute in the future.
- 4 The Applicant shall provide full and accurate disclosure on any applications, documents, statements or other form of communications or information provided to the Registrar or his authorized representatives regardless of previous disclosure.
- 5 The Applicant shall not be a partner, shareholder, officer, or director, of a dealership.
- 6 The Applicant shall not transfer his registration as a motor vehicle Salesperson to another dealer without having first obtaining the prior written consent of the Registrar.
- 7 The Applicant shall not be involved in the process of buying or selling motor vehicles without the benefit of registration.

- 8 The Applicant shall not use his registration to buy or sell motor vehicles where the Applicant knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
- 9 The Applicant shall provide a copy of this order to any future employer.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

Released: December 3, 2002

MICHAEL PUCHTA

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE *ONTARIO NEW
HOME WARRANTIES PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL: SIMON DANN, Member

APPEARANCES: MICHAEL PUCHTA, Applicant, representing himself
KAREN JONES, Counsel, representing the Ontario New Home
Warranty Program
RANDY VARDY, Agent, representing the Added Party, Cenpac
Developments Inc.

DATE OF
HEARING: December 16, 2002 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") by Michael Puchta (the "Applicant") under section 14(3) of the *Ontario New Home Warranties Plan Act* (the "Act") respecting a decision by the Ontario New Home Warranty Program (the "Respondent" and the "Program") dated August 28, 2002, (the "Decision") denying the Applicant's claim for compensation.

The Applicant's claim relates to a dwelling located at 550 Queens Quay W., Suite 301, Toronto, Ontario (the "unit") which was constructed by Cenpac Developments Inc. in terms of a written agreement of Purchase and Sale dated June 30, 1998 and the transaction was completed for possession on January 31, 2001.

The Applicant provided notice of complaint by faxes dated January 28, 2002 and January 31, 2002. The Program first inspected the Applicant's home on May 7, 2002 and re-inspected on June 26, 2002.

The Program's Decision Letter described the Applicant's complaints as follows:

1. "Floor laminated in living room a lot of scratches."
2. "Dusting problem."
3. "Venting, furnace heating thermostat problem."
4. "Balcony – to fix brick no fix ceiling only 1 coat paint, looks very ugly needs to paint and stucco sliding door frame too."
5. "Small window (glass cracks)."
6. "Bath tub crack."
7. "Washroom door at bottom."
8. "Kitchen counter repairs made worse."
9. "Vibrations and clicking noise within suite."
10. Issues identified as being outstanding when given to the ONHWP representative during the June 26, 2002 re-inspection visit.

EXHIBITS:

Exhibit #1 Decision Letter dated August 28, 2002;
Exhibit #2 Notice of Appeal dated September 6, 2002;
Exhibit #3 Book of Documents of the Respondent

FACTS:

A summary of the reasons given by the Decision Letter, Exhibit 1, for denying the Applicant's claim are as follows:

1. "...numerous superficial scratches were observed on the laminate hardwood floor finish within the living room...primarily in the centre of the room in the vicinity of the coffee table. The warranty start date was January 31, 2001 and this specific complaint was received by ONHWP within the first year of possession (received January 28, 2002). However, your Pre-Delivery Inspection Form and the Certificate of Completion and Possession do not mention the observed defect. Therefore, ONHWP cannot determine responsibility."
2. "... The clothes dryer (stacked laundry appliances) contains an integral lint filter that was free of lint. The 4" metal dryer duct is vented to the exterior and contains an "in-line" lint filter complete with an access door (located in the ceiling of the laundry area) for maintenance. The in-line lint filter was inspected and revealed an accumulation of lint (1/8" thick) on the filter screen...not abnormal and requires cleaning after use to provide optimum venting. No defects in workmanship and/or materials were noted..."
3. "The heat/cool thermostat ...located on east wall of kitchen hallway...You requested that it be relocated...to provide a balanced temperature...You also stated that the glazing, which makes up roughly 70 percent of the exterior wall partition on the south elevation is drafty and too cold at night. The draftiness noted may result from convective current; cold, dense air descending along the inside of the window and across the floor, as no window coverings have been installed within this 745 sq. ft. unit...The present location of the thermostat provides effective heating and cooling...as it is shielded from solar gain and heat loss. No defects in work and/or materials and/or Ontario Building Code violations were noted..."

4. "...noted issues are considered part of the Common Element and as such are beyond the scope of the unit warranty. These may, however, be pursued with the Condominium Board as they are considered to be the owner of the common elements for the purpose of the warranty..."
5. "...resolved and...no longer an issue."
6. "A hairline crack (1-1/2" in length) was observed...(directly under the chrome overflow plate). The warranty start date...was January 31, 2001 and this specific complaint was received by ONHWP within the 1st year of possession... However, the Pre-Delivery Inspection form and the Certificate of Completion and Possession do not reference the observed defect. Therefore, ONHWP cannot determine responsibility."
7. "...complaint was first reported to ONHWP...roughly 14 months after possession...too late to be considered for warranty coverage."
8. "...resolved and...no longer an issue."
9. "...a *clicking* noise, emanating from the low-voltage light fixture in the ceiling of the bathroom is audible particularly at night. The lamp retainer was removed from the bezel to observe the interior portion of the fixture. No defects...observed and no unusual sounds...detected...no vibrations detected within the unit at the time of...re-inspection meeting. This complaint does not represent a defect in either materials or workmanship nor is it a violation of the Ontario Building Code. Pursuant to Section 13(4) of the Act,...this complaint was received too late to be considered for warranty coverage."
10. "Pursuant to Section 13(4) of the Act, complaints must be received by ONHWP in writing within the first year after...possession...and (they) are too late to be considered for warranty coverage."

The Applicant did not have any witnesses and was prepared to give testimony on his own behalf.

The Program's counsel, Ms. Karen Jones advised the Program would have two witnesses: Allan Stevenson and Rob Rosset.

In giving his evidence, Mr. Puchta provided the following testimony regarding the unresolved warranty complaints listed in the ONHWP Decision Letter and his Appeal of the ONHWP decision:

No. 1 – scratches on laminated floor

Mr. Puchta said that at the time of possession there was dirt and dust on the floor so he could not clearly see anything on the floor. He also testified that the floor had only been installed one day before and that it took him 2 to 3 days to clean up and that he could not see anything before cleaning up.

No. 2 – dusting problem

Mr. Puchta testified that in his view the lint filter did not sit or fit properly and that when it was in place there was an air gap through which dust was able to escape into the air in his unit.

Mr. Puchta argued that (a) the filter was missing a seal and therefore did not sit tightly in its position, (b) perhaps it was the wrong size element, and (c) there had not been a general duct cleaning so dust in the system was coming into his unit.

No. 3 – venting, furnace heating thermostat problem

Testimony by Mr. Puchta focused on noise from the furnace whenever it came on and he stated that his solution to the problem was to change the lock to the room containing his furnace unit (the Tribunal learned that each floor of the condominium building had rooms off the general hallways which contained the furnace units for suites on that floor and that the furnace units were not in the individual suites).

When asked if he had considered getting an outside expert's opinion, Mr. Puchta stated that he did not call in an independent contractor but he did state that once he changed the lock to the furnace room, leaving himself with the only access key, the noise from the furnace stopped.

No. 4 – balcony issue

After describing his complaint about the appearance of the balcony finish, Mr. Puchta also acknowledged the balcony to be a common element and that he had spoken with the property manager as well as the condominium's Board of Directors and that they will look into this item.

No. 6 – bath tub crack

Mr. Puchta described the crack as outlined in the ONHWP Decision Letter but provided no material support, photographs or other evidence to assist the Tribunal on this complaint.

No. 7 – washroom door

Mr. Puchta testified that this was no longer an issue as his nephew had fixed the problem.

No. 9 – vibrations and clicking noise

Mr. Puchta testified that he heard disturbing sounds emanating from (a) the light fixture attached to the bathroom ceiling and (b) from the floor when he walked in certain areas and that he believed these sounds were coming from some kinds of surveillance devices in place to monitor his activities.

Mr. Puchta did not provide the Tribunal with any material evidence to support this claim.

Regarding the No. 10 Claim in the ONHWP Decision Letter, Mr. Puchta provided no specific comments to the individual items listed in this No. 10 paragraph. When asked if he could provide specific comments, he stated that he only wanted to concentrate on 3 issues which he listed as being (1) the floor scratches and (2) the dust problem. His testimony did not identify the third issue but repeatedly returned to the dusting problem.

Counsel for the ONHWP then called the witnesses for the Program.

Allan Stevenson, a warranty representative with the ONHWP, testified he had been with the Program for 14 years and prior to this had been Chief Building Official with the Town

of Whitby for more than 10 years. In addition, Mr. Stevenson confirmed that his experience included the inspection of hundreds of units.

Mr. Stevenson confirmed the details of his Conciliation Inspection Report (Exhibit 3, Tab 7), which occurred on May 7, 2002 and also included the following points:

- (re No. 1) scratches were seen around the coffee table but how they got there could not be determined and they had not been mentioned in the original Certificate of Completion and Possession;
- (re No. 2) upon examining the filter Mr. Puchta referred to, it was found to be clean – other units were examined for cross-reference and Mr. Stevenson testified his findings were consistent with what would normally be found in these types of lint filters;
- (re No. 3) Mr. Stevenson testified he found the unit to have adequate air flow and there were no vent obstructions; he also stated there were no window coverings;
- (re No. 6) Mr. Stevenson confirmed the hairline crack in the tub, just under the overflow plate but said he could not determine its origin as there had been no previous report on this item.

Also present for the inspection were Mr. Puchta, the builder's representative, Randy Vardy, and Bonnie Douglas, also from the ONHWP.

Robert Rosset, a warranty representative with the ONHWP, testified he had been with the Program for 13 years and prior to this had been a construction supervisor for more than 5 years. In addition, Mr. Rosset testified his experience included the inspection of hundreds of units.

Mr. Rosset confirmed the details of his Reinspection Report (Exhibit 3, Tab 8), which occurred on June 26, 2002 and that the purpose of the reinspection was to review the previous conciliation report and identify any possible defects in materials and or workmanship. His testimony included the following points:

- (re No. 1) scratches around the coffee table were considered to be typical of a heavy object pulled across the floor but as this had not been previously documented, the cause could not be identified;
- (re No. 2) upon examining the lint filter Mr. Puchta spoke of, Mr. Rosset confirmed that his findings were consistent with what would normally be found in a clothes dryer's lint filter;
- (re No. 3) Mr. Rosset testified that he discussed the large window area and how drapes could be a way to prevent cold air from coming through the large window area;
- (re No. 6) Mr. Rosset confirmed the hairline crack in the tub, just under the overflow plate but said he could not determine its origin as there had been no prior report;

- (re No. 9) regarding the noise and vibrations Mr. Puchta had noted, Mr. Rosset testified he had removed the bezel of the light and showed Mr. Puchta that there was no surveillance camera or other device to monitor his bathroom activities; the space behind the bezel only had enough room for the fixture wires. Mr. Rosset stated that this was the only noise Mr. Puchta mentioned to him.

Also present for the inspection were Mr. Puchta and Patty Lutz, Office Manager of the condominium section of the ONHWP.

When asked if he wished to present a closing argument, Mr. Puchta submitted opinions and comments regarding his concerns and the Program. He then indicated that he did not have anything else to add.

In closing argument, the Program's counsel, Ms. Jones, argued that while some issues raised by Mr. Puchta were past the warranty date, the ONHWP stood by its position on the other claim items that no evidence had been presented to show there were either defects in material or workmanship or violations of the Ontario Building Code.

Ms. Jones referred to the Respondent's Book of Authorities (Tab 4, page 11, item 5, paragraph 48), *Corrine and Firat Uludamar, OCRATD No. 46, March 18, 19, 1997* in arguing that "unless the complaint is included on the Pre-Delivery Inspection Report (Certificate of Completion and Possession), the Tribunal must not make a finding in favour of the Applicant and must rely on the statute".

Ms. Jones pointed to Section 15 of the *Ontario New Home Warranties Plan Act* in arguing that the balcony issue was a matter for the condominium corporation to pursue.

(For the record, the Tribunal notes that Mr. Puchta left the hearing room prior to the conclusion of Ms. Jones' closing argument.)

ISSUE:

Based on the Applicant's testimony and concluding statement of interest in 3 claim issues (though only 2 were identified by the Applicant), the Tribunal was directed to the 2 issues he referred to: (1) the scratches on the laminate flooring, and (2) the dusting problem.

In consideration of this narrowing of the claims by the Applicant, the Tribunal must consider whether the scratches and dusting claims are a breach of warranty and therefore, should the Tribunal set aside, confirm, or modify the decision of the Program to disallow the Applicant's claim for compensation under section 14(3)(b) of the *Ontario New Home Warranties Plan Act*

APPLICABLE LAW:

Section 14 of the *Ontario New Home Warranties Plan Act* (the “Act”) states in part:

- (3) Subject to the regulations, an owner of a home is entitled to receive payment out of the guarantee fund for the cost of the remedial work required to correct a breach of warranty if,
 - (b) the person has a cause of action against the vendor or the builder, as the case may be, for damages resulting from the breach of warranty

Section 13(1) of the Act adds:

Every vendor of a home warrants to the owner,

- (a) that the home,
 - (i) is constructed in a workmanlike manner and is free from defects in material,
 - (ii) is fit for habitation, and
 - (iii) is constructed in accordance with the Ontario Building Code;
- (b) that the home is free of major structural defects as defined by the regulations; and
- c) such other warranties as are prescribed by the regulations.

Section 13(4) states in part:

“A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect...”

Section 15 of Regulation 892 under the Act states:

- (2) Every vendor of a new home warrants to the owner,
 - (a) that the home is constructed in a workmanlike manner and is free from defects in materials including windows, doors and caulking such that the building envelope of the home prevents water penetration;
 - (b) that the electrical, plumbing and heating delivery and distribution systems are free from defects in material and work;
 - (c) that all exterior cladding of the home is free from defects in material and work resulting in detachment, displacement or physical deterioration;
 - (d) that the home is free from violations of the Ontario Building Code regulations under which the Building Permit was issued, affecting health and safety, including but not limited to fire safety, insulation, air and Vapour barriers, ventilation, heating and structural adequacy;
- (3) The warranties described in subsection (2) apply only in respect of claims made within two years after the home was completed for possession...

APPLICATION OF LAW TO FACTS:

As the Applicant concluded his testimony with the statement that he only wanted to focus on three (3) claim issues but only identified two (2) issues, (1) the scratches on the laminate flooring, and (2) the dusting problem the Tribunal will therefore consider only these two (2) remaining claim issues and whether they represent a breach of warranty.

A finding by the Tribunal as to whether there is a breach of warranty on the first issue, regarding the scratches, is an issue on which the burden was on the Applicant to...

- a) prove that the scratches had occurred prior to possession,
- b) were either noted at the time of possession on the Certificate of Completion and Possession or communicated to the Program after the 2 to 3 days that the Applicant testified it took him to clean up after moving in.

The evidence provided to the Tribunal shows that the complaint information regarding the scratches was not presented until days before the expiry of the one year warranty period.

The Tribunal finds itself in agreement with the submissions by the Program that it is not possible to determine the origin of the scratches. Therefore the Tribunal finds that this is not a warrantable item.

Regarding the second item, being the dust in the air of the Applicant's suite and the claim that it originates through a gap between the lint filter and its in-line location (that the filter either does not fit properly or is missing sealant to close off the gap), the Tribunal was not presented with any kind of material or substantive evidence to assist it in weighing the merits of the claim.

The Tribunal therefore finds the Applicant has not met the burden of proof on this second claim and dismisses this claim as well.

In conclusion, the Tribunal was not presented with any kind of supporting evidence, documentation or expert reports to assist it in considering the Applicant's claims. In fact, the Applicant has failed to present any credible or acceptable evidence to discharge the onus that rested upon him and therefore has not satisfied the Tribunal that his version of the issues is correct.

The Tribunal finds that the Program is not in breach of warranty on either of the two (2) identified complaint issues which the Applicant stated, in his testimony, as being the claims in which he still had an interest. Since the other claims were not pursued by the Applicant, and there being no evidence before the Tribunal, they are dismissed as well.

DECISION:

Accordingly, by virtue of the authority vested in it under section 16(3) of the *Ontario New Home Warranties Plan Act*, the Tribunal directs the Ontario New Home Warranty Program to disallow the Applicants' claim.

LICENCE APPEAL TRIBUNAL

Simon Dann, Member

RELEASED: December 23, 2002

JOSEPH FINE CAR SALES LTD. AND RIADH JIRJIS

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
MOTOR VEHICLE DEALERS ACT

TO REVOKE REGISTRATIONS

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

PETER DISHO, Agent, representing Joseph Fine Car Sales Ltd. and
Riadh Jirjis

AVIVA HARARI, Counsel, representing the Registrar, *Motor Vehicle
Dealers Act*

DATES OF

HEARING: November 28, 2002

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal before the Licence Appeal Tribunal (the "Tribunal") from a Notice of Proposal (the "proposal") pursuant to section 7 of the *Motor Vehicle Dealers Act* (the "Act"). The proposal dated August 23, 2002, seeks to revoke the registration of Joseph Fine Car Sales Ltd. as a motor vehicle dealer (the "Dealer") and Riadh Jirjis as a motor vehicle salesperson ("Jirjis") under the Act. The Dealer and Jirjis are collectively referred to as the "Applicants". The proposal sets out the Registrar's reasons for seeking an order for the revocation of both the Applicants' registrations. The reasons are stated as follows:

The intention and objective of the Act is to protect the public interest. The requirements of the Act include that Registrants be financially responsible in the conduct of business and that Registrants carry on business in accordance with the law and with integrity and honesty. The Registrant's conduct is inconsistent with the intention and objective of the Act, and therefore warrants disentitlement to registration under the Act.

The particulars upon which the Registrar relies are stated in the proposal, as follows:

1. Joseph Fine Car Sales Ltd. (hereinafter the "Dealer" is currently registered as a motor vehicle dealer and was originally registered on or about May 2, 1996.
2. Riadh Jirjis (hereinafter the (sic) "Jirjis") is currently registered as a motor vehicle salesperson and was originally registered on or around May 2, 1996.
3. Jirjis is the sole officer/director of the Dealer.
4. The Dealer has failed to comply with the requirements of the Retail Sales Tax Act as to the filing of returns, remitting of tax due and paying assessments when due.
5. As a result of failure to comply with the Retail Sales Tax Act, the Dealer is indebted to the Ministry of Finance in the amount of \$11,823.19 as of June 21, 2002.

By written Notice of Appeal in terms of Section 7.(2) of the Act, the Applicants notified the Tribunal that they required a hearing regarding their appeals to the Registrar's proposal.

THE EVIDENCE:

The evidence presented to the Tribunal by the Registrar consisted of documentary evidence as well as the testimony of Anna Lundrigan and Louise Gingras. The evidence presented by the Applicants consisted of the testimony of Jirjis.

At the commencement of the hearing the Applicants' agent informed the Tribunal that the Applicants did not dispute and formally admitted that Jirjis was at all material times the sole Director, and sole Officer of the Dealer.

ANNA LUNDRIGAN

Lundrigan testified that she is employed by the Ministry of Finance (the "Ministry") and has been with that Ministry for the past 20 years. She is presently working as a Field Collection Officer based in North York, Toronto and has held that position for the past 3½ years. She stated that in her employment she deals with retail sales tax due by various vendors under the *Retail Sales Tax Act* (the "Act"). She stated that vendors under the Act are obliged to complete monthly returns in respect of retail sales tax collected by them pursuant to sale transactions governed by the Act. A vendor is obliged to remit payment to the Ministry, together with the completed monthly returns. The tax collected by a vendor is considered trust monies and is to be remitted by the vendor by no later than the 23rd day of the month following the month in which the tax was collected by the vendor from a purchaser. Lundrigan further testified that the Ministry relies on vendors' monthly returns to be accurate and truly reflective of monies collected by such vendors. However, if returns are not filed by vendors the Ministry then is entitled to estimate tax due by the vendor and audits of vendors' records are carried out by the Ministry from time to time.

Lundrigan went on to state that she is conversant with the Ministry's file pertaining to the Applicants and referred to a schedule dated June 21, 2002 prepared by the Ministry. This schedule is marked "Schedule A" in the Registrar's Book of Documents (Exhibit 3, tab 4) and makes reference to the Dealer and its history with the Ministry relating to Retail Sales Tax. Lundrigan stated further that in February 1997 the Dealer's account with the Ministry was referred to her department for collection as the Dealer had defaulted in its monthly returns and a subsequent audit assessment indicated tax collected by the Dealer was not remitted to the Ministry. Several arrangements for payment were made with the Dealer and were subsequently broken by the Dealer. Finally, on October 22, 2001 written Terms and Conditions were signed by the Dealer, therein represented by Jirjis, in terms of which the Dealer undertook to pay the balance of tax then owing to the Ministry, namely \$25,826.72, by way of monthly instalments. On October 30, 2001 the Dealer was credited with an amount which resulted in the balance then due by the Dealer being reduced \$14,959.50. This credit in favour of the Dealer did not relate to payments made by the Dealer on account of his then current or past indebtedness but related to a reversal by the Ministry of a provisional estimate of retail sales tax owing by the Dealer. This provisional estimate was reversed when the Dealer signed the Terms and Conditions.

Lundrigan stated further that the Dealer since signing the Terms and Conditions had failed to comply with the payment schedule in that the Dealer had issued cheques to the Ministry which were returned marked "N.S.F." The Dealer continued in its failure to comply with the filing of his monthly returns promptly or at all.

During cross-examination Lundrigan stated that under the signed Terms and Conditions the Dealer had, as of October 8, 2002, reduced the amount owing to the Ministry for Retail Sales Tax to the sum of \$8,413.81 but the Dealer continues to issue cheques to the Ministry that are returned "N.S.F." The cheques that accompanied the Dealer's returns for the months of June, August and September 2002 had all been returned unpaid to the Ministry.

LOUISE GINGRAS

Gingras stated in her testimony that she is employed by the Ontario Motor Vehicle Industry Council ("OMVIC") and is presently a senior inspector with OMVIC which was created in 1997 as a non-profit corporation with the mandate to administer the Act and its Regulations.

Gingras reviewed Section 5 of the Act which deals with registration of motor vehicle dealers and salespersons under the Act and when registration may be refused or revoked. She also reviewed the Notice of Proposal to Revoke the registrations in this matter and confirmed that both Applicants are currently registered under the Act. Gingras noted that the Act constitutes consumer legislation which requires the Registrar to be vigilant insofar as the conduct of registrants and applicants for registration are concerned.

The conduct of the Applicants in this particular matter gives Gingras cause for concern as the allegations relate to the failure by the Dealer to account to the Ministry for tax due to the Ministry and which the Dealer had collected on the Ministry's behalf and for which it had persistently failed to account to the Ministry. She repeated to the Tribunal that the Registrar, in conformity with his obligations under the Act, persists in his proposal to revoke both Applicants' registrations.

RIADH JIRJIS

Jirjis testified that he does owe the Ministry retail sales tax which was collected by the Dealer and not accounted for to the Ministry. However, he disputed the correctness of the amount claimed by the Ministry as being due and owing by the Dealer. He contended that the Ministry had debited the Dealer's account with an estimated amount of tax collected and that such estimate was incorrect as the Dealer did not in fact collect the amount estimated by the Ministry. He further contended that the Dealer filed an objection to the Ministry's assessment as to the amount owing by the Dealer and following that objection the amount due and owing was reduced when the estimated amount was reversed and the Dealer's account credited. He did concede that he did sign Terms and Conditions (Exhibit 3, tab 4). The balance shown as then due and owing by the Dealer was incorrect, as that balance did not reflect the credit due to the Dealer for the reversal of estimated retail sales tax collected.

Jirjis produced a Notice of Assessment dated October 8, 2002 addressed by the Ministry to the Dealer (Exhibit 5). Jirjis stated that that notice showed a balance then due to the Ministry of \$8,413.81 against which amount the Dealer had paid \$1000.00 in cash on November 25, 2002. He therefore contended that the Dealer's present liability to the Ministry is \$7,413.81. He also disputed that, as shown on the Notice of Assessment of October 8, 2002, the Dealer gave the Ministry a dishonoured cheque for \$280.00 which cheque the Dealer forwarded with its return for the period August 1, 2002 to August 31, 2002. He did concede that the Dealer has defaulted at times in respect of the \$1000.00 per month payments that the Dealer was obliged to pay to the Ministry and that when he failed to keep to the monthly payments under the signed Terms and Conditions it was due to the Dealer not having the necessary funds to make those payments.

FACTS FOUND PROVEN:

The following are the facts found proven by the Tribunal:

1. The Dealer and Jirjis are currently registered as motor vehicle dealer and motor vehicle salesperson respectively under the Act.
2. Jirjis is currently and at all material times was the sole director and officer of the Dealer.

3. The Dealer was in terms of the *Retail Sales Tax Act* at all material times the agent of the Ministry and as such was obliged to levy and collect retail sales tax imposed under the Act upon the purchasers of motor vehicles sold to the purchasers by the Dealer.
4. The Dealer in terms of the *Retail Sales Tax Act* was at all material times obliged to remit to the Ministry all retail sales tax collected by the Dealer. The Dealer has failed to remit to the Ministry all retail sales taxes collected.
5. The Dealer in terms of the *Retail Sales Tax Act* was obliged at all material times to make and file with the Ministry returns of retail sales tax levied and collected by the Dealer.
6. The Dealer failed to remit and make returns to the Ministry of retail sales tax levied and collected by the Dealer as agent for the Ministry.
7. The Dealer, therein represented by Jirjis, entered into written Terms and Conditions, dated October 22, 2001, with the Ministry in terms of which the Dealer agreed and undertook to make payment to the Ministry at the rate of \$1000.00 per month, all retail sales tax collected but not remitted by the Dealer as agent for the Ministry.
8. The Dealer has failed to remit and pay to the Ministry, both in respect retail sales tax levied and collected by the Dealer and in respect amounts owing by the Dealer under the agreed Terms and Conditions, an amount of not less than \$7,413.00

THE LAW:

Section 5.1 of the *Motor Vehicle Dealers Act* (the "Act"), states as follows,

5 (1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

- (a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
- (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or

Section 6.2 of the Act states;

- 6 (1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 5.
- (2) Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5, if the registrant were an applicant, or where the registrant is in breach of a term or condition of the registration.

Section 4.2 (1) of the *Retail Sales Tax Act* states:

(1) Despite section 2, every purchaser of a used motor vehicle shall pay to Her Majesty in right of Ontario a tax in respect of the consumption or use thereof, computed at the rate of 8 per cent of the fair market value thereof.

Section 10 of the *Retail Sales Tax Act* states:

Every vendor is an agent of the Minister and as such shall levy and collect the taxes imposed by this Act upon the purchaser or consumer.

Section 13.(1) and (3) of the *Retail Sales Tax Act* states:

13. (1) All taxes and all amounts collected as or on account of tax by a vendor under this Act shall, subject to subsections 2 (16) and (16.3), be remitted to the Minister at the time or times and in the manner prescribed by the regulations.

(3) Any person who collects any amount as or on account of tax shall be deemed to be a vendor for the purposes of subsection (1) and for the purposes of assessment, collection and enforcement of this Act.

APPLICATION OF LAW TO FACTS:

The onus of proof rests upon the Registrar in this matter and the test in this matter has been set out in the leading case of *Brenner 19 CRAT SCO Decisions and Orders (1971-1989)*. In that decision Southey J. held that a Tribunal should only refuse to direct the Registrar to carry out his proposal if it thinks the Registrar was in error in concluding that the past conduct of an Applicant afforded reasonable grounds for belief that such Applicant would not carry on business in accordance with law and with integrity and honesty.

The Dealer, represented by Jirjis, its sole Director and Officer, collected retail sales tax from various purchasers of motor vehicles. This was not disputed by the Applicants. The Dealer was obliged to account to the Ministry for the tax that it collected. Again, Jirjis did not dispute this obligation which was placed upon the Dealer by the Act.

Further, Jirjis did not dispute that the Dealer had not accounted to the Ministry for amounts collected by the Dealer in respect of retail sales tax and, in fact, admitted that the Dealer had not accounted to the Ministry for over seven thousand dollars. This amount represents trust monies collected by the Dealer as agent for the Ministry. The repeated failure of the Dealer to remit trust funds in its possession is reflective of the Dealer's and Jirjis' conduct in not acting with honesty and integrity and in accordance with law. The failure to remit these trust monies is ongoing and has become a course of conduct insofar as the Applicants are concerned. The

Dealer continues to forward cheques to the Ministry that are dishonoured by non payment when presented to the Dealer's bank. Failure to make payment of monies lawfully due to a party is in and of itself indicative of financial irresponsibility but failure to account for monies that are held in trust for another party does not only indicate financial irresponsibility but also reflects a lack of honesty and integrity. Once the Dealer received monies representing retail sales tax from various purchasers, such monies became trust funds in the hands of the Dealer. These trust funds were to be accounted for by the Dealer to the Ministry in terms of the trust imposed upon the Dealer by the *Retail Sales Tax Act*. The Dealer in failing to pay over these trust funds to the Ministry was in breach of trust which course of conduct was repeated time and again.

Jirjis in his capacity as sole Director and Officer of the Dealer was clearly the controlling mind of the Dealer and he bears equal responsibility for its failure to account to the Ministry for trust funds held by the Dealer on the Ministry's behalf.

Having regard to what is stated above, the Tribunal does not believe the Registrar was in error in concluding that both Applicants' actions reflect a lack of integrity and honesty and that if allowed to continue in business they will likely not carry on business in the future in accordance with law and with honesty and integrity.

DECISION:

Pursuant to the authority vested in it by section 7.(4) of the *Motor Vehicle Dealers Act*, the Tribunal directs the Registrar to carry out his proposal dated August 23, 2002 to revoke the Registrations of Joseph Fine Car Sales and motor vehicle dealer and of Riadh Jirjis as motor vehicle salesperson.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice Chair

Released: December 17, 2002

ROBERT SALHANY AND MARY GARDINER

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE *ONTARIO NEW
HOME WARRANTIES PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, Vice Chair

APPEARANCES:

ROBERT SALHANY, representing himself and as Agent for Mary
Gardiner

JEAN G. LEGAULT, Counsel, representing the Ontario New Home
Warranty Program

TARA LEWICKI, Agent, representing the Added Party, Tartan
Homes Corporation

DATE OF
HEARING: December 10 and 11, 2002

Ottawa

REASONS FOR DECISION AND ORDER

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") from a written decision of the Ontario New Home Warranty Program (the "Program") dated May 22, 2002 wherein the claims of Robert Salhany ("Salhany") and Mary Gardiner ("Gardiner") collectively referred to as the "Applicants" were denied by the Program.

BACKGROUND:

The Applicants' claim that they and Tartan Homes Corporation ("Tartan") entered into an Agreement of Purchase and Sale regarding a residence (the "home") to be built by Tartan upon 78 Gleeson Way in the City of Nepean, Ontario. Pursuant to that agreement, Tartan built the home and on December 15, 2000 the Applicants took occupation and possession of the home.

After taking occupation and possession of the home, the Applicants became aware of defects in the home, which they contended were due to the defective workmanship of Tartan and the defective materials supplied by Tartan. The defective work and materials

constituted, according to the Applicants, a breach of warranty in terms of section 14(3)(b) of the Act entitling them to damages. Tartan has denied the Applicants' claims.

The Applicants complained to the Program regarding the defects noted by the Applicants. Pursuant to such complaints and request by the Applicants for a conciliation inspection, a meeting and inspection was held and following the Program's inspection report, it issued its decision letter of May 22, 2000. In the decision letter of May 22, 2002 the Program confirmed and adopted the reasons given in the conciliation inspection report of May 1, 2002. When the Applicants' appeal came before the Tribunal, Salhany for the Applicants, Counsel on behalf of the Program and the Agent for Tartan agreed that there were only two unresolved issues to be dealt with. The hearing of the Applicants' appeal therefore proceeded on the two unresolved issues, which are referred to in the conciliation inspection report of May 22, 2002. That report states as follows in regard to those two unresolved issues.

1st ISSUE

Complaint:

200-amp service - Electrical meter outside and breaker box inside house.

Observation:

A 100 Amp electrical service has been installed in this home as per the Agreement of Purchase and Sale, Schedule "G". Furthermore, in the Agreement of Purchase and Sale under "Request for Change #70WT-003" it clearly indicates that a 200 amp service is to be installed. The ONHWP has documents showing that the builder did make an offer to reimburse the cost for the change. However the owner refused the offer.

Assessment:

Although this item of complaint was on a Request for Change and paid by the owner, this was not a specific selection and therefore cannot be covered under warranty. The builder's responsibility is to reimburse the owner the full amount, which he was charged for the change in the amount of \$435.00

Furthermore, this complaint does not represent a defect in either materials or workmanship nor is it a violation of the Ontario Building Code.

2nd ISSUE

Complaint:

Bubbled seam along counter top. Kitchen. Located at the corner seam between the stove and the wall to family room.

Observation:

Waves of bubbles are noticeable along the mitre joint in the kitchen counter top located on the left of the sink. This situation is also starting on the mitre joint at the right of the sink.

Despite the above observation, these joints in the counter tops are not water tight or sealed against any water or moisture that can be left along or on top of these joints for a certain time period.

Assessment:

This complaint does not represent a defect in either materials or workmanship nor is it a violation of the Ontario Building Code. Furthermore, this complaint represents an item of damage. It has not been documented on any pre-delivery documents, such as the Certificate of Completion and Possession. Therefore, ONHWP cannot determine responsibility.

THE EVIDENCE:Robert Salhany

Salhany testified that he and his wife, Mary Gardiner, are the Applicants in this appeal. He stated that he and Gardiner entered into an Agreement of Purchase and Sale with Tartan dated April 4, 2000 in terms of which they purchased the home to be built by Tartan at 78 Gleeson Way in Nepean, Ontario. (Exhibit 3, tab 5)

1st Issue

Schedule "G" to the Agreement of Purchase and Sale provided that Tartan would supply and install a 100 amp electrical breaker panel in the home.

Pursuant to the completion of the home the Applicants took possession and occupation on December 15, 2000.

Salhany went on to state that by way of a written "request for change" dated May 3, 2000 Tartan and the Applicants agreed to a change in regard to the supply and installation of the 100 amp electrical breaker panel in the home. In lieu of a 100 amp electrical breaker panel, Tartan would "supply and install a 200 amp service" in the home at an agreed additional cost to the Applicants of \$435.00. Salhany conceded under cross-examination that at the foot of the second page of the "request for change" form, immediately above his signature and that of Tartan's representative, the following words appear:

The Vendor will undertake to incorporate the work covered by the Change Order in the construction of the house but will not be liable to the Purchaser in any way if for any reason any work covered by the Change Order is not carried out. In that event, any monies paid in connection with same shall be returned to the Purchaser.

(Exhibit 3, tab 6)

The Applicants duly paid Tartan an agreed sum of \$435.00 for this change to the electrical system in the home.

When, after taking occupation and possession of the home, the Applicants learned that they had not received a 200 amp electrical service in the home they complained to Tartan who advised the Applicants that the City of Nepean would not permit a 200 amp

service on newly constructed homes. However, Tartan upgraded the standard 32 circuit panel that it had installed in the home to a 40 circuit electrical panel. This upgrade, combined with the original 100 amp service would, according to Tartan, meet any future electrical needs that may be required. Tartan forwarded the Applicants a cheque for \$175.00 being the difference between the \$435.00 upgrade cost of the 200 amp service and the cost of the 40 circuit panel installed in lieu of a 32 circuit panel.

Salhany went on to state that upon Tartan informing him that a 200 amp service could not be provided, he caused enquiries to be made with officials of the City of Nepean and Ottawa Hydro. Salhany stated that Ottawa Hydro contended there was no restriction on the supply and installation of a 200 amp service and this could be provided as an upgrade from a 100 amp service at a cost of \$2,179.80 including G.S.T. Ottawa Hydro's position was that a 100 amp service is "ample for the vast majority of homes" and "services larger than 100 ampere are the exception" amounting to less than 5% of total homes in its area. (Exhibit 4)

On June 2, 2002, after the conciliation inspection report and the Program's decision letter had been received by the Applicants, they received a letter from Tartan enclosing a cheque in their favour for \$435.00 as "reimbursement" for the \$435.00 paid by the Applicants for the supply and installation of a 200 amp service which had not been supplied and installed. Salhany conceded that this cheque had been deposited by the Applicants but stated that it was deposited in error. At the time of depositing the cheque both Applicants were distracted as Salhany's mother was terminally ill and the Applicants were going back and forth to visit Salhany's mother in Montreal. The stress of the mother's illness resulted in the cheque being deposited in error. Salhany conceded under cross-examination that since depositing the cheque in June 2002 no attempt had been made to make refund of \$435.00 to Tartan.

Under cross-examination Salhany conceded that the electrical system as installed is functioning properly and that such system was installed by a qualified electrician and had been approved by the City of Nepean.

2nd Issue

Salhany testified that approximately three to four months after taking possession and occupation of the home he noticed that the corner seam on the kitchen counter top evidenced bubbling over a length of about six inches. He, at about the time of discovering the bubbling, verbally reported the problem to Tartan. He contended that the seam had "come apart" and that there did not appear to be silicon between the two pieces of counter top where they were joined. He was able to put his finger nail between the two pieces of counter top where these two pieces met. Salhany also stated that he had not had anyone inspect this complaint other than Canac Kitchens who had supplied and installed the kitchen cabinets including the counter top. He went on to state that when Canac Kitchens inspected the counter top on October 26, 2001 he was present but did not speak with the representative of Canac Kitchens either during or after the inspection.

Under cross-examination Salhany denied that he had ever notice water pooled on the counter top near or at the seam where bubbling had occurred. He conceded that he never "took the counter top apart" so as to see whether or not there was silicone between the seam where the two pieces of counter top meet.

Paul Rochon

Rochon testified on behalf of the Program. He stated that he has been employed with the Program for the past 13 years. He is presently a warranty representative with the Program. Prior to his employment with the Program he was a customer service manager with a builder/developer of residential homes where his duties included making inspections of newly constructed homes. Prior to being a service manager he was a building official with the building departments of two Ontario municipalities.

Rochon stated that he became involved in this matter as the Program's warranty representative and attended the conciliation inspection on May 1, 2002. He authored the subsequent conciliation inspection report and the Program's decision letter of May 22, 2002.

1st Issue

Insofar as the first issue is concerned, Rochon stated that "schedule G" to the Agreement of Purchase and Sale between the Applicants and Tartan called for a 100 amp electrical service to be installed in the home. By subsequent written agreement dated May 3, 2000 and titled "Request for Change" between the Applicants and Tartan this 100 amp service was to be upgraded to a 200 amp service at an agreed cost to the Applicants of \$435.00 which the Applicants paid to Tartan. However, the upgrade was not done by Tartan and Tartan refunded to the Applicants the \$435.00 paid by them for such upgrade. This refund was made in terms of the conditions attached to the "Request for Change" form.

Rochon went on to state that a permit for the 100 amp electrical service had to be issued by the necessary authorities prior to occupation and possession. From his inspection he noted that the supply and installation of the 100 amp service was free of defects in material, was done in a workmanlike manner and was not installed in contravention of the Ontario Building Code. The Applicants did not complain that the 100 amp service was defective but stated that they felt it might be inadequate in the future to service an anticipated basement apartment and a swimming pool.

2nd Issue

Insofar as the second issue was concerned Rochon confirmed that when he inspected the counter top at the time of the conciliation inspection he did observe that over a distance of some 6" there was a bubbling of the counter top surface where the two pieces of the counter top met. From his experience this bubbling was caused by water or wet cloths having been left on top of the counter top at the seam or joint between the two pieces of counter top. The mitre joint was damaged by water entry or excessive moisture caused by wet cloths being left on the joint. Rochon stated that when the Applicants took possession and occupation of the house on December 15, 2000 there was no damage recorded at the predelivery inspection regarding the kitchen counter top and this damage clearly occurred subsequent to occupation. Water or moisture penetration into the mitre joint can affect the composite materials of which a counter top is made and the bubbling observed is consistent with water entry or moisture penetration.

Rochon maintained that damage to the counter top could have been avoided if the Applicants had properly maintained the kitchen counter top by ensuring that water or wet cloths did not stand on the mitre joint. Rochon stated that in his opinion the construction and assembly of the counter top was done by Canac Kitchens according to normal acceptable methods. The Ontario Building Code had not been violated, the home was not unfit for habitation and the counter top was constructed in a workmanlike manner and is free of defects in materials that were used.

FACTS FOUND PROVEN:

The following are the facts found by the Tribunal found to have been proven.

1. The Applicants and Tartan entered into a written agreement dated April 4, 2000 in respect of the construction and sale of a single family residential home by Tartan to the Applicants.
2. Included in the home to be constructed was a 100 amp electrical service.
3. Subsequent to the Applicant and Tartan entering into the written agreement dated April 4, 2000, referred to in paragraph 1 above, they entered into a written agreement titled "Request for Change" dated May 3, 2000 in terms whereof Tartan agreed to upgrade the home's electrical system from 100 amp service to a 200 amp service at an agreed cost to the Applicants of \$435.00, which sum the Applicants paid to Tartan.
4. It was a condition of the written agreement titled "Request for Change" dated May 3, 2000 that Tartan would not be liable to the Applicants in any way if for any reason any work covered by the change request was not carried out, in which

event any monies paid in connection with the change were to be returned by Tartan to the Applicants.

5. Tartan did not carry out the work covered by the aforesaid "Request of Change" and by cheque dated May 31, 2002 for the sum of \$435.00 refunded the Applicants the monies they paid to Tartan in respect of the upgrade.
6. The Applicants accepted Tartan's cheque for \$435.00 by depositing same to their banking account and have not refunded that amount or any amount to Tartan.
7. The 100 amp electrical service installed by Tartan in the home is not defective, functions adequately and was supplied and installed in terms of the Agreement of Purchase and Sale. There was and is no defect in material or workmanship in regard to the 100 amp service and the installation is not in violation of the Ontario Building Code nor has it resulted in the home being unfit for habitation.
8. There is water damage that has manifested itself by bubbling along the mitre joint in the kitchen counter top. The damage occurred subsequent to the Applicants' occupation of the home and is consistent with improper maintenance by the Applicants.
9. There has been no failure by Tartan to construct and install the kitchen counter top in a workmanlike manner. It is free from defects in material and was not constructed in violation of the Ontario Building Code.

THE LAW:

Section 14.(3)(b) of the *Ontario New Home Warranties Plan Act* (the "Act") states as follows:

14. (3) Subject to the regulations, an owner of a home is entitled to receive payment out of the guarantee fund for damages resulting from a breach of warranty if,
 - (b) the person has a cause of action against the vendor or the builder, as the case may be, for damages resulting from the breach of warranty.

Section 13.(1)(a) of the Act states as follows:

13. (1) Every vendor of a home warrants to the owner,
 - (a) that the home,
 - (i) is constructed in a workmanlike manner and is free from defects in material,
 - (ii) is fit for habitation, and
 - (iii) is constructed in accordance with the Ontario Building Code;

Section 13.(2)(f) of the Act states as follows:

Exclusions

(2) A warranty under subsection (1) does not apply in respect of,

(f) damage resulting from improper maintenance;

REASONS FOR DECISION:

There are two issues for consideration in this matter.

The first issue relates to the 100 amp electrical service installed by Tartan in the home.

There is no dispute that the Applicants and Tartan did enter into a written Agreement of Purchase and Sale in terms whereof Tartan was to construct a residence for the Applicants which included a 100 amp electrical service. There is also no dispute that subsequent to the Agreement of Purchase and Sale the Applicants and Tartan amended that agreement insofar as the supply and installation of the 100 amp service was concerned and they agreed in writing dated May 3, 2000 that at a cost to the Applicants of \$435.00, which they paid, Tartan would supply and install an upgraded 200 amp service. There is further no dispute that the amending agreement whereby the 200 amp service was to be supplied contained a term and condition that Tartan would have no liability to the Applicants "if for any reason" Tartan did not supply and install the 200 amp service in which event the \$435.00 paid for such service would be refunded to the Applicants. It was also not disputed that Tartan did not supply and install the 200 amp service and that it refunded the \$435.00 to the Applicants. That the Applicants accepted the refund, albeit possibly in error, does not affect the legal consequences of the fact that they did accept a full refund from Tartan. The Applicants have made no effort to refund the \$435.00 to Tartan, which in and of itself serves to confirm acceptance of Tartan's refund of the \$435.00 in terms of the conditions attached to the May 3, 2000 amending agreement.

The Tribunal finds quite apart from there being no breach of the Agreement of Purchase and Sale by Tartan, that the Applicants have not met the onus of proof that the 100 amp service is in any way defective or that it constitutes a defect in terms of Section 13.(1) of the Act. The 100 amp service has not been shown by the Applicants to be inadequate or defective. The possibility that a basement apartment may be incorporated in the home at some future time and that a pool may be added to the home is mere speculation. Even if such additions are made in the future there is no evidence to indicate that a 200 amp service is necessary or required.

The present 100 amp service was installed by a qualified electrician and was inspected by the City of Nepean prior to an occupation permit being issued. In fact, the Applicants did not contend or complain the 100 amp service was defective.

Accordingly, on the basis of the foregoing the Tribunal dismisses the Applicants' first claim.

Insofar as the second issue is concerned there is no doubt, and the Tribunal finds, that the mitre joint on the kitchen counter top shows signs of bubbling over a length of some 6". The Tribunal also finds that this bubbling was not present when the Applicants took possession and occupation of the home on December 15, 2000 and was verbally brought to the notice of Tartan for the first time some three to four months after possession and occupation pursuant to which and Tartan caused Canac Kitchens to inspect the mitre joint in October of 2001.

The Applicants, upon whom the onus rests, did not call any evidence whatsoever in regard to the cause of the bubbling. They brought no evidence to counter the evidence of Rochon, which the Tribunal accepts.

The only evidence place before the Tribunal was the testimony of Rochon who clearly has had considerable experience in the building industry generally. His uncontraverted evidence was that the bubbling was caused by water having penetrated the mitre joint. He testified that, other than a granite like top, there is no counter top made of wood composite material, such as the one installed in the Applicants' home, that is completely watertight. Leaving pooled water on the top of a mitre joint or even a wet cloth would cause water to penetrate the counter top and cause it to be damaged. The bubbling observed along the mitre joint is due to water damage caused after the Applicants took occupation of the home.

Normal and proper maintenance would have prevented water accumulating over the mitre joint and causing damage. The Applicants had a clear duty to properly maintain their property and ensure that accumulating water did not cause damage. This the Applicants failed to do and they are the authors of their own misfortune. The damages resulting from the improper maintenance of the counter top are excluded from warranty pursuant to section 13.(2)(f) of the Act.

The Applicants have brought no evidence to show that the counter top was constructed in an unworkmanlike manner and is not free from defects in material. Nor have they shown that the home is not fit for habitation or that the kitchen counter top was constructed in contravention of the Ontario Building Code.

Accordingly, the Applicants have not discharged the onus of proof as to this second issue and their second claim is dismissed.

ORDER:

Pursuant to the authority vested in it by Section 16.(3) of the *Ontario New Home Warranties Plan Act*, the Tribunal directs the Ontario New Home Warranty Program to disallow both claims of the Applicants.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: December 24, 2002

PREHEARING

DONALD F. ROUGHLEY AND ASSOCIATES INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *ONTARIO NEW HOME WARRANTIES
PLAN ACT*

TO REFUSE TO RENEW THE
REGISTRATION

TRIBUNAL: WILLIAM M. MCINTOSH
Presiding Vice-Chair

APPEARANCES: CAROL STREET,
Counsel for the Ontario New Home Warranty Program
by telephone conference

DONALD F. ROUGHLEY, Agent
on behalf of Donald F. Roughley And Associates Inc.
by telephone conference

DATE OF PREHEARING: December 11, 2002 Toronto

ORDER

Following the attendances by teleconference on December 2, 2002 at a prehearing before this Tribunal of Donald F. Roughley, appearing on behalf of Donald F. Roughley And Associates Inc. (the "Applicant"), and Carol Street, Counsel, with Anil Darr, representing the Registrar, Ontario New Home Warranty Program (the "Respondent").

The Tribunal makes the following Order:

1. The parties to the hearing shall be the Applicant and the Registrar, Ontario New Home Warranty Program.
2. The Applicant shall forward to the offices of the Registrar on or before December 31, 2002 in the form supplied by the Registrar an Indemnity Agreement duly executed by the wife of Donald F. Roughley.

3. Upon receipt and satisfaction of the said Indemnity Agreement, the Registrar will notify the parties of the Respondent's withdrawal of the Notice of Proposal.

LICENCE APPEAL TRIBUNAL

William M. McIntosh
Presiding Vice-Chair

Released: December 11, 2002

TORONTO INSTITUTE OF TECHNOLOGY INC.

APPEAL FROM A DECISION OF THE SUPERINTENDENT OF
PRIVATE CAREER COLLEGES UNDER THE *PRIVATE CAREER
COLLEGES ACT*

TO REFUSE REGISTRATION

TRIBUNAL: CARL DOMBEK, Chair, Presiding

APPEARANCES:

XIAOJUN MA, Counsel representing the Applicant
ANITA L. LYON, Counsel representing the Superintendent of Private
Career Colleges

DATE OF
HEARING: December 17, 18, 19 & 20, 2002

Toronto

ORDER

1. Pursuant to the powers given it under section 7(4) of the *Private Career Colleges Act* (the Act) the Tribunal directs the Superintendent to carry out his Proposal to refuse to register the Applicant.
2. The Tribunal further orders the Superintendent to post a minimum of 2 (two) and a maximum of 4 (four) Notices to Students advising them that the Applicant is not registered under the Act. These Notices shall be posted in prominent locations at each place of business operated by the Applicant.
3. The Tribunal further orders that the Applicant, and specifically Mr. Anchuan Jiang, assist the Superintendent in the placement of the Notices, including giving access to its places of business to the Superintendent and his staff.
4. Upon a future application for registration made under Section 10 of the Act, the Tribunal orders that the Terms and Conditions attached as Appendix "A" to this Order shall be part of any future Proposal to register the Applicant. These Terms and Conditions are subject to any modifications that may be necessary due to any new

circumstances that exist at the time of the application. For clarity, this may include a "relaxing" of the Terms and Conditions.

5. The Tribunal may be approached regarding the wording of the Notices to Students.
6. The Tribunal shall provide written reasons for its Decision and Order in due course.

LICENCE APPEAL TRIBUNAL

Carl, F. Dombek, Chair, Presiding

RELEASED: December 23, 2002

Appendix “A” Terms and Conditions

1. Declaration of Familiarity with Legislation

That Anchuan Jiang, in both his capacity as an authorized officer of the Applicant and in his personal capacity, sign a sworn Declaration that he has read and is familiar with the provisions of the *Private Career Colleges Act* (the Act) and Regulation 939 under the Act.

2. Separate Corporate Structure and Name

2.1 That the Applicant limit its business to that of a private career college, or alternatively, that the Applicant's business as a private career college be maintained through a legally differentiated business structure with a unique registered business name and separate financial records.

2.2 That in either of the circumstances set out in 2.1 above, the Applicant conduct the business of a private career college under a name that is clearly distinct from the name of any private school owned or operated by the Applicant or by an enterprise or corporation controlled, directly or indirectly, by Anchuan Jiang.

3. Submission of Revised Application

3.1 That the Applicant submit to the Superintendent a new, complete application that fully complies with the requirements of s.2(1) and s.2(2) of Regulation 939, and which revised application must include:

- a new pro forma financial statement as required under s.2(2)(p) of Regulation 939;
- course evaluations completed by objective, external evaluators approved by the Superintendent for the purpose of conducting such evaluation(s) prior to the initiation of such evaluations submission of the completed application;

3.2 That if a course is to include a co-op component, the application must include, in addition to Appendix I of the application form, evidence satisfactory to the Superintendent verifying that there will be a minimum of one co-op placement opportunity for every two students, that the co-op placement is directly relevant to the academic content of the course and that the co-op student will be supervised and directed by an individual with knowledge and experience relevant to the purpose of the co-op placement.

4. Bonding Requirement

4.1 That pursuant to s.9(2.10), the Applicant provide the Superintendent with a bond or a form of collateral security as provided in Regulation 939, in an amount which is the greater of:

- \$100,000; or
- the total amount of tuition fees collected.

4.2 That the Superintendent review this bonding requirement three years after registration and may modify the required bond or collateral security to an amount as provided in s.9(2) to 9(2.9).

5. Minimum Course Admission Requirements

That the minimum admission requirement for any course eligible for registration by the Superintendent is an Ontario Secondary School Diploma or equivalent.

6. Audited Financial Statements

That for the first three years of registration, the Applicant must provide the Superintendent with an audited financial statement, which statement shall be provided within three months of the end of the Applicant's financial year.

7. Translation of Non English or French Documents

That in addition to the requirements of Regulation 939 relating to the Superintendent's prior approval of advertising, the Applicant must submit to the Superintendent all publications and advertising (including student contracts and material distributed through a Web site or other electronic media) which are prepared by or on behalf of the Applicant in a language other than English or French. Such materials shall be submitted to the Superintendent prior to publication or distribution accompanied by an English translation certified as accurate by a translator approved by the Superintendent.

8. Audit of Published Material

That the Superintendent may conduct audits, from time to time, of the content of material and documents published or distributed by or on behalf of the Applicant in a language other than English or French and that the Applicant shall reimburse the Superintendent for the cost of the translation of such material or documents.

9. Publication of Plain Language Version of Tuition Fee Refund Requirements and Approved Courses

9.1 That the Applicant shall post on its Web site (1) a plain language version, prepared by the Superintendent, of the student tuition fee refund requirements set out in Regulation 939, and (2) a list of the Applicant's courses registered by the Superintendent. The Applicant also shall ensure that this material is readily available on request to students and members of the public.

9.2 That the Superintendent shall prepare the plain language version of the relevant regulatory provisions in English and in the Chinese language or languages used by the Applicant in its Chinese publications. The Applicant shall reimburse the Superintendent for the cost of the Chinese translation(s).

10. Age of School

That the Applicant shall ensure that it not make any statements that would lead a student or member of the public to believe that the Applicant was incorporated or in existence prior to 2001.

11. Impact of Non Compliance

That the Superintendent may suspend or revoke the Applicant's registration in the event of any breach of the Act, regulations under the Act or terms of this Order.

TORONTO INSTITUTE OF TECHNOLOGY INC.

APPEAL FROM A DECISION OF THE SUPERINTENDENT OF
PRIVATE CAREER COLLEGES UNDER THE *PRIVATE CAREER
COLLEGES ACT*

TO REFUSE REGISTRATION

TRIBUNAL: CARL DOMBEK, Chair, Presiding

APPEARANCES:

XIAOJUN MA, Counsel representing the Applicant
ANITA L. LYON, Counsel representing the Superintendent of Private
Career Colleges

DATES OF

HEARING: December 17, 18, 19 & 20, 2002

Toronto

DECISION

These are the reasons for the oral decision and Order which was given at the conclusion of the hearing on December 20, 2002.

The Toronto Institute of Technology Inc (the "Institute") is not a private career college as defined under the *Private Career Colleges Act* (the "Act"). However, it applied for registration under the Act's predecessor statute which was entitled the *Private Vocational Schools Act* in October of 2001. Supporting material was submitted on May 27, 2002. On August 22, 2002, Anchuan Jiang, the sole owner and President of the Applicant, revised the application particularly with respect to the location of the school and the programmes to be offered. The Superintendent refused to register the Applicant and gave his reasons, addressed to Mr. Jiang, as follows:

It is the opinion of the Superintendent of Private Career Colleges that Toronto Institute of Technology is not entitled to registration because the past conduct of Toronto Institute of Technology and yourself as director, afford reasonable grounds for the belief that the school will not be carried on in accordance with law and with integrity and honesty, and because the Toronto Institute of Technology is carrying on activities that are in contravention of the Act and regulations.

The Superintendent relied on the following facts in reaching this decision:

- that since October 2001, the Toronto Institute of Technology, with the knowledge of yourself as the director and chief operating officer, offered programs, or held itself out as offering programs at 1220 Sheppard Avenue East, Toronto, that would require registration under the Act, when the school was not registered. Such programs also were offered or were held out as being offered at 4580 Dufferin Street, Toronto in June and July 2002. This was in contravention of the Act.
 - that over the period from March 2002 to the present, the Superintendent has received complaints from students or potential students that Toronto Institute of Technology, through its staff or officers, portrayed itself as a registered private vocational school (now known as private career colleges) when it had never been registered under the Act;
 - that Toronto Institute of Technology's advertisements in the Chinese-language newspaper *Sing Tao Daily News*, which ran in March 2002, included untrue and/or misleading statements regarding matters such as: the authorization of the Toronto Institute of Technology and programs offered by the school, by the Ministry of Training, Colleges and Universities; the existence of an application for government authorization to offer degree programs; formal arrangements or agreements with universities for the recognition or transfer of credits from the Toronto Institute of Technology; and the facilitation of required immigration visas or study permits.
 - that Toronto Institute of Technology produced, distributed or made available to members of the public, a colour brochure entitled *Cultivate Enquiring Minds and Inspire Innovative Ideas*, that contained similar, untruthful or misleading statements regarding government authorization or approval of the school and its programs.
 - that the advertisements and brochure, and statements to members of the public from staff or officers of Toronto Institute of Technology, were misleading or tended to be misleading to students, potential students and members of the public by both affirmative statements or omissions by leading such individuals to believe that:
 - the Toronto Institute of Technology was an institution endorsed or approved by the provincial and federal government and leading academic bodies; and
 - a student attending the Toronto Institute of Technology would be able to enrol (*sic*) in vocational or career programs that were authorized or were about to be authorized by the Ontario government and recognized by other government bodies, and that could culminate in degrees based on arrangements with leading universities.
- (emphasis from original)

At the commencement of her opening statement Counsel for the Applicant, Ms Ma, admitted that the above reasons, which concerned the misleading advertisements and the brochure, were accurate. However, her defence was "what was advertised was not taught".

Mr. Jaing in his testimony also agreed that the advertisements and brochure were inaccurate and misleading. However, his explanation was that once he was apprised of the nature of these documents, he did not offer them for distribution and he actually changed the wording in the advertisements. With these admissions the Superintendent proved his case, since under section 5(1)(c)(ii) of the Act it is "the ***past*** conduct of a corporation's officers or directors which gives the Superintendent reasonable grounds to believe that the private career college will not be operated in accordance with law, integrity and honesty (emphasis added).

Despite the above, which is sufficient to uphold the Superintendent's decision, the Tribunal also found that Mr. Jaing:

1. entered into an agreement with an organisation called the Canadian Institute of Information Technology to use its licence for the business of the Institute. This arrangement was illegal under the Act and its Regulations;
2. was willfully blind to the daily operations of his business, insofar as he did not proof read the content of the advertisements or brochure;
3. continues to operate his school by offering courses which require the approval and registration of the Superintendent;
4. continued to make offers to foreign students to participate in programmes that offered courses which required the approval and registration of the Superintendent at least until August 9, 2002 despite warnings from an official from the Department of Immigration and Citizenship not to do so;
5. agreed that he was a participant in a scheme to circumvent the currency laws of China;
6. despite all official warnings, did not know whether the misleading brochures was still being distributed;
7. did not proofread the content of the misleading brochure for its accuracy but was only concerned about the quality of the print;
8. continues to blame employees, former employees, consultants and agents for the untrue and misleading text in his advertisements and brochure even though he was the sole owner and Director of the Institute;
9. refused to answer questions which were appropriately asked of him in cross-examination regarding evidence that he testified to in examination in chief; and
10. during his entire testimony was very confusing about dates of events, was evasive, would not answer the questions that were asked, was argumentative and generally was not a credible witness.

The leading decision, which is binding on this tribunal, is *Brenner v. Ontario (Registrar of Motor Vehicles and Salesmen)*, [1983] O.J.No.1017. This case dealt with the interpretation of legislation which was identical to the present Act. In the *Brenner* decision, Southey J. stated that:

"the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded

reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty."

That decision went on to state, in referring the matter back to the Tribunal for a rehearing, that:

"The proper question at the rehearing remains, however, whether the past conduct of the applicant for its reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal."

Accordingly, it is the Superintendent's belief that is an issue in these proceedings, and not the belief of this Tribunal. Only if the Tribunal believes that the Superintendent was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that such applicant would not carry on business in accordance with law and with integrity and honesty, should this Tribunal refuse to direct the Superintendent to carry out his proposal.

Based on the admissions made by the Applicant, and the additional findings of this Tribunal, the evidence was overwhelmingly in favour of the Superintendent coming to the decision that caused him to refuse to register the Applicant. However, this does not conclude the matter. The Tribunal is concerned about the protection of the consumer, i.e. the students who may be attending the Institute.

Consequently, the Tribunal orders that the Superintendent take some additional remedial steps to protect the students and to notify them of the non-registration of the Institute. Furthermore, based on the past and continuing conduct of the Applicant, the Tribunal agrees with Counsel for the Superintendent that additional conditions should be placed on any future registration of the Applicant. These conditions, which were submitted by the Superintendent, are attached as Appendix "A" to the order that was issued at the conclusion of the hearing. As stated therein, these terms and conditions may be modified or relaxed depending on the circumstances existing at the time of any future application.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek, Chair, Presiding

RELEASED: December 30, 2002

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
RYAN ERIC HUGHES

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: September 18, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

RYAN ERIC HUGHES

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Ryan Eric Hughes, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: December 13, 2002

PREHEARING

BERNADETTE AND DEREK DOOLAN

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE *ONTARIO
NEW HOME WARRANTIES PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL: WILLIAM McINTOSH, Vice-Chair

APPEARANCES: ANDREA TAYLOR, Counsel for Bernadette and Derek Doolan ("The Applicants")
NETANUS RUTHERFORD, Counsel, representing the Ontario New Home Warranty Program ("The Respondent")
CHRISTOS PAPADOPOULOS, Counsel, representing 1219190 Ontario Limited ("The Added Party")

DATE OF
PREHEARING: December 2, 2002 Toronto

ORDER

Following an attendance by teleconference of a prehearing before the Licence Appeal Tribunal (the "Tribunal") on December 2, 2002 of Andrea Taylor, Counsel representing Bernadette and Derek Doolan (the "Applicants"), Netanus Rutherford, Counsel representing the Ontario New Home Warranty Program (the "Respondent") and Christos Papadopoulos, Counsel representing 1219190 Ontario Limited (the "Added Party");

WHEREAS, there was no resolution of the issues between the parties at this prehearing, the Tribunal makes the following Order:

1. The Parties to the hearing are Bernadette and Derek Doolan (the "Applicants"), the Ontario New Home Warranty Program, (the "Respondent") and 1219190 Ontario Limited, (the "Added Party").
2. The Parties agreed that as two of the counsel will testify on a matter of substance at the hearing, they will seek advice from The Law Society of Upper Canada as to the appropriateness of counsels' own firms continuing to represent the parties and

appearing at the hearing. Counsel shall file their written submissions which may include the advice and shall form part of the record on a motion before the Vice Chair of the Tribunal seized of this matter to be held by teleconference at 9:30 a.m. on February 3, 2003.

3. The Hearing shall commence at 9:30 a.m. on March 24, 2003 and continue at 9:30 a.m. on March 25, 26 and 27, 2003, until complete.
4. The Applicants will by 4:30 p.m. January 27, 2003 forward to the parties the list of items for which they are seeking relief and all documents available in support; the parties to file written responses by 4:30 p.m. February 28, 2003. All documents to be relied upon by the Applicants will be forwarded to the parties by 4:30 p.m. February 28, 2003 and responses filed with the Tribunal by 4:30 p.m. March 14, 2003.

LICENCE APPEAL TRIBUNAL

William McIntosh, Vice-Chair

Released: December 5, 2002

1318-MED-ALCL

Appeal under Section 50(1) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 47(1) of that Act.

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ROSS C. BENNETT, M.D., Presiding Member

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATES OF HEARING: October 30, 2002 and November 29, 2002

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

PRELIMINARY MATTERS:

This Appeal was initially opened on October 30, 2002. At the outset, the Applicant advised the Tribunal that additional medical reports that she had forwarded to the Ministry early in October 2002, were not included in the file. These reports apparently contained information requested by the Ministry in a letter dated July 13, 2001. Since this information would be essential to the Hearing, the Tribunal and both parties agreed to an adjournment until November 29, 2002, to allow time for the Respondent to try and locate these reports.

The Applicant was also asked to request her doctors to provide duplicate reports, in case the originals were not located.

Unfortunately the reports were not located in either the Ministry of Transportation or the Tribunal files and the Applicant said she had been too sick to obtain the duplicates.

EXHIBITS:

- 1) Notice of Suspension of Driver's Licence from The Ministry of Transportation dated February 4, 2000.
- 2) Notice of Appeal from the Applicant received at the Tribunal October 4, 2002.
- 3) File Summary received from the Respondent.

FACTS:

The Applicant, a 60 year old female, had her driver's licence suspended by the Ministry of Transportation on February 4, 2000, after receiving a medical report on December 9, 1999, from Physician #1, a cardiologist. Physician #1 informed the Ministry that the Applicant suffers from unheralded syncope and her fitness to drive should be evaluated.

The Ministry informed the Applicant in the Suspension letter of February 4, 2000 that her case would be reconsidered upon receipt of satisfactory detailed reports from neurology and cardiology investigations, including results of ECG, Holter Monitor, EEG, MRI and CT scan.

The Applicant was investigated by Physician #2, a neurologist, who reported to the Ministry on August 30, 2000 that she had not experienced any more blackouts and had curtailed her drinking. However, her liver function tests were elevated and she had a toxic amount of alcohol in her blood on her previous visit.

The Ministry then advised the Applicant on October 25, 2000 that an assessment was also necessary by a specialist in Addictions Medicine. This request was repeated on February 16, 2001.

The Applicant was examined by Physician #3, an Addictions Specialist, in March, 2001. Physician #3 concluded that she probably is an alcoholic, but did not think she required treatment at the present time. The Applicant told him her laboratory markers were normal, but they had been misplaced at the Ministry of Transportation and were not available. When repeated in May, her GGT was slightly elevated. When the Applicant was asked how long since she had her last drink of alcohol, she said it had been 3 months.

In evidence the Applicant informed the Tribunal the missing reports, that she was asked at the adjournment in October to bring, were from the East General Hospital Emergency. The visit was on March 6, 2001, but she could not recall why she went there. Previously she had simply referred to them as doctors reports. She now says that she sent these reports to the Tribunal, not the Ministry.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffer from any mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

The Deputy Registrar acted in accordance with Section 47(1) of the *Highway Traffic Act* in suspending the Applicant's driver's licence, after being informed that she was experiencing syncope spells.

From the outset the Ministry outlined a number of steps the Applicant had to take before her licence could be reinstated. The Applicant did see a neurologist and an addiction specialist, but their reports were very sketchy and did not satisfy the MAC's needs. She has not been making regular visits to her family physician and so no one has been monitoring her drinking problem. She does not appear to appreciate or have any insight into the fact that she has an alcohol problem and that is the reason for her licence suspension.

The problem started in December 1999 and since then she has been asked repeatedly by the MAC for proof that she has stopped drinking. She has virtually ignored these requests, except for claims that she had sent in medical reports 2 months ago that have not been located. She also failed to obtain copies of these reports during the adjournment, as requested by the Tribunal.

The Tribunal did not find the Applicant credible for these reasons. In addition there was not enough evidence produced to demonstrate abstinence from alcohol consumption in order to justify reinstatement of the Applicant's driver's licence according to Section 47(1) of the *Highway Traffic Act*.

DECISION:

Upon the application by the Applicant to appeal the decision dated February 13, 2000 of the Registrar of Motor Vehicles ("Registrar") to suspend her driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

Ross C. Bennett M.D., Presiding Member

RELEASED: December 10, 2002

PREHEARING

SALVATORE ASSENZA

APPEAL FROM A DECISION OF THE BOARD OF TRUSTEES OF
THE ONTARIO MOTOR VEHICLE DEALERS COMPENSATION FUND

TO DISALLOW A CLAIM

TRIBUNAL: CARL DOMBEK, CHAIR
STUART CORK, MEMBER

APPEARANCES: SALVATORE ASSENZA, Applicant (representing himself)
AVIVI HARARI, Counsel, representing the Board of Trustees of the
Ontario Motor Vehicle Dealers Compensation Fund (Respondent)

DATE OF
PREHEARING: December 3, 2002 Toronto

ORDER

Following the attendance on December 3rd, 2002 at a prehearing before the Licence Appeal Tribunal of Salvatore Assenza, Applicant and Aviva Harari, Counsel for the Board of Trustees of the Ontario Motor Vehicle Dealers Compensation Fund (the "Respondent");

The Tribunal makes the following Order:

- 1) The parties present at the prehearing recorded that there was no resolution of the issues in this matter at this time.
- 2) The hearing of this matter is scheduled to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario at 9:30 a.m. on January 21st, 2003 for one day.
- 3) Should the Applicant choose to withdraw his Appeal before this Tribunal, he has agreed that he will notify the Respondent in writing at least two weeks prior to the scheduled hearing date.

- 4) It was determined that the filing dates with the Tribunal of submissions and documents to be used in the hearing by both parties would occur **on or before 4:00 p.m., January 10, 2003**. Both parties will file three copies with the Tribunal and deliver one copy to all parties. It was confirmed that the rules of the Tribunal require full disclosure 10 days prior to the hearing. For greater certainty this Tribunal orders that full disclosure be provided by the parties no later than 4:00 p.m. Monday January 13, 2003.

LICENCE APPEAL TRIBUNAL

Carl Dombek, Chair

Stuart Cork, Member

Released: December 12, 2002

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF
CHAMNEY CONTRACTING LTD.

AND IN THE MATTER OF PROPOSAL by
the Registrar, *Ontario New Home Warranties Plan Act*
TO REVOKE REGISTRATION
- Proposal dated: September 19, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

CHAMNEY CONTRACTING LTD.

- Applicant

- and -

REGISTRAR, *ONTARIO NEW HOME WARRANTIES PLAN ACT*

- Respondent

CONSENT ORDER

Upon the application to the Tribunal by, Chamney Contracting Ltd., Applicant, and the Registrar under the *Ontario New Home Warranties Plan Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Ontario New Home Warranties Plan Act* as to the disposition of this proceeding which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: December 5, 2002

1335-MED-SEIZ

Appeal under Section 50(1) of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 47(1) of that Act.

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ROSS BENNETT, M.D., Presiding Member

APPEARANCES: LUBA NEUWIRTH
Representative for the Registrar of Motor Vehicles
Solicitor for Applicant

DATE OF
HEARING: November 21, 2002

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the Highway Traffic Act (Ontario).

EXHIBITS:

- 1a) Notice of Suspension of Driver's Licence effective September 9, 2002 issued by the Registrar of Motor Vehicles.
- 1b) Notice of Downgrading of Class AMB to Class GM dated September 9, 2002.
- 2) Notice of Appeal Form received at the Tribunal October 16, 2002, filed by the Applicant.
- 3) Applicant's Appeal Book received at the Tribunal November 12, 2002.
- 4) Certified Copy of the Applicant's Driver Record from the Ministry of Transportation.
- 5) Applicant's driver's record from the Ministry of Transportation.

FACTS:

The Applicant, a 52-year-old self-employed truck driver, suffered a Cerebral Vascular Accident on February 4, 2001. He was taken to the Haliburton Hospital and then transferred to the Toronto Hospital's Western Branch. The attending physician sent a Medical Condition Report to the Ministry of Transportation on February 16, 2001 stating that the Applicant had suffered a Right Middle Cerebral Artery Stroke with physically

minimal defects, but with higher order problems –cognitive/short term recall /memory.

The Ministry of Transportation notified the Applicant on March 23, 2001 that his driver's licence has been suspended.

The Applicant was treated by Physician #1, a neurologist and Director of the stroke program and a neuropsychologist, Physician #2. Physician #1 informed the Ministry on May 14, 2001, that the Applicant had made a complete recovery in terms of his motor functions and had no field defects or primary sensory deficits. Recommendation was that the Applicant be assessed at a driver-training program.

The Ministry responded, requesting an up-to-date neurologist's assessment confirming no residual visual defects and 120-degrees of uninterrupted field of vision. The Applicant had the visual examinations completed and was referred to another neurologist, Physician #3. Physician #3 did not find any major defect, such as cognitive function, visual fields, and visual attention on both sides, motor or sensory skill loss that would prevent him from operating a motor vehicle. He also suggested the Applicant have an assessment at a driver improvement centre. An EEG on June 8, 2001, disclosed persistent Delta activity over the right hemisphere, indicating underlying structural lesion, consistent with a right cerebral infarct.

The Applicant completed an assessment at the "Skill Builders Rehabilitation Centre" on July 30, 2001 and the instructor recommended his driving privileges be reinstated.

Unfortunately the Applicant suffered a tonic clonic seizure, while at home on August 14, 2001 and a second one in the ambulance, before he was even aware that his licence had been reinstated.

The Applicant's licence was again suspended on September 2, 2001

Physician #3 examined the Applicant on February 5, 2002 and ordered a CT scan, an MRI and an EEG. The CT scan disclosed the previous cerebral infarction and the EEG again demonstrated Delta activity over the right side, but no seizure activity. The rest of the examination was normal. Treatment was Dilantin 450 mg daily with serum levels every 3 months. Physician #3 believed the seizure was a result of the previous stroke.

The Ministry notified the Applicant on May 22, 2002 that his Class ABM licence was being changed to a Class GM and if he wished to regain his Class ABM licence he must apply for a waiver of the medical standards.

Physician #4, a consultant in Neurology and Electrodiagnosis, examined the Applicant and sent a medical report and medical waiver to the Ministry on June 21, 2002. Physician #4 stated that the Applicant had recovered completely from his stroke and was under good control on Dilantin. He said it was reasonable for the Ministry to allow the Applicant to regain his Class A licence.

The MAC responded on September 9, 2002, stating that the cerebral infarct significantly lowers his seizure threshold and he does not meet requirements for waiver consideration. The MAC demanded strict adherence to the CMA guidelines section 5.4.2 and the National Safety

Code 6.3, which the Applicant needs to be seizure free while being off medication for 5 years or seizure free for 10 years while being on/off medication.

Physician #4 did a follow up neurological examination and completed a Medical Report for the Ministry on September 25, 2002. Physician #4 again stated the Applicant was doing very well from a neurological point of view and had no recurrence of his seizure in August 2001. An EEG was reported normal and his Dilantin was at a therapeutic level, indicating compliance. He enclosed a second medical waiver to assist in the Applicant's appeal.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffer from any mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or

- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS

The Registrar acted appropriately under Section 47(1) of the *Highway Traffic Act* in suspending the Applicant's driver's licence, when informed that the Applicant had suffered a stroke on February 4, 2001. The licence was reinstated August 20, 2001, but suspended again on September 2, 2001 after the Applicant was reported to have had a seizure on August 14, 2001.

The Applicant has been examined by four neurologists who have stated he has completely recovered from the stroke and has not suffered any residual effects. He had one seizure in August 2001 and no recurrence in the past 15 months. His EEG's had previously shown Delta activity over the cerebral infarct, but his latest EEG, in September, was normal.

Physician #4, his present neurologist, has submitted 2 Medical Waivers, as requested by the MAC. The MAC, in a September 9, 2002 Case Study, reasons for denying Physician #4's waiver, refers to CMA's "Determining Medical Fitness to Drive" section 5.4.2. This particular section is titled "After a diagnosis of epilepsy".

In the evidence presented, there is no mention of epilepsy or a diagnosis of epilepsy. The Applicant suffered a single seizure, which according to two neurologists was a result of his previous stroke. No evidence of seizure activity was demonstrated in any of the EEG's, although there was evidence of Delta activity in the area of the cerebral infarct. The most recent EEG in September 2002 was reported normal.

The CMA guidelines for professional drivers, Section 5.4.1, which covers driver's with a single unprovoked seizure, states:

- not drive for at least 3 months,
- get neurological assessment, including EEG and CT scan
- if no epilepsy diagnosis, resume professional driving if seizure-free for 12 months.

The National Code for Motor Carriers, under Solitary Seizures Section 6.3.2, states:

The individual who has suffered a single unprovoked seizure should not be considered for any class of motor vehicle until a detailed neurological assessment and EEG have been performed and are satisfactory.

The individual may be considered for a classified (1-4) licence after 12 months, if the

EEG is normal and there has been no recurrence of seizure.

The Applicant has fulfilled all of these requirements.

The Tribunal did not find evidence to justify further suspension of the Applicant's driver's licence under Section 47(1) of the *Highway Traffic Act*. He had been evaluated by 4 neurologists and a certified occupational therapist and all recommended reinstatement of his licence.

DECISION:

Upon the application by the Applicant to appeal the decision dated March 23, 2001 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the Highway Traffic Act ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be set aside.

LICENCE APPEAL TRIBUNAL

Ross Bennett, M.D., Presiding Member

RELEASED: December 4, 2002

PREHEARING

BEL-CO EXPRESS HAULAGE INC. and
619086 ONTARIO LTD. o/a BEL-CO EXPRESS FLOAT SERVICE,
1041800 ONTARIO INC. o/a EXPRESS EXCUVATION,
PEEL WASTE MANAGEMENT INC. and
1025647 ONTARIO INC.

IN THE MATTER OF an application by 61908 Ontario Ltd o/a Bel-Co Express Float Service, 1041800 Ontario Inc.o/a Express Excavation, Peel Waste Management Inc., 102 5647 Ontario Inc., and BelCo Express Haulage Inc. dated November 5th, 2002 for a hearing before the Licence Appeal Tribunal pursuant to section 50(1) of the *Highway Traffic Act*, to consider the appeal of the Suspension and Seizure Orders of the Registrar of Motor Vehicles dated October 24th, 2002,

AND IN THE MATTER of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8 as amended;

AND IN THE MATTER of an application by Bel-Co Express Haulage Inc. for a Commercial Vehicle Operator's Registration Certificate;

AND IN THE MATTER of the Commercial Vehicle Operator's Registration CVOR certificates #077-807-750, 116-064-459, 130-646-949 and 118-625-091 issued to 619086 Ontario Ltd. o/a Bel-Co Express Float Service, 1041800 Ontario Inc. o/a Express Excavation, Peel Waste Management Inc. and 1025647 Ontario Inc.;

AND IN THE MATTER of the Notice of Suspension and Seizure issued to 619086 Ontario Ltd. o/a Bel-Co Express Float Service, 1041800 Ontario Inc. o/a Express Excavation, Peel Waste Management Inc. and 1025647 Ontario Inc.; Bel-Co Express Haulage Inc., on the 24th day of October, 2002;

AND IN THE MATTER of the safety record of 619086 Ontario Ltd. o/a Bel-Co Express Float Service, 1041800 Ontario Inc. o/a Express Excavation, Peel Waste Management Inc. and 1025647 Ontario Inc.; Bel-Co Express Haulage Inc.;

AND IN THE MATTER of unpaid fines;

TRIBUNAL: STUART CORK, Presiding Member

APPEARANCES: PATRICK MOORE, Counsel for the Respondent
C. ALEXIOU, Solicitor for the Applicant

DATE OF

PRE-HEARING: November 26, 2001

Toronto

ORDER

A Pre-hearing between the parties was held on December 5th, 2002 in Toronto at 1 St. Clair Avenue West, 12th Floor as set forth in the Tribunal's Notice of Pre-hearing Conference dated November 25, 2002.

Both of the parties at this Pre-hearing requested that the two matters be combined, and heard by the Tribunal as one single matter. With the agreement of both parties, the Tribunal granted this request.

The Tribunal makes the following Orders respecting the hearing:

1. The hearing date has been set for 9:30 a.m. on March 3rd, 4th, and 5th, 2003, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.
2. It was determined that the filing dates with the Tribunal of submissions and documents to be used in the hearing by both parties would occur on or before February 20, 2003.

Both parties will file three copies with the Tribunal and deliver one copy to all parties. It was confirmed that the Tribunal requires full disclosure 10 days prior to the hearing.

The Applicant undertakes to provide the Respondent with a list of their witnesses on or before January 31, 2003.

3. The Respondent will present evidence and testimony from one witness, Carrier Safety Rating Administrator Louis Janitos. Officer Janitos will present evidence of all the Applicant's records and information, including the Applicant's CVOR records, analysis and supporting documents, accident reports, and show cause meeting notes. Officer Janitos will provide detail of the procedural steps taken by the Ministry and the sequence of events that lead to the Order.
4. Among the issues to be raised by the parties will be whether there are sufficient grounds for the Order, and are the penalties justified.

5. Among the issues to be raised by the Applicant will be the point weighting of an accident, the calculation of the fleet size for the purposes of the CVOR, and the Applicants record since December of 2000.
6. The parties present at the prehearing recorded that there was no resolution of the issues between the parties.
7. At the hearing of this matter, the Tribunal will be asked to review in detail a time period from approximately the early 1990's, with main consideration being given to the two years prior to the Suspension Order.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

RELEASED: December 16, 2002

1363-MED-MTR

Appeal under Section 50(1) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 47(1) of that Act.

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: JOHN A. CARMICHAEL, M.D., Presiding Member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF
HEARING: December 3, 2002

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

FACTS:

The Applicant is a 34 year old, married mother of two who suffers from Cerebral Palsy resulting in significant motor dysfunction of right upper and lower limbs. (Exhibit 2). Because of the increasing need for transportation for her growing family and her husband's work schedule (frequently working weekends) the applicant applied for a class G drivers licence in January 2002.

The applicant successfully completed the written part of the test and was advised to contact the "Driver Assessment Program" at the Name Continuing Care Centre in City, Ontario re the installation of 'adaptive driving equipment' to her car. The conclusion of the Driver Assessment Program was that the applicant required a left foot accelerator and a steering wheel spinner knob plus instruction in their use.

Following six lessons, using the modifications recommended, it was the opinion of the occupational therapist (O.T.) that the applicant should not be approved for a class G drivers licence (exhibit 3). The applicant was informed of this decision.

After some discussion with the O.T.'s superior it was agreed that the applicant should receive a further 6 lessons. The same driving instructor gave the subsequent series of lessons, the original O.T. was present for the first lesson and by happenstance a second O.T. was present for the final lesson. The final assessment noted that the applicant had made little progress despite 12 lessons and that the type or quality of the applicant's disability was such that it was unlikely to improve with time, experience or further lessons. It was the consensus of the driving instructor and the two O.T.s that the applicant should not be granted a drivers licence. The applicant was informed of this decision and given the name and phone number of two other Driver Assessment Programs should she want to seek a second opinion (exhibit 3). These programs were located in Toronto and Ottawa, and the only programs in the opinion of the O.T. competent to fairly assess the applicant's particular disability. This opportunity was declined firstly out of consideration of costs (the applicant has already spent \$600.00 on driving lesson plus other expenses) and secondly both the applicant and her husband are confident of the applicant's ability to drive carefully and safely. As a result the applicant did not think a second opinion necessary. The applicant is a high school graduate and although she has not worked outside her home has a number of post secondary community college level credits. The applicant is fully active around the house requiring only minimal assistance in certain areas (exhibit 4).

As a result of the Driver Assessment Program's decision and the opinion of the applicant that the assessment was "unjust and inaccurate" an appeal was filed (exhibit 1). With the Appeal a "Chronology Of Events" was submitted in which it is suggested that the applicant was prejudiced against by her assessors (exhibit 5).

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

The Ministry has tabled a list of the applicant's driver deficiencies noted by the three assessors, driver instructor and two O.T.s. Of particular importance is the observation of the O.T. that at times of momentary stress, excitement or confusion the applicant's affected (right) side becomes dominant and the applicant effectively loses control of the steering wheel and/or foot peddle. As well, this type of disability is permanent and not likely to improve over time no matter what further efforts are made. The Ministry notes that the applicant's purpose in obtaining a drivers license is to transport her children to and from their activities and that the very presence of small children in the car increases the frequency of moments of stress, confusion and excitement, The Ministry further notes that although the applicant intends to drive only in quiet areas at quiet times, realistically this is impossible to control and the applicant will invariably, from time to time, find herself in more stressful and demanding traffic situations.

The applicant bases her appeal on her demonstrated ability to function as a student, mother and housekeeper and on her own confidence that she can drive carefully and safely. The applicant's second argument is that some kind of conspiracy, (office politics), was formed against her by the driver instructor and the two O.T.s. and that the two lessons with the O.T.s in attendance were deliberately booked during the busiest part of the day (12 noon) and conducted in the busiest part of town. The Tribunal finds no reason for, nor evidence of, such a conspiracy and notes that driver assessments are routinely conducted in all levels of traffic activity, compatible with the safety of the applicant, instructor and the public.

Although the Tribunal is sympathetic to the first of the applicant's two arguments, it finds neither argument compelling enough to reverse the opinion of the Driver Assessment Program and subsequent decision of the Ministry. The disability as described clearly falls within Regulation 340/94, Section 14, (a) of the *Highway Traffic Act*.

DECISION:

Upon the application by the Applicant to appeal the decision dated November 1, 2002 of the Registrar of Motor Vehicles ("Registrar") to suspend her driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

John A. Carmichael, M.D.,
Presiding Member

RELEASED: December 6, 2002

597370 ONTARIO LTD. O/A PETER BULK GREENHOUSE LTD.

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: ELIZABETH SPROULE, presiding member

APPEARANCES: LYNDA DUNBAR, Representative for the Registrar of Motor Vehicles (by written submission only)

PETER BULK, Agent for Applicant
(by written submission only)

DATE OF HEARING: December 4, 2002

DECISION RELEASED: December 6, 2002 Written

REASONS FOR DECISION

A written hearing was held on December 4, 2002, at Waterloo, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8, as amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	597370 Ontario Ltd. o/a Peter Bulk Greenhouse Ltd. (the "Applicant")
Motor Vehicle:	1999 Ford CTV, Plate # FX 2359 (the "vehicle")
Date of Appeal:	November 7, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence (i.e. all reasonable efforts) to determine that the driver's licence was not suspended and further on the basis that the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(c) and (d) of the Act. The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

This matter came before this Tribunal on December 4, 2002 and proceeded as a written hearing.

ISSUE:

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal read the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal (Exhibit 1) states:

Reasons for appeal:

1. I am the owner of the impounded vehicle (not the driver.) When the driver was hired 3 years ago, we checked his licence upon hiring and he was driving every day in at work with his own vehicle up to the day of impoundment.
2. I am a rosegrower. This is the truck that we have to use to ship the flowers to the customers every day. I am just a farmer and the cost is also a hardship.

written hearing. I request a written hearing because I cannot take time off work to go to the hearing in person

In a letter dated and received November 25, 2002, (Exhibit 4), in reply to the submissions of the Registrar the Applicant further states:

With reference to the submissions of the Registrar dated November 22nd, 2002. I would like to draw you attention to Part IV - argument #10. page 7. which states that I have (5) five alternative vehicles. First of all, two of the five vehicles do not belong to me; they belong to somebody else P.J. Bulk of Grimsby. Second, Ford year 87, has not been road-worthy since the summer and I cannot use that truck anymore. The Ford 98 is a passenger vehicle and cannot be used for shipping farm product. I am already using the Ford van 2002, but since it was designed only to be a back-up vehicle on the occasion of an extra large load, it is much too small to be the main shipping vehicle. Currently I am making 2 to 3 trips with the van to deliver roses instead of one trip we used to do with the Ford 99. Often the roses arrive now very late at the wholesalers. Please, could you release the impounded vehicle a.s.a.p. It would be greatly appreciated since our Christmas crop is coming up soon and we need the extra room in the Ford 99.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar (Exhibit 3) are as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by John Douglas Mann;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;

4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until May 9, 2003.
5. Copy of the Ministry of Transportation records indicating the registration of other vehicles in the name of the Applicant.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(c) and (d).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: **A.** adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. *Law.* The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
 - (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
 - (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;

- (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

To succeed in this appeal, the Applicant must establish either that due diligence was exercised in determining that Mr. Mann's driver's licence was not under suspension on October 29, 2002, or that the impoundment order will result in exceptional hardship.

With respect to the issue of due diligence, the only inquiry the Applicant made in this regard was three years ago, at the outset of Mr. Mann's employment. The Tribunal finds that one inquiry in three years does not amount to what can be termed due diligence.

As to exceptional hardship there is very specific criteria set out in section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, that must be met. The Applicant submits that the impounded vehicle is needed for the delivery of product to customers daily and that "the cost is also a hardship". The Tribunal understands that the loss of the use of this vehicle has caused inconvenience and possibly some economic loss to the Applicant. Inconvenience, however, is not a consideration in determining "exceptional hardship".

For financial or economic loss to be considered the Applicant must demonstrate that no alternative to the impounded motor vehicle is available and that the financial or economic loss will be immediate, significant and lasting. It is the Applicant's evidence that it does have at least one other vehicle suitable for the purpose needed, although it is smaller than the impounded vehicle and less efficient and convenient. The Applicant provided no evidence that any resulting financial or economic loss will be immediate, significant and lasting. After considering the evidence and the criteria set out in section 22(1) of the Regulation the Tribunal finds the Applicant has not established exceptional hardship.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Elizabeth Sproule, Presiding Member

RELEASED: December 6, 2002

HIGHWAY TRAFFIC ACT
Section 50(1), R.S.O. 1990, Chapter H.8 as amended

RTS ENTERPRISES LTD.

IN THE MATTER of the *Highway Traffic Act* R.S.O.
1990, Chapter H.8 as amended (the "Act").

AND IN THE MATTER OF an application by RTS
Enterprises Ltd. for a Commercial Vehicle Operator's
Registration Certificate.

AND IN THE MATTER of a requirement for a hearing
respecting the said NOTICE

RTS ENTERPRISES LTD.

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended (the "Act"), RTS Enterprises Ltd. (the "Applicant") initiated an appeal under section 50(1) of the Notice of the Registrar of Motor Vehicles made pursuant to section 47(1) of the Act, to refuse to issue a Commercial Vehicle Operator's Registration Certificate dated September 23, 2002 issued to RTS Enterprises Ltd.;

AND WHEREAS, the Applicant has failed to pay the filing fee as prescribed by section 3(2) of Ontario Regulation 632/98 under the *Highway Traffic Act*;

AND WHEREAS, the Applicant has not responded to the Tribunal's Notice of Intent to Dismiss Proceedings sent to the Applicant pursuant to section 4.6 of the *Statutory Powers Procedure Act*, R.S.O. 1990, Chapter S. 22 as amended, and Rule 2.10 of the Rules of Practice of the Licence Appeal Tribunal, whereby a proceeding before this Tribunal may be dismissed without a hearing for failure to pay the required filing fee;

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers Procedure Act*, as amended, this proceeding, initiated by the Applicant's request for a hearing before this Tribunal, is dismissed;
2. Pursuant to the authority vested in it under section 50(2) of the *Highway Traffic Act*, this Tribunal confirms the Notice of the Registrar of Motor Vehicles to refuse to issue a Commercial Vehicle Operator's Registration Certificate to RTS Enterprises Ltd.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek, Chair

Released: December 12, 2002

HIGHWAY TRAFFIC ACT
Section 50.2 and Regulation 574, R.S.O. 1990, Chap. H8 as amended

GARY CHARLES ROBINSON

IN THE MATTER of an APPEAL of AN ORDER TO IMPOUND A
MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR
VEHICLES

AND IN THE MATTER OF an ORDER of the Registrar of Motor
Vehicles made pursuant to section 55.1 of the *Highway Traffic Act*
of an Order to Impound a motor vehicle for a period of 45 days
effective October 2, 2002

AND IN THE MATTER of a requirement for a hearing respecting
the said ORDER

GARY CHARLES ROBINSON

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended (the "Act"), Gary Charles Robinson (the "Applicant") initiated an appeal under section 50.2 of the Order of the Registrar of Motor Vehicles pursuant to section 55.1 of the Act, effective October 2, 2002 to impound the Applicant's motor vehicle for a period of 45 days;

AND WHEREAS, the Applicant has failed to commence an appeal within the 15 day period prescribed by section 20(1) of the Ontario Regulation 632/98 under the *Highway Traffic Act*;

AND WHEREAS, the Applicant has not responded to the Tribunal's Notice of Intent to Dismiss Proceedings sent to the Applicant pursuant to section 4.6 of the *Statutory Powers Procedure Act*, R.S.O. 1990, Chapter S. 22 as amended, and Rule 2.10 of the Rules of Practice of the Licence Appeal Tribunal, whereby a proceeding before this Tribunal may be dismissed without a hearing for failure to commence an appeal within the 15 day period;

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers Procedure Act*, as amended, this proceeding, initiated by the Applicant's request for a hearing before this Tribunal, is dismissed;
2. Pursuant to the authority vested in it under section 50.2(5) of the *Highway Traffic Act*, this Tribunal confirms the Order of the Registrar of Motor Vehicles effective October 2, 2002, to impound Gary Charles Robinson's motor vehicle for a period of 45 days.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek, Chair

Released: December 19, 2002

LENA LAZAROV

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: BARBARA FRASER
Presiding member

APPEARANCES: LYNDA DUNBAR
Representative for the Registrar of Motor Vehicles

LENA LAZAROV, Applicant
unrepresented

DATE OF HEARING: December 4, 2002

DECISION RELEASED: December 6, 2002 St. Catharines

REASONS FOR DECISION

A hearing was held on December 4, 2002, at St. Catharines, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Lena Lazarov (the "Applicant")
Motor Vehicle:	1989 Chevrolet Celebrity, plate AKHS 205 (the "vehicle")
Date of Appeal:	November 15, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on December 4, 2002 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing. The Applicant stated that she needs her car now; that it is humiliating to have to ask people for the use of their car and then explain why she is without the use of hers.

Ms. Dunbar stated that the Impoundment order should stand .

Both parties stated that it was not their intention to call witnesses.

There were no preliminary matters therefore the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

My vehicle was recently impounded due to an unlicensed driver driving my vehicle. I am asking that the Licence Suspension Appeal Board consider the hardship I am experiencing due to not having a vehicle to continue with my present employment. I'm employed as a crisis counselor with Women's Place of south Niagara Inc. My hours have recently been reduced to 26.5 hours a week from 40 hours a week. Any additional hours will be on an on call basis. I also am employed in corrections on an on call basis. Both my places of employment are a half hour drive from my residence.

I also own a GMC 1984 truck that is in need of repair due to an accident 1.5 years ago due to the fault of someone else. I am unable to repair this vehicle because of financial restraints.

I have been driving for over 20 years and have received one traffic violation for speeding. This matter has caused my great personal stress that has impacted both my work performance and my personal life. Without a vehicle I am at risk of loosing my one job which is on call only and therefore I will also suffer financially.

In addition, I am having difficulties meeting my rent, school loan, utilities, and additional bills with my hours being reduced as of this week.

Through my employment in the correction field I understand and have respect for the law. I can promise you, will not here from me again.

I am requesting that due to the hardship of not having a vehicle that my car be released to me before the standard 45 days.

I would like to thank you for your time and consideration to my case. Should you require any further information please do not hesitate to contact me.

(sic)

The Applicant stated under oath, that she knew that the person to whom she gave her car keys did not have a licence but she had been attending a night out with the girls. She met up with him later that night, and he told her that she had better not drive, that he would. The Applicant stated that she didn't think anything about it at the time.

The Applicant entered into evidence (Exhibit 4) a letter dated 12 03 02, signed by John Falusi, wherein he stated the following:

Due to the situation that Lena is in i John Falusi, have lent my car to her when needed to get back and forth to work. I have been driving my truck which is now in storage for the winter, but seeing how upset and

stressed out she has been over the whole situation ; was glad i could do this for her P.S. if this letter helps in any way i am pleased to do so.

(sic)

Also entered into evidence by the Applicant (Exhibit 6) is a letter dated December 3/02 signed by Carol Weir. She stated the following:

This letter is to confirm that Lena Lazarov has suffered many hardships while her car has been impounded. Lena has had to rely on friends including myself for rides to complete her daily errands. Lena works in Niagara Falls and it was very difficult for her to get back and forth to work. In addition to a lack of transportation, Lena also suffered a great deal of emotional stress due to her car being impounded . On several occasions while speaking to Lena, she was crying and very upset about how she didn't have the money to pay the impound charges for her car. Lena said she would have to borrow the money to pay these charges and this is something Lena has said will create even more of a financial hardship for her. I hope this letter helps to clarify the hardships Lena has experienced while her car has been impounded.

The Applicant testified that in addition to the help her friends have given her that she has had to travel by taxi on some occasions.

She also testified that her work hours had been cut back prior to the impoundment. With respect to her second job which is an "on call" basis, she testified that she was called once, but she was not at home at the time to take the call. She said that she really needs to find additional employment but that if she secures another job, she will have to have a car.

The Applicant also stated that she lives alone with her cat. She does not have a health problem which would require transportation for medical treatment . She also stated that she does not require the vehicle for educational purposes.

Ms. Dunbar, on behalf of the Registrar, referred to Registrar's Exhibits 2 and 3 regarding the impoundment of the Applicant's vehicle and the driving record of the person whom the Applicant gave her keys to drive her vehicle for her.

The Tribunal finds that the oral evidence given by the Applicant was although quite emotional at times, was open and credible. Having said that however, it is the opinion of the Tribunal that she has not met the standard set out in Section 50.2(3)(d) of the *Highway Traffic Act*.

The Applicant has not demonstrated that the Order will result in extreme hardship.

She stated that she has had access to other vehicles and taxis. She further stated that she feels ashamed when she has to explain her circumstances to others. The Applicant admitted that she does not require the car for medical treatments for herself, and that no one is depended upon her for transportation. She stated that she does not require the vehicle in order to attend an educational facility.

The Tribunal sympathizes with the Applicant who admitted that she made an error in judgement when she knowingly permitted a driver whose licence is under suspension to drive her vehicle.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Michael S. Lambert;
2. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
3. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving While Disqualified under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until May 4, 2004.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

- (4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using

another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant has not met the test of exceptional hardship set out in s. 22(3) of Regulation 574 for the following reason. According to the Applicant's evidence, due to the kindness of John Falusi and other friends, she has had access to another motor vehicle. Therefore, an alternative to the impounded vehicle is available and the loss is not lasting.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Barbara Fraser, Presiding Member

RELEASED: December 6, 2002

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
SOHAIL AMAN KHAN

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: October 30, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

SOHAIL AMAN KHAN

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Sohail Aman Khan, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: December 12, 2002

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
789 Don Mills Road, Suite 800
Toronto, ON M3C 1T5

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Sohail Aman Khan
204 Alma Street North
Guelph, ON N1H 5X5

Pursuant to subsection 5(2) of the *Motor Vehicle Dealers Act* Sohail Aman Khan (hereinafter referred to as "the Applicant") and the Registrar, *Motor Vehicle Dealers Act*, (hereinafter referred to as "the Registrar"), in accordance with section 4.1 of the *Statutory Powers Procedure Act*, do hereby waive the requirements of a hearing and consent to an Order of the Licence Appeal Tribunal based upon the following Terms and Conditions:

1. The Applicant agrees not to transfer his registration under the *Motor Vehicle Dealers Act* to another dealer without the prior written consent of the Registrar.
2. The Applicant shall not be an officer, director, owner or partner in a dealership.
3. The Applicant agrees to provide proof, within 60 days of the date of this order, that satisfactory repayment arrangements have been made with regards to his former dealership, Auto Point Ltd., to the Manheim Auctions Ltd.
4. The Applicant agrees to honour any outstanding judgements against the Applicant or his former dealership Auto Point Ltd.
5. The Applicant agrees to repay the Motor Vehicle Dealers Compensation Fund (MVDCF), within 10 days of receiving notice from the MVDCF of any claims being paid out against his former dealership Auto Point Ltd.
6. The Applicant agrees not to negotiate the purchase, sale or lease of a motor vehicle, except on behalf of the dealer to which he is registered.
7. The Applicant agrees not to be involved in the signing of any security agreements on behalf of a dealer. The Applicant may sign Bills of Sale with respect to the purchase and sale of vehicles.
8. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle Applicant arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.
9. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.

10. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, or if he is convicted under the *Criminal Code* or convicted under any law of an industry-specific offence, the Registrar is directed to and shall carry out the proposal.
11. The Applicant will provide a copy of this order to his employer forthwith.
12. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
13. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
14. The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____ this _____ day of _____ 2002.

Sohail Aman Khan (signature)

These Terms and Conditions are accepted by the Registrar, *Motor Vehicle Dealers Act*.

Date:

Carl Compton
Registrar
Motor Vehicle Dealers Act

1396-ADLS-NOMC

En vertu de l'article 50.1 du *Code de la route*, L.R.O. de 1990, chap. H.8 tel que modifié, interjette appel d'une décision rendue par le registrateur des véhicules automobiles conformément à l'alinéa 48.3 (2) du *Code de la route*;

L'APPEL CONCERNE UNE SUSPENSION ADMINISTRATIVE DE PERMIS DE CONDUIRE POUR UNE PÉRIODE DE 90 JOURS.

TRIBUNAL : JEAN-MARC LEFEBVRE, c.r.
Vice-président

PRÉSENTS : LUBA NEUWIRTH
Représentante du registrateur des véhicules automobiles

requérant, Non représenté

TRADUCTRICE/
INTERPRÊTE SUZANNE ROTHE

DATE DE
L'AUDIENCE : le 4 décembre 2002

DATE DE
LA DÉCISION : le 17 décembre 2002

MOTIFS DE LA DÉCISION

Une audience a été tenue le 4 décembre 2002, à Ottawa, Ontario, pour entendre l'appel interjeté par le requérant en vertu de l'article 50.1 du *Code de la route*, L.R.O. de 1990, chap. H.8 modifié.

Le Tribunal a rendu sa décision le 4 décembre 2002 et a confirmé qu'il présentera ses motifs à une date ultérieure.

LE TRIBUNAL A CONFIRMÉ la suspension imposée par le registrateur aux termes du paragraphe 48.3 du *Code de la route* pour les motifs suivants.

MOTIFS

RENSEIGNEMENTS GÉNÉRAUX

AVIS D'APPEL ET DROITS PRESCRITS

Le présent appel est déposé auprès du Tribunal par voie d'avis d'appel de le requérant, en vertu du paragraphe 50.1 du *Code de la route*, L.R.O. de 1990, chapitre H.8, tel que modifié. Le requérant a opté pour que le Tribunal résolve l'appel par voie d'audience électronique (téléconférence). L'avis d'appel déposé en vertu du paragraphe 50.1 du *Code de la route* et daté du 12 novembre 2002 est parvenu au Tribunal le 14 novembre 2002, accompagné d'un mandat de 100 \$ couvrant les droits prescrits.

MOTIF DE L'APPEL

Le requérant invoque le motif suivant dans l'avis susmentionné:

"Il m'était impossible, pour des raisons médicales, de fournir l'échantillon d'haleine/de sang demandé."

QUESTIONS PRÉLIMINAIRES

Aucune matière préliminaire ayant été soulevée, l'audience procéda.

PRÉSENTATION DE DOCUMENTS ÉCRITS

par le requérant

- a) Document # 1:
Avis au registrateur émis par l'agent de police et soumis au registrateur des véhicules moteurs, daté le 11 octobre 2002.
- b) Document # 2:
Avis d'appel déposé au tribunal par le requérant, daté le 12 décembre 2002 accompagné de sa soumission écrite (2 pages) et de deux documents qu'il transmet pour appuyer sa requête.
- c) Document # 3:
Certificat d'immatriculation (IRP) d'un véhicule moteur International no. de plaque L232997-7 pour l'an 2000
- d) Document # 4:

Rappel de suspension du permis de conduire daté le 15 octobre 2002, émis par le registrateur des véhicules moteurs et déposé au tribunal le 18 novembre 2002

LITIGE

Compte tenu du fait que le présent appel relève de l'alinéa 50.1 (2)(b) du *Code de la route* et, de ce fait, du Tribunal, voici la question à résoudre: est-ce que le requérant a omis ou refusé de se conformer à un ordre de fournir un échantillon d'haleine/de sang parce qu'il en était incapable pour des raisons médicales?

LA LOI

Les dispositions des paragraphes 50.1 (1) et (2) du *Code de la route*, qui régissent la suspension administrative de permis de conduire, prévoient ce qui suit:

50.1 (1) La personne dont le permis de conduire est suspendu en vertu de l'article 48.3 peut interjeter appel de la suspension devant le Tribunal.

(2) Les seuls motifs pour lesquels une personne peut interjeter appel en vertu du paragraphe (1) et les seuls motifs pour lesquels le Tribunal peut ordonner l'annulation de la suspension sont les suivants :

- a) soit la personne dont le permis a été suspendu n'est pas la même que celle à qui a été donné un ordre de fournir un échantillon d'haleine ou de sang, ou sur qui un tel échantillon a été prélevé, selon le cas, en vertu des dispositions du *Code criminel* (Canada) visées au paragraphe 48.3 (3) ou conformément à celles-ci;
- b) soit la personne ne s'est pas conformée à un ordre donné en vertu de l'article 254 du *Code criminel* (Canada) de fournir un échantillon d'haleine ou de sang, ou a refusé de le faire, pour des raisons médicales.

Le *Code de la route* énonce ce qui suit au paragraphe 50.1 (4):

Le Tribunal peut confirmer la suspension ou ordonner son annulation.

Les paragraphes 15 (1), (2) et (3) du règlement 574 (modifié) du *Code de la route*, exigent qu'un rapport médical contienne :

- 15. (1) a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
 - (a) the name, telephone number and address, with the postal code, of the medical practitioner;
 - (b) the name, date of birth and address of the person who is the subject of the report;

- (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the Board from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner.

Enfin, l'article 13 du règlement 574 (modifié) prévoit ce qui suit :

A person appealing a suspension has the onus of establishing the merit of the appeal.

LES FAITS

Trois (3) agents de la sûreté d'Ottawa ont témoigné devant le tribunal à l'effet que le requérant a omis de fournir un échantillon de son haleine lorsqu'il a été sommé de le faire. Chacun des agents a témoigné à l'effet que le requérant soufflait de sorte à faire passer l'haleine outre l'instrument fourni de sorte qu'un montant d'haleine insuffisant était fourni et ne fournissait pas un échantillon capable d'être analysé.

Le requérant n'a pas contre interrogé les agents de police au sujet de leurs témoignages malgré l'opportunité qu'il avait de le faire, indiquant plutôt qu'il allait simplement témoigner de sa position lui-même.

Lorsqu'il témoigna, le requérant souleva deux motifs pour appuyer sa demande:

1. Il souffre de haute pression et doit ingérer des médicaments pour contrôler ses malaises. Lorsqu'il tentait de souffler pour fournir un échantillon de son haleine il devenait étourdi et perdait son dentier ce qui l'empêchait de produire la quantité d'échantillon nécessaire aux fins d'analyse.
2. Lorsqu'il a été sommé par les policiers à l'origine de son interpellation par les agents de police il était dans sa résidence ordinaire (un camion remorque comportant un lit et un endroit pour dormir) même si à l'instant où il fut arrêté il était au volant du véhicule. Il explique que le véhicule n'était pas en marche par lui, comme chauffeur puisqu'il était

assoupi et que les clefs du véhicule étaient dans sa poche, mais plutôt en marche automatique pour réchauffement de l'intérieur de l'habitacle où il dormait.

APPLICATION DE LA LOI AUX FAITS

L'article 50(1)(2)(b) du code de la route de l'Ontario stipule qu'une personne qui a omis ou refuse de fournir un échantillon de son haleine lorsque sommé de le faire en vertu de l'article 254 du code criminel du Canada peut présenter une demande, en appel, de la suspension de conduire un véhicule moteur en invoquant comme motif pour son omission ou son refus: une inhabilité fondée sur une raison médicale.

Le requérant n'a pas demandé à son médecin de remplir la page 2 (l'endos) de son avis d'appel. Il prétendait qu'il ne croyait pas que le rapport de son médecin pouvait être nécessaire afin de fournir une explication de son inhabilité à fournir un échantillon de son haleine, c'est-à-dire de la raison médicale. Le requérant prétend que le simple fait de présenter une copie de l'ordonnance médicale de ses médicaments suffirait, ce qui n'est pas le cas. Le requérant a le fardeau de la preuve et doit présenter des preuves suffisantes pour convaincre le tribunal. La preuve soumise, par lui, n'est nettement pas suffisante pour satisfaire le tribunal du bien-fondé de sa requête en appel.

La soumission du requérant lorsqu'il invoque l'argument à l'effet que son camion est son domicile est un argument qui n'est pas du ressort de ce tribunal mais plutôt de la cour criminelle ou il pourra la présenter s'il le veut.

DÉCISION

Après étude de la demande du requérant en appel d'une ordonnance de suspension (administrative) de son permis de conduire, daté le 11 octobre 2002 par le registrateur de véhicules moteurs en vertu de l'article 48.3 du code de la route de l'Ontario ("HTA") et après avoir considéré toutes les preuves présentées devant ce tribunal ainsi que les représentations du registrateur et du requérant;

En vertu de l'autorité conférée au tribunal par l'article 50.1(4) du HTA, ce tribunal confirme la suspension.

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

Jean-Marc Lefebvre, c.r.
Vice-président

FAIT LE: *le 17 décembre 2002*

TRANSPORTACTION LEASE SYSTEMS INC.

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: NIVES MONTANO
Presiding member

APPEARANCES: ADELAIDE PINDER & KIM BEINTEMA
Representatives for the Registrar of Motor Vehicles

BEVERLY SALMON, Agent representing the Applicant

DATE OF HEARING: December 5, 2002

DECISION RELEASED: December 12, 2002 Toronto

REASONS FOR DECISION

A hearing was held on December 5, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Transportation Lease Systems Inc. (the "Applicant")
Motor Vehicle:	1990, Mercedes 500 SL, Plate No. ANCT 863 (the "vehicle")
Date of Appeal:	November 18, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on December 5, 2002 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

The vehicle that is impounded is a vehicle owned by Transportation and leased by Mr. Allan Mohammed. Mr. Allan Mohammed breached his lease obligations (Clause 6(a)) by allowing the vehicle to be driven by Mr. Kenneth Mohammed who did not hold a valid driver's license.

Transportation undertakes to not return this vehicle to the Lessee and terminate the lease upon receipt of the vehicle from impound. Not returning the vehicle to Transportation will cause Transportation undue financial loss.

The following is a summary of Ms. Salmon's affirmed testimony.

The Applicant is a business which operates coast-to-coast in the vehicle leasing business. It operates on long-term lease contracts (2-4 year terms) for fleet vehicles, but also has a minimum of 12 month lease agreements for some consumer transactions. Approximately 20,000 vehicles are leased on a long-term basis.

The Applicant is the registered owner of the impounded vehicle, who leased the impounded vehicle to A. Mohammed for a 12-month term. A. Mohammed lent the vehicle to K. Mohammed. K. Mohammed's licence is under suspension until February 21, 2003.

The lease agreement is still in full force and effect. Since the impoundment, the lease agreement has not formally been severed. November's lease payments have cleared A. Mohammed's bank account. December's payment is due to clear any day. Ms. Salmon has attempted to contact A. Mohammed unsuccessfully regarding the impounded vehicle. To date, no formal written correspondence has been forwarded to A. Mohammed.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows (Exhibits 4 & 5):

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Kenneth Mohammed;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of impaired driving under the *Criminal*

Code of Canada pursuant to which the driver's licence of the driver was then under suspension until February 21, 2003.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,

- (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The lessee paid the November lease payment and there is no evidence regarding the December payment. The lease is currently in good standing.

Even if the December lease payment was dishonoured, the Applicant would still have to establish that the lessee's failure to pay the December lease payment was an exceptional hardship.

The Tribunal as well as the Representatives for the Registrar of Motor Vehicles determined that Ms. Salmon appeared before this Tribunal to obtain information with regard to having the impounded vehicle released to it rather than A. Mohammed. Ms. Salmon is aware that the Applicant will need to mitigate its losses and take alternative actions against A. Mohammed for breach of his lease agreement, but understands that the Applicant will not suffer exceptional hardship regarding this particular impoundment.

Ms. Beintema advised Ms. Salmon that once the Applicant provides documented proof of ownership of the impounded vehicle as well provide evidence that a lien is registered against the impounded vehicle, the Registrar of Motor Vehicles will be satisfied and the Release Order will be granted in the Applicant's name rather than that of A. Mohammed.

The Applicant has failed to establish exceptional hardship.

Accordingly, after considering the criteria set out in section 22(3) and (4) of Regulation 340 as amended by Ontario Regulation 632/98, the Tribunal finds the Applicant has not established exceptional hardship as set out in section 50.2(3)(d) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Nives Montano, Presiding Member

RELEASED : December 12, 2002

1406-ADLS-MISTAKE

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF
HEARING: December 11, 2002

DECISION
RELEASED: December 12, 2002

REASONS FOR DECISION

A hearing was held on December 11, 2002, at City, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on December 12, 2002, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated November 21, 2002, and was received by the Tribunal on November 21, 2002, together with the prescribed fee of \$100.00, paid by Cash.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

“This is a case of mistaken identity. I am not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken.”

Preliminary Matters

Prior to the commencement of the Hearing the Representative of the Ministry advised the Tribunal that neither Police Constable summoned to testify was able to attend. The Representative of the Ministry sought to introduce Occurrence Notes from Provincial Constable #1 and a Witness Statement from the Breathalyzer Technician Police Constable #2.

The Tribunal asked the Applicant if he had any objections, and as he did not, both items were entered in evidence.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice to Registrar dated September 17, 2002, issued by the Registrar of Motor Vehicles.
- b) Exhibit # 2 Notice of Appeal Form – received November 21, 2002.

By the Respondent:

- a) Exhibit # 3 Ministry of Transportation submissions – received December 5, 2002.

- b) Exhibit # 4 Provincial Constable #1's Notes – 4 pages – received December 11, 2002.
- c) Exhibit # 5 Provincial Constable #2's Notes and Witness statement – 5 pages – received December 11, 2002.
- d) Exhibit # 6 Note of Application for Increased Penalty – received December 1, 2002.
- e) Exhibit # 7 Promise to Appear – Received December 11, 2002.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(a) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Whether the Applicant whose licence was suspended is the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

- 50.1(1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
 - (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
 - (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

As per Notice to the Registrar, and the Notice of Appeal the Applicant's Driver's Licence was suspended on "Sept 14 2002".

Applicant's Evidence

On page 1 of the Notice of Appeal the Applicant marked "mistaken identity", as the reason of appeal.

At the Hearing the Applicant testified as to the events leading up to the Applicant being stopped by the police, as well as the circumstances that led to and surrounding the subsequent demand for a breath sample and the breath test session.

The Applicant was asleep in the motor vehicle while his friend, drove home. Before allowing his friend to drive, the Applicant asked to see Mr. Murray's driver's licence, but did not notice that the licence had expired. After being stopped by the police, his friend told the Applicant that his licence was in fact not valid. At this point, the Applicant and his friend changed places, so that the Applicant was in the driver's seat when the officer approached the vehicle.

In cross-examination the Applicant acknowledged signing the Notice to the Registrar, the Notice of Application For Increased Penalty, as well as the Promise to Appear, and consented to the documents being entered in evidence.

The Applicant further testified that he was the occupant of the vehicle, who was arrested by the police, that he is the person from whom a breath sample was demanded and the person charged with failing to provide a breath sample.

His friend was called as a witness by the Applicant. His friend confirmed: that he was driving; that the vehicle had a flat tire which, he fixed; that he changed places with the Applicant when they were stopped by the police, and that since he "...*was never out of the car...*" he is not aware of what transpired other than the fact that the Applicant was arrested.

In closing the Applicant confirmed that he feels that what has happened is unfair as he was attempting only to do a favor for a friend.

Respondent's Evidence

The Respondent provided the following Documents:

- 1 Certified Copy of Notice to the Registrar, sealed November 25, 2002
- 2 Certified Copy of the Driving Record of the Applicant, sealed November 25,

2002

3 Copy of Vehicle Record as of Occurrence date, sealed November 26, 2002

In his notes Provincial Constable #1, of the West Detachment of the Ontario Provincial Police, notes: "...*Applicant's name and address. ...*"

P.C. #2 provided a Witness Statement wherein he confirms that he has "...*approximately 5 years experience as a police constable combined with the Hamilton Wentworth Regional Police and the Ontario Provincial Police...*". P.C. #2 became a qualified Breathalyzer Technician on "...*July 18, 2001...*" and has since "...*conducted over 100 breath tests...*"

According to PC #2's statement: " *At 0119 hrs, the accused was brought into the breath tech's room. The accused was identified with a valid Ont. DL to be the Applicant's name and address.*"

At the hearing the Respondent's Representative offered no viva voce evidence, opting to rely on the information provided for the hearing and the Constable's statements introduced at the hearing.

In closing the Respondent Representative clarified the reason for this appeal. Whether or not the Applicant was impaired and whether or not he had proper control of his vehicle at the time is not at issue. The Applicant appealed under Section 50.1 (2) (a), suggesting that he is not one and the same as the person from whom a breath sample was demanded.

The Respondent Representative emphasized that according to the evidence presented there is no doubt that there is in fact no mistaken identity.

APPLICATION OF THE LAW TO FACTS:

Although the preceding reflects only a summary of the totality of the evidence contained in the documentation presented, all documents were thoroughly reviewed and considered. Statements not directly germane to the issue were not transcribed.

At issue is whether the Applicant is one and the same as the individual from whom a breath sample was demanded as per Section 50.1 (2) (a).

The Tribunal finds that it is evident that the Applicant is the person from whom a breath sample was demanded. This finding is corroborated by the Applicant's own admission that he was the individual sitting behind the wheel when approached by the Provincial Constable, and that he is the individual from whom a breath sample was subsequently demanded. Further the Tribunal's finding is substantiated by the fact that the Applicant admitted to being the individual who signed the Notice to the Registrar, the Notice of Application For Increased Penalty, as well as the Promise to Appear.

Regulation 574 as amended, particularly Section 13, provides that the Appellant has the onus of establishing the merit of the appeal. The Tribunal finds that the Applicant has failed to do so.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated September 14, 2002 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal **confirms** the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.
Presiding Member

RELEASED: December 20, 2002

PAULETTE McINNES

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: TERRENCE LORETTE
Presiding member

APPEARANCES: LYNDA DUNBAR
Representative for the Registrar of Motor Vehicles

PAULETTE McINNES, Applicant
unrepresented

DATE OF HEARING: December 9, 2002

DECISION RELEASED: December 12, 2002 Hamilton

REASONS FOR DECISION

A hearing was held on December 9, 2002, at Hamilton, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO SET ASIDE the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Paulette McInnes (the “Applicant”)
Motor Vehicle: 1993 Honda Civic VCD, plate 429 XEN (the “vehicle”)
Date of Appeal: November 25, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on December 9, 2002 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant’s request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant’s appeal.

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant’s evidence follows.

Applicant’s written submission filed with the Tribunal in support of appeal states:

I hereby appeal the impounding of my vehicle for the following reasons:

- The suspended driver of the vehicle, Jason Modesty (sic), will not be the person suffering the loss as set out in your section 3(d)(ii). The loss will be a person other

than the driver of the vehicle, it will be the innocent owner of the vehicle - Paulette McInnes.

- **My vehicle was driven by a person unauthorized by myself.** My daughter, Ashley McInnes was given permission (by myself) to drive my car on November 16, 2002. When Ashley became unable to drive the car, Jason Modesty, 17 Abigail Street, Brantford, ON offered to drive the car for her. Unknown to Ashley, Jason Modesty did not have a valid driver's license. Jason did not advise Ashley that he did not have a valid driver's license.
- The vehicle was stopped in a random spot check on the license plate on November 16, 2002. The license plate does not match the vehicle type in the Ministry of Transportation database. I purchased this vehicle in July 2002. I changed the ownership over at that time. However, it appears the Ministry's database is not up-to-date. I have been stopped four times in a period of 3 months during random Police spot checks, because the plates do not match the vehicle description. After being stopped the first time, I checked at the Ministry of Transportation office whether my vehicle registration had been completed correctly, I was informed that the registration is correct. I was also informed by Ministry staff that the computer has a back-log of data input/processing because of the strike last year.
- I am employed as a cleaner, I am part of a 9-member crew. **It is my responsibility to wash and dry the daily linens needed by the work crew** and to bring a fresh supply to the crew each morning. None of the other staff are able/willing to take on the daily task of washing the linens. Without transportation, I can't give the other members the daily linens. **The other members of the cleaning crew depend on my delivering of daily linens to enable them to complete their job.**
- I am sole support of my household and need my car to go to and from work.
- As well as being employed as a day cleaner, I clean houses in the evenings and on weekends. I would be unable to fulfill this obligation without my car.
- **My Mother**, who is 78, **relies on me solely to get her groceries, take her to pay her bills, drive her to the Doctors** and drive her to the cemetery for visits.
- Financially **I am unable to rent another vehicle nor take taxi's to and from work**
- **No family member of friends are available to drive me** to and from work. Both my **sons work out of town** and unable to drive me to and from work, nor take on my Mother's errands.
- **I do not live on direct City bus route** to take the bus to work, **nor are the houses in the evening and weekends on the City bus route.**
- If I am unable to go to work, I will lose my job. I do not have money saved to pay my rent. **The loss would be immediate and to a person other than the suspended person driving the car.**
- I am 56 years of age, **unable to find other work that does not require transportation.** I am **unable to be trained for other type work.**

The Applicant's oral testimony expanded on the points made in her written submission. She stated that she did not know Mr. Jason Modessy nor had she ever met him. She stated that her daughter was in control of her car on the evening in question and because her daughter felt too ill to drive that Mr. Modessy would drive her home using her mother's car. The applicant also elaborated on her claim that the Ministry's database is not up to date pointing out that a local newspaper report of the incident in question stated that the reason that the vehicle was stopped was because its plate number did not match the car's description on the police computer system. This database error was substantiated by the Registrar whose representative, Lynda Dunbar, confirmed that the database was still in error as of the date of this hearing. The Applicant also stated that the police officer who stopped Mr. Modessy on the night in question had also stopped the Applicant some few weeks previous for the same reason.

The Applicant also testified as to the nature of her employment and how it depended a great deal on her being punctual and mobile and that her vehicle was used daily to transport items that she could not easily ask others to allow her to transport in a borrowed vehicle. Not being able to deliver these items meant that other workers could not properly perform their duties either in part or on time.

The Applicant further testified that her wages as a cleaner are only slightly above the minimum wage and that she simply cannot afford to rent a vehicle and that paying taxi fares to and from her work locations would cost her as much as half her earnings. The Applicant stated that there was no public transport available to the locations she had to travel to and that transporting her supplies to and from these locations via public transport would be extremely difficult. The Applicant stated that she has two sons with cars but that each worked out of town and they were unable to assist her or lend her a car.

As the sole wage earner of her household that Applicant also testified to the financial impact that the loss of her job would have on herself and her family.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Jason Chauncy Modessy;
2. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
3. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving While Disqualified under the

Criminal Code of Canada pursuant to which the driver's licence of the driver was then under suspension until November 21, 2004.

The Respondent read for the record the pertinent sections of the Law dealing with "exceptional hardship" (see below) and pointed out that the Applicant failed to show that there was any threat to and individual's health and/or safety, nor show that there would be any significant or lasting financial losses. The Respondent also stated that the Applicant failed to show that she had exhausted all means to secure alternative transportation.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
 - (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
 - (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
 - (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

Section 50.2(3)(d) of the Act requires an Applicant to show exceptional hardship for an appeal to succeed. The Tribunal is satisfied that this Applicant will suffer exceptional hardship. The loss of her motor vehicle will have a disproportionate impact on her.

Section 22(3)(a), (b), (c) and (d) of Regulation 574, R.R.O.1990, as amended, provides very specific criteria that the Applicant must meet to determine if exceptional hardship under the Act will result from the impoundment.

In making its determination the Tribunal considered the application of:

Section 22(3)(a) - no alternative to the impounded motor vehicle is available. The Tribunal found that the Applicant had made all reasonable efforts to find an alternative to the impounded vehicle but was unsuccessful.

Section 22(3)(b) (c) and (d) - the loss will be immediate, significant and lasting. Since the impoundment of her car the Applicant has been successful in maintaining her usual level of work performance but given the nature of her job the potential for immediate job loss is very real although not explicitly threatened. It is the Tribunal's finding that should the Applicant's job performance suffer due to her lack of adequate transportation that it could very well result in her loss of her job and that the potential for immediate, significant and lasting loss is very real and that with reference to clause (c) the loss will be upon a person ordinarily transported by the vehicle in question and not upon the person whose license was suspended.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal sets aside the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Terrence Lorette, Presiding Member

RELEASED: December 12, 2002

FRANCES MACLEAN

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: TERRENCE LORETTE
Presiding member

APPEARANCES: ADELAIDE PINDER
Representative for the Registrar of Motor Vehicles

FRANCES MACLEAN, Applicant
unrepresented

DATE OF HEARING: December 13, 2002

DECISION RELEASED: December 24, 2002 Oshawa

REASONS FOR DECISION

A hearing was held on December 13, 2002, at Oshawa City Hall, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Frances MacLean (the "Applicant")
Motor Vehicle:	Mercury XR 7 1996, plate ADXJ 684 (the "vehicle")
Date of Appeal:	November 26, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on December 13, 2002 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

Reason for Appeal

I work everyday, now that the vehicle has been impounded, I'm forced to take a cab to the GO Bus stop morning and night. It is costing me fifteen dollars a day, which I cannot afford.

The reason I take a cab is because I suffer from Arthritis, and cannot walk any distance without severe pain in my knees.

Type of Hearing

I request an oral (in person) hearing before the Tribunal.

Owners Position

I left my car at home the day in question because of weather conditions and decided to take the bus.

The Applicant added to her written submission (above), testifying that the impoundment of her vehicle was extremely inconvenient and costly. She further stated that she was a very private person and did not know her neighbours well enough to ask them for favours like the borrowing of their car or having them drive her to the Go station. She also stated that she had no friends and family living nearby who could help her out and that there was public transport in her area.

In response to questions from the Tribunal member the Applicant stated that she was aware that her husband was not permitted to drive a car and could not explain why he chose to do so on the day the car was impounded. The Applicant also testified that her Arthritis condition is long standing, aggravated mostly by weather conditions and severe enough to prevent her from walking any distance resulting in her need to take a cab to the Go station stop. The Applicant also stated that she had not missed any time at work since the impoundment but only because she was incurring the cost of the taxi trips.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Bernard C. McLean;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal*

Code of Canada pursuant to which the driver's licence of the driver was then under suspension until November 13, 2003.

The Respondent pointed out that the Applicant did not provide sufficient evidence under the sections of the Act dealing with exceptional hardship to have the impoundment order set aside. The Respondent suggested that there was an obvious alternative to the impounded vehicle, a taxi, and that the Applicant had been successfully getting to and from work for the past several weeks. The Respondent also stated that a \$15 a day taxi fare should not be considered an immediate, significant and lasting loss.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in

determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

Section 50.2(3)(d) of the Act provides for an appeal on this basis but section 22(3)(a), (b), (c) and (d) provides very specific criteria that the Applicant must meet to determine if exceptional hardship under the Act will result from the impoundment. The Tribunal finds that the Applicant did not meet the test set out in section 22(3) since there clearly is an alternative to the impounded vehicle and the Applicant will not suffer significant financial losses.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Terrence Lorette, Presiding Member

RELEASED: December 24, 2002

BRIAN CLARE MOUNCE

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: CHARLES SANDIFORD
Presiding member

APPEARANCES: LUBA NEUWIRTH
Representative for the Registrar of Motor Vehicles

BRIAN CLARE MOUNCE, Applicant
unrepresented

DATE OF HEARING: December 12, 2002

DECISION RELEASED: December 17, 2002 Toronto

REASONS FOR DECISION

A hearing was held on December 12, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Brian Clare Mounce (the "Applicant")
Motor Vehicle:	1988 Ford Taurus, plate 702 YVV (the "vehicle")
Date of Appeal:	November 28, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on December 12, 2002 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing. Neither party had any submissions to add. The hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

On Nov 22/02 I was stopped by Aurora O.P.P. on Hwy 404 on my way home from work (T.T.C.) to Keswick. I explained to officer my licence was suspended June 26/02 and I had appealed conviction through my lawyer David Lakie (905) 898-2686 Newmarket.

I was of the understanding that as of my filing of Appeal I would have the privilege of driving my vehicle until another trial was arranged. I did contact my lawyer re this impoundment notice and he advised me that he did not ask for my licence be reinstated as to very expensive fees to do so. If I had any knowledge that this was the case I certainly would not have used my vehicle under any circumstance and very much regret doing so.

I am employed with the T.T.C. and have been for 23 years in various positions and now working night shift I have a few times missed bus in Keswick to reach Toronto in order to be in time for work and I do admit I have done this on a few occasions not realizing I was doing anything against the law.

I would ask that due to my work hours and my excessive financial hardship currently under bankruptcy that you could understand my position and have a regard for reasonable and lenient consequences in allowing this appeal to have my vehicle removed from impoundment as soon as possible. I will immediately remove plates and park vehicle until such time as my licence could be reinstated.

Thank you for your attention.

The Applicant expanded on his submission to include the information that while the service is limited, there is public transportation to his job in Toronto.

In response to questions by both the Respondent and the Tribunal it was determined that vehicle transport was available to the Applicant through his brother in Newmarket in an emergency or if the regular bus was missed. He also revealed that he had received his bankruptcy discharge in September 2002, which should have left him free of debt. His statement that he was going to remove the plates and store his car conflicts with his intention to let a neighbour in Keswick drive him to the Toronto bus from Newmarket.

The Applicant had no written evidence to support his claim that his lawyer had begun an appeal on his current conviction which he claims is now in process. He was advised that his driving offence of November 10, 2002 must also be dealt with as he was a suspended driver by virtue of his earlier conviction and suspension until June, 2003.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The Respondent had little to add in respect to the Applicant's statements and submission but to emphasize the fact a conviction and suspension was in effect when the Applicant was stopped and a new charge has been laid and must be dealt with in the court.

The Respondent read the terms and conditions in respect to the Act as it defines the Applicant's requirements to support an appeal.

In closing the Respondent asked the Tribunal to confirm the order to impound as no evidence was supplied to support the Applicant's basis for an Appeal as described in 50.2(3)(d) of the Act.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Brian Clare Mounce;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until June 26, 2003.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
 - (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,

- (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant has appealed under section 50.2(3)(d) of the Act on the basis that the impoundment of his vehicle will and has resulted in exceptional hardship and has caused him difficulty in getting to his job and other family needs. Section 22 of Regulation 632/98 is very specific and provides the Tribunal with clear criteria that must be met by the Applicant in order to establish exceptional hardship as a result of the impoundment of their vehicle.

The Tribunal cannot consider any factors arising from or directly related to the impoundment of the vehicle itself.

Under section 22(2) of Regulation 632/98 the Tribunal cannot consider financial or economic loss or loss of employment or employment opportunity unless the Applicant demonstrates that all of the criteria set out in section 22(3) apply. One of these criteria is that no alternative to the impounded vehicle is available.

Furthermore, section 22(4) of the Regulation requires the Applicant to demonstrate that every reasonable option has been explored to obtain an alternative to the impounded vehicle.

In this case the Applicant is a suspended driver and an alternative vehicle is of limited or no value until he has regained his licence. Since his appeal of a previous driving charge was denied, a conviction and suspension followed. In addition he now faces new charges for driving while under suspension.

Two alternatives are available to the impounded vehicle. First, the Applicant declared that current bus transportation to his job is a time consuming option which will cause an inconvenience. Second, he states that his brother in Newmarket can drive him if he were to miss the bus. These are nevertheless valid options as defined in Regulation 632/98 section 22(3)(a).

Inasmuch as the evidence present and expanded upon by the Applicant is that he is currently using public transit without any real hardship, no credible evidence to support the Applicant's

appeal under 50.2(3)(d) was offered to the Tribunal. The burden to supply evidence to support the Applicant's appeal is that of the Applicant. He has not done so in this case.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Charles Sandiford, Presiding Member

RELEASED: December 17, 2002

MUSKOKA INSURANCE BROKERS LTD.

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: FRANK WOLMAN
Presiding member

APPEARANCES: LYNDA DUNBAR
Representative for the Registrar of Motor Vehicles

WILLIAM FRANKISH, Agent for Applicant

DATE OF HEARING: December 16, 2002

DECISION RELEASED: December 23, 2002 *by teleconference*

REASONS FOR DECISION

A hearing by teleconference was held on December 16, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Muskoka Insurance Brokers Ltd. (the "Applicant")
Motor Vehicle:	2002 Chrysler Intrepid, plate no. AEAE 983 (the "vehicle")
Date of Appeal:	November 29, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on December 16, 2002 and proceeded as a teleconference hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

Re: Impound Order #2607405 - 2002 Chrysler Intrepid 4DR
Registered Owner - Muskoka Insurance Brokers Ltd.

Dear Sirs/Madam:

I am writing in connection with the above noted automobile. It has come to my attention that this vehicle has been impounded for a period of 45 days under The Highway Traffic Act.

This vehicle is leased to my company, Muskoka Insurance Brokers Ltd. and the principle operator of this vehicle is Shirley MacDonald, who is the office manager here. Recently another of my employee's Ange MacDonald, who is the daughter of Shirley MacDonald, underwent major back surgery at St. Michael's hospital in Toronto, Ontario. Ange was then subsequently released into the care of her mother, Shirley and has been residing at her mother's place since her release from the hospital. On the date in question, November 17th, 2002, Ange suffered a reaction to withdrawal from pain medication and was sick to her stomach. I am told David Stothers who is Ange's boyfriend who offered to pick up the medication was given the car to assist. It is obvious Shirley was under a great deal of stress and simply was not thinking clearly and didn't check to make sure David had a valid drivers license. She was simply thinking of assisting her daughter who was in a great deal of discomfort at the time.

Shirley has always been a responsible person. She is not in the habit of lending her vehicle to others under normal circumstances. I believe that the extenuating circumstances caused unclear thinking. Shirley is still caring for her daughter in her home and has found it even more difficult without transportation. This vehicle is also used in connection with her employment as an Insurance Broker.

I would like to ask at this time that you review all the information enclosed and reconsider the decision to continue to impound the vehicle for the minimum 45 day period.

Yours sincerely,
"W.J. Frankish"
Mr. W.J. Frankish
President

Statement of Shirley MacDonald

My daughter had just been released from hospital in Toronto after a back operation, and was extremely sick all the way back home. Upon arriving home she continued to throw up. My daughter's boyfriend had accompanied us on the trip home, and was present at this time. In the stress of this situation, and without checking to ensure he was licensed I let him take the car to get some medication. My only excuse is that in the stress of the situation, I wasn't thinking clearly. I apologize for my part in this situation.

"Shirley MacDonald"
Shirley MacDonald

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as plate owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by David G. W. Strothers;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle; (Exhibit #2)
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until August 29, 2003.

The evidence filed establishes that David G. W. Strothers drove a motor vehicle, namely a 2002 Chrysler Intrepid, licence plate number AEAE 983, while his driver's licence was under suspension. As a result the motor vehicle was impounded. Shirley MacDonald is the principle operator of the vehicle, which is leased to Muskoka Insurance Brokers Ltd.

Shirley MacDonald asked David G. W. Strothers to pick up some medicine for her daughter. She made no inquiries as to the validity of his driver's licence.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
- (b) financial or economic loss to any person;
- (c) loss of employment or employment opportunity to any person; or
- (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,

- (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant filed a letter by W. J. Frankish, President of Muskoka Insurance Brokers Ltd. in which he raises the issue of extenuating circumstances. Further, the Applicant argued that the order impounding the motor vehicle will result in great inconvenience. Unfortunately, neither of these submissions meets the tests imposed by the Act.

To succeed in its application to set aside the order to impound under s 50.2(3), the Applicant must first establish that she meets all of the conditions in s. 22(3) of the Regulation 574 R.R.O. 1990 as amended by Ontario Regulation 632/98. Only then can the test in s. 22(2) "exceptional hardship" be considered.

The Applicant has not established that no alternative to the impounded vehicle is available as required by s. 22(3)(a) and (4). Nor has she established that the loss will be immediate, significant and lasting as required by s. 22(3)(b).

Even if she met all the conditions in the first test, which is clearly not the case, she does not meet the conditions in the second test set out in 22(2) of the Regulation. Shirley MacDonald's responses to questions indicated that she did not lose her employment or suffer any reduction in her salary. She did say that in her job as office manager she also tried to bring in new clients; at the time of the impoundment there was one prospective client and since then she obtained and lost 2 prospects. She was not reimbursed for \$40/week which she incurred in the process.

She continued to be able to get to and from work, and missed no work days.

She stated that she was not taking any education or training. She spoke of "inconvenience" since the automobile would be helpful, especially in the Christmas season. In any case, inconvenience is not a criterion that the Licence Appeal Tribunal may consider.

It is unfortunate that this situation has occurred, but in the circumstances, the Act is very clear and the impoundment must stand.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Frank Wolman, Presiding Member

RELEASED: December 23, 2002

1420-ADLS-RESP

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: KYLE BIEL,
Representative for the Registrar of Motor Vehicles

Applicant

DATE OF
HEARING: December 19, 2002

DECISION
RELEASED: January 7, 2003

REASONS FOR DECISION

A hearing was held on December 19, 2002, at London, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on December 20, 2002, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated November 27, 2002, and was received by the Tribunal on November 29, 2002, together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

Prior to the commencement of the Hearing the Representative of the Ministry sought to introduce the videotape of the Applicant's breathalyzer test session as evidence.

The Tribunal asked the Applicant if he had any objections, and as he had none, the videotape was entered as exhibit # 5.

As there was only copy of the videotape available, Mr. Biel, the Respondent's Representative gave the Tribunal an undertaking to forward to the Tribunal, within five business days, a copy of said videotape.

The Representative of the Ministry provided the Tribunal with original certified copies of Ministry of Transportation documents on file.

The Applicant submitted a map indicating the route he took on the night in question, while in transit from his uncle's house to the location where the police approached him. Mr. Biel commented on the relevance of the map, but had no objections to its admission as an exhibit. The Applicant's map was entered as exhibit # 4.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Suspension Reminder dated November 13, 2002, issued by the Registrar of Motor Vehicles.
- b) Exhibit # 2 Notice of Appeal Form – 3 pages – received November 29, 2002.
- c) Exhibit # 4 Map of roads the Applicant used from his uncle's house to his residence – received December 19, 2002

By the Respondent:

- a) Exhibit # 3 Ministry of Transportation submissions – received December 13, 2002.
- b) Exhibit # 5 Video-taped breathalyzer test session – received December 19, 2002.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

- 50.1(1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
 - (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or

- (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason”.

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

- 15.(1) “a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
 - (a) the name, telephone number and address, with the postal code, of the medical practitioner;
 - (b) the name, date of birth and address of the person who is the subject of the report;
 - (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver’s licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner.”

Finally, section 13 of Regulation 574 (amended) provides:

“A person appealing a suspension has the onus of establishing the merit of the appeal”.

FACTS:

According to the Notice to the Registrar the Applicant’s Driver’s Licence was suspended November 12th, 2002. (Exhibit # 1)

In his Notice of Appeal the Applicant lists the Effective Date of Suspension as November 13th, 2002. (Exhibit # 2)

Applicant's Evidence

Page two of Notice of Appeal was prepared by Physician #1, a physician on duty at a walk-in-clinic, and is dated "27.11.02".

Physician #1 amended the question: "How long has this person been your patient?" by striking out the word "your". In brackets Physician #1 offers the following explanation: "Pt been seen in the walk in clinic. Pt has his own F.C.)

Physician #1 details the Applicant's diagnosis and treatment as follows: "The Applicant was seen by me ...on 24.10.01, 30.10.02 & 13.11.02 for Bronchitis & breathing difficulty ...treated ...Antibiotics (Bioxin) ...on 24.10.02 x 1 wk and 13.11.02 x 2 days ...on 13.11.02 ...given ...nasal spray ...squirt each nostril twice daily if needed ...advised to follow up with his family physician and to omit smoking"

At the hearing, the Applicant offered evidence by describing the events of the evening before the demand for the breath sample.

The Applicant was assisting his uncle strip wallpaper using a mixture of water and vinegar. He believes the fumes caused him to feel unwell. After a while the Applicant had a coughing spell, and his nose began to bleed. As a remedy, since there was no brandy available the Applicant was offered a couple of shots of "CC".

On his return home, the Applicant turned into the wrong driveway. Upon realizing his mistake, the Applicant pulled out and parked his van in the proper driveway. After exiting the van and locking the door, the Applicant was approached by the police, taken to the police station, and subsequently demanded to provide a breath sample.

The Applicant stated that he was given "...*fourteen*..." opportunities to provide a breath a sample and claims the he did his "...*best fourteen times*...".

In cross-examination, the Respondent's Representative asked the Applicant to describe to the Tribunal "...*the symptoms of the bronchitis*..." at the time he was approached by Officer #1. The Applicant stated that he had been coughing on the way but had not coughed in front of the Constables. When the Respondent's Representative suggested the he was "...*feeling perfectly fine*..." the Applicant responded: "Yes".

The Applicant indicated that he was not experiencing the symptoms of bronchitis, but that the problem was that his "...*nose was blocked ...had to breath through ...mouth*...".

In response to Mr. Biel's questions the Applicant stressed that he did not recall some of the events immediately preceding the breathalyzer test session. The Applicant remembered being subdued by the officers and having trouble breathing, and confirmed that he "...was screaming..." at the officers: "*I can't breathe, I can't breathe*".

The Respondent's Representative pursued his line of questioning by asking the Applicant if he had asked the officers for medical assistance. The Applicant acknowledged that no medical assistance was requested, and admitted that he did not visit his family physician after the incident.

The Applicant established that during the visits to the walk-in-clinic, he was examined by Physician #1 and that Physician #1 did not order any chest X-rays nor Pulmonary Function Tests.

With respect to medication, the Applicant verified that no inhaler was prescribed. Physician #1 gave the Applicant a seven-day's supply of Bioxin on the 24th of October, and a further 2 day's supply on October 30th and November 13th. However, the Applicant took only 5 of the 6 pills given to him, on his last visit to Physician #1, on the thirteenth of November.

The Applicant called his uncle, Uncle #1 as a witness. Uncle #1 testified as to the Applicant's state of health while at his house. Uncle #1 recalled noticing that the Applicant was not feeling well, as he was coughing and his nose appeared to be bleeding. Uncle #1 thought the vinegar fumes might be affecting the Applicant, but the Applicant attributed his condition not just to the fumes but also to his existing bout of bronchitis.

Uncle #1 regrets giving the Applicant two ounces of Canadian Club. He feels that he may have inadvertently been responsible for what happened to the Applicant. Nonetheless, Uncle #1 emphasized that had the Applicant been impaired he would not have allowed the Applicant to drive home.

Uncle #1 appealed to the Tribunal to empathize with the Applicant's familial and financial circumstances and urged the Tribunal to exercise leniency.

In his closing remarks the Applicant stated that he was not drunk, he was nervous and upset and feels that he was not given enough time to provide a sample.

The Applicant requested that his licence be reinstated as his family depends on him.

Respondent's Evidence

The Respondent provided the following Documents:

1. Certified Copy of Notice to the Registrar, sealed December 11th, 2002
2. Driving Record of The Applicant, sealed December 3rd, 2002
3. Copy of Vehicle Record Search, sealed December 3rd, 2002

4. Witness Statement of PC #2
5. Witness Statement of Cadet #3

In his General Occurrence Statement, PC #2, of the London Police Service, states that he was working with his partner Officer #1 on November 12th, 2002, when both officers had occasion to approach the vehicle driven by the Applicant.

PC #1 goes on to describes the altercation that developed between the Applicant and the Police in the early hours of November 12th, 2002, after the Applicant had been transported to the "...cells...".

The General Occurrence Statement of Cadet #3 relates the altercation between the Applicant and the Police, while "...Constables #1 and #2..." were conducting "...the search of their prisoner..."

The Respondent called Constable #1, a member of the London Police Service as a witness. Officer #1 testified that he has been a police officer for "...approximately six years..."

Officer #1 described the events that led to the Applicant being stopped and the subsequent demand for a breath sample.

While the Applicant was initially co-operative, he became increasingly agitated and belligerent due to the fact that he objected to being searched. A struggle ensued, the Applicant continued, "...wailing and screaming ...for a long period of time..." after being subdued for compliance. At no time was the Applicant observed by Officer #1 to be out of breath or having any breathing difficulties. Officer #1 is adamant that, at no time, did the Applicant inform him that he could not breathe. The Applicant did not advise Officer #1 that he was in need of medical assistance.

PC #4 a Qualified Breath Technician with the London Police Service, on duty at the time of the Applicant's arrest, was called to testify, by the Respondent's Representative. PC #4 first testified for the record that she has been a Qualified Breath Technician for "...three years..."

As part of PC #4' testimony, the Respondent's Representative introduced the videotape of the Applicant's breathalyzer session and asked PC #4 to comment as the portion of the tape that dealt with the actual breathalyzer test session was viewed.

PC #4 pointed out that the Applicant was asked by the Sergeant on Duty whether he had any medical problems and the Applicant replied "NO".

The Applicant was given several opportunities to provide a breath sample, but failed to do so. Each time the Applicant blew into the machine he did not blow long enough for the instrument to register. PC #4 formulated the opinion that the Applicant was blocking the tube with his tongue.

At one point the Applicant suggested to PC #4 that he had asthma but at no time was the Applicant observed, to be struggling with his breath or exhibiting any symptoms of respiratory distress.

In closing the Respondent's Representative pointed out that it is the Registrar's position that the Applicant had no intention of co-operating with the police. The Applicant's behaviour of screaming and fighting with the police are not the actions of someone suffering from bronchitis.

The Respondent's Representative drew attention to the fact that the videotape clearly shows that the Applicant was able to speak easily, was apparently breathing through his nose and was not having shortness of breath.

As for Physician #1's comments on the Notice of Appeal, the Respondent's Representative notes that the form is incomplete, in that no history of the condition is given, there is no mention of pulmonary function tests being required, and finally Physician #1 does not provide an opinion as to how the Applicant's bronchitis could have affected his ability to provide a breath sample.

Mr. Biel, the Respondent's Representative summarized by re-iterating the Registrar's contention that there is insufficient medical evidence that the Applicant's failure to comply with the breath demand was due to medical reasons.

In conclusion the Respondent's Representative asked that the Tribunal uphold the Registrar's decision.

APPLICATION OF THE LAW TO FACTS:

Although all of the evidence presented was considered, the preceding notes reflect a summary of the proceedings.

Prior to setting out the reasons for the decision, the Tribunal will address issues, not germane to the case but which, nonetheless appear to be of concern to the Applicant.

As a plea for empathy and leniency was made, the Tribunal feels that some clarification for the benefit of the Applicant is essential. Although the Tribunal may empathize with the Applicant's current dilemma, as well as with the Applicant's emphasis that he was not drunk at the time, the Tribunal must deliberate solely on evidence as it pertains to Section 50.1 (2) (b) of the Highway Traffic Act. At issue is not the individual's state of impairment but rather whether a medical condition exists that may preclude the compliance with the demand for a breath sample.

The Tribunal must also formally give reasons as to why the Applicant's attempt to refer to documents in his possession appearing to be Crown Disclosure notes were not admissible. As Mr. Biel, the Respondent's Representative pointed out, the notes in question did not form part of the Registrar's evidence, and were not disclosed to the Registrar as part of the Applicant's submissions. In accordance with the Tribunal's Rules of Practice, all evidence must be disclosed to the parties involved, ten days prior to the hearing. Since this evidence was not disclosed the Tribunal has ruled that it is not admissible.

The Applicant brought an appeal under Section 50.1 (2) (b) of the Highway Traffic Act, which prescribes:

"... person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason..."

The Respondent's Representative contends that the Applicant's behaviour clearly demonstrates that he had no intention of complying with the breath demand. The Applicant's behaviour albeit deplorable, is not at issue. At issue, is whether the Applicant has a medical condition that could cause the Applicant to fail or not comply with the breath demand.

Mr. Biel's, critique of Physician #1's report is that it does not contain sufficient information to corroborate the medical grounds for the appeal. Furthermore, Mr. Biel maintains that the Applicant's argument lacks the support of specialist's reports. The Tribunal agrees.

The Tribunal reviewed Physician #1's report carefully. Noteworthy is the fact that Physician #1 specifies that Bioxin was prescribed "...24.10.02 x 1 wk and 13.11.02 x 2 days...". There is no indication, other than the Applicant's apparently confused assertion, that Physician #1 found it necessary to prescribe a further dose of Bioxin on the "...30.10.02..." visit. The Tribunal cannot speculate as to the reason Physician #1 gave the Applicant a 2 day's supply of Bioxin on November 13th.

The Applicant has not provided the Tribunal with medical reports from any specialists. It would in fact have been possible for Physician #1 if he thought that the Applicant's condition was severe enough, to warrant a referral to a respiratologist or to order pulmonary function tests. Such reports would provide specific evidence of the Applicant's ability to perform a breathalyzer test.

The Tribunal has considered the eyewitness testimony at the scene. In this case the Tribunal has not only the evidence of Constables #1 and #4 but has also viewed the videotape of the breathalyzer session. There are certain unmistakable indicators of respiratory distress that are visible even to an untrained person. At no time, was the Applicant observed to be in an afflicted breathing state. It is apparent that the Applicant did not exhibit any of the symptoms commonly associated with severe respiratory illness, such wheezing, continuous coughing or shortness of breath.

The Applicant may have been diagnosed with bronchitis, but there is insufficient evidence to satisfy the Tribunal that he was in any respiratory distress at the time of the breathalyzer session and unable to provide a breath sample.

The onus being on the Applicant to establish the merit of the appeal, the Tribunal finds that the Applicant's testimony although credible, failed to substantiate the basis for an appeal on medical grounds. Thus, the Tribunal finds that the Applicant does not meet the criteria of Section 50.1 (2) (b), in that he was not able to demonstrate that he was suffering from a medical condition, which would prevent him from providing a breath sample.

DECISION:

Upon the application by The Applicant to appeal the suspension order dated November 13, 2002 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal **confirms** the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: January 7, 2003

ERIC EDWARD SOKK

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: NIVES MONTANO
Presiding member

APPEARANCES: ADELAIDE PINDER
Representative for the Registrar of Motor Vehicles

ERIC EDWARD SOKK, Applicant
unrepresented

DATE OF HEARING: December 20, 2002

DECISION RELEASED: December 24, 2002 Toronto

REASONS FOR DECISION

A hearing was held on December 20, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act

to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Eric Sokk (the "Applicant")
Motor Vehicle:	1984, Dodge, plate #AFMC 478 (the "vehicle")
Date of Appeal:	December 9, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that he exercised due diligence to determine that the driver's licence was not suspended as provided in section 50.2(3) of the Act. The owner also appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on December 20, 2002 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

" I have a very irresponsible twin brother, whom my family and I thought possessed a valid Ontario driver's licence. I did not know he was under suspension. In the future my brother Allan is prohibited from driving or operating any of my vehicles, because now I am aware of his driving record.

I require this car that was impounded as a second vehicle to drive myself."

The following is a summary of the Applicant's affirmed testimony.

The Applicant is married and a father of 3 children. His wife is a teacher and he has been employed with the City of Thunder Bay in the Sewer and Water Department for the past 20 years.

The Applicant is also the identical twin brother of Allan, the driver at the time the vehicle was impounded. Allan lives in Ignace, Ontario, approximately 200 miles (3 hours) from Thunder Bay. He is employed with a forestry company in which he does not need a vehicle. Allan visits his brother and his family on a monthly basis and borrows one of the Applicant's vehicles when he is visiting. Allan has a motorhome registered in his name, which he gave to the Applicant. The Applicant pays the insurance on this vehicle. It is currently in winter storage. Allan does not own any other vehicles. The brothers generally have a good relationship.

The Applicant knew of his brother's 1983 and 1990 Criminal Code convictions, but was unaware of the 2001 and 2002 convictions.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Allan Sokk;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of driving with more than .08 mgs of alcohol in blood under the *Criminal Code of Canada* pursuant to which the driver's

licence of the driver was then under suspension until August 12, 2003.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(c).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: **A.** adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. *Law.* The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

APPLICATION OF LAW TO FACTS:

Appeal – Due Diligence

The first issue to be considered in this appeal is whether the Applicant exercised due diligence in attempting to determine that Allan Sokk's driver's licence at the time in respect of which the order was made was not then under suspension as required by section 50.2(3)(c) of the Act.

The Applicant has conceded that he is the owner of the vehicle that has been impounded. At the time of the impoundment, the vehicle was being driven by his twin brother, whose driver's licence was then under suspension due to a conviction under the *Criminal Code of Canada* for driving with more than 80 mg of alcohol in his blood.

The evidence before the Tribunal was that the Applicant only saw a driver's licence "years ago". With the knowledge of his brother's previous convictions, the Applicant did not check with the insurance company and/or the Ministry of Transportation to determine whether his brother was an eligible driver. When the Applicant would ask his brother if he had a valid driver's licence, his brother would avoid the question. Unfortunately, the Applicant merely assumed that his brother had a valid driver's licence and did not take any measures to ensure that he had a valid driver's licence. By merely viewing a driver's licence "years ago" does not constitute the necessary step to ensure its validity. Furthermore, there was no evidence heard that would confirm the Applicant's actions were anything but passive in nature.

The Tribunal therefore has no evidence that the Applicant exercised due diligence as required by section 50.2(3)(c) of the Act.

Appeal – Exceptional Hardship

The Tribunal must determine whether it should set aside the Registrar's order to impound the vehicle on the basis that the owner of the impounded vehicle will suffer exceptional hardship.

The Applicant has appealed on the grounds of "exceptional hardship" under section 55.2(3)(d).

Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the criteria the Applicant must meet to determine if in fact "exceptional hardship" will result from the impoundment. The Applicant in this case has argued that the impoundment will result in hardship as described in section 22(2). In order for his appeal to be considered under section 22(2), he must have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulations provides the criteria for demonstrating that every reasonable option has been considered respecting an alternative vehicle.

The Tribunal's consideration of subsections 22(3)(a), (b) and (c) follows:

- (a) **"no alternative to the impounded motor vehicle is available"**. The Applicant testified that there are alternative vehicles: (i) his wife drives a Suburban 4x4; (ii) the Applicant is currently driving a truck; (iii) a 1983 motorcycle; (iv) Allan gave the Applicant a motorhome to use which the Applicant pays the insurance. It is currently in storage for the winter; and (v) every 5-6 weeks, the Applicant brings home the company cube van in the event of any call-outs.

The Applicant testified that once the impounded vehicle is release, it will no longer be driven as it is considered a "marked car".

- (b) **"the loss will be immediate, significant and lasting"** The Applicant testified that (i); he has not missed any days of work or lost any wages due to his vehicle's impoundment; (ii) he has not had nor has missed any doctor's appointments; (iii) there are no health issues with any of his family members; and (iv) although there is no need to use public transit, the

Applicant lives in a rural part of Thunder Bay where there is no public transit.

- (c) **"the impact of loss will be upon a person ordinarily transported by the motor vehicle"** The children are taken to school by a school bus. Should that not be available, the Applicant's wife drives them to school.

The Applicant may pursue compensation from the suspended driver, Allan Sokk, as is stated in section 55.1(21) of the *Highway Traffic Act*:

"The owner of a motor vehicle that is subject to an order to impound under this section may bring an action against the driver of the motor vehicle at the time the order was made to recover any costs or other losses incurred by the owner in connection with the order".

The Tribunal is sympathetic with plight of the Applicant being confused with his identical twin, the embarrassment this has caused him and his family, but after considering the above requirements, the Tribunal finds that the Applicant has alternatives to the impounded vehicle and has managed. The impact will not be immediate significant and lasting.

Accordingly, after considering the criteria set out in section 22(3) and (4) of Regulation 340 as amended by Ontario Regulation 632/98, the Tribunal finds the Applicant has not established exceptional hardship as set out in section 50.2(3)(d) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Nives Montano
Presiding Member

RELEASED: December 24, 2002

HIGHWAY TRAFFIC ACT
R.S.O. 1990, Chap. H.8 as amended

IN THE MATTER of the ORDER to IMPOUND a MOTOR VEHICLE Order # 2601605 OWNED BY: Benedict J. Bartlett, 69 Avenue Road, Cambridge, Ontario, N1R 1B8 made pursuant to section 55.1 of the *Highway Traffic Act*, effective on: November 28, 2002.

AND IN THE MATTER of a requirement for a hearing respecting an appeal of the said Order to Impound, pursuant to section 50.2 of the *Highway Traffic Act*.

BENEDICT J. BARTLETT

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Benedict J. Bartlett, Applicant, and by the representative for the Registrar of Motor Vehicles, for the issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22, and having reviewed the written settlement signed by the Applicant and the Registrar of Motor Vehicles as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the facts and on the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: December 9, 2002

Schedule "A"

LICENCE APPEAL TRIBUNAL

Between:

BENEDICT J. BARTLETT

Applicant

-and-

THE REGISTRAR OF MOTOR VEHICLES

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

1. On November 28, 2002, the motor vehicle described in **Order to Impound #2601605** was impounded in accordance with subsection 55.1(3) of the *Highway Traffic Act*, RSO 1990, c. H. 8 as amended.
2. The Applicant, Benedict J. Bartlett, whose name is shown on the vehicle portion and the plate portion of the permit for the impounded motor vehicle, is the owner of the said vehicle.
3. No other order to impound under section 55.1 of the *Highway Traffic Act* has previously been made with respect to any motor vehicle then owned by the Applicant.
4. The Applicant filed an appeal to the impoundment order, in accordance with the grounds permitted under clause 50.2(3)(d) of the *Highway Traffic Act*, stating **that the order will result in exceptional hardship.**
5. Materials provided to the Registrar indicate that exceptional hardship will result from the impoundment of the motor vehicle as defined by Regulation 632/98 of the *Highway Traffic Act*.
6. The Applicant has had the opportunity to obtain independent legal advice with respect to consent to this Order.
7. The parties agree that this agreement does not bind the Ministry of Transportation or the Registrar of Motor Vehicles in any way, with respect to future hearings or consent orders.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsection 50.2(5) of the *Highway Traffic Act* that the Tribunal set aside the order to impound.

Benedict J. Bartlett

The Registrar of Motor Vehicles

(signature of Applicant)

(signature of Registrar)

(date)

(date)

EXEC DISTRIBUTION INC.

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: SIMON DANN
Presiding member

APPEARANCES: LYNDA DUNBAR
Representative for the Registrar of Motor Vehicles

CLIVE BOWDEN
Agent for Applicant

DATE OF HEARING: December 23, 2002

DECISION RELEASED: December 24, 2002 *by teleconference*

REASONS FOR DECISION

A hearing was held on December 23, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Exec Distribution Inc. (the "Applicant")
Motor Vehicle:	1995 Freightliner D12, plate no. 3482DH (the "vehicle")
Date of Appeal:	December 10, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence (i.e. all reasonable efforts) to determine that the driver's licence was not suspended and the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(c) and (d) of the Act.

This matter came before this Tribunal on December 23, 2002 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

12/05/02

Reference. Notice of Appeal - Owners Position License Appeal Tribunal

1 St Clair Avenue West, Suite 1200 Toronto, Ontario M4V 1K6

Attachment to Notice of Appeal

Background

The company is owned and operated by Ted Bowles and Clive Bowden, sole shareholders. Exec Distribution is a small transportation supplier with 1 straight truck servicing London and 1 tractor trailer servicing London to Toronto. The service is for customers of Exec Warehouse Inc. in London owned by the same persons.

Due Diligence

The driver Mark Braithwaite, driving under suspension, was hired full time in November 2000 from Drivers Alliance, a professional truck drivers employment agency. They supplied an acceptable abstract and recommended him. On June 7, 2001 we did a follow up check (copy Attached) and the old speeding offense was the only issue and no demerit points were current. In the all of the time Mark worked for us his job performance and attendance was excellent. His latest performance review was just on November 27 and his report was excellent. The only time off he has taken was in August of this year. He phoned in sick. We now have learned that he lied to us and this was when his license was suspended. He did not advise us and we had no reason to suspect his suspension, as he has been a trusted employee for 3 years. We find it hard to understand that there is no system to notify an employer when an AZ commercial license is suspended. As a small company you cannot check abstracts weekly especially when you have never had a problem.

Loss of Vehicle

As this is our only tractor trailer the company will have to rent a vehicle at a rate of \$857.00 per week plus mileage. This along with the towing and impoundment fee will total in excess of \$9000.00. We also have had to return the trailer with the goods on board to meet commitments at a premium of \$700.00. We have terminated Mr Braithwaite and will train a new driver, also significant expenses. This vehicle had just returned from a major overhaul costing us \$10000.00 to insure it was safe and dependable. This put at our credit limit with our dealer source for further rentals. We feel that this penalty is severe and will have significant impact on both of the businesses we operate. We understand the law and the reasons behind it, but we feel the punishment to an employer who has abided by all rules and regulations they were aware of, shouldn't have to pay such a harsh punishment only because an employee lied to them.

Hearing Request

We have requested a telephone conference as we would have to drive to Toronto for the hearing. This would be the most cost effective for us as we both work in this business, however we will attend a hearing if this is the only option

"Ted Bowles"

Ted Bowles

"Clive Bowden"

Clive Bowden

The Applicant, Mr. Clive Bowden, confirmed, through his testimony, the details contained in the Notice of Appeal and the following points:

- over the course of his employment with the company, Mark Braithwaite had become a trusted employee;
- the company first saw a check of Mr. Braithwaite's record when he was hired and a second or last check occurred about one year ago;
- during Mr. Braithwaite's November 2002 performance review, he did not advise the company about his licence suspension;
- Mr. Bowden said he thought "the system would advise us" about the suspension of his employee's driver's licence;
- Mr. Braithwaite had been terminated;
- the impounded vehicle was the company's only highway vehicle and that a replacement vehicle had been rented to continue the company's commitments to its customers;
- the replacement rental and associated impoundment costs were expected to total \$9000.00.

In a concluding comment, Mr. Bowden expressed the view that "the loss would have been difficult to prevent".

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mark F. Braithwaite;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;

4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Blood/Alcohol Content in Excess of .08 under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until September 24, 2003.

In response to questions submitted to the Applicant by Lynda Dunbar, Mr. Bowden did not provide any specific information about a company policy requiring regular checks of a driver's licence record. He also provided the following additional information:

- the last time, in fact, that Mr. Braithwaite's driving record had actually been checked by the company was in June 2001, about one and a half year's ago;
- the company's one other vehicle is an in-town unit and while it could be used for the London-Toronto return trip it would need to make two trips as it is not large enough to hold the same size of load;
- that even if the company did use its in-town truck for the highway run, they would still need to rent another truck to replace the in-truck and while that rental would be less expensive it was not a chosen option;
- that even if the company's appeal is not successful it will continue as there is no other choice.

The Tribunal also learned more about the company's business operations in that:

- the freight transport part of the businesses owned by Mr. Bowden and his partner, Ted Bowles, would ordinarily take about 2 to 3 months to make the amount of money that would be the cost of the impoundment;
- the freight transport business only has the two trucks and that it was established to provide a customer support service to certain customers of the main warehousing and storage business, which is located in a 140,000 square foot warehouse;

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
 - (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(c) and (d).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. *Law.* The attention and care due from a person in a given situation....

Also, “due diligence” in Black’s Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,

- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

To succeed in this appeal, the Applicant must establish either due diligence in determining the validity of the driver's licence under section 50.2(3)(c) or exceptional hardship under section 50.2(3)(d) of the Act.

As to the Applicant's appeal to have the impounded vehicle returned on the basis that (a) the company had exercised due diligence in ensuring that the employee's driving licence was not

under suspension or (b) that the loss of the vehicle will result in exceptional hardship, the evidence established:

- (i) the company did not have a clearly stated policy regarding any kind of regular checks of driver abstracts (for example in the case of a small company such as Exec Warehouse Inc., the annual review process could include a mandatory abstract search);
- (ii) that while the company could experience some financial strain as a result of the impoundment costs, it had been able to afford to make immediate alternate vehicle rental arrangements and would continue to be in operation throughout the impoundment period and afterwards;
- (iii) the company had not lost any contracts or work due to the loss of use of the impounded vehicle.

This evidence submitted does not establish the Applicant exercised due diligence as defined under subsection 50.2(3)(c) or that exceptional hardship as required under section 50.2(3)(d) of the Act will result from the impoundment.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Simon Dann, Presiding Member

RELEASED: December 24, 2002

1329-ADLS-CHEST

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: LUBA NEUWRITH,
Representative for the Registrar of Motor Vehicles

Applicant
by written submissions only

DATE OF
HEARING: November 19, 2002

DECISION
RELEASED: December 6, 2002 Toronto

REASONS FOR DECISION

A hearing was held, on November 19, 2002, at Toronto, Ontario, by way of a written hearing, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on November 21, 2002, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of a written hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated October 10, 2002, and was received by the Tribunal on October 16, 2002, together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Applicant's Written Submissions

- a) Exhibit # 1 Notice to Registrar dated September 05, 2002, issued by the Registrar of Motor Vehicles.
- b) Exhibit # 2 Notice of Appeal Form received October 16, 2002.
- c) Exhibit # 9 Applicant's response to the Respondent's "PART 3, ARGUMENT" – received November 18, 2002.
- d) Exhibit # 10 Applicant's "Crown Disclosure Information" – received November 18, 2002.
- e) Exhibit # 11 Applicant's Closing Statement – received November 18, 2002.

Respondent's Written Submissions

- a) Exhibit # 3 Written Submissions of the Registrar – Part 1, "THE FACTS" – received November 8, 2002.
- b) Exhibit # 4 Written Submissions of the Registrar – Part 3, "ARGUMENT" – received November 8, 2002.
- c) Exhibit # 5 Written Submissions of the Registrar – Part 4, "ORDER REQUESTED" – received November 8, 2002.
- d) Exhibit # 6 Written Submissions of the Registrar – "DRIVER INFORMATION" –

received November 8, 2002.

- e) Exhibit # 7 Written Submissions of the Registrar – written statement of Customs Officer #1 – received November 8, 2002.
- f) Exhibit # 8 Written Submissions of the Registrar – written statement of P.C. #1 – received November 8, 2002.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

- 50.1(1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
 - (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
 - (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

Section 50.1(4) of the HTA states:

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Subsections 15(1), (2) and (3) of Regulation 574 (as amended) of the *Highway Traffic Act* requires that a medical report must contain:

- 15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
 - (a) the name, telephone number and address, with the postal code, of the medical

practitioner;

- (b) the name, date of birth and address of the person who is the subject of the report;
 - (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
 - (3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

The Applicant's Driver's Licence was suspended "Sept 5, 2002" as per Notice of Appeal (Exhibit # 2) arising out of the failure or refusal of the Applicant to provide a sample of breath.

Applicant's Evidence

The Applicant relies upon a medical report which was prepared, on October 10, 2002, by Physician #1, who has been the Applicant's physician for "27 years". Physician #1 writes: *"This patient has documented ischemic heart disease with admission to Welland General Hosp. on Mar 23rd, 2002. Thallium stress testing thereafter indicates the presence of ischemia (angina). On Sept 4th, 2002 following dinner in Niagara Falls NY he had to come home earlier than expected because of chest tightness which we interpreted as angina. This produced severe anxiety and hyperventilation rendering him incapable of giving a proper breath sample. June 17th 2002 – in office for follow-up on blood cholesterol levels."*

(Exhibit # 2)

A copy of a Patient Discharge Information Record, from the Niagara Health System Welland

Hospital Site, dated "March 27/00", is also attached to the Notice of Appeal. The report confirms the discharge diagnosis: as "myocardial infarction" and lists the drug therapy to be followed by the Applicant. (Exhibit # 2)

After having the opportunity to review the Registrar's argument, the Applicant submitted a response, which includes a copy of the Crown Disclosure information and a Closing Statement. (Exhibits # 9,10,11)

The Applicant made several handwritten notations on the margin of the typewritten document entitled: "*PART III – Argument*":

1. In reply to statement number 1, wherein the Registrar "...denies that any medical reason caused the appellant's failure to provide the required breath sample..."the Applicant writes: "hypervent". (Exhibit # 9, Paragraph 1).
2. On the margin beside paragraph 2, the Applicant directs the Tribunal to "*CHECK CUSTOMS OFFICER #1 S NOTES – PAGE 6*" (Exhibit # 9, Paragraph 2).
3. In paragraph 4 of the Registrar's argument, the Applicant underlined the word "medication", in the sentence: "...he would have his heart medication on him..." and stated in the margin: "*I did*". (Exhibit # 9, Paragraph 4).
4. Paragraph 5 of the Registrar's argument reads: "*The Applicant was observed to smoke two cigarettes by the Police Constable #1 shortly after the breath demand...*"the words "shortly after" are underlined. The Applicant's handwritten comments state: "*00:05 * RELEASED AT 2:25 TO A TAXI. I WAS IN CUSTODY FOR TWO HOURS & 22 MINUTES AFTER BREATH DEMAND.*" (Exhibit # 9, Paragraph 5).

The Applicant submitted a detailed dispute of the Registrar's "*PART III –Argument*". A summary follows:

- 1) *REGISTRAR STATES MEDICAL REASON ON DOCTOR'S STATEMENT IS ISCHEMIC HEART DISEASE. PHYSICIAN #1'S STATEMENT CLEARLY STATES SEVERE ANXIETY AND HYPERVENTILATION AS THE REASON...*
- 2) *REGISTRAR SUBMITS I DID NOT EXHIBIT ANY SIGNS OF A MEDICAL PROBLEM ...CUSTOMS OFFICER #1S STATEMENT– ...'AND THROUGHOUT THE WHOLE ORDEAL, THE APPLICANT COMPLAINED OF HIS HEART PROBLEM...'*
- 3) *I AGREE*

- 4) REGISTRAR NOT CLEAR WHETHER PHYSICIAN #1 SAW ME ON OCT 10/02. THE DOCTOR DID SEE ME ... AND THE DOCTOR IS AWARE OF WHAT THE APPEAL FORM IS FOR. AS TO SEEKING ATTENTION (MEDICAL) I WAS IN CUSTODY FROM :00:03 UNTIL 02:25 ...TAKEN NITROGLYCERINE (sic) 8 TO 10 TIMES DURING THAT PERIOD ...NEVER LEAVE HOME WITHOUT NITRO IN MY POCKET, GLOVE COMPARTMENT ...MEDICATION ...CUSTOM OFFICER CUSTOMS OFFICER #1 REFERS TO ...ARE THE VARIETY I TAKE ...I ONLY REFERRED TO THOSE WHEN I AM FELT ANXIOUS ...THE MEDICATION I WOULD NEED IF I WERE IN A GREAT DISTRESS I ADMINISTERED IN FULL VIEW OF THE 4 OFFICERS OVER A 2 HR PERIOD (NITROGLYCERINE) [sic]
- 5) ...EARLIER APPROX. 00:15 WHILE I WAS TAKING MY NITRO TRYING TO STOP HYPERVENTILATING I JOKINGLY SAID ANYBODY GOT A SMOKE ...CUSTOM OFFICER D. CUSTOMS OFFICER #2 WATCHED ME LEAVE THE BUILDING AND MADE NO MENTION OF ME SMOKING ...SITTING INSIDE THE BUILDING WAITING AREA ...WOULD NOT ALLOW THE SAME ...I DO NOT SMOKE ...”
(Exhibit # 9)

As part of his submissions to the Tribunal, the Applicant encloses a copy of the statement provided to the Crown, by Canada Customs and Revenue Officer, Customs Officer #2 .

The Applicant directs the Tribunal to specifically note the following points from Ms. Customs Officer #2 's witness statement:

- *and that he then described his heart condition in detail and the many medications that he is currently taking including 'Zoloft' and that he went on to describe his father's and grandfather's deaths due to heart problems;*
- *and that at approximately 00:18 hrs he stated that he was having chest pains and asked to use his 'spray' to ease the discomfort;*
- *and that the label on this spray indicated 'Nitrolingual Pump 200DS';*
- *and that he began to pant and hold his chest;*
- *and that Customs Officer #1 allowed him to use his medication for his health and safety;*
- *and that he was speaking quietly and said 'strange situation';*
- *and that at approximately 00:25 hrs he complained of chest pains;*
- *and that at 00:28 hrs, he again sprayed the medication into his mouth twice;*

- *and that Customs Officer #1 assisted him by saying 'Keep blowing' several times;*
- *and that she then observed him put two sprays of his medication into his mouth;*
- *and that at this time, Customs Officer #1 asked Applicant if he had health problems that affected his lungs; [sic]*
- *and that he described that he had health problems with his heart;*
- *and that Applicant stated loudly in clear voice, 'I am not refusing. I am on 16 pills a day and I am very excited to be here';*
- *and that at approximately 02:08 she assisted Customs Officer #1 in presenting to Cst. #1;*
- *and that she further assisted Customs Officer #1 in escorting him to the public waiting area;*
- *and that she observed him walk to his vehicle in the customs parking area with no apparent difficulty at approximately 02:25." (Exhibit # 10)*

In his "Closing Statement" the Applicant contends: "...I HAD SHORTNESS OF BREATH DUE TO AN ANGINA ATTACK WHICH STARTED 1/2 hr. EARLIER & WAS GETTING PROGRESSIVELY WORSE ...I WAS EXTREMELY ANXIOUS ...HAVING BECOME AWARE THAT THIS WAS HER FIRST TEST & I WAS HER TRAINING DUMMY I BECAME MORE ANXIOUS AND STARTED TO HYPERVENTILATE ...I TOOK A COUPLE OF SPRAYS OF NITRO (FIRST OF 6 OR 7 TIMES). THE ANXIETY ATTACK AND HYPERVENTILATION CAUSED BY THE ONSET OF ANGINA CERTAINLY HEIGHTENED MY STRESSFUL SITUATION ...I SUGGESTED THEY TAKE A BLOOD SAMPLE ...PROCEEDED TO ADMINISTER ANOTHER TEST TO THE CHANTS OF COME ON COME ON BLOW BLOW YOU CAN DO IT, WHICH I FELT WAS DEMEANING & JUST INCREASED MY ANXIETY PANIC AND HYPERVENTILATION ...EVIDENCE SHOWS ON THE EVENING IN QUESTION I WAS INDEED SUFFERING AN ANGINA ATTACK WHICH IS BY DEFINITION, A SIGN THAT THE HEART IS NOT GETTING ENOUGH OXYGEN. ONE OF THE FACTORS IS STRESS WHICH INCREASES THE DEMAND ON THE HEART, WITH LESS SUPPLY, AND MORE DEMAND THE HEART CANNOT GET ENOUGH OXYGEN ...THE TREATMENT IS REDUCED STRESS, REST, MEDICATION (NITROGLYCERINE [sic] & ATENOLOL) WHICH I AVAILED MYSELF TO DURING & IMMEDIATELY AFTER. MY CONDITION THAT EVENING RENDERED ME INCAPABLE OF PROVIDING A BREATH SAMPLE. I CONFIRM THAT I DON'T SMOKE AND DID NOT SMOKE ON THAT OR ANY OTHER EVENING..."

Registrar's Evidence

The written submissions provided the Tribunal by the Registrar contains the following documents:

1. PART I – THE FACTS (Exhibit # 3)
2. PART II – THE LAW
3. PART III – THE ARGUMENT (Exhibit # 4)
4. PART IV – ORDER REQUESTED (Exhibit # 5)
5. Copy of Notice to the Registrar
6. Copy of Ministry of Transportation Driver Information for Applicant (Exhibit # 6)
7. Written Statement of Customs Officer #1 (Exhibit # 7)
8. Written Statement of PC #1 (Exhibit # 8)

In PART I – THE FACTS, the Registrar referred to statements obtained from: “Customs Officer Customs Officer #1, dated September 5, 2002, and Police Constable Kadwell.”

Paraphrasing Customs Officer Customs Officer #1's statement the Registrar sets out in paragraph 4 of PART I – THE FACTS: “ At 00:10 Applicant blew into the device and it showed an Error. The Applicant blew into the device seven more times, each time the device registering an Error. Each time that Customs Officer Customs Officer #1 witnessed The Applicant blow into the device, she heard the buzzing sound and the air going into it. Each time The Applicant stopped blowing into the device...”

(Exhibit # 3)

In her statement Customs Officer Customs Officer #1 describes the events that led to the breath demand and the events that surrounded the breathalyzer session.

Ms Customs Officer #1 states:

- ...at 00:10 hrs The Applicant blew into the device and showed an error’;
- ...The Applicant blew into the device seven more times, each times the device registering an error;
- ...each time I witnessed The Applicant blow into the device I heard the buzzing sound and the air going into it ...each time he stopped blowing into the device;
- complained of his heart problems”
- ...when asked to give us a number to call for his medication he said ‘no, I don’t want to wake anyone up...”

(Exhibit # 7)

PC #1 was present during the breathalyzer test session and reports as follows:

- *...observed as APPLICANT failed to provide a sample ...next attempt blew for one or two seconds and the tone indicating enough pressure was being produced was heard ...He then stopped providing the breath sample, and then after a moment began blowing again ...at no time did I notice that APPLICANT had trouble breathing...*

(Exhibit # 8)

The Registrar's closing argument emphasizes:

1. "...The Registrar denies that any medical reason caused the appellant's failure to provide the required breath sample...
2. The Registrar submits that the appellant did not have a health problem at the time the breath demand was made which would have prevented him from giving a breath sample. The appellant did not exhibit any signs of any condition that might suggest a medical problem...
3. The report further states that The Applicant 's last visit was on June 17th, 2002 for follow –up on blood cholesterol level...
4. The Registrar submits that Physician #1's medical report was prepared on October 10, 2002 which is 35 days after the breath demand was made ...not clear whether Physician #1 saw or examined the patient on October 10, 2002 ...report is not accompanied by investigative reports, or test results that would ...substantiate the nature and severity of The Applicant heart condition ...no indication that The Applicant has sought any medical attention for his angina at the time of or shortly after the breath demand...
5. ...The Applicant was observed to smoke two cigarettes...
6. The appellant has failed to submit any sufficient evidence regarding how his condition rendered him incapable to provide a breath sample...
7. ...the appellant has the onus of establishing the merit of the appeal ...the appellant has not met this onus ...failed to prove that there was a medical reason that rendered him incapable of providing a breath sample on September 5th, 2002."

(Exhibit # 4)

APPLICATION OF THE LAW TO FACTS:

Although the preceding reflects only a summary of the totality of the evidence contained in the documentation presented, all documents were thoroughly reviewed and considered. Statements not directly germane to the issue were not transcribed.

Prior to setting forth the reasons for decision, the Tribunal notes that none of the material submitted for consideration as evidence, was in the form of a sworn statement.

With respect to the issue raised by the Applicant regarding the possibility of obtaining a blood sample, the Tribunal points out that Subsection 48.3 (3) 1 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H-8 as amended is clear in its provision, the concentration of alcohol in the blood may be obtained "...by an analysis of the person's breath sample or blood taken...". The decision to request a blood sample is at the discretion of the officers, who had the best opportunity to observe the demeanor of the Applicant.

The Applicant implies that the Registrar's witnesses are less than reliable as the statements made regarding the Applicant being seen smoking two cigarettes are inaccurate. The Applicant emphasizes that he is not a smoker. The Tribunal sees no necessity to take into account the statements made with respect to smoking, particularly as these statements are in fact conflicting.

An appeal was brought by the Applicant under Section 50.1 (2) (b) of the Highway Traffic Act, which provides:

"...person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason..."

At issue, is whether the Applicant has a medical condition that caused the Applicant to fail or not comply with the breath demand. More specifically, the Applicant has the burden of proving that an angina attack, or attacks, or some other medical condition prevented him from providing a breath sample.

The Tribunal does not dispute Physician #1's diagnosis that the Applicant suffers from: *"...documented ischemic heart disease..."* (Exhibit # 2) However, the Tribunal notes that he opines: *"...This produced severe anxiety and hyperventilation rendering him incapable of giving a proper breath sample..."*. Although Physician #1's theory may be flawless, he was not present at the scene of the breathalyzer test session. Physician #1's conclusion was obviously formulated based on information relayed by the Applicant regarding his level of discomfort both prior to and at the time of the breath sample.

In assessing the Applicant's evidence, the Tribunal finds the evidence provided by the Applicant to be inconsistent in a number of key respects. As a result the Tribunal finds that the Applicant did not establish that his failure or refusal to comply with the breath demand was due to a medical reason.

The Applicant states that his condition, at the time, was acute enough to warrant the use of the Nitrospray. The evidence on the quantity consumed however, is inconsistent.

Officer. Customs Officer #2 states that she witnessed “...at ...00:18 ...*spray into his mouth twice with the medication (sic) ...at 00:28, ...again sprayed the medication into his mouth twice ...then observed him put two sprays of his medication into his mouth...*”

At Exhibit # 9, the Applicant writes that he was compelled to take “...*NITROGLYCERINE (sic) 8 TO 10 TIMES...*” during the two-hour period that he was in custody. Whereas the Applicant states in his Closing Statement, filed as Exhibit # 11, “...*I TOOK A COUPLE OF SPRAYS OF NITRO (FIRST OF 6 OR 7 TIMES)...*”

Whether the dosages were 6,7, 8 or 10, is unclear. In the Tribunal’s view, it would appear that these were extremely large doses, which could have led to an overdose with physical symptoms such as headache, nausea, and dizziness requiring hospitalisation. No such symptoms are noted, however.

The Tribunal notes that the evidence of the Applicant appears unreliable. After stating to Customs Officer Customs Officer #2 : “I need access to my medication in 1hour or I am a dead man”, the Tribunal notes that according to Officer Customs Officer #1 , the Applicant refused an offer to call someone to bring his medication, stating: “No- I don’t want to wake anyone up.”

Finally, the Tribunal notes that the Applicant has not filed a medical report from a specialist dated immediately or even shortly after the incident. In fact, the Applicant was not even examined by his own physician until 35 days after the breath demand. Given the alleged seriousness of his condition, a more recent medical report such as from the emergency department of a hospital would have been warranted. Yet after the incident, it was the evidence of Customs Officer Customs Officer #2 that: “she observed him walk to his vehicle in the customs area parking area with no apparent difficulty at approximately 02:25hrs.”

These inconsistencies greatly reduce the reliability of the Applicant’s evidence. Addressing the issue of reliability, the Tribunal finds that the discrepancies in the Applicant’s evidence are most disturbing and have a significant negative impact on his credibility as a witness.

The onus being on the Applicant to establish the merit of the appeal, the Tribunal finds that the Applicant failed to substantiate the basis for an appeal for medical reasons. Thus, the Tribunal further finds that the Applicant does not meet the criteria of Section 50.1 (2) (b), in that he was not able to demonstrate that his medical condition precluded his compliance with a demand for a breath sample.

DECISION:

Upon the application by Applicant to appeal the suspension order dated August 2, 2002 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* (“HTA”) and

having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant, the Tribunal confirms the suspension imposed by the Registrar, pursuant to the authority vested in it under section 50.1(4) of the HTA.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: December 6, 2002

MAJID BANKI

IN THE MATTER OF THE MOTOR VEHICLE DEALERS ACT

AND IN THE MATTER OF A REGISTRATION OF
MAJID BANKI

AND IN THE MATTER OF A MOTION FOR A STAY OF
THE ORDER OF THE LICENCE APPEAL TRIBUNAL
RELEASED OCTOBER 11th, 2002 UNTIL DISPOSITION
OF AN APPEAL TO THE DIVISIONAL COURT OF
THE SUPERIOR COURT OF JUSTICE

TRIBUNAL: BRIAN MAROTTA, Vice-Chair
STUART CORK, Member

APPEARANCES: ARIF RAZA,
Counsel, representing the Applicant
MICHAEL ROTHE,
Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: November 25, 2002 Toronto

REASONS FOR RULING

BACKGROUND

This is a Motion by the Respondent, the Registrar, *Motor Vehicle Dealers Act*, for an Order staying the Decision and Order, released October 11, 2002 of Vice-Chair, Antoine Aouad, directing the Registrar to refrain from carrying out the proposal to refuse the registration of Madjid a.k.a. Mike Banki as a salesperson under the *Motor Vehicle Dealers Act*, until such time as the Appeal in this matter is heard and a decision rendered therein.

The Hearing of this matter was held before the Tribunal on September 27, 2002. By Order of the Tribunal released October 11, 2002, the Tribunal directed the Registrar not to carry out the proposal to refuse the registrations of Madjid a.k.a. Mike Banki, but to issue a salesperson's licence subject to the terms and conditions stated in the Order.

FACTS

The Respondent, (Registrar) by its Notice of Appeal, dated October 15, 2002, has appealed to the Ontario Superior Court of Justice, Divisional Court. There is no date scheduled for the hearing of this Appeal. The Registrar estimated that the Appeal would take anywhere from between six months to one year before it is heard.

Affidavit Evidence

In support of the Respondent's Motion to stay the Order of this Tribunal, there has been filed the Affidavit of Mary Jane South.

Mary Jane South is employed by the Ontario Motor Vehicle Industry Council (hereinafter referred to as OMVIC), as the Deputy Registrar, *Motor Vehicle Dealers Act*.

Ms. South stated that by a Proposal dated May 23, 2002 and Further and Other Particulars dated September 10, 2002, the Registrar proposed to refuse the registration of Majid a.k.a. Mike Banki (the Applicant) as a motor vehicle salesperson.

The Proposal and Further and Other Particulars alleged that the Applicant knowingly violated separate Security Agreements he had entered into with Automotive Finance Company and with Mannheim Auto Auctions by financing several vehicles through them and selling the vehicles out of trust without informing them of the sales and without repaying either Company. The Applicant did so by obtaining replacement permits from the Ministry of Transportation when he knew or ought to have known that it was improper to do so.

After a hearing before Vice-Chair Aouad of the Licence Appeal Tribunal on September 27, 2002, the Tribunal's Reasons for Decision and Order were released October 11, 2002.

The Reasons for Decision and Order directed the Registrar not to carry out the Proposal to refuse the registration of Madjid a.k.a. Mike Banki and to issue a salesperson's licence subject to the terms and conditions that were set out in the Order.

The Registrar did not agree with the terms and conditions in the Reasons for Decision and Order and filed a Notice of Appeal dated October 15, 2002.

Ms. South asserted that the terms and conditions in the Decision are insufficient and unenforceable and thereby failed to adequately protect the public.

She asserted that the first condition that the Applicant not be allowed to handle cash was insufficient as there was no prohibition on his handling other forms of payment, such as credit cards, cheques and money orders.

The second condition attached to the registration that the Applicant not be allowed to attend auctions on his own nor to buy or sell vehicles at auction on behalf of the dealer was insufficient as no level of supervision was required, nor was the nature and authority of the person meant to accompany the Applicant stipulated.

The third condition that the Applicant not carry on business transactions for the sale or purchase of motor vehicles outside the premises of the dealer was unclear as to whether or not the Applicant was limited from motor vehicle off premise buying or selling on the dealers or his personal account. Both of these are currently prohibited pursuant to the *Motor Vehicle Dealers Act*.

The fourth condition that all purchase and sale transactions be approved and verified by the sales manager prior to being closed was insufficient as the terms and conditions did not limit the Applicant from working as a sales manager. Further, this condition required a non party to the proceedings to act in accordance with this condition of the Applicant's registration.

The condition requiring that the Applicant inform a prospective dealer principal that he or she is to notify the Registrar within thirty days of offering employment to the Applicant and that the dealer was aware of the Applicant's conditions of registration was a further attempt to bind the conduct of a non party. Further, the *Motor Vehicle Dealers Act* required the dealer to notify the Registrar in writing within five days of the commencement or termination of employment of its sales people.

She also stated that while the Applicant's registration is to be revoked should he be convicted of fraud, it did not address what would happen should the Applicant be convicted of similar economic convictions such as uttering a forged document, theft, false pretenses, breach of trust or any industry specific offences.

She continued to say that although all conditions of registration required that the relation between the Applicant and his dealer principal be arms length, there were no conditions or safeguards in place to prevent the Applicant from becoming the operating mind of the dealership.

She was also concerned that the conditions of registration did not restrict the Applicant from transferring his registration to a dealership where there was little or no supervision of the Applicant's actions or any enforcement of the Applicant's conditions of registration.

Ms. South stated that she believed that, given the Applicant's past conduct, he would not comply with any terms and conditions imposed by the Tribunal if the stay Motion was not granted.

Decision of the Tribunal which is appealed:

The Tribunal ordered registration of the Applicant on the following conditions:

1. The Applicant is not to be allowed to handle cash.
2. The Applicant is not to be allowed to attend auctions, on his own, and purchase or sell vehicles at auctions, on behalf of the Dealer.
3. The Applicant is not to carry on business transactions for the sale or purchase of motor vehicles outside the premises of the Dealer.
4. All transactions of trade, purchase or sale of motor vehicles are to be approved and verified by the Sales Manager, prior to the Applicant closing any deal with prospective buyers and or sellers.
5. The Applicant is to inform any prospective employers of the limitations on his licence.
6. The Applicant shall advise the Dealer, employing him that the Dealer is required to notify the Registrar, in writing, within thirty days of offering employment to the Applicant that the Dealer is aware of the restrictions imposed on the Applicant's licence.

Further, this Tribunal orders that:

1. In the event of breach of any of the conditions listed above, the Applicant shall forthwith forfeit his Salesperson's licence.
2. In the event a conviction of fraud is registered against the Applicant, the Applicant shall forthwith forfeit his Salesperson's licence.

Argument of Respondents (Appellants) Counsel

It was argued on behalf of the Registrar that the Applicant had been originally registered as both a salesman and dealer in March of 1997.

While acting in that capacity, he had a financial arrangement with two lending institutions. The Applicant would buy vehicles from an auction and the finance company would pay for the vehicles and transfer them into the Applicant's name, however, they would retain the physical possession of the ownership. The Applicant would then sell the vehicles and advise the finance companies to fill in the amounts on the pre signed cheques which they held and they would send him the ownerships. The Registrar alleged that the Applicant sold vehicles without informing the finance companies contrary to the agreement with them. He accomplished this by obtaining replacement ownership without telling the finance companies. The Applicant then

declared bankruptcy owing approximately \$108,000.00, with \$90,000.00 to \$100,000.00 of that money owing to the two finance institutions.

In the Hearing before Vice-Chair, Aouad, the finance company had given evidence that there was no arrangement with the Applicant which would allow him to obtain replacement ownerships to transfer the vehicles. Despite this evidence, the Tribunal found that there was no indication that the Applicant had intentionally acted dishonestly. Counsel for the Registrar also repeated the arguments that were contained in the Affidavit of Mary Jane South.

The Registrar argued that the Supreme Court of Canada set out in the *RJR - MacDonald Inc. v. Canada* (A-G) (1991) 82 D.L.R. (4th) 385 at 405, there were three tests that had to be met in order to be successful in this Motion. The tests are as follows:

1. There must be a serious question to be tried.
2. Would the Applicant suffer irreparable harm if the Application were refused.
3. An assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision.

In regard to the serious issue test, the Registrar argued that this is a very low threshold to meet. It is not meant to be an in-depth analysis of the merits of the case, but a preliminary assessment that the Appeal is neither frivolous nor vexatious.

The Registrar argued that the Tribunal had placed an inordinate amount of weight on the evidence of the Applicant in the face of direct evidence of witnesses for the Registrar and physical evidence produced by way of bills of sale which were stamped stating that they were not to be used to obtain replacement ownerships.

The Applicant had not met the test that he would act with honesty and integrity and according to law, and he had not acted with financial responsibility in the way that he had dealt with the vehicles and the bankruptcy.

The Registrar also referred to the *Brenner (Brenner v Ontario (Registrar of Motor Vehicle Dealers and Salesman))* 1983 O. J. No. 1017 (Ontario Supreme Court-High Court of Justice Divisional Court) test that if the Registrar is found to have a reasonable belief that the Applicant would not act in accordance with law that the Tribunal must grant the Registrar's proposal. It was argued that since the decision of the Tribunal was contrary to the Brenner test, that was enough of a serious issue to be tried.

In accordance with the second test, the Registrar does not typically bring Motions to stay the Tribunal's decisions. It was the Registrar's position that it would be the public that would suffer irreparable harm if the stay were not granted and the public is

represented by the Registrar. By allowing the Tribunal's decision to stand pending appeal, it would expose the public to potential harm and that the irreparable harm was the registration of the Applicant.

In regard to the third test, it was argued that this proposal by the Registrar is a refusal and not a revocation. This was not the case where a dealer was currently operating and his income was being taken away. The Applicant is a person who was not yet operating as a salesman and, therefore, it was not taking anything away from him to refuse his registration. Although the Applicant had been working as a salesman since the release of the Tribunal's decision, he was not working as a salesman before that time and, therefore, he was not as dependent upon that income from being a salesman as a person who was already working and reapplying for registration.

The Registrar again referred to the RJR - MacDonald case and stated that although this was a Charter case, the principals enunciated by the Court in paragraph 71 at page 75 applied:

In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the Court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

The Registrar argued that the risk to the public was that they may buy a motor vehicle without a clean title. It was admitted that there was no evidence of this in the present case. It did, however, go to the issue of honesty and integrity. The Applicant's actions concerning the finance institutions was industry related since it had to do with financing vehicles.

Argument of Applicants (Respondents in Appeal) Counsel

It was argued that a decision of the Tribunal is not automatically stayed on Appeal under the Statutory Powers Procedure Act and, therefore, the onus the Registrar must meet is greater to stay the decision of this Tribunal.

At the hearing, the Applicant had given evidence that it was in the normal course of business to issue replacement permits on vehicles which he was selling rather than obtain the original permits back from the finance institutions because of the great distance between the location of the Applicant and the finance institutions. It was stated that this evidence was not contradicted by anyone during the original hearing.

Vice-Chair Aouad had the advantage of hearing the evidence directly from the witnesses and making a finding of fact pursuant to the evidence presented.

Further, in regard to the first test as to whether there was a serious issue to be tried, the Applicant stated that the preliminary assessment must be where the Tribunal's findings so flawed that there was a serious error? It was argued that the Tribunal has more experience in this area as it deals with these matters on a regular basis and that is the reason that a Tribunal's decision is not automatically stayed on appeal.

The Registrar based its proposal to refuse registration as a salesperson based upon the written application of the Applicant whereas the Tribunal actually heard the evidence given in person and based its decision on the evidence. The standard of Appellant review for setting aside a finding of fact is that it is patently unreasonable. The Tribunal had heard the evidence and made findings of fact based upon that evidence and there is no reason to believe that the findings are patently unreasonable.

In regard to the second test, it was argued that the onus is on the Registrar to show that there would be irreparable harm if the stay motion were refused. In reviewing the evidence, the Registrar was in error in advancing the position that the Applicant was dishonest just because he had some financial problems. The Tribunal had made a finding that the Applicant may have made some poor business decisions, however, there was no evidence of dishonesty. There was the theory proposed by the Registrar that the public could suffer some harm by possibly purchasing a vehicle without clear title, however, there was no evidence that the Applicant had acted dishonestly in regard to any purchaser. There were no losses suffered by any purchaser and there was no evidence of any problems with any title passed to any member of the public. The only evidence given was that no consumers were harmed by the Applicant's actions. In regard to honesty and integrity, there was no evidence that there were any charges against the Applicant for any offence.

The above arguments also were applied to the third test of which of the parties would suffer greater harm from the granting or refusal of the stay. Since there was no evidence of any harm to consumers, would there be any harm to the Applicant by granting the stay? The Applicant disagreed with the Registrar that there would be no harm to him since he was applying for a licence rather than applying for a renewal. The Applicant had previously been registered both as a salesman and a dealer since 1997. His licence was lost in 2001 and he had been over one year without a licence. He has been prohibited from earning income for over one year from his occupation as a salesman and is trying to resume the trade, rather than applying for a first time. The Applicant argued that the balance of convenience favours him or is at least equal to that of the Registrar and if the balance of convenience is equal, then the Registrar has not satisfied the onus placed upon it.

The Law

Section 25 (1) of the *Statutory Powers Procedures Act* states:

Unless it is expressly provided to the contrary in the Act under which the proceeding arises, an appeal from a decision of a Tribunal to a Court or other appellate tribunal operates as a stay in the matter except where the Tribunal or the Court or other body to which the appeal is taken otherwise orders.

Section 7(9) of the *Motor Vehicle Dealers Act* states:

Although a registrant appeals from an order of the Tribunal under section 11 of the Ministry of Consumer and Commercial Relations Act, the order takes effect immediately, but the Tribunal may grant a stay until disposition of the appeal.

Metropolitan Stores (MTS) Ltd. v Manitoba Food and Commercial Workers, Local 832 (1987) 38 D.L.R. (4th) 321 sets out the three stage test. This test was adopted by the Supreme Court of Canada in *RJR MacDonald Inc. v. Canada (Attorney General)* (1994) 1 S.C.R. 311.

The three-stage test is as follows:

1. First test: A preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried.
2. Second test: It must be determined whether the Applicant would suffer irreparable harm if the application was refused.
3. An assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision.

ANALYSIS:

The issue before this Tribunal at this motion is whether or not to exercise its discretion under section 7(9) of the *Motor Vehicle Dealers Act* and grant a stay as of the decision of this Tribunal, which ordered the registration of the Applicant as a salesperson on terms and conditions. The Registrar is only entitled to the relief of a stay if he can satisfy all three of the tests as enunciated by the Supreme Court of Canada in *RJR MacDonald* supra. The Tribunal will consider each of the three stages of the tests having completed a through review of the affidavit evidence, the law and the legal analysis referred to by Counsel in their argument during the motion.

1. Serious issue test:

In the consideration of whether or not there is a serious issue to be appealed the Tribunal is not put in the position of judging on the merits of the appeal itself. The Supreme Court of Canada in *RJR MacDonald* supra cites at paragraph 44 the dictum

of Lord Diplock from the *American Cyanamid Co. Ethicon Ltd.* (1975) A.C.396 which states that the applicant need no longer demonstrate a strong prima facie case. Rather it would suffice if he or she could satisfy the court that the case is not frivolous or vexatious; in other words, that there is a serious question to be tried. It is the role of this Tribunal to make a preliminary assessment of this point to determine if there is an arguable case. Even if the Tribunal should feel, based upon its own assessment, that it is unlikely that the appeal will be successful, the Tribunal would still find this stage of the test has been satisfied if the issue before the appeal court is not frivolous or vexatious. This stage of the test requires a low threshold for success.

Based on the arguments presented by Counsel for the Registrar the Tribunal finds that there is a serious issue to be argued before the appeal court. In particular, the issue of whether or not the test as established in the *Brenner* case had been properly applied. On that ground alone the Register has shown that a serious issue exists.

2. Irreparable harm

The Supreme Court of Canada in *RJR MacDonald* supra provided a definition of irreparable harm at paragraph 59; Irreparable refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. The Supreme Court then at paragraph 58 characterizes the nature of this stage of the test as follows:

At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

In support of this ground, the Registrar's Counsel argues that the irreparable harm is the registration of the Applicant. As the *Motor Vehicle Dealers Act* is a public protection statute, the Registrar stands in the place of the public and the public would suffer irreparable harm if the Applicant were allowed to be registered as a salesperson on the terms and conditions as set out in the Tribunal's Decision released on October 11, 2002. In order to determine the validity of the Registrar's argument, it is necessary to review the conditions imposed on the Applicant and the arguments of the Registrar.

1. The Applicant is not to be allowed to handle cash.

The argument of the Registrar was that, while the Applicant is not allowed to handle cash, there is no prohibition on his handling other forms of payment, such as but not limited to, credit cards, cheques and money orders. It was the Registrar's position that this was not considered in the Decision and that it leaves the public open to fraud by the Applicant.

The Tribunal does not agree with the Registrar's position. It must be remembered that the Applicant is applying for registration as a salesperson for a motor vehicle dealership. The product that is being sold at the dealership is motor vehicles. Except in very rare circumstances, payment for articles as large as motor vehicles are normally paid by certified cheque or money order or financing agreements. It would be a very rare circumstance where a member of the public would walk into a motor vehicle dealership and pay cash for a motor vehicle. Even if this did occur, the Applicant would be prohibited from handling that cash. Any payment made by credit card, cheque or money order would normally be made payable to the dealership and not to the Applicant. The Tribunal, therefore, feels that this restriction is sufficient.

2. The Applicant is not to be allowed to attend auctions, on his own and purchase or sell vehicles at auctions, on behalf of the dealer.

The Registrar's argument was that there was no level of supervision required nor was the nature or authority of the person meant to accompany the Applicant stipulated. The Tribunal is of the opinion that Vice-Chair, Aouad, had understood the difference between a salesperson's licence and a dealer's licence. A motor vehicle dealer or someone on his authority would be able to attend at an auction and purchase vehicles. This restriction does not allow the Applicant to do so on his own. It is, therefore, implied in the Decision that a person with authority given by the dealer would be accompanying the Applicant to purchase or sell vehicles at auctions. The dealer that employs the Applicant would be aware of this condition.

3. The Applicant is not to carry on business transactions for the sale or purchase of motor vehicles outside the premises of the dealer.

The Registrar argued that this provision was unclear as to whether or not the Applicant was limited from motor vehicle off premises buying or selling on the dealer's or his personal account. The Tribunal feels that this matter was also considered by Vice-Chair, Aouad. He was well aware that both of the Registrar's concerns are currently prohibited pursuant to the *Motor Vehicle Dealers Act*. If the Applicant engaged in either concern of the Registrar, it was provided by this Tribunal that a breach of any of the conditions would result in an immediate forfeiture of the Applicant's salesperson's licence. The Tribunal, therefore, finds that the public is adequately protected with this provision.

4. All transactions of trade, purchase or sale of motor vehicles are to be approved and verified by the Sales Manager, prior to the Applicant closing any deal with prospective buyers and/or sellers.

The Registrar's concern with this provision was that it does not prevent the Applicant from working as the Sales Manager. Further, this required a non-party to the proceedings to act in accordance with this condition of the Applicant's registration. The Tribunal feels that the Registrar's position in this regard may be stretching the bounds of reality. This condition is very clear to both the Applicant and any dealer that may employ the Applicant. Just as one cannot be judge in one's own case, the Applicant as a salesperson could not approve and verify his own transaction. He must present it to a Sales Manager, which, by necessary implication, means that he must bring it to another person who is a Sales Manager of the dealer. To do otherwise would be contrary to the intention of the condition and Vice-Chair, Aouad, has made provision for this by providing that the Applicant's licence would be forfeited forthwith if the condition were breached.

5. The Applicant is to inform any prospective employers of the limitations on his licence.

Although there was no argument made against this condition, it is noteworthy that the Applicant has this responsibility. He would, therefore, be required to notify any prospective employers of each and every limitation and condition on his licence. This would put any employer on notice and it would be in the best interest of the Applicant to ensure that this was done. This is a condition of his licence and if he failed to inform any prospective employer, he would forfeit his licence.

6. The Applicant shall advise the dealer employing him that the dealer is required to notify the Registrar, in writing, within thirty days of offering employment to the Applicant that the dealer is aware of the restrictions imposed on the Applicant's licence.

The Registrar's argument against this condition is that it is a further attempt to bind the contact of a non-party to the proceedings. Moreover, the *Motor Vehicle Dealers Act* requires the dealer to notify the Registrar, in writing, within five days, of the commencement or termination of employment, appointment or authorization of its sales people.

To address the first issue, it is in the Applicant's best interest to make sure that the dealer employing him gives the required notice to the Registrar. The Order is not binding the dealer, but is binding the Applicant to advise the dealer that he must notify the Registrar in writing. There are no sanctions attributed to the dealer if he does not comply, however, there are serious sanctions against the Applicant. It is, therefore, in the Applicant's best interest to make sure that the dealer complies with notification to the Registrar or the Applicant would be the one in breach of the condition and forfeit his salesperson's licence. It is forcing the Applicant to make sure there is compliance with the Order.

Dealing with the second part of that argument, the *Motor Vehicle Dealers Act* requires the dealer to notify the Registrar of certain events within five days. The thirty days, which is mentioned in the decision of this Tribunal, does not extend the time for reporting as required under the Act. The Act takes precedence over this condition and, therefore, the Applicant is not relieved of his obligation to comply with the time limits in the *Motor Vehicle Dealers Act*.

The Applicant correctly states that the legislation does not provide for an automatic stay on the filing of the appeal and therefore the Registrar must prove that such a stay should be granted. The basis for proving this is by satisfying the three tests set out in *RJR MacDonald*.

This Tribunal holds that the Registrar has not met the second stage of the test. There was no evidence that any past action of the Applicant had harmed any consumer. There were no criminal charges against the Applicant or any losses to any consumer. Even if successful at the appeal the Registrar has not established that the granting of the Applicants salesperson registration on the terms and conditions as imposed by the Tribunal would cause any harm to the public. Thus the Registrar has failed to meet the definition of irreparable harm as found in *RJR MacDonald*. As the Registrar has not satisfied the second required test it is not necessary for the Tribunal to proceed to the third test.

DECISION

For the reasons stated above, pursuant to the authority vested in it by Section 7 (9) of the *Motor Vehicle Dealers Act*, the Tribunal directs that there shall not be a stay of its Order issued herein on October 11, 2002, respecting the issuing of a salespersons licence subject to the terms and conditions set out in the Tribunal's Reasons for Decision and Order.

LICENCE APPEAL TRIBUNAL

Brian Marotta, Vice Chair
Presiding

Stuart Cork, Member

RELEASED: December 17, 2002

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
FRANZ A. PAVELIC

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: June 27, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

FRANZ A. PAVELIC

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Franz A. Pavelic, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicants and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Attachment "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Attachment "A".

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: October 15, 2002

TO: The Registrar
Motor Vehicle Applicants Act
Ontario Motor Vehicle Industry Council
36 York Mills Road, Suite 110
Toronto, Ontario M2P 2E9

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Franz A. Pavelic
10 Telfer Glen Road
Morriston, ON N0B 2C0

In accordance with Section 4.1 of the *Statutory Powers Procedure Act*, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereinafter the "Act") the parties to the proceeding, Franz A. Pavelic (hereinafter referred to as "the Applicant"), and the Registrar, *Motor Vehicle Dealers Act* (hereinafter the "Registrar") waive the requirement of a hearing and hereby consent to an Order of the Licence Appeal Tribunal based on the following terms and conditions:

1. The Applicant agrees to provide full and accurate disclosure on any applications, documents, statements or other form of communication or information provided to the Registrar or his authorized representatives regardless of previous disclosure.
2. The Applicant agrees not to be a partner, shareholder, officer, director or sales manager of a dealership.
3. The Applicant agrees not to be the final signatory on any sales contracts on behalf of the dealer.
4. The Applicant agrees not to transfer his registration as a motor vehicle Salesperson to another dealer without having first obtained the prior written consent of the Registrar.
5. The Applicant agrees not to be involved in the process of buying or selling motor vehicles without the benefit of registration.
6. The Applicant agrees not to invite the public to deal at a place other than his employer's registered premises.
7. The Applicant will comply with the Ontario Motor Vehicle Industry Council's Code of Ethics and Standards of Business Practice as may be amended from time to time.
8. The Applicant acknowledges and understands that his registration will not be used to buy or sell motor vehicles where the Applicant knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
9. The Applicant agrees that he is under a positive obligation to disclose all material facts about the vehicles he sells to his customers. Material facts include but are not limited to salvage, previous salvage, frame and unibody damage, rebuilt, accident repair, theft recovery, prior use as a police cruiser, taxicab or daily rental and branded vehicles.

10. The Applicant acknowledges that he is required to conduct business in a financially responsible manner and will make arrangements to meet any and all outstanding financial obligations.
12. The Applicant agrees to immediately enrol in the Ontario Motor Vehicle Industry Council Certification Course and to be responsible for all fees in relation to enrolment. The Applicant further acknowledges that enrolment in the course entitles him to a sixty (60) day conditional registration period that allows for his successful completion of the course (including passing the exam).
13. The Applicant agrees that his registration will not prevent the Registrar from taking administrative action, including a proposal to revoke his registration, arising from matters that may have occurred or may occur in the future related to his financial circumstances and honesty and integrity.
14. The Applicant acknowledges that his registration as a motor vehicle Salesperson will not prevent the Registrar from taking legal action, including a Provincial Offences prosecution arising from matters that may have occurred or may occur in the future related to his financial circumstances and honesty and integrity.
15. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
16. The Applicant will provide a copy of this order to any future employer.
17. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
18. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
19. The Applicant acknowledges that he has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER of the REGISTRATION of
468 AUTO SALES INC.
as MOTOR VEHICLE DEALER

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Motor Vehicle Dealers Act*
made pursuant to section 7 of the *Motor Vehicle Dealers Act*
TO REFUSE THE REGISTRATION
- Proposal dated: June 27, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

468 AUTO SALES INC.

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by the Counsel for the Applicant, 468 Auto Sales Inc. and Counsel for the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, c.484; and

AND having heard submissions by the Counsel for the Applicant and Counsel for the Respondent as to the disposition of these proceedings;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing, the Applicant having withdrawn its appeal to the Proposal and having consented to this order refusing the Applicant's registration as a motor vehicle dealer.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: October 15, 2002

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
JOZO PRALJAK

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATION
- Proposal dated: June 27, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

JOZO PRALJAK

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Jozo Praljak, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicants and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Attachment "C";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Attachment "C".

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: October 15, 2002

TO: The Registrar
Motor Vehicle Applicants Act
Ontario Motor Vehicle Industry Council
36 York Mills Road, Suite 110
Toronto, Ontario M2P 2E9

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Jozo Praljak
12 Dovehaven Crt.
North York, ON M2M 2G3

In accordance with Section 4.1 of the *Statutory Powers Procedure Act*, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereinafter the "Act") the parties to the proceeding, Jozo Praljak (hereinafter referred to as "the Applicant"), and the Registrar, *Motor Vehicle Dealers Act* (hereinafter the "Registrar") waive the requirement of a hearing and hereby consent to an Order of the Licence Appeal Tribunal based on the following terms and conditions:

1. The Applicant agrees to provide full and accurate disclosure on any applications, documents, statements or other form of communication or information provided to the Registrar or his authorized representatives regardless of previous disclosure.
2. The Applicant agrees not to be a partner, shareholder, officer, director or sales manager of a dealership.
3. The Applicant agrees not to be the final signatory on any sales contracts on behalf of the dealer.
4. The Applicant agrees not to transfer his registration as a motor vehicle Salesperson to another dealer without having first obtained the prior written consent of the Registrar.
5. The Applicant agrees not to be involved in the process of buying or selling motor vehicles without the benefit of registration.
6. The Applicant agrees not to invite the public to deal at a place other than his employer's registered premises.
7. The Applicant will comply with the Ontario Motor Vehicle Industry Council's Code of Ethics and Standards of Business Practice as may be amended from time to time.
8. The Applicant acknowledges and understands that his registration will not be used to buy or sell motor vehicles where the Applicant knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
9. The Applicant agrees that he is under a positive obligation to disclose all material facts about the vehicles he sells to his customers. Material facts include but are not limited to salvage, previous salvage, frame and unibody damage, rebuilt, accident repair, theft recovery, prior use as a police cruiser, taxicab or daily rental and branded vehicles.
10. The Applicant acknowledges that he is required to conduct business in a financially responsible manner and will make arrangements to meet any and all outstanding financial obligations.

12. The Applicant agrees that his registration will not prevent the Registrar from taking administrative action, including a proposal to revoke his registration, arising from matters that may have occurred or may occur in the future related to his financial circumstances and honesty and integrity.
13. The Applicant agrees to immediately enrol in the Ontario Motor Vehicle Industry Council Certification Course and to be responsible for all fees in relation to enrolment. The Applicant further acknowledges that enrolment in the course entitles him to a sixty (60) day conditional registration period that allows for his successful completion of the course (including passing the exam).
14. The Applicant acknowledges that his registration as a motor vehicle Salesperson will not prevent the Registrar from taking legal action, including a Provincial Offences prosecution arising from matters that may have occurred or may occur in the future related to his financial circumstances and honesty and integrity.
15. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
16. The Applicant will provide a copy of this order to any future employer.
17. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
18. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
19. The Applicant acknowledges that he has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
ANTE VRKLJAN

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATION
- Proposal dated: June 27, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

ANTE VRKLJAN

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Ante Vrklijan, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicants and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Attachment "B";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Attachment "B".

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: October 15, 2002

TO: The Registrar
Motor Vehicle Applicants Act
Ontario Motor Vehicle Industry Council
36 York Mills Road, Suite 110
Toronto, Ontario M2P 2E9

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Ante Vrkljan
702-3320 Fieldgate Drive
Mississauga, ON L4X 2J2

In accordance with Section 4.1 of the *Statutory Powers Procedure Act*, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereinafter the "Act") the parties to the proceeding, Ante Vrkljan (hereinafter referred to as "the Applicant"), and the Registrar, *Motor Vehicle Dealers Act* (hereinafter the "Registrar") waive the requirement of a hearing and hereby consent to an Order of the Licence Appeal Tribunal based on the following terms and conditions:

1. The Applicant agrees to provide full and accurate disclosure on any applications, documents, statements or other form of communication or information provided to the Registrar or his authorized representatives regardless of previous disclosure.
2. The Applicant agrees not to be a partner, shareholder, officer, director or sales manager of a dealership.
3. The Applicant agrees not to be the final signatory on any sales contracts on behalf of the dealer.
4. The Applicant agrees not to transfer his registration as a motor vehicle Salesperson to another dealer without having first obtained the prior written consent of the Registrar.
5. The Applicant agrees not to be involved in the process of buying or selling motor vehicles without the benefit of registration.
6. The Applicant agrees not to invite the public to deal at a place other than his employer's registered premises.
7. The Applicant will comply with the Ontario Motor Vehicle Industry Council's Code of Ethics and Standards of Business Practice as may be amended from time to time.
8. The Applicant acknowledges and understands that his registration will not be used to buy or sell motor vehicles where the Applicant knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
9. The Applicant agrees that he is under a positive obligation to disclose all material facts about the vehicles he sells to his customers. Material facts include but are not limited to salvage, previous salvage, frame and unibody damage, rebuilt, accident repair, theft recovery, prior use as a police cruiser, taxicab or daily rental and branded vehicles.
10. The Applicant acknowledges that he is required to conduct business in a financially responsible manner and will make arrangements to meet any and all outstanding financial obligations.
11. The Applicant agrees to provide the Registrar with proof of his/her Discharge from Bankruptcy, immediately upon being discharged.

13. The Applicant agrees that his registration will not prevent the Registrar from taking administrative action, including a proposal to revoke his registration, arising from matters that may have occurred or may occur in the future related to his financial circumstances and honesty and integrity.
14. The Applicant agrees to immediately enrol in the Ontario Motor Vehicle Industry Council Certification Course and to be responsible for all fees in relation to enrolment. The Applicant further acknowledges that enrolment in the course entitles him to a sixty (60) day conditional registration period that allows for his successful completion of the course (including passing the exam).
15. The Applicant acknowledges that his registration as a motor vehicle Salesperson will not prevent the Registrar from taking legal action, including a Provincial Offences prosecution arising from matters that may have occurred or may occur in the future related to his financial circumstances and honesty and integrity.
16. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
17. The Applicant will provide a copy of this order to any future employer.
18. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
19. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
20. The Applicant acknowledges that he has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER of the REGISTRATION of
JOZO PRALJAK and ANTE VRKLJAN
o/a 468 AUTO SALES
as MOTOR VEHICLE DEALER

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Motor Vehicle Dealers Act*
made pursuant to section 7 of the *Motor Vehicle Dealers Act*
TO REVOKE THE REGISTRATION
- Proposal dated: June 27, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

JOZO PRALJAK and ANTE VRKLJAN
o/a 468 AUTO SALES

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by the Counsel for the Applicant, Jozo Praljak and Ante Vrklijan o/a 468 Auto Sales and Counsel for the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, c.484; and

AND having heard submissions by the Counsel for the Applicant and Counsel for the Respondent as to the disposition of these proceedings;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing, the Applicant having withdrawn its appeal to the Proposal and having consented to an order revoking the registration of Jozo Praljak and Ante Vrklijan o/a 468 Auto Sales as a motor vehicle dealer.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: October 15, 2002

1364-ALCL

Appeal under Section 50(1) of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 47(1) of that Act.

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ROSS BENNETT, M.D., Presiding Member

APPEARANCES: LUBA NEUWIRTH
Representative for the Registrar of Motor Vehicles

Applicant
Unrepresented

DATE OF
HEARING: December 11, 2002

Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the Highway Traffic Act (Ontario).

EXHIBITS:

- 1) Notice of Suspension of Driver's Licence effective September 28, 2001 issued by the Registrar of Motor Vehicles.
- 2) Notice of Appeal Form received at the Tribunal November 6, 2002, filed by the Applicant.
- 3) Summary of Case File introduced by the Respondent
- 4) Certified Copy of the Applicant's Driver Record from the Ministry of Transportation.

FACTS:

The Applicant, a 69 year old retired fire fighter had his driver's licence suspended for 15 months by the Ministry of Transportation on October 12, 1999, as a result of a conviction for impaired driving on September 4, 1999. His licence was reinstated on December 1, 2001, but again suspended September 10, 2001 for medical reasons.

The Ministry had previously received a Medical Report on August 26, 1997, from Physician #1, a cardiologist, detailing the Applicant's history of two myocardial infarctions, a cardiac arrest and a bout of Delirium Tremens, earlier that month. The Applicant developed an organic brain syndrome as a result of cerebral anoxia during the cardiac arrest.

The Applicant was under the care of a psychiatrist and a neurologist because of his confusion and problems with orientation, judgement and memory. Physician #1 stated in his opinion the Applicant was unfit to drive a vehicle at that time.

A psychologist's report on October 22, 1997, indicated the Applicant's cognitive function had improved considerably. She attributed this mainly to reduced alcohol consumption.

Physician #1 reported in January 1998 that the Applicant had undergone bypass surgery and was doing very well. His cardiogram was normal; he was free of angina and had no symptoms of cardiac failure. The only response to all of this from the Ministry was on June 5, 1998, requesting an update assessment from a neurologist. There is no record of this being received.

On July 5, 2001, the Ministry requested an up-to-date assessment from a physician specializing in alcohol addiction. Following receipt of an Alcohol Assessment form on July 23, 2001, which recommended abstinence, the Ministry requested that liver function tests be done. The result of a test done on July 23, 2001 was received and the MCV test was 95, which is in a normal range.

On September 14, 2001, the Ministry, on a recommendation from the MAC, again suspended the Applicant's driver's licence. The reasoning was that the Applicant has a long history of excessive alcohol consumption and continues to drink. The MAC also added that he had one episode of D.T.'s, a drinking and driving conviction and one collision.

The Applicant and his wife gave evidence that they believed the episode in the hospital was a reaction to morphine, which he had experienced before.

There is no record of the Applicant ever having had a collision and he denies it. The Applicant and his wife both testified that he drinks a maximum of three beers in the afternoon while he's refinishing antique furniture.

The Ministry informed the Applicant on December 13, 2001, that his licence would remain under suspension until a satisfactory detailed report was received from an addictions medical specialist. This report must include results of a complete physical examination, MCV and GGT interpretations, alcohol history, confirmation of an alcohol treatment program and abstinence from alcohol for a period of 12 months.

The Applicant saw an Addictions specialist on August 9, 2002 and had two more MCV and GGT blood tests, which were all normal. The specialist did not really add anything new and said he would leave it up to the Ministry to decide the case on its own merit.

The Ministry repeated the same demands as before in letters to the Applicant on September 13, October 8 and November 19, 2002. The Applicant visited the specialist again on October 30 and had the blood tests repeated. They were still normal and the physician recommended the Applicant go ahead with the Appeal process.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS

The Tribunal found this to be a rather unusual case, in that no action was taken by the Ministry when Medical Reports were received in the fall of 1997, indicating the Applicant had significant physical and mental problems. His cardiologist reported that the Applicant had recently suffered 2 myocardial infarctions and a cardiac arrest. He considered the Applicant to be totally unfit to drive a motor vehicle. The cardiologist also stated the Applicant was being treated by a psychiatrist and a neurologist because of significant problems with orientation, memory and judgement.

Eight months later, on June 8, 1998, the Ministry requested an up-to-date, detailed assessment from a neurologist. The letter noted that this assessment had to be received by July 31, 1998 or his driver's licence would be suspended. The Applicant had now been driving for several months without any apparent problems.

In October 1999 the Applicant was charged and convicted of impaired driving and his licence was suspended for 15 months. The licence was reinstated in January 2001 and then re-suspended in October 2001 for apparent problems in the past.

In spite of several normal bio-chemical markers and two visits to a specialist in alcohol addictions, with no recommendations, except to try the appeal process, the Ministry refuses to reinstate his licence. The same demands are repeated several times about seeing an

addictions specialist, having more bio-chemical markers, a relapse prevention program and a twelve month period of alcohol abstinence.

The Applicant testified and his wife confirmed that his only drinking is two to three beers in the afternoon, while he is refinishing furniture. The consistently normal biochemical markers verify that the Applicant is not doing any heavy drinking.

The Applicant has not demonstrated any problem with alcohol in the past 3 years. The Tribunal can not understand why the MAC recommended the second suspension, months after reinstating his licence, when nothing really happened. There does not appear to be any evidence to warrant the strong stance being taken at the present time by the MAC in refusing to reinstate his licence according to Section 47(1) of the *Highway Traffic Act*.

DECISION:

Upon the application by the Applicant to appeal the decision dated March 23, 2001 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the Highway Traffic Act ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be set aside.

LICENCE APPEAL TRIBUNAL

Ross Bennett, M.D., Presiding Member

RELEASED: December 23, 2002

DELTA MINIVAN AND CARS INC., AND CARLOS VERAS

IN THE MATTER OF THE MOTOR VEHICLE DEALERS ACT

AND IN THE MATTER OF THE REGISTRATION OF
DELTA MINIVAN AND CARS INC. ("the dealer")
AND CARLOS VERA ("the salesperson")

AND IN THE MATTER OF A MOTION TO STAY
THE ORDER OF THE LICENCE APPEAL TRIBUNAL
RELEASED MAY 13, 2002 UNTIL DISPOSITION
OF AN APPEAL TO THE DIVISIONAL COURT OF
THE SUPERIOR COURT OF JUSTICE

TRIBUNAL: STUART CORK-Presiding Member
CARL DOMBEK - Chair

APPEARANCES: YEHUDA LEVINSON, Counsel, representing the Applicant and
AVIVA HARARI, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: December 3, 2002 Toronto

REASONS FOR RULING

BACKGROUND:

This is a Motion by the Applicant, Delta Minivan and Cars Inc, for an Order staying the Decision and Order of the Licence Appeal Tribunal, released May 13, 2002, That Decision directed the Registrar to carry out the Proposal dated December 28, 2001 to revoke the registrations of Delta Minivan and Cars Inc. as a motor vehicle dealer, and Carlos Veras (also referred to as Carlo Veras) as a motor vehicle sales person under the Act. This Motion requested a stay until such time as the Divisional Court hears the Appeal of this matter and a decision is rendered. The Motion was dated November 8, 2002 and was based upon a Notice of Appeal dated initially June 13, 2001 (sic) 2002 and subsequently amended by letter dated and faxed July 5, 2002 and further amended November 8, 2002 and received by the Tribunal on November 25, 2002.

EXHIBITS:

Exhibit #1: Decision of the Tribunal released on May 13, 2002 (LAT)

By the Applicant:

Exhibit #2: Notice of Appeal to the Superior Court of Justice dated June 13, 2002

Exhibit #3: Notice of Motion dated November 8, 2002

Exhibit #4: Affidavit of Christina Veras dated November 6, 2002

Exhibit #6: Affidavit of Carlos Veras dated November 28, 2002

Exhibit #7: Responding affidavit of Christina Veras dated November 28, 2002

By the Respondent:

Exhibit #5: Responding Party's Motion Record received November 27, 2002

FACTS:

The Applicant, by its Notice of Appeal, dated June 13, 2002, has appealed to the Ontario Superior Court of Justice, Divisional Court. There is no date scheduled for the hearing of this Appeal.

Applicant's Affidavit Evidence:

Affidavit of Christina Veras

In support of the Application, to stay the order, the Applicant filed the affidavits of Christina Veras and Carlos Veras. These affidavits were not cross-examined upon and contain the following assertions.

In her affidavit, Christina Veras stated that she is the President of Delta Minivan and Cars Inc., and has held that position since the company's incorporation in 1997, when it was also registered as a motor vehicle dealership. The dealership is located at a high traffic intersection in the City of Cambridge. Mrs. Veras further stated in her affidavit that she appeared before this Tribunal on May 6, 2002 on an appeal from the Proposal from the Registrar to revoke the registration of Delta Minivan and Cars Inc. In attendance at that hearing was Mary Jane South, the Deputy Registrar for OMVIC. Mrs. Veras stated that she had no prior knowledge of the Registrar's intention to call nine witnesses. She asked the Chair of the Tribunal for an adjournment so that she might present a character witness of her own who had purchased a vehicle from the dealership that had a rolled back odometer. Mrs. Veras also stated that she would have called a former auditor for the Provincial Sales Tax department to testify on her behalf, as to whether the dealership maintained proper book keeping records.

The Tribunal denied Mrs. Veras' adjournment request. However, Mrs. Veras did enter into an agreed statement of facts that was prepared by her and the Registrar.

Mrs. Veras stated that she disputes the testimony of David Wilson, an OMVIC Investigator, at the appeal hearing. She stated that she had no knowledge of the rolling back of odometers at the dealership, and that at the time that Mr. Wilson served her with the documents regarding the revocation, he told her that he did not believe that she knew anything about the odometer rollbacks.

Regarding the testimony of Ms. South which was that Mrs. Veras should have been following Mr. Veras actions very closely as a result of his known past actions in rolling back odometers, Mrs. Veras stated that there had been no problems for a long time and that she was exercising diligence. However, she gave no examples of her diligence in her affidavit.

In referring to the findings of the Tribunal, Mrs. Veras stated that the relevant sections of the Act, which she had allegedly contravened, dealt with the operating of a business with honesty and integrity, not negligence. Furthermore she indicated that there were no facts before the Tribunal at the appeal hearing that cast doubt on her honesty or integrity. She stated in her affidavit that she was not checking odometers.

Regarding the irreparable harm that would be caused, Mrs. Veras stated that the damage to the company reputation, and loss of referral business would be harmful, due to the fact that her business was well known in the City of Cambridge. The company had compensated customers whose vehicles had rolled back odometers, and had honoured the warranty claims of customers. The current closure of the business has caused financial hardship for all concerned, and if it continues, the company may be forced to shut down due to mounting expenses, financial damages, and a lack of revenue.

As for balance of convenience, Mrs. Veras stated that the status of their employee, Mr. Reaman, who was hired in September 2002, would be made permanent if Delta Minivan and Cars were to reopen.

Affidavit of Carlos Veras

The Applicant presented the Affidavit of Carlos Veras in reply to the affidavits of OMVIC inspectors Louise Gingras and Dave Wilson, which refer to a July 2002 site visit to the premises of Delta Minivans and Cars. Mr. Veras stated that he was on the premises that day doing construction work on the property, which he owns.

Mr. Veras stated that there is signage on the building indicating that the business is closed, and advising customers to wait until it re-opens. He stated that when Ms. Gingras saw him on the site, she pressed him for information regarding whether there were any vans for sale, to which he told her that the business was closed and may re-open in a few weeks. Ms. Gingras continued to ask about a vehicle on site, and he provided her with a price and mileage. The

vehicle is still on the site, and Mr. Veras stated that he was in no way attempting to sell these vehicles, and that the business was closed.

Affidavit of Christina Veras in Response

In her affidavit in response to the affidavit of Mary Jane South, Mrs. Veras disputes Ms. South's claim that at the appeal hearing before the Tribunal, the Applicant knew that the Respondent would be calling witnesses. It was Mrs. Veras' recollection that since an agreed upon statement of facts was filed, no witnesses would be necessary or called. She further stated that the Respondent pressured them into agreeing to the statement of facts under the threat of facing the costs of calling fourteen witnesses. Mrs. Veras stated that she was surprised when the Respondent called nine witnesses. She believed that since there were so many witnesses, they would not all be heard in one day; that her adjournment request would be granted and that she would be able to call her own supporting witnesses.

Respondent's Affidavit Evidence:

The Respondent filed affidavits from Mary Jane South, Deputy Director, OMVIC, and OMVIC inspector Louise Gingras, and investigator Dave Wilson. These affidavits were not cross-examined upon and contain the following assertions.

Affidavit of Mary Jane South

Ms. South stated in her affidavit that the allegations in the Proposal to revoke the registrations of the Applicant relate to twenty instances of odometer tampering by Carlos Veras. Furthermore, at the May 6th 2002 appeal hearing, Mr. Veras consented to the revocation of his registration as a dealer. Also at the commencement of that hearing, Mrs. Veras signed an agreed statement of facts, which was entered into evidence before the Tribunal. Included in that statement of facts were the uncontested facts that there were a total of twenty vehicles that had odometers rolled back, including fourteen which had already been sold to unsuspecting purchasers. Restitution has been made to these fourteen purchasers.

Ms. South further stated that at the time the Proposal was served, the Applicant also received a copy of the Tribunal's information booklet, which outlined the procedures and processes for appealing a decision of OMVIC, and specifically, the rules regarding the process of subpoenaing witnesses to hearings. Ms. South believed that the Applicant was fully aware and ought to have known that witnesses could be called to testify at their appeal hearing. Ms. South insisted that at no time did she attempt to convince the Applicant not to seek an adjournment.

Ms. South stated that she previously issued a Proposal to revoke the registration of the Applicant in 1998, and the Commercial Registrations Appeal Tribunal (CRAT) heard the Appeal of that Proposal. A decision was released on June 25, 1998. Among the findings of that Tribunal was that it was Mr. Veras who controlled the business at that time. The current

Applicant was registered in October of 1998, under certain conditions, including an agreement to disclose all material facts about the vehicles they sell to their customers.

Carlos Veras was ultimately convicted of a number of criminal offences, and had his registration as a dealer revoked.

Ms. South detailed the history of the past conduct of Mr. Veras, and expressed concern regarding the present situation whereas Mrs. Veras should have been aware of the situation, and should have taken steps to prevent it from occurring again. It is for this reason that the Registrar believed the public was at risk from this dealership.

Affidavit of Louise Gingras

In her affidavit, Inspector Gingras stated that she attended at the Applicant's premises on July 4, 2002, where she observed that there was an electronic sign on the lot, as well as several vehicles that were parked on the premises facing the street. She noticed that the dealership office was locked, but there was a phone number to call for information.

On her way back to her car, she happened to encounter Carlos Veras. Inspector Gingras asked Mr. Veras about a particular van on the premises, and Mr. Veras replied that the van belonged to him, and that he was the owner of Delta Minivan and Cars Inc. Mr. Veras further stated to her that the business was closed due to construction, but she could have a look at the van however he could not sell it to her for two weeks.

Mr. Veras also provided Inspector Gingras with the price, model name, and approximate mileage for the vehicle. He further indicated that he could obtain financing for her if necessary at a good rate. Inspector Gingras concludes in her affidavit that based upon this incident, the Applicant was acting as a motor vehicle dealer without the benefit of registration.

Affidavit of Dave Wilson

Inspector Wilson stated in his affidavit that he attended at the Applicant's premises on July 4, 2002 with Inspector Gingras. At the premises, he observed a large electronic screen displaying advertisements on behalf of Delta Minivans and Cars. This screen listed two vehicles for sale, with model details and prices, and the message that the grand opening was coming soon. Inspector Wilson also noticed vehicles that he described in his affidavit as for sale on the premises, and he took several photographs of them, and the electronic sign (exhibit 5 appendices A and B).

Applicant's Argument:

The Applicant argued that the Supreme Court of Canada set out three tests to successfully stay an order in the *RJR - MacDonald Inc. v. Canada (A-G)* (1991) 82 D.L.R. (4th) 385 at 405,

there were three tests that had to be met in order to be successful in this Motion. The tests are as follows:

1. Is there a serious question to be tried?
2. Would the Applicant suffer irreparable harm if the Application were refused?
3. Would the Applicant or the Respondent suffer greater harm from the granting or refusal of the remedy pending a decision?

In regard to the serious issue test, the Applicant argued that this is a very low threshold to meet. It is not meant to be an in-depth analysis of the merits of the case, but a preliminary assessment that the Appeal is neither frivolous nor vexatious.

The Applicant argued that under s. 5(1) of the Act the only conduct that is relevant in this case is the conduct of the sole officer of the corporation, Christina Veras. The conduct of Carlos Veras should not be considered. The Applicant further argued that the denial of an adjournment request made by Christina Veras at the May 6, 2002 hearing which resulted in the Applicant not producing any witnesses, and being unprepared for the witnesses of the Respondent, was a very serious issue, that had a great impact on the outcome of the hearing. The failure to grant an adjournment irreparably prejudiced the Applicant, and was contrary to the principles of Natural Justice.

Furthermore, the Applicant argued that if the Tribunal found that Mrs. Veras had knowledge of the actions of Mr. Veras, such a finding was unsupported since there was no evidence produced at the hearing that would have supported this finding. The Tribunal found that Mrs. Veras was negligent in her handling of the matter. It made her liable on the basis of vicarious liability as the sole corporate director of the dealership for the actions of an employee. The Tribunal then made a finding of a lack of honesty and integrity as described by the Act.

The Applicant argued that irreparable harm would be caused to the business if a stay of proceedings was not granted, since the Applicant has no remedy and cannot collect any damages if the court appeal is successful. The affidavit of Christina Veras describes the financial damages the dealership has suffered, among others, and the financial data produced describe losses of up to \$40,000 a month.

The Applicant argued that the balance of convenience was in their favour, since there is a public interest in addressing the issues raised by the findings of the Tribunal at the appeal hearing. Specifically, that the finding that Christina Veras was at fault for the conduct of her husband, was flawed, and that she was “at the heart of the problem” was wrong. Furthermore, the lack of opportunity for the Applicant to present witnesses at the appeal hearing would have changed the outcome of the matter.

Respondent's Argument:

The Respondent argued that in order to apply the test of Section 5 (1) of the Act, all sections of the Act must be applied in full. Specifically, 5(1)c refers to applicants that are corporations, and (d) is carrying on activities that are in contravention of the Act.

At the appeal hearing the Tribunal made a finding that there was de facto control of the dealership by Carlos Veras, a situation that Christina Veras had allowed to occur. The Respondent also disputed the Applicant's claim that it was denied the opportunity to call witnesses. The procedures were open and established.

The Respondent argued that as a result of the Applicant's actions, irreparable harm has in fact been done to the vehicle purchasers, the industry, as well as to public confidence. Vehicles having incorrect odometers will be resold, and future purchasers may prove to ultimately be unknowing victims of the tampering. The prejudice in this case is the harm to the public, since the Registrar represents the public interest.

The Law

Section 25 (1) of the *Statutory Powers Procedure Act* states:

Unless it is expressly provided to the contrary in the Act under which the proceeding arises, an appeal from a decision of a Tribunal to a Court or other appellate tribunal operates as a stay in the matter except where the Tribunal or the Court or other body to which the appeal is taken otherwise orders.

Section 7(9) of the *Motor Vehicle Dealers Act* as amended states:

Even if a registrant appeals from an order of the Tribunal under section 11 of the *Licence Appeal Tribunal Act*, 1999 the order takes effect immediately, but the Tribunal may grant a stay until disposition of the appeal.

Metropolitan Stores (MTS) Ltd. v Manitoba Food and Commercial Workers, Local 832 (1987) 38 D.L.R. (4th) 321 sets out a three stage test in determining whether or not a stay should be granted. This test was adopted by the Supreme Court of Canada in *RJR MacDonald Inc. v. Canada (Attorney General)* (1994) 1 S.C.R. 311.

The three-stage test is as follows:

1. First test: A preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried.
2. Second test: It must be determined whether the Applicant would suffer irreparable harm if the application were refused.

3. Third Test: An assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision.

ANALYSIS:

The issue to be determined by this Tribunal is whether or not to exercise its discretion to grant a stay of the decision of this Tribunal pending the disposition of the appeal of the Tribunal's decision, which ordered the Registrar to carry out the proposal to revoke the registration of the Applicant.

The Applicant is only entitled to the relief of a stay if it can satisfy all three of the tests as enunciated by the Supreme Court of Canada in *RJR MacDonald* supra. The Tribunal will consider each of the three stages of the tests having completed a thorough review of the affidavit evidence, the law and the submissions of Counsel in their argument during the motion.

1. Serious issue test:

In determining whether or not there is a serious issue to be appealed the Tribunal is not put in the position of judging on the merits of the appeal itself. The Supreme Court of Canada in *RJR MacDonald* supra cites at paragraph 44 the dictum of Lord Diplock from the *American Cyanamid Co. Ethicon Ltd.* (1975) A.C.396 case in which he states that the applicant need no longer demonstrate a strong prima facie case. Rather it would suffice if he or she could satisfy the court that the case is not frivolous or vexatious; in other words, that there is a serious question to be tried. It is the role of this Tribunal to make a preliminary assessment of this point to determine if there is an arguable case. Even if the Tribunal should find, based upon its own assessment, that it is unlikely that the appeal will be successful, the Tribunal would still find this stage of the test has been satisfied if the issue before the appeal court is not frivolous or vexatious. This stage of the test requires a low threshold for success.

The Tribunal accepts the arguments presented by Counsel for the Applicant, and the Tribunal finds that there is a serious issue to be argued before the appeal court. The Tribunal finds that the issues at stake in this matter are inherently serious.

2. Irreparable harm test:

The Supreme Court of Canada in *RJR MacDonald* supra provided a definition of irreparable harm at paragraph 59; Irreparable refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. The Supreme Court then at paragraph 58 characterizes the nature of this stage of the test as follows:

At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants own interests that the harm could

not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

The undisputed affidavit evidence of Mrs. Veras was that the dealership was suffering ongoing financial losses, which could not be recovered, either from the Respondent, or through future sales. Furthermore, the Applicant speculated that the dealership might fail as a result of these losses. The Tribunal was presented with the company's financial position. The Registrar did not challenge the reason why the Applicant is still paying rent to Carlos Veras for the premises or why it is paying for advertising for an inoperative business. Thus, in these circumstances, the Applicant deserves the benefit of the doubt. The Tribunal therefore finds that there is in fact irreparable harm being done to the Applicant, and has therefore met the second part of the test.

3. Balance of Inconvenience test:

The Supreme Court of Canada in *RJR MacDonald* supra provided a definition of balance of inconvenience:

The third branch of the test, requiring an assessment of the balance of inconvenience to the parties, will normally determine the result in applications involving Charter rights. A consideration of the public interest must be taken into account in assessing the inconvenience, which it is alleged will be suffered by both parties. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation has in fact this effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

The Tribunal notes that this case does not involve the Applicant's Charter Rights. Even were it to involve such rights, no notice was provided as required by the Rules of Practice of this Tribunal. The *RJR MacDonald* decision places the burden of proof squarely on the Applicant, which must show that the suspension of the legislation during the stay provides a public benefit. The Tribunal is not persuaded that the Applicant has shown a public benefit.

The Applicant argues that the public interest would be served by a stay in order to correct the original decision of the Tribunal, which in the Applicant's view was flawed. This would include the denial of the above mentioned adjournment request, so that the Applicant could present witnesses as to Mrs. Veras character, and to correct the Tribunal's finding of fact that it was Christina Veras, not Carlos Veras, who was at fault, and responsible for the actions of the corporation. As well a stay would permit the Applicant to carry on business and thus make one of their employees permanent.

The Tribunal is not persuaded that these arguments are in fact valid public interest concerns. They appear to be private interests, which the Applicant has characterized as public. Moreover, the Applicant did not establish that it complied with the Tribunal's Rules of Practice regarding adjournments since no motion was brought seeking an adjournment on notice to the parties at least ten days prior to the hearing.

The Tribunal also remains unconvinced as to how Christina Veras would run the operation in the future in a manner that was consistent with the Act. There was no evidence as to what specific steps she would take, or has taken, to verify that the odometers on the vehicles offered for sale by Delta Mini Vans and Cars are in fact accurate.

The Tribunal was also concerned that the Applicant does not appear to be abiding by the original May 6, 2002 Order. The Affidavit evidence of the OMVIC investigation by Louise Gingras and Dave Wilson would make it appear that the Applicant was attempting to carry on business. The photographs taken at the place of business include pictures of vehicles with large price stickers on them. They also show vehicles adorned with streamers on the antennae which would draw the public's attention to them. This evidence was most compelling and was not adequately answered by the Applicant.

The Applicant did argue that these photographs and the events of the investigation described a business that was not actually operating at the time, but it was anticipating a re-opening pending the successful outcome of this Motion. Further more there was no evidence to show that any vehicles had actually been sold by the Applicant after the Order had been made. Nevertheless, the Tribunal considers this resolution of this issue to be less than satisfactory, and finds the circumstances suspicious.

The evidence at this hearing was that the odometers of twenty vehicles had been tampered with such that the distance traveled had been misrepresented to many members of the public. The Tribunal finds that this is a serious matter of significant public interest. The actual harm done to the purchasers of those vehicles and the greater public at large far outweighs any harm suffered by the Applicant.

Furthermore, the Tribunal rejects the argument that the Applicant was dealt with at the May 6, 2002 appeal hearing in any manner that would suggest damage to the public interest. In fact, there was no evidence at this hearing to suggest that prior to the hearing the Applicant did not receive the usual information. The evidence was to the contrary. The Tribunal can also take notice of its administrative process, which is to always furnish an appellant with the appropriate brochure and the Tribunal's rules. It is the Applicant's sole fault that it attended the hearing without any witnesses and then voluntarily entered into an agreed statement of facts.

In order to come to a decision on granting of the stay, the Tribunal must weigh the balance of inconvenience between the parties. It is not for this Tribunal to review the original findings of fact based upon the evidence presented at the May 6, 2002 appeal hearing; evidence which was not before the Tribunal hearing this motion for stay.

The Tribunal finds that the Registrar's evidence disclosing the large number of individuals affected by the actions of the applicant warrants the continued protection of the public. The Tribunal finds that the balance of inconvenience has thus been suffered by the vehicle

purchasing public, and not the Applicant. Therefore, the Tribunal finds that the Applicant has not met the third part of this test.

The Tribunal further notes that the Applicant has failed to show how it could continue to operate the business and protect the public without the participation of Carlos Veras. Since the Applicant indicates that Carlos Veras owns the land upon which the used car business operates and is actively involved on an on-going basis in construction on the premises, a conditional registration is not appropriate.

The Applicant may consider section 8 of the Motor Vehicle Dealers Act, since it provides for a further application for registration upon new or other evidence or where it is clear that material circumstances have changed.

This Tribunal, as stated above, must apply the three-part test as outlined by the Supreme Court of Canada in *RJR MacDonald*. Therefore, the findings of the Tribunal at the May 6, 2002 Appeal hearing must stand.

ORDER:

For the reasons stated above, pursuant to the authority vested in it by Section 7 (9) of the *Motor Vehicle Dealers Act*, as amended the Tribunal dismisses the Applicant's motion seeking a stay of its Order issued on May 6, 2002.

There shall be no order as to costs.

LICENCE APPEAL TRIBUNAL

Stuart Cork
Presiding Member

Carl F. Dombek
Chair

Released: January 9, 2003

RANDALL AND LUCILLE WILSON

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JOHN ORT, Member

APPEARANCES: RANDALL WILSON and LUCILLE WILSON, Applicants,
representing themselves
CAROL STREET, Counsel, representing the Ontario
New Home Warranty Program
OSCAR GATTO, Agent, representing G. Gatto Construction
Ltd., the Added Party

DATES OF
HEARING: September 4, 5, and 6; November 18, 19, and 20; and
December 17, 2002

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") by Randall and Lucille Wilson (the "Applicants") under section 14 of the *Ontario New Home Warranties Plan Act* (the "Act") respecting a decision of the Ontario New Home Warranty Program (the "Program") dated April 29, 2002, (the "Decision") denying the Applicants' claim for compensation.

The Decision, exhibit 1, described the Applicants' claims as follows:

1. Water penetration/Cracked foundation - cold cellar, basement bathroom and game room.
Damaged wall, Water penetration. (February 27, 2002)
2. Structural problem, front porch.
Porch columns. Porch Roof. (February 27, 2002)
3. Improper caulking, exterior windows and doors. Did not remove old cracked caulking, but caulked over. Missed some.
Window Installation. That the home is constructed in a workmanlike manner and is free from defects in material including the windows, doors and caulking such that the building envelope of the home prevents water penetration.
4. Dishwasher installation - kitchen island - improperly positioned, not flush with the cabinets.

- Dishwasher installation.
5. The furnace installation. (February 27, 2002)
 6. Bathroom Basin.
 7. Plumbing fixtures in powder room: brass taps, chrome drain and stopper.
Chrome drain and stopper.

EXHIBITS:

- Exhibit #1 - Decision letter issued by the Ontario New Home Warranty Program, dated April 29, 2002.
- Exhibit #2 - Notice of Appeal form, received at the Tribunal on May 14, 2002, filed by the Applicant.
- Exhibit #3 - Book of documents of the Program.
- Exhibit #4 - Building plan dated September 8, 1994.
(Exhibits #4 to #60 were provided by the Applicants.)
- Exhibit #5 - Loewen window quote dated September 19, 1994.
- Exhibit #6 - HUDAC building contract dated October 27, 1994.
- Exhibit #7 - Loewen window order dated November 23, 1994.
- Exhibit #8 - Appraisal report dated November 26, 1994.
- Exhibit #9 - Quote for front entrance dated November 28, 1994 and attachments.
- Exhibit #10 - Chart of window and door dimensions.
- Exhibit #11 - Barzotti Woodworking Ltd. fax dated April 5, 1995.
- Exhibit #12 - Renaissance Landscape Group contract dated August 21, 1995.
- Exhibit #13 - Status report dated September 5, 1995.
- Exhibit #14 - ONHWP Certificate of Completion and Possession.
- Exhibit #15 - Inspection report dated October 12, 1995.
- Exhibit #16 - *What Every New Home Buyer Should Know* excerpt.
- Exhibit #17 - Letter from Hayes Murphy dated April 12, 1996.
- Exhibit #18 - Letter from Randall Wilson to Mr. Gazzola dated June 28, 1996.
- Exhibit #19 - Letter from Lucille Wilson to Dianna Maynes dated July 11, 1996.
- Exhibit #20 - Letter from Lucille Wilson to Guido Gatto dated July 21, 1996.
- Exhibit #21 - Letter from Leonard Lodder to Gatto Construction Inc. dated July 31, 1996.
- Exhibit #22 - Tremco materials.
- Exhibit #23 - Letter from Richard Gazzola to Randall Wilson and others dated August 2, 1996.
- Exhibit #24 - Loewen warranty.
- Exhibit #25 - Letter from Lucille Wilson to Charles Loewen dated August 31, 1996.
- Exhibit #26 - Letter from Peter Brazolot to Mr. Gazzola dated September 9, 1996.
- Exhibit #27 - Letter from Ron Falsetto to G. Gatto Construction Ltd. dated September 10, 1996.
- Exhibit #28 - McCullough-Shuh Appliances invoice.
- Exhibit #29 - Letter from Oscar Gatto to Dianna Maynes dated September 25, 1996, and attachments.

Exhibit #30 - Conciliation request form.

Exhibit #31 - Maytag materials page.

Exhibit #32 - Maytag dishwasher specifications.

Exhibit #33 - Letter from Doug Irvine to the Applicants dated January 9, 1997 with attachments.

Exhibit #34 - Letter from Doug Irvine to G. Gatto Construction Ltd. dated January 9, 1997.

Exhibit #35 - Letter from the Applicants to Doug Irvine dated January 8, 1997.

Exhibit #36 - Letter from Doug Irvine to Applicants dated January 9, 1997.

Exhibit #37 - Letter from Oscar Gatto to the attention of Ron Falsetto dated March 4, 1997.

Exhibit #38 - Letter from Richard Gazzola to the attention of Ron Falsetto dated March 7, 1997.

Exhibit #39 - Letter from the Applicants to Doug Irvine dated March 7, 1997.

Exhibit #40 - Letter from Guido Gatto to the attention of Doug Irvine dated March 13, 1997.

Exhibit #41 - Letter from Doug Irvine to the Applicants dated March 19, 1997.

Exhibit #42 - Letter from Ron Falsetto to the Applicants.

Exhibit #43 - Letter from Brian Haskett to G. Gatto Construction Ltd. dated September 4, 1997.

Exhibit #44 - Letter from the Applicants to Brian Haskett dated October 14, 1997.

Exhibit #45 - Letter from the Applicants to Brian Haskett dated July 19, 1998.

Exhibit #46 - Letter from Doug Irvine to the Applicants dated August 20, 1998.

Exhibit #47 - G. Gatto Construction Limited v. Randall Wilson and Lucille Wilson examination for discovery.

Exhibit #48 - Letter from Michal F. O'Connor to Richard Gazzola dated January 23, 2001.

Exhibit #49 - Letter from Lucille Wilson to Brian Haskett dated July 4, 2001.

Exhibit #50 - Letter from Brian Haskett to the Applicants dated September 19, 2001.

Exhibit #51 - Letter from Lucille Wilson to John Reid dated November 19, 2001.

Exhibit #52 - Letter from John Reid to Lucille Wilson dated December 21, 2001.

Exhibit #53 - Letter from Lucille Wilson to Brian Haskett dated February 27, 2002.

Exhibit #54 - Letter from Lucille Wilson to John Reid dated February 27, 2002 and attachments.

Exhibit #55 - Decision letter dated April 29, 2002.

Exhibit #56 - Window damage photographs 1 to 12.

Exhibit #57 - Dishwasher photographs 1 to 3.

Exhibit #58 - Caulking photographs 1 to 5.

Exhibit #59 - Porch pillars, etc. photographs 1 to 12.

Exhibit #60 - Revised Applicants' documents index.

Exhibit #61 - Release dated April 27, 2001.

Exhibit #62 - Statement of Claim in G. Gatto Construction Limited v. Randall Wilson and Lucille Wilson.

Exhibit #63 - Statement of Defence and Counterclaim in G. Gatto Construction Limited v. Randall Wilson and Lucille Wilson.

Exhibit #64 - Reply and Defence to Counterclaim in G. Gatto Construction Limited v. Randall Wilson and Lucille Wilson.

Exhibit #65 - Fax cover sheet from Richard Gazzola to Program dated August 26, 2002, and attachments.

Exhibit #66 - Pillar sample.

Exhibit #67 - Loewen door information.

Exhibit #68 - Front page of Maytag dishwasher booklet.

Exhibit #69 - Letter from Aubrey LeBlanc to Applicants dated February 12, 1996.

Exhibit #70 - Statement of Adjustments.

Exhibit #71 - Amended Statement of Adjustments.

Exhibit #72 - Photograph of front of Applicants' house provided by Respondent.

Exhibit #73 - Photograph of Applicants' property featuring blue box provided by Respondent.

Exhibit #74 - Examination for discovery.

Exhibit #75 - Photographs 1 to 7, provided by respondent.

Exhibit #76 - Built-in dishwasher installation instructions.

Exhibit #77 - Sprinkler position sketched by Randall Wilson.

Exhibit #78 - Unresolved warranty issues, stamped July 5, 2001.

Exhibit #79 - Drawing of window detail, provided by Applicants.

FACTS:

The Applicants' witnesses were Randall and Lucille Wilson. The witnesses for the Program were Douglas Irvine, a warranty representative with the Program or the Alberta warranty program since 1979, and Brian Haskett, the author of the Decision, the regional manager of the London office of the Program since 1994, the operations manager of the Program from 1992 to 1994, and a member of the high-rise condominium group with the Program from 1988 to 1992.

The date of possession of the house at 16 Trillium Crt., Guelph was September 6, 1995, as shown on the Certificate of Completion and Possession, Exhibit 14.

Cold Cellar Water Penetration

Mrs. Wilson stated that the cold cellar is under the front porch. The other areas of water penetration had been fixed. The Program was advised of the complaint in writing on July 11, 1996, as set out in exhibit 19. The last time that Mrs. Wilson observed a water leak in the cold cellar was in 1999, when she observed a puddle of water the size of a teacup.

Mr. Wilson could not recall when there was last water penetration into the cold cellar. In 1999 and 1998, Mrs. Wilson observed a water puddle maybe once. On February 27, 1997, the Applicants telephoned Oscar Gatto to observe water penetration in the cold cellar. Mr. Gatto failed to attend to inspect. He testified that the Added Party and the Applicants were in litigation at the time. On February 28, 1997, the Applicants advised

the Program of the water penetration. The Program chose not to inspect at that time. Doug Irvine inspected the house on behalf of the Program on December 17, 1996, and found that cold cellar water entry was not evident, as stated at tab 8 of exhibit 3. Brian Haskett testified that Mrs. Wilson made no mention of a leak in the cold cellar during his inspection. Mrs. Wilson stated that the Applicants have not determined where the leak is coming from and do not know what repair is appropriate.

Porch Column

On July 11, 1996, the Applicants complained that the pillars are cracking at the bottom, as set out in exhibit 19. Further, on November 4, 1996, the Applicants complained of mildew on the columns, as shown in exhibit 30. The Applicants cut a rectangle about 1 foot by 2 feet in size out of the cladding of the column approximately a foot above its base. The material, exhibit 66, consists of small pieces of badly-damaged plywood. Mrs. Wilson admitted on cross-examination that only one of the four sides of the cladding of the column appears to be water damaged. She stated that there is no failure of the column as a load-bearing structure.

The letter from the architect to the Added Party, exhibit 21, recommended that the front porch columns be repaired. Oscar Gatto testified that the Added Party cut off the bottom of the plywood cladding, applied sealant where the column meets the floor, and attached new trim to the outside of the bottom of the column. Mr. Gatto also applied foam around the rain-water pipe that passes through the column where the pipe exits the ceiling of the cold cellar. He said that the styrofoam around the pipe was put there previously, before pouring the concrete of the porch above. Mr. Haskett states in the Decision that repair work done by the builder in November 1996 did eliminate the contact the wood cladding was making with the concrete porch and that the repair met the requirements of the Ontario Building Code. According to Mr. Haskett, the inside of the column, shown on photograph 6 of exhibit 59, reveals no water stain on the floor and no damage to the bottom of the structural wood. He concluded that no water is wicking up from the bottom.

Porch Roof

The Applicants advised the Program on July 11, 1996, that the drain on the porch roof is too high and water is not draining properly from the roof, as set out in exhibit 19.

The architect states in exhibit 21 that the small amount of ponding which does occur on the front porch roof should evaporate quickly. He writes that this often occurs next to roof drains and he does not recommend any repair. Mr. Haskett testified that the wood of a new one-storey house will normally shrink about $\frac{1}{4}$ "; the plastic drain will not shrink and will end up $\frac{1}{4}$ " higher than the surrounding roof surface.

Photographs 8 and 9 of exhibit 59 show damage to the wood moulding under the flashing at the corners of the front of the porch roof. Mr. Haskett testified that this problem was first brought to the attention of the Program in July 2001. Mrs. Wilson argued that the wood moulding should have been made of aluminum since the building contract, exhibit 6, specifies that soffit should be made of aluminum. Mr. Haskett stated that the wood moulding part could not have been made of aluminum,

Windows

By letter dated July 11, 1996, exhibit 19, the Applicants advised the Program of various problems with the windows including the following: caulking around the windows has not adhered, primer between the windows is peeling away, and main bathroom window sticks.

The Applicants argued that the windows were improperly installed in openings that are too small. Thus, windows stick. As shown in exhibit 10, Mrs. Wilson found several instances where the window openings specified on the architect's drawings, exhibit 4, were smaller than the rough stud openings specified by the window manufacturer in exhibit 7. The Applicants did not measure the window openings before window installation. On December 17, 1996, Doug Irvine opened and closed the main washroom window with little or no resistance, as set out at tab 8 of exhibit 3. The Decision states that during the re-inspection on July 16, 2001, several windows were opened and closed and their operation was found to be acceptable. Mr. Haskett testified that the framers who install windows check the rough stud opening size specified by the window manufacturer, not the opening size shown on an architect's drawing, since the windows provided may not be the same size as the windows that the architect put on his drawing. According to Mr. Haskett, the windows fit into their openings.

The architect advised the Added Party by letter, exhibit 21, that where sealant pulled away from painted steel lintels over windows and doors, the joints were quite small, less than $\frac{1}{4}$ ". The Applicants argued that caulking was defective because caulking joints were too narrow as a result of windows installed in improperly small openings. Doug Irvine states at tab 8 of exhibit 3 that he found all present caulking of windows and doors on December 17, 1996, acceptable. Mrs. Wilson testified that no maintenance of the caulking was done by the Applicants. There is no complaint of water entry through the caulking. Mr. Haskett stated that caulking is applied between the window and the masonry.

The masonry is put in after the installation of a window in its rough stud opening and the masonry covers the studs. Thus, the quality of caulking is unrelated to the size of the rough stud opening.

Photographs of exhibit 56 show that the primer on some of the windows is now peeling. The primer was put on by the window manufacturer. Doug Irvine stated at tab 8 of

exhibit 3 that he inspected all windows from the interior and the exterior where possible and found no peeling primer on December 17, 1996.

Brian Haskett saw a bathroom window and a bedroom window that touched the "j" strip, the fascia board, when fully opened. He said that the windows were not jamming and were not hitting the "j" strip with force. Mr. Gatto argued that if there is any touching of the "j" channel, it is because the Added Party when positioning the windows followed the architect's drawings, exhibit 4, provided by the Applicants.

Mr. Haskett testified that items such as weather stripping not extending to the bottom of certain windows as shown on photograph 4 of exhibit 56 and a protruding divider between windows shown on photograph 11 of exhibit 56 may be defects, but were reported in July 2001, after the one -year warranty period had passed.

Dishwasher Installation

The Applicants argued that the dishwasher was installed in a cabinet opening that is too small. As specified in the agreement between the Applicants and the Added Party, exhibit 6, the Applicants supplied a dishwasher and the Added Party installed it in an island cabinet. The cabinets were provided by Barzotti Woodworking Ltd. Mrs. Wilson measured the depth of the cabinet opening to be 22 ¼". The depth of the dishwasher was not measured. The height and the width of the dishwasher are not an issue. The Applicants complain that the dishwasher is not installed flush with the neighbouring cabinets and that there are holes at the sides between the floor and the dishwasher. The photographs of exhibit 57 show that flanges behind the door of the dishwasher and at its sides were attached to neighbouring cabinets. Mr. Irvine testified that the dishwasher is properly installed.

Furnace Installation

The furnace is working properly. Its location is not in accordance with the architect's drawing, exhibit 4. As a result, access to the water heater is now restricted by the furnace venting. A repairman had to reschedule a hot water tank repair to have time to take off the furnace venting to access the tank. Thus, the Applicants were without hot water for three or four days. Mr. Haskett said that the first notice of this problem was given to the Program in February 2002.

Bathroom Basin

Mr. Wilson testified that there is a hairline crack from left to right in a china basin of standard size in the en suite bathroom. The complaint is included in the Certificate of Completion and Possession, exhibit 14, and in a letter to the Program dated July 4,

2001, exhibit 49. Mr. Gatto stated that the basin was replaced in November 1995 by Star Mechanical.

Chrome Drain and Stopper

The Amended Statement of Adjustments, exhibit 71, sets out an additional payment of \$160.00 from the Applicants to the Added Party for "brass fixtures". Mr. Haskett stated that "fixtures" would include a drain and a stopper. The Applicants complained to the Program on July 11, 1996, in exhibit 19, that they wanted a brass drain and a brass stopper in the powder room, but the builder put in a chrome drain and a chrome stopper. Oscar Gatto said that Mr. Wilson was given a choice of chrome or brass and said, "do what you wish". Mr. Wilson only recalled being told by Oscar Gatto that a brass stopper would pit.

ISSUE:

Should the Tribunal set aside, confirm, or modify the decision of the Program to disallow the Applicants' claim for compensation under section 14 of the *Ontario New Home Warranties Plan Act*?

LAW:

The *Ontario New Home Warranties Plan Act*, R.S.O. 1990, Chapter O.31, states the following:

- 13.(1) Every vendor of a home warrants to the owner,
 - (a) that the home,
 - (i) is constructed in a workmanlike manner and is free from defects in material,
 - (ii) is fit for habitation, and
 - (iii) is constructed in accordance with the Ontario Building Code;
 - (b) that the home is free of major structural defects as defined by the regulations; and
 - (c) such other warranties as are prescribed by the regulations.
 - (2) The warranty under subsection (1) does not apply in respect of,
 - (a) defects in materials, design and work supplied by the owner...
 - (3) The vendor of a home shall deliver to the owner a certificate specifying the date upon which the home is completed for the owner's possession and the warranties take effect from the date specified in the certificate.
 - (4) A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed.
-
- 14.(1) Where,
 - (a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;
 - (b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty; or

(c) the owner suffers damage because of a major structural defect as defined in the regulations for the purposes of section 13, and the claim is made within four years after the warranty expires or such longer time under such conditions as are prescribed, the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

16.(3) Where a person or owner gives notice in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and may by order direct the Corporation to take such action as the Tribunal considers the Corporation ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Corporation.

Regulation 892 under the Act adds the following:

1. In this Regulation, ...

"major structural defect" means, for the purposes of clause 13(1)(b) of the Act, any defect in work or materials,

(a) that results in failure of the load-bearing portion of any building or materially and adversely affects its load-bearing function, or

(b) that materially and adversely affects the use of such building for the purposes for which it was intended, ...

14. Every vendor of a new home warrants to the owner that there will be no water penetration through the basement or foundation of the home for two years after the date upon which the home is completed for possession.

15. (1) In this section,

"building envelope" means the wall and roof assemblies that contain the building space, and includes all those elements of the assembly that contribute to the separation of the outdoor and indoor environments so that the indoor environment can be controlled within acceptable limits;...

(2) Every vendor of a new home warrants to the owner,

(a) that the home is constructed in a workmanlike manner and is free from defects in materials including windows, doors and caulking such that the building envelope of the home prevents water penetration;...

(3) The warranties described in subsection (2) apply only in respect of claims made within two years after the home was completed for possession, in respect of homes that were enrolled, or should have been enrolled, after the 31st day of December, 1990.

16. Where a home was enrolled after the 31st day of December, 1990. the claim for damages because of a major structural defect may be made within seven years of the date specified in the certificate of completion and possession.

18.(1) Every vendor of a new home warrants to the owner that the vendor shall make no substitutions in those items of construction or finishing for which the purchaser is entitled to make selection pursuant to the purchase agreement without the written consent of the purchaser.

(2) Subsection (1) does not apply where,

(a) the purchaser, having been notified, does not make a selection within thirty days after executing the purchase agreement or within such other time period as may be agreed; or

(b) an item selected under clause (a) is not available and the purchaser does not make a selection within seven days of receiving written notice from the vendor or within such other time period as may be agreed that the item is unavailable.

(3) Every vendor of a new home warrants to the owner that where the purchaser fails to make a selection under clause (2)(a) or (b) that the vendor will make a selection on the purchaser's behalf that is of equal or better quality than the original selection as set out in the purchaser agreement.

19. Every vendor of a new home warrants to the purchaser that, where the vendor makes a substitution with respect to an item that is referred to in the purchase agreement that is not an item that is to be selected by the purchaser, the item will be of equal or better quality than the item referred to in the purchase agreement.

20. A claim may be made under subsection 17(1) and subsection 18(1) or section 19 only where,
(a) the transaction closes; and
(b) the claim is made by an owner within one year after the date upon which the home is completed for possession.

APPLICATION OF LAW TO FACTS:

Cold Cellar Water Penetration

The Tribunal finds that the alleged water penetration into the cold cellar is not a warrantable item. Mrs. Wilson testified that the last water penetration in to the cold cellar was in 1999, when she observed a puddle of water the size of a teacup. Such water accumulation is minor. The Applicants stated that there was water penetration on February 27, 1997. There appears not to have been significant water accumulation in the cold cellar since that date. On December 17, 1996, Doug Irvine found that cold cellar water entry was not evident. Mr. Haskett stated that Mrs. Wilson made no mention of a leak in the cold cellar during his later inspection. Mrs. Wilson admitted that the Applicants have not determined where the leak is coming from and do not know what repair is appropriate. The burden of proof was on the Applicants. The Tribunal finds that the Applicants failed to satisfy that burden. This part of the Applicants' claim fails.

Porch Column

The Tribunal finds that the porch column cladding was damaged by water. Exhibit 66 shows that one of the four sides of the rectangular column near the bottom is clearly water damaged. No damage to the top of the column has been proved. The Tribunal finds persuasive the argument that all four sides of the column would have been damaged by water if significant amounts of water were flowing within the column from the top. Such water would travel down along the outside of the rain-water pipe or along the inside of the cladding.

The water would gather at the bottom of the column and would damage all four sides of the column at the bottom. Likewise, if water were wicking up from the bottom then all four sides of the column would likely be damaged. There is no water stain on the floor of the inside of the column shown on photograph 6 of exhibit 59.

The Applicants have not proved where the water that damaged the column came from. The water may have come from the outside of the column, as suggested by Counsel for the Program. No defect in the building envelope that would allow water penetration was proved. The Applicants' claim concerning the porch column fails.

Porch Roof

The porch roof is not defective. The architect states in exhibit 21 that the amount of ponding on the roof is small, should evaporate quickly, and often occurs next to roof drains. Mr. Haskett testified that the plastic drain will end up above the surface of the surrounding roof as a result of normal wood shrinkage. Mr. Irvine and Mr. Haskett found no defect. The Tribunal accepts the opinions of the architect, Mr. Irvine, and Mr. Haskett and finds no defect.

Windows

The wood moulding under the flashing at the corners of the front of the porch roof shows damage. The Program was notified of this problem in July 2001. The one-year and two-year warranties under the Act had passed. The wood moulding is not a load-bearing portion of the house. The problem did not materially and adversely affect the use of the house. The damage to the wood moulding does not constitute a major structural defect. The Applicants interpret the building contract as calling for an aluminum moulding. Mr. Haskett testified that the moulding could not have been made of aluminum. If there were a substitution made by the Added Party then the item provided is of equal or better quality than the item referred to in the building contract. Thus, there is no breach of warranty.

The Tribunal finds no evidence that windows stick or that the windows were installed in openings that are too small. The Applicants did not measure the window openings before window installation. Mr. Haskett testified that framers who install windows check the rough stud opening size specified by the window manufacturer, not the opening size shown on an architect's drawing. During the inspection on July 16, 2001, several windows were opened and closed by the representative of the Program and their operation was found to be acceptable.

The Tribunal finds no breach of warranty based on peeling of primer on windows. The primer was applied by the window manufacturer. Mr. Irvine found no peeling of primer on December 17, 1996, over a year after the date of possession. The Tribunal accepts his testimony and finds no warrantable defects in material.

The caulking is not defective. On December 17, 1996, Mr. Irvine found all caulking to be acceptable.

The bathroom window and the bedroom window that touch the "j" strip when fully opened are defective. The defect is minor. It is the result of positioning of the windows in accordance with the architect's drawings supplied by the Applicants. In accordance with subsection 13(2)(a), the Tribunal finds that no warranty applies.

Such items as weather stripping not extending to the bottom of certain windows and a protruding divider between windows were reported after the one-year warranty had passed.

Dishwasher Installation

The Tribunal finds no evidence that the dishwasher was improperly installed. Flanges at the sides of the dishwasher were attached to cabinets neighbouring the dishwasher. The flanges are behind the door of the dishwasher. As a result, the dishwasher door must protrude and cannot be flush with the neighbouring cabinets. Mr. Irvine testified that the dishwasher is properly installed.

Furnace Installation

The furnace installation does not constitute a major structural defect. The Applicants complained to the Program about the furnace after the one-year and two-year warranties had expired. The furnace is working properly. The furnace has no load-bearing function. The Applicants were without hot water for three or four days in part due to the new position of the furnace.

The Tribunal finds that being without water for such a short period does not materially and adversely affect the use of the house for the purpose for which it was intended.

Bathroom Basin

The hairline crack in the bathroom basin is a defect that is not under warranty. The Applicants first advised the Program of the defect in July 2001, long after the one-year warranty had passed.

Chrome Drain & Stopper

The Applicants are entitled to a brass drain and a brass stopper. The Applicants and the Added Party changed the building contract by an Amended Statement of Adjustments to entitle the Applicants to brass fixtures in return for an \$160.00 increase in the purchase price. Mr. Haskett stated that "fixtures" would include a drain and a stopper. The Tribunal agrees.

There was a substitution of an item that is not of equal or better quality than the item referred to in the amended purchase agreement.

DECISION:

Accordingly, by virtue of the authority vested in it under section 16(3) of the *Ontario New Home Warranties Plan Act*, the Tribunal directs the Ontario New Home Warranty

Program to replace the chrome drain and the chrome stopper in the powder room with a brass drain and a brass stopper. Further, the Tribunal directs the Ontario New Home Warranty Program to disallow all of the other Applicants' claims.

LICENCE APPEAL TRIBUNAL

John Ort, Member

Released: January 29, 2003

OTTAWA CARLETON CONDOMINIUM CORPORATION #581

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT
TO DISALLOW A CLAIM

TRIBUNAL DOUGLAS MACKINTOSH, VICE-CHAIR

APPEARANCES JEANINE GOURGEON-LEBRUN, Counsel for the Applicant
JEAN G. LEGAULT, Counsel for the New Home Warranty Program
MORRIS KERTZER, Counsel for the added party
Waterbrook Condominiums Inc.

DATE OF HEARING November 28, 2002 Ottawa

ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal by the Applicant, Ottawa-Carleton Condominium Corporation #581 ("O-CCC No.581"), from a decision of the Ontario New Home Warranty Program ("the Program") set out in a letter dated the 30th July 2002, later amended by a subsequent letter dated the 3rd September 2002.

In its decision, the Program denied the claim by O-CCC No.581 for \$247,612 to correct severe condensation and icing on their windows and curtain wall.

When the hearing commenced, the Tribunal found that only half the time needed for a full hearing had been allocated. So it was decided to hear only the preliminary issue of whether or not O-CCC No.581 can claim against the Program after giving a categorical release to the Builder/vendor.

It is not clear if Ms. Gurgeon-Lebrun, the representative for O-CCC No.581, knew of the time shortage before the hearing commenced. However, she was quick to understand and accepted the proposal to address this single issue as a practical solution.

No witnesses were called in the hearing. The evidence considered came entirely from a number of exhibits filed and there were two agreed-upon facts.

RELEVANT FACTS PROVEN:

1. The condominium O-CCC No.581 is an impressive high quality 18-storey building known as "The Commodore" situated at 3106 Carling Avenue in Nepean.

2. The Applicant's claim is that every winter after its registration in the Land Registry Office on 11 April 1996, severe condensation and icing developed on the windows and curtain wall of some of the condominium units.

Under the Condominium Act, the Condominium Corporation is responsible for the windows and the curtain wall, which are part of the common elements of the building.

3. In June 1998 O-CCC No.581 retained Morrison Hershfield to investigate the problem. Their conclusion was that the Fulton Curtain Wall Systems being used were inappropriate for this application and modifications were recommended.
4. Trial modifications to correct the icing problems were carried out with the involvement of three further consultants (two of them from the Program) and two glass companies.
5. In the meanwhile, O-CCC No.581 was negotiating with the builder/vendor, Waterbrook Condominium Inc., (hereinafter "Waterbrook"), which made a series of offers to settle. The first offer came on 15th October 1998 for \$10,000 in addition to specified remedial work to be done. . Another offer for \$40,000 came at a meeting (at which Alan Stevenson was present) on 16th November 1999. Neither offer was accepted.
6. At a meeting in May 2000, the builder/vendor made an offer of settlement to O-CCC No.581 of \$100,000. This offer was not accepted.

However, it is of note that during this negotiation the Program's representative, Alan Stevenson, was present but he did not participate. (That is a fact agreed upon).

7. On 22nd November 2000 the Ottawa-Carleton Condominium Corporation #581 signed a release, which had been drawn up by their own legal counsel, Nelligan Power, as follows:

"RELEASE"

IN CONSIDERATION of payment of the sum of ONE HUNDRED AND EIGHTEEN THOUSAND DOLLARS (\$118,000.00), the receipt and sufficiency of which is hereby acknowledged, Ottawa-Carleton Condominium Corporation #581 ("O-CCC No.581") hereby releases and forever discharges Waterbrook Condominiums Inc., their directors, officers, employees ("the releasees") from any and all actions, causes of action, claims and demands, for damages related to the repair of defects in the windows which relate to excess condensation or icing of those windows.

AND FOR THE SAID CONSIDERATION O-CCC No.581 further agrees not to make any claim or take or continue any proceedings against any other person or corporation regarding the said matters as a result of which the said person or corporation could or might claim against the Releasees.

IT IS UNDERSTOOD AND AGREED that this said payment is deemed to be no admission whatsoever of liability on the part of the releasees.

IN WITNESS WHEREOF QCCC No.581 has executed this release this 22nd day of November 2000 (three signatures follow, the President, the Vice-President and Secretary-Treasurer)".

8. After this release, on 14 December 2000, obviously to clear up any ambiguity, the Applicant's solicitor wrote to the builder/vendor confirming that the release would apply to damage related to the repairs of defects in any of the windows as long as those defects related to the icing problem.
9. 18 months after the release, on 30 April 2002 the Applicant submitted a detailed claim to the Program for \$365,612.86 less the amount paid on the release \$118,000, making a net claim of \$247,612.86.

The claim indicated that the total amount on the invoice was what was necessary to correct the window and patio door icing problems in the Applicant's Commodore Building. Owing to the lapse of 6 years since the registration of the Condominium, the only warranty claim that was not out of time was the seven years for a major structural defect.

10. A fact agreed upon during the hearing by the Applicant, the Program and the added party was, "if there is no release ... if ONHWP is required to pay monies to honour a warranty to Condo-Corpn581, it has a right to pursue repayment of any such monies paid to Condo-Corpn518 from Waterbrook Condominiums Inc. (the Builder)".

THE ISSUE:

The issue is whether the release given by the Applicant to the Builder/vendor, Waterbrook Condominium Inc., precludes the Applicant from making a warranty claim against the Program.

THE LAW:

The Ontario New Home Warranty Plan Act ("the Act")

The Act is a remedial consumer protection statute. The Program administers an insurance scheme to protect new homeowners from certain defects in material, and construction. The homeowners pay insurance premiums to the builder, who in turn pays premiums to the Program for coverage of specified problems.

Sec.13 (1) Every vendor of a home warrants to the owner:

(b) that the home is free from major structural defects....

(6)The warranties set out in subsection (1) apply despite any agreement or waiver to the

contrary and are in addition to any other rights the owner may have and to any other warranty agreed upon.

The Ontario Court of Appeal considered the effect of s. 13(6) in Mandos v ONHWP (1995) 86 OAC 382. In that case the Applicants had a builder with whom they had a loose agreement (see 21 Dec '92 CRAT decision) to construct a new home. They terminated the services of their builder but he sued them for \$6,902 for work completed. When the Applicants failed to pay the debt, the builder registered a lien against the property. In order to vacate the lien the Applicants settled on a payment of \$5,000 to the builder and executed a mutual release drawn up by the builder's solicitor.

Later, the Applicants sought compensation from the Ontario New Home Warranty Program but the Commercial Registration Appeal Tribunal denied the claim on the basis that the mutual release which they executed cancelled any cause of action against the builder for failure to perform the contract.

When it reached the Court of Appeal, the Court ruled that the Act was remedial legislation and the best interpretation to be given to s. 13(6) was that the warranties contained in section 13(1) continued in force, irrespective of any agreement by the parties to the contrary. The Court continued that if the Legislature had intended that a release would be a bar to any action by an owner for breach of warranties in s. 13(1), it should have provided for the same, and the owners should have been warned of the dangers of entering into such a release.

However, the Legislature has made neither of these changes suggested.

It follows that since the Act is a complete code, providing an owner with payment out of the guarantee fund should settle a s. 13(1) breach of warranty claim. The difference occurs when an owner receives compensation from the builder then a warranty claim continues. This demonstrates that the legislature probably intended the Act to over-ride private agreements.

s. 13 of the Act fortifies this conclusion.

s. 13(4) Any settlement or release does not bar the rights of the corporation unless the corporation has concurred therewith in writing.

To date the Program has not concurred with the release and is therefore not bound by its terms.

On the other hand, the Act allows a private agreement that is arbitrated.

17(4) Every agreement between a vendor and prospective owner shall be deemed to contain a written agreement to submit present or future differences to arbitration, subject to appeal to the Divisional Court and the Arbitration Act applies.

Conciliation is a different matter. It is solely a request that the homeowner can make. The vendor is not entitled to request conciliation under the Act,

s. 17(1) The Corporation may, upon request of an owner, conciliate any dispute between the owner and a vendor,

In the present case, the unspoken question between the parties has been the distinction between contracting out before the formation of the contract and contracting out after much of the construction had been completed. This issue was clearly addressed in Mandos (1993) 627 OAC 247 by the Divisional Court which dismissed the distinction.

POSITION OF THE PARTIES:

Ms. Gourgeon-Lebrun for the Applicant, O-CCC No.581, submitted she was under the impression the release had nothing to do with the Program and that the release was necessary to enable them to mitigate their damages which their solicitor had advised them to do. But she never thought they were releasing the Program, as she knew it would cost more than the compensation in the release.

Counsel for the Program while acknowledging their decision letters denied the Applicant's claim because of the Applicant's release of the Builder, Waterbrook Condominium Inc., leaving no live cause of action, urged the Tribunal to distinguish Mandos on the grounds that this particular release is directed to a specific problem.

Counsel for the builder, Waterbrook Condominium Inc, contends that the Applicant had expert reports and had a solicitor for negotiations. He said that the release contained all the necessary components of a binding contract without duress. He submitted that a bargain was struck and that both parties are bound by it.

APPLICATION OF THE LAW TO THE FACTS:

In order to protect the homebuyer, the Act contemplates the involvement of the Program in the whole process of a new home being built but the Program did not participate in any conciliation nor in the terms of settlement.

On a plain reading of section 13(6) of the Act, it is clear from the Court of Appeal decision that the warranties in the Act continue despite any agreement or waiver to the contrary and are in addition to any other rights that the owner may have. Therefore the Applicant Condominium Corporation may file a claim with the Program.

The release in question is not however without effect as the payment made by the builder attracts s.14 (6) of the Act which provides that the plan must take into consideration "...any benefit, compensation, indemnity payable..." furnished to the person from any source.

INTERIM ORDER:

Accordingly, this tribunal pursuant to the authority vested in it by section 9(4) of the Act hereby issues the following interim orders:

1. That the release given by the Applicant O-CCC581 to the added party Waterbrook does not preclude the Applicant from claiming on the warranties set out in s. 3(1) of the Act that are not out of time.
2. That the parties file with the Tribunal by the January 24, 2003 their estimate of the number of days required to complete the hearing with a list of the days in February, March and April 2003 during which they are available to continue the hearing.

LICENCE APPEAL TRIBUNAL

Douglas Mackintosh, Vice-Chair

Released: January 9, 2003

DONALD R. SCOTT

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF THE
MOTOR VEHICLE DEALERS ACT

TO REFUSE REGISTRATION

TRIBUNAL: ANTOINE AOUAD, M.D., Presiding Member

APPEARANCES: FRASER SCOTT, Agent, representing the Applicant
A. MICHAEL ROTHE, Counsel, representing the Registrar, *Motor Vehicle Dealers Act*

DATE OF
HEARING: January 14, 2003 Toronto

ORDER

PURSUANT to the provisions of the *Motor Vehicle Dealers Act* R.S.O., 1990, Chapter M.42, as amended, Donald R. Scott (the "Applicant") appealed a Proposal of the Registrar, *Motor Vehicles Dealers Act* (the "Registrar") as per Notice of Proposal dated July 24, 2002;

WHEREAS the Applicant filed an appeal with the Tribunal requesting a hearing;

AND WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter on October 31st, 2002, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th, Floor, Toronto, Ontario;

AND WHEREAS by letter dated October 29, 2002, the Applicant requested an adjournment of the hearing due to an ongoing trial in Superior Court, providing alternate dates in January, 2003.

AND WHEREAS at the commencement of the hearing on October 31, 2002 the Applicant in this matter was not present, but was represented by Tom Zitek who requested an adjournment on the Applicant's behalf;

AND WHEREAS the hearing in this matter was adjourned peremptory against the Applicant, to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th, Floor, Toronto, Ontario, at 9:30 A.M. on Tuesday, January 14th, 2003;

AND WHEREAS, on January 14th, 2003, the Applicant was not able to attend and sent Fraser Scott to represent him.

AND WHEREAS Fraser Scott, not having a written confirmation from the Applicant as required by Rule 2.11 of the Licence Appeal Tribunal's Rules of Practice, took an oath attesting that he had been duly authorized by the Applicant to represent the Applicant at the hearing;

AND WHEREAS, the Agent representing the Applicant informed the Tribunal that he wished to withdraw the Applicant's Appeal before this Tribunal;

AND WHEREAS Mr. Rothe, appearing on behalf of the Registrar, clarified for Mr. Scott the significance of withdrawing the appeal instead of withdrawing the Application for Registration;

AND WHEREAS Fraser Scott confirmed that he understood that in withdrawing the Appeal, the Registrar's Notice of Proposal to Refuse to Register the Applicant as a Salesperson under the *Motor Vehicles Dealers Act* was final and without further appeal;

AND WHEREAS the Applicant has provided evidence of his court appearance in compliance with the order of the Tribunal released November 1, 2002, such that no costs are payable in this matter;

NOW THEREFORE this Tribunal orders that these proceedings are concluded before this Tribunal.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.
Presiding Member

Released: January 16, 2003

LAURA AND MARCELLO GIUSTIZIA

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE *ONTARIO
NEW HOME WARRANTIES PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL: MICHAEL H. TURK, Vice Chair

APPEARANCES:
LAURA GIUSTIZIA and MARCELLO GIUSTIZIA, Applicants,
MARCUS A. KNAPP representing the Ontario New Home
Warranty Program,
LISA VEY, representing Madison Homes Limited, added party

DATE OF
HEARING: January 6, 2003 Toronto

REASONS FOR DECISION AND ORDER

The Applicants appeal to the Licence Appeal Tribunal from a decision of the Ontario New Home Warranty Program (the Program) set out in a decision letter dated August 21 2002 denying the claim made by the Applicants for delayed closing.

BACKGROUND:

On November 21, 1998, the Applicants executed an agreement of purchase and sale with the added party, Madison Homes Limited (hereinafter "Madison Homes") for the purchase of a new home to be constructed on 39 Moraine Drive, Woodbridge Ontario. The agreement was accepted by Madison Homes on November 23, 1998 and contains a closing date of December 16, 1999.

On August 24, 1999, Madison Homes sent a letter to the Applicants notifying them that the closing date of December 16, 1999 was being extended to April 13, 2000.

On October 1, 1999, the Applicants executed an amendment to the agreement of purchase and sale. This amendment revised the closing date to April 13, 2000 and

required Madison Homes to group the three windows in the living room and dining room together.

On January 17, 2000 Madison Homes sent a further letter extending the closing date from April 13, 2000 to June 16, 2000. The agreement was completed on June 16, 2000.

The Applicants contend that Madison Homes was permitted an extension of 120 days from December 16, 1999 to April 16, 2000 and submit a claim for delayed closing for the additional days from April 13, 2000 to June 16, 2000.

In its decision letter the Program denied the Applicants claim on the ground that the amendment that the Applicants executed on October 1, 1999 had the effect of revising the closing date to April 16, 2000 therefore the delay was acceptable, as the Applicants had been provided with proper notice of the extension.

THE EVIDENCE

The Applicants appeared in person.

The Program called one witness, Sherri Budgell, a customer service representative.

Lisa Vey gave evidence on behalf of the added party.

Laura Giustizia

Laura Giustizia testified that she was aware that in accordance with Schedule "F" to the agreement of purchase and sale, Madison Homes was entitled to extend the closing date, without her consent, a maximum of 120 days. The agreement of purchase and sale is contained at Tab 1 of the Program's book of documents that was filed and marked as Exhibit Number 3.

Laura Giustizia acknowledges receipt of the correspondence from Madison Homes dated August 24, 1999 and January 17, 2000 whereby the closing date was extended from December 16, 1999 to April 13, 2000 and further extended from April 13, 2000 to June 16, 2000. These letters are contained at Tabs 2 and 3 of Exhibit Number 3. Laura Giustizia testified that whereas in her view Madison Homes was entitled to extend the closing to April 13, 2000, the extension from April 13, 2000 to June 16, 2000 was in excess of 120 days and therefore she was entitled to submit a claim for a delayed closing of 65 days.

As it relates to executing the amendment to the agreement of purchase and sale, Laura Giustizia testified that on October 1, 1999 she attended at Madison Homes' office and discussed the previous agreement to group together the three windows in the living room and dining room. During discussions about the revision, a salesperson of Madison Homes prepared an amendment pertaining to the window grouping and advised her that while she was already there, that she should execute the amendment which also included confirmation of the amendment of the closing date. The amendment to the agreement is contained at Tab 2B of Exhibit Number 3.

Laura Giustizia concluded her testimony by stating that she was not advised that it was necessary to take the amendment to a solicitor for review, signed the amendment as a formality and had no intention of waiving any of her rights.

On cross-examination by Mr. Knapp, Laura Giustizia testified that her solicitor reviewed the agreement of purchase and sale and represented her and her husband on the closing of this transaction. Laura Giustizia concluded her cross-examination by stating that she did not contact her solicitor regarding the amendment or the Ontario New Home Warranty Plan and that any questions regarding the expense claimed should be directed to her husband, Marcello Giustizia.

Marcello Giustizia

Marcello Giustizia testified that commencing in January 2000 his family moved into his parent's home and lived with his parents until the transaction was finally completed.

During this time he paid his father \$500.00 per week or \$2,000.00 per month which was the equivalent of what he would have otherwise been required to pay in rent. Marcello Giustizia further testified that he did not keep records for what he paid his father and that at the time he did not know that he could claim compensation for delayed closing.

On cross-examination by Mr. Knapp, Marcello Giustizia testified that he felt that he was misled. He acknowledged executing the amendment to the agreement of purchase and sale, did not consult legal counsel, believed that Madison Homes could extend the transaction 120 days and saw no reason to question Madison Homes.

In support of the claim for delayed closing the Applicants submitted an Affidavit from Marcello Giustizia's father, Victor Giustizia, indicating that he charged and received the sum of \$5,600.00 for rent and storage from April 16, 2000 to June 16, 2000. This Affidavit is contained at Tab 16B of Exhibit Number 3.

Lisa Vey

Lisa Vey testified that she is the construction coordinator for Madison Homes, has been so employed for the past 1 1/2 years and was not involved in this transaction.

Lisa Vey testified that the policy of Madison Homes is that signing of the amendment in question was voluntary and that but for the amendment, Madison Homes would not have been entitled to extend the transaction the additional 65 days.

Lisa Vey concluded her testimony by stating that the Applicants had retained a solicitor and that the solicitor proposed amendments to the initial offer.

Lisa Vey was not cross-examined.

Sherri Budgell

Sherri Budgell has been employed by the Program for 14 years and has been a customer service representative dealing with complaints for delayed closings since 1998.

Sherri Budgell testified as to permissible extensions, the time frames thereto and that for delayed closings a maximum of \$5,000.00 could be claimed.

Sherri Budgell testified that due to the amendment, Madison Homes' extension from April 13, 2000 to June 16, 2000 was permissible and that as there was no evidence that the Applicants executed the amendment under duress, they were not entitled to compensation for delayed closing.

As it relates to the issue of damages, Sherri Budgell testified that the only evidence submitted by the Applicants to the Program consisted of an Affidavit from Victor Giustizia stating that on June 1, 2000 he received the sum of \$5,600.00 from the Applicants for rent and storage from April 16, 2000 through June 16, 2000.

Sherri Budgell continued by stating that she would not have approved the Applicants' claim based upon the Affidavit of Victor Giustizia. This would have been insufficient in that when the Program receives a claim where money was paid to a relative she would require particulars such as a lease, cancelled cheques, withdrawal receipts, receipts for utilities and confirmation that the recipient has claimed the income for income tax purposes.

Sherri Budgell concluded her testimony by stating that the Applicants did not provide any evidence to substantiate the costs and that the monies paid were paid for inconvenience.

On cross examination by Laura Giustizia, Sherri Budgell testified that she did not pursue the issue of the Affidavit being insufficient due to the fact that it was determined that Madison Homes' extension was proper and therefore the Applicants were not entitled to advance a claim for delayed closing.

ISSUES:

There are two issues.

The first is whether the Applicants are entitled to advance a claim for delayed closing?

The second is that in the event that the Applicants are entitled to advance a claim for delayed closing, have they proven their damages?

THE LAW:

The relevant sections of the Ontario New Home Warranty Plan Act are as follows:

Regulation 892

17. (1) Every vendor of a new home of a type referred to in clause (a) or (b) of the definition "home" in section 1 of the Act warrants to the owner that in the event of a delay in closing that is more than five days beyond,

(a) the date originally fixed for the closing of the agreement; or

(b) an extension referred to in clause 3 (a) or (b),

the vendor shall compensate the owner for all direct costs caused by the delay in an amount that does not exceed \$100 a day for living expenses and \$5,000.00 in total.

- 17 (3) Subject to paragraph 5 of the Addendum referred to in paragraph 12 of section 1 Regulation 894, subsection (1) does not apply where,

(a) the vendor extends the closing beyond the original closing date after

giving written notice to the purchaser at least sixty-five days before the

original closing date; or

(b) the vendor extends the closing for not more than fifteen days beyond the original closing date referred to in clause (a), after giving written

notice to the purchaser at least thirty-five days before the original closing date or the extended closing date referred to in clause (a).

THE APPLICATION OF THE LAW TO THE FACTS & FINDINGS:

The salient facts in this matter are not in dispute and can be summarized as follows:

The transaction was originally scheduled to be completed on December 16, 1999 and Madison Homes extended the closing twice. The first was on August 20, 1999 whereby Madison Homes extended the closing to April 13, 2000. The second extension took place on January 17, 2000 whereby Madison Homes extended the closing to June 16, 2000. The closing took place on June 16, 2000.

On October 1, 1999, the Applicants executed an amendment to the agreement of purchase and sale. This amendment refers to the insertion of a new closing date of April 13, 2000 and grouping of three windows in the living room and dining room.

The Applicants' execution of the amendment had the legal effect of revising the closing date in the agreement of purchase and sale to April 13, 2000 thus eliminating any potential delay claim from the original closing date of December 16, 1999 to April 13, 2000.

Madison Homes was legally entitled to extend the closing from April 13, 2000 to June 16, 2000, an extension of 62 days, provided that it provided the Applicants with notice of at least 65 days prior to the closing date of April 13, 2000 if the extension was for more than 15 days. As notice was sent to the Applicants on January 16, 2000, the Applicants were provided with proper notice of the extension and therefore they are not entitled to claim for delayed closing.

The Applicants testified that at no time did they intend to waive any of their legal rights and that when they executed the amendment, they were not advised to review the same with their lawyer and had no knowledge that by executing the same they were providing Madison Homes with their agreement to the extension.

In this respect the Applicants submit that Madison Homes should have explained to them the significance of the amendment. This is a consistent theme in that, notwithstanding that the Applicants were represented by counsel as early as the time of submitting the agreement of purchase and sale, they maintain that they did not understand the amendment, were unaware of the Ontario New Home Warranty Program and were further unaware, at the relevant time, that they could be compensated for delayed closing.

As noted above, by executing the amendment the Applicants in effect revised the closing date and eliminated the possibility of any delay claim from December 16, 1999 to April 13, 2000.

The Applicants acknowledged that they did not execute the amendment under duress but maintain that had they understood the significance of executing the amendment they would not have executed the same.

The Applicants did not provide the Tribunal with any submission that would enable it to find that the amendment as executed was or should be unenforceable.

As it relates to the issue of assessing the quantum of the Applicants claim for delayed closing, the only documentary evidence submitted to the Tribunal was in the form of an affidavit from Victor Giustizia, which states that " I received payment of \$5,600.00 on June 1st, 2001 for rent and storage I charged Marcello and Laura Giustizia to cover the period of April 16th 2000 through June 16, 2000".

The Applicants did not provide any other supporting documentation regarding the amount claimed in the Affidavit. The testimony of Marcello Giustizia of weekly payments to his father is not consistent with the Affidavit in that the appellant acknowledges receipt of one lump sum payment.

Marcello Giustizia was quite candid when he advised the Tribunal that he did not keep records of the money paid to his father and could not provide the Tribunal with receipts if required.

The Tribunal finds that by executing the amendment the Applicants consented to the closing date being revised to April 13, 2000 thereby eliminating any potential claim for delay from December 16, 1999 to April 13, 2000.

As such, the Tribunal finds that as proper notice of the extension from April 13, 2000 to June 16, 2000 was provided, the Applicants are not entitled to compensation for delay within the meaning of the Act.

The Tribunal finds further that in the event that the Applicants were entitled to advance a claim for compensation for delayed closing, apart from the affidavit of Victor Giustizia, that they failed to provide the Tribunal with any documentary evidence supporting the expenses paid or with evidence that these expenses were reimbursable under the Act. The Tribunal finds that the Applicants have not proven the damage component of their claim.

DECISION:

By virtue of the authority vested in it by section 16(3) of the Ontario New Home Warranty Plan Act, the Tribunal upholds the decision of the Program to disallow the Applicants claim and does hereby dismiss the Applicants appeal.

LICENCE APPEAL TRIBUNAL

Michael H. Turk, Vice-Chair
Presiding

RELEASED: January 31, 2003

BRANDER TRUCKING LTD. AND SAM BISIGNANI

IN THE MATTER OF the *Highway Traffic Act*,
R.S.O. 1990 Chapter H.8, as amended;

AND IN THE MATTER OF an Application by Brander Trucking Ltd.
and Sam Bisignani dated September 24, 2002, for a hearing before
the Licence Appeal Tribunal pursuant to section 50(1) of the
Highway Traffic Act appealing the Suspension and Seizure Order of
the Registrar of Motor Vehicles dated September 23, 2002;

AND IN THE MATTER OF the Commercial Vehicle Operator's
Registration certificates 080-952-466 and 093-195-199 issued to
Brander Trucking Ltd. and Sam Bisignani;

AND IN THE MATTER OF the plate portion of permits issued to
Brander Trucking Ltd. and Sam Bisignani;

AND IN THE MATTER OF the safety record of Brander Trucking
Ltd.;

AND IN THE MATTER OF fines unpaid by Brander Trucking Ltd.
and Sam Bisignani.

TRIBUNAL: JOHN ORT, Member

APPEARANCES: PATRICK MOORE, Counsel for the Registrar of Motor Vehicles
No-one appearing for the Applicants Brander Trucking Ltd. and
Sam Bisignani

DATE OF
HEARING: January 8, 2003 Toronto

DECISION AND REASONS

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") by Brander Trucking Ltd. and Sam Bisignani (the "Applicants") respecting a Suspension and Seizure Order

dated September 23, 2002, (the "Order"), issued by the Deputy Registrar of Motor Vehicles (the "Registrar") pursuant to sections 47 and 47.1 of the *Highway Traffic Act* (the "Act").

The Order, Exhibit 1, states in part the following:

I have considered your other submissions, your safety record, your history of and current unpaid fines, I remain concerned for highway safety.

NOW THEREFORE IT IS ORDERED that pursuant to Section 47 & 47.1 of the Highway Traffic Act that as of 30th day of September, 2002, CVOR certificate #'s 080-952-466 and 093-195-199 and the plate portion of permits for all commercial motor vehicles and trailers issued to Brander Trucking Ltd and Bisignani, Sam be suspended for 30 days and thereafter until all fines are paid and the plate portion of permits, or if issued by a jurisdiction other than Ontario, the permits, and the number plates be seized.

This suspension and seizure will be effective the 30th day of September 2002 at 9:00 a.m. Eastern Standard Time to the 30th day of October, 2002 at 8:59 a.m. and thereafter until all fines are paid.

ISSUE:

Should the Tribunal confirm, modify or set aside the Registrar's order?

PRELIMINARY MATTER:

No one appeared for the Applicants at the scheduled start of the hearing at 9:30 a.m. on January 8, 2003. The hearing was adjourned for thirty minutes in case the Applicants were delayed. When the hearing resumed at 10:38 a.m., no one appeared for the Applicants.

Ms. Ranjit Lal, Hearings Co-ordinator for the Licence Appeal Tribunal, testified that a copy of the pre-hearing order in this matter, released by the Tribunal on November 21, 2002, was sent to the Applicants in accordance with the Tribunal's rules. Ms. Lal stated that the pre-hearing order set the hearing date for 9:30 a.m. commencing on January 8, 2002/(sic) 2003. Efforts by the Tribunal office to contact the Applicants on January 7 and 8, 2003, were unsuccessful.

EXHIBITS:

Exhibit #1 - Suspension and Seizure Order dated September 23, 2002, issued by the Deputy Registrar of Motor Vehicles;

Exhibit #2 - Notice of Appeal Form received at the Tribunal September 26, 2002, filed by the Applicants; and

Exhibit #3 - Respondent's Appeal Book.

FACTS:

Registrar's evidence:

The Registrar's witness was Bernadette McKenna, whose uncontroverted evidence is as follows:

Ms. McKenna has worked for the Ministry of Transportation (the "Ministry") for twenty-five years. She is now a Carrier Safety Rating Administrator in the Carrier Safety and Enforcement Branch.

Sam Bisignani is the president of Brander Trucking Ltd.

The Commercial Vehicle Operator's Registration (CVOR) System tracks the on-road safety performance of commercial vehicle operators. The CVOR system monitors convictions, reportable accidents, vehicle mechanical safety inspections, carrier information such as fleet size, and Ministry of Transportation interventions. (As set out at tab 20 of Exhibit 3).

Reportable accidents involve damage over \$1,000 and/or personal injury. Accident points are assigned to them based on factors such as the presence of impropriety, charges and the severity of damage, being property damage, personal injury, or fatal injury. An accident violation rate based on accident points per vehicle per month is calculated.

Similarly, a conviction violation rate based on safety-related conviction points per vehicle per month is calculated. An inspection violation rate based on points on vehicle inspection per vehicle unit inspected is also calculated.

The violation rates in each category are compared against threshold values to determine the Percentage of Threshold. Accidents are weighted at double the severity of convictions and inspections. The scores are then combined to calculate the Overall Percentage of Threshold. One carrier in a thousand has an Overall Percentage of Threshold score that exceeds one hundred.

Ms. McKenna prepared an analysis of Brander Trucking Ltd. for May 26 to June 25, 2002 (See further tab 6 of Exhibit 3). The Conviction Percentage of Threshold for the firm was 251.8 and the Overall Percentage of Threshold was 116.9. The calculations used a fleet size of eighteen based on information provided by the Applicants, set out at tab 16 of Exhibit 3. The Applicants later advised that the fleet size is ten. Use of a fleet size smaller than eighteen would lead to higher Percentage of Threshold figures.

The analysis of Brander Trucking Ltd. took into account eleven accidents, sixty convictions, and forty-nine inspections, as summarized on page 23 of tab 7 of Exhibit 3.

Particulars of the accidents are provided at tab 9 of Exhibit 3. Three of the accidents involved an insecure load. Safety inspections revealed an out-of-service rate of 57.7% compared to a provincial average of 35.3%.

Numerous convictions and resulting fines imposed are recorded in the CVOR at tabs 11 and 12 of Exhibit 3 for both Brander Trucking Ltd. and Sam Bisignani. A summary as of December 16, 2002, on page 107 of Exhibit 11 shows total fines unpaid by Sam Bisignani personally of \$3,026.25 and total fines unpaid by Brander Trucking Ltd. of \$37,819.25. Ms. McKenna testified that the total fines unpaid by the two Applicants are \$42,402.50 as of January 6, 2003. The time for appealing the fines has passed. Ms. McKenna emphasized that she could not find a single fine that was paid by either Applicant.

There were also two wheel separation incidents, which took place on June 23, 1998, and February 26, 2002 (see more page 16 of tab 6 of Exhibit 3 and tab 12 of Exhibit 3).

On June 5, 1999, Sam Bisignani attended an interview at the Ministry of Transportation concerning the performance of Brander Trucking Ltd., as shown at tab 13 of Exhibit 3. On December 8, 1999, the Ministry sent a letter to Brander Trucking Ltd. listing convictions and out-of-service inspections as problem areas. The details of a facility audit of Brander Trucking Ltd. on September 11, 2000 are set out at Tab 15 of Exhibit 3. The company failed the audit of both drivers and vehicles with an overall Audit Compliance Achieved of only 44.7%. A Show Cause Meeting concerning Brander Trucking Ltd. was held on July 25, 2002. The meeting was attended by Sam Bisignani, who requested thirty days to provide the Ministry of Transportation with a fine repayment schedule (see tab 18 of Exhibit 3). No such schedule has been received

LAW:

The *Highway Traffic Act*, Revised Statutes of Ontario, 1990, Chapter H.8, as amended states the following:

- 47.(1) Subject to section 47.1, the Registrar may suspend or cancel,
 - (a) the plate portion of a permit as defined in Part II;
 - (b) a driver's licence; or

- (c) a CVOR certificate,
on the grounds of, ...
 - (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
 - (g) any other sufficient reason not referred to in clause (d), (e) or (f).
- (2.1) Subsection 17(4) applies, with necessary modifications, for the purpose of determining who are related parties under clause (1)(f).
- 17.4 An applicant is related to a person for the purpose of subsection (3) if,...
- (c) either the applicant or the person, directly or indirectly, controls or controlled or manages or managed the other;...
- 47.1(1) Before taking any action under clause 47(1) (a) or (c) or subsection 47(2), the Registrar shall notify the person whose plate portion of a permit of CVOR certificate is to be affected of his or her proposed action.
- 50.(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or sub clause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or Registrar.

Regulation 424/97, as amended by regulation 197/99, made under the Act adds the following:

- 5.1(1) The safety record of an operator shall contain a record of the following information:
- 6. Any warning letters sent by, or interviews held with, Ministry officials relating to the operator's safety performance and practices.
 - 7. Any conviction related to the operation of a commercial motor vehicle or a vehicle drawn by it, for an offence committed by an operator, its agents or employees,
 - i) under this Act or under any other Act of the Legislature or the Parliament of Canada or any regulation or order made under any of them, or
 - ii) for an offence under a municipal by-law regulating traffic on the highways, or orders made under any of them, except convictions for offences for standing or parking.
 - 8. The particulars of any accident involving a commercial motor vehicle operated by the operator or a vehicle drawn by it.
 - 9. The results of any inspection under section 82 or 82.1 of the Act or any similar inspection of a commercial motor vehicle operated by the operator, or a vehicle drawn by it.

12. The results of any audits of the operator.

17. Any compilations or analyses of any of the information in paragraphs 1 to 16.

APPLICATION OF LAW TO FACTS:

The Tribunal finds that the Registrar's decision is not in error and in accordance with section 47 and 47.1 of the Act. There is reason to believe, having regard to the safety record of Brander Trucking Ltd., that the company will not operate a commercial motor vehicle safely or in accordance with the Act, the regulations and other laws relating to highway safety.

Brander Trucking Ltd. was convicted about sixty times for offences related to the operation of a commercial motor vehicle or a vehicle drawn by it. The Conviction Percentage of Threshold for the firm was 251.8. Further, Brander Trucking Ltd. was involved in about eleven reportable accidents. Three of those accidents involved an insecure load. There were also two wheel-separation incidents. Safety inspections of the company's commercial motor vehicles and vehicles drawn by them revealed an out-of-service rate of 57.7% compared to a provincial average of 35.3%. The company failed a facility audit of both its drivers and its vehicles. The Overall Percentage of Threshold for Brander Trucking Ltd. based on reportable accidents, convictions, and inspections was 116.9. Only one carrier in a thousand has an Overall Percentage of Threshold score exceeding one hundred.

Mr. Sam Bisignani is the president of Brander Trucking Ltd. Thus, he controls or manages the company and by section 17.4(c) of the Act Brander Trucking Ltd. is a person related to Sam Bisignani. Since there is reason to believe that Brander Trucking Ltd. will not operate a commercial motor vehicle safely or in accordance with the Act, the regulations and other laws relating to highway safety, the Registrar may suspend the plate portion of a permit or a CVOR certificate held by the Applicant Sam Bisignani pursuant to section 47 of the Act.

There is also other sufficient reason for the Registrar to suspend the plate portion of permits and the CVOR certificates of the Applicants in accordance with subsection 47(1)(g) of the Act. Unpaid fines assessed against Brander Trucking Ltd. for industry-related convictions totaled \$37,819.25 on December 16, 2002. Total unpaid fines against Sam Bisignani at that time were \$3,026.25. Ms McKenna testified that not a single industry-related fine assessed against either Applicant was paid.

DECISION:

Accordingly, by virtue of the authority vested in it under section 50 of the *Highway Traffic Act*, the Tribunal confirms the Suspension and Seizure Order of the Deputy Registrar dated September 23, 2002, and orders that CVOR certificates numbered 080-

952-466 and 093-195-199 and the plate portion of permits for all commercial motor vehicles and trailers issued to Brander Trucking Ltd. and Sam Bisignani be suspended for thirty days and thereafter until all fines are paid and the plate portion of permits, or if issued by a jurisdiction other than Ontario, the permits, and the number plates be seized.

LICENCE APPEAL TRIBUNAL

John Ort, Member

RELEASED: January 23, 2003

NATO GRATTA

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: ANTOINE AOUAD, M.D., Presiding Member

APPEARANCES: SCOTT GUERTIN, Student at-law, representing the Applicant
NATO GRATTA, Applicant

YOVANKA MC BEAN, Agent, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: January 07, 2002

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") from a notice of Proposal issued by the Registrar under the Motor Vehicle Dealers Act (the "Registrar"), pursuant to section 7 of the Motor Vehicle Dealers Act (the "Act"). The Proposal dated the 12th, day of September 2002, seeks to refuse the Registration of Mr. Nato Gratta.

The Proposal sets out the Registrar's reasons for seeking an order to refuse the registration. The reasons are stated as follows:

The intention and objective of the Act is to protect the public interest. The requirements of the Act include that Registrants be financially responsible in the conduct of business and that Registrants carry on business in accordance with the law and with integrity and honesty. The Applicant's past conduct is inconsistent with the intention and objective of the Act, and therefore warrants disentitlement to registration under the Act. Therefore, the Registrar is unwilling to register Mr. Nato Gratta under the *Motor Vehicle Dealers Act*.

The particulars in the Notice of Proposal dated the 12th, day of September 2002, are:

1. Nato Gratta (the "Applicant") applied for registration as a salesperson on or about August 14th, 2002
2. On the application to become a registered salesperson, question 9 asks:

“Have you ever been found guilty or convicted of an offence under any law or are any charges pending? (This includes those instances where a conditional or absolute discharge has been ordered)”

The Applicant said, “no”

3. A criminal history check found that the Applicant has the following criminal convictions:

Dangerous Driving - August 11th, 1981

Conspiracy to Traffic in a Narcotic – January 8th, 1998

The original Notice of proposal was amended by Notice of Further and Other Particulars dated the 1st, day of October 2002, wherein the Registrar stated as follows:

1. Paragraph 2 of Notice of Proposal dated September 12th, 2002 is deleted and replaced with the following:

On the application to become a registered salesperson, question 9 asks:

“Have you ever been found guilty or convicted of an offence under any law or are any charges pending? (This includes those instances where a conditional or absolute discharge has been ordered)”

The Applicant said, “yes” indicating:

“I have pled guilty to a drug charge in 1998 Jan 8

I was charged with this incident in on April 2-96 (sic)

I have no outstanding charges and I have never been in any kind of trouble since my 1st offence on April 2-96”

By written Notice of Appeal Mr. Nato Gratta informed the Tribunal pursuant to section 7 (2) of the Act that a hearing was requested regarding an appeal to the proposal.

THE EVIDENCE

The evidence presented to the Tribunal by the Registrar consisted of documentary evidence as well as the oral testimony of Ms. Louise Gingras.

The evidence presented by Mr. Nato Gratta consisted of his statements attached to the Notice of Appeal dated September 25th, 2002; a brief prepared by the Applicant’s solicitor containing: a letter dated September 25, 2002 from Nicoles E.M. Menard, Parole Suprvisor; a letter dated September 30, 2002 from T & R Auto Service Centre Inc.; seven certificates of achievement; and his viva voce testimony at the hearing.

The Applicant’s Reasons for Appeal as per Notice of Appeal are as follows:

1. The Applicant did not conceal his previous criminal conviction for the conspiracy to traffic in a narcotic from the Registrar. Although the Applicant checked the “no” box to question 9 of the Application, the Applicant disclosed the details of his 1998 criminal

conviction in the explanation lines provided with that question.

2. The Applicant did not provide details of the 1981 Dangerous Driving conviction but the Applicant was not being dishonest or trying to conceal the charge from the Registrar. Providing the details of the recent charge was foremost in his mind and 1981 conviction seemed unrelated and unnecessary at the time. The Applicant realizes his mistake but hopes that it is not so serious as to bar him from obtaining his motor vehicle dealer licence.
3. The Applicant respectfully submits that the Registrar erred in refusing the licence based on his past convictions. The Applicant makes no excuses for his past conduct and has learned from his mistakes. He has not been in trouble with the law since he was charged in 1996. He cooperated with the authorities and pled guilty in both instances. He is genuinely remorseful. He has worked to improve his situation for himself and his two children of whom he has sole custody. The two convictions were not fraud or theft or industry related.

A summary of the evidence follows:

WITNESSES FOR THE REGISTRAR

Testimony of Ms Louise Gingras

Ms. Louise Gingras began her testimony by describing for the Tribunal her current position as a Senior Inspector with OMVIC and reciting prior job experience as an investigator.

Ms. Gingras explained that OMVIC is a not for profit corporation which has been delegated the responsibility to administer the Motor Vehicles Act. The Motor Vehicles Act is a public protection statute regulating dealers, and salespersons in the trade of buying and selling motor vehicles. The criteria for entitlement to registration is set out in Section 5 of the Motor Vehicles Act which, requires that individuals and corporations registered or applying to be registered under the Act meet standards of honesty, integrity, compliance with law and financial responsibility.

Ms. Gingras re-iterated the Registrar's position that the decision to refuse the registration of the Applicant was based on the grounds set out in the Notice of Proposal dated September 12th, 2002 and in a Notice of Further and Other Particulars dated October 1st, 2002, found respectively at tabs #1 and # 2 of exhibit #4.

Although it is correct that the Applicant disclosed the conviction of Conspiracy to Traffic in narcotics, he did not disclose the driving conviction, which occurred in 1981. Ms. Gingras pointed out that the omission reflects the Applicant's lack of honesty and integrity.

A copy of the actual the Application for Registration under the Motor Vehicles Dealers Act, identified by Ms. Gingras, filed under tab # 4 of exhibit # 4, indicates that the application was

signed August 9th, 2002, and that the Applicant listed previous employment as "Social Assistance Aug-99 till date."

Filed under Exhibit # 4, tab # 4, is a copy of the criminal record of the Applicant, which Ms. Gingras read into record. Ms. Gingras noted the Applicant was on "Full Parole" from August 9, 1999, to October 7, 2002.

The Registrar also requested and obtained a copy of the information outlining the 1981 charge of "Dangerous Driving" laid against the Applicant, which is entered in exhibit #4, at tab #5 and was read into the record by Ms. Gingras.

Ms. Gingras continued her testimony by reading the details, and the disposition, of the three charges of conspiracy to traffic laid against the Applicant, filed at tab #7, exhibit # 4. According to Ms. Gingras, in considering the refusal of an application for registration, the Registrar takes into account the length of the prison term awarded the individual. The Applicant's sentence of "*...four years and nine months in jail...*" was determined to be "*...pretty serious...*". It was also noted that the Applicant's sentence was longer than any of the sentences faced by the co-accused, thus raising the suspicion that he may have been the "*...leader of the organized crime...*"

Ms. Gingras clarified for the Tribunal that an individual who has acted outside the law is of particular concern to the Registrar. The Registrar must be pro-active rather than reactive in protecting the public. As a salesperson, the individual will have access to the credit information of customers, which can be potentially tempting, and used for illegal purposes. As the Applicant is no longer on parole, it is now up to the Registrar to protect the public's interest.

In cross-examination by the Applicant's Representative, Mr. Scott Guertin, Ms. Gingras justified her allegation that possibly the Applicant had been the group leader by comparing the Applicant's sentence to the sentences received by the co-accused.

Applicant's evidence

In examination-in-chief, the Applicant was asked by counsel to provide details of his family life. The Applicant has custody and is the sole parent of his two children.

The Applicant described for the Tribunal the circumstances surrounding the charge of Dangerous Driving to which he pled guilty in 1981.

There were no other charges until 1996, when the Applicant was charged with conspiracy to traffic. The Applicant pointed out that originally, there were three charges; two charges were dropped before the Applicant attended court. The Applicant stressed that he was "*...forced...*" to plead guilty in order to protect his family. At the time, the Applicant was advised by his lawyer that "*...a proceeds of crime charge...*" could be laid against his family.

The Applicant feels that his period of incarceration was a "...*blessing*..." which allowed him to get his health and his life back. While incarcerated the Applicant participated in several workshops which he found to be very helpful.

Although the Applicant was under observation since 1996, he feels that he would have been able to break the law, had he wanted to. However, he chose to live within the law.

In cross-examination the Applicant maintained that no narcotics were found in his house, he was not importing narcotics from Venezuela and that he did not even know half the people that were involved. At the time, the Applicant was not a well man, and allowed others to control his life; these people used his phone without his knowledge.

Submissions by Ms Yovanka Mc Bean

In support of her argument Ms Mc Bean, presented the Tribunal with copies of precedent decisions and quoted from these precedents during her submissions.

Ms. Mc Bean reminded the Tribunal that the Motor Vehicles Dealers Act is a public protection statute. As such the Registrar had a duty to consider an Applicant's past conduct.

Ms. Yovanka quoted case law wherein it was established that, in order to reverse the decision, the Tribunal must find that the Registrar in refusing registration, erred in law. In this case, it is the Registrar's position that the 1998 conviction against the Applicant was serious enough to warrant refusal of the Applicant's application, particularly in view of the Applicant's guilty plea. Sympathy is not to be a factor in the decision making process, it must be determined that the Applicant's character is impeachable.

Further as the Applicant is no longer under supervision, it is possible that he will revert to illegal behaviour. The Registrar is responsible to protect the public in a pro-active not re-active manner, refusing to grant the Applicant a motor vehicles' salesperson licence the Registrar is ensuring that the public is protected.

Submissions by Mr. Scott Guertin

The Applicant's Representative, Mr. Guertin explained that the Applicant did not intentionally omit the 1981 conviction, he was simply more concerned with the 1996 charge of which he was convicted, jailed and subsequently placed on parole.

Mr. Guertin referred to the letter from the Applicant's parole officer, which indicated that the Applicant has exhibited "...positive pro-social behaviour..." Further, by pleading guilty the Applicant assumed responsibility for his behaviour.

At this point in time the Applicant has two children to look after, and there is every indication that the Applicant has changed his life.

Mr. Guertin closed by stating that the Applicant his willing to accept any limitations imposed on his licence as a precaution.

FACTS FOUND PROVEN:

The following are the facts found by the Tribunal to have been proven.

1. The Applicant applied for registration as a motor vehicle salesperson on or about August 9, 2002, proposing to work for T & R Auto Service Centre Inc.
2. The Applicant has the following criminal convictions:

Dangerous Driving - August 11th, 1981.
Conspiracy to Traffic in a Narcotic – January 8th, 1998.
3. The Applicant was released on parole on August 9, 1999, and fully released as of October 7th, 2002.

THE LAW:

Section 5. (1) of the *Motor Vehicle Dealers Act* states:

5(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

(a) having regard to the financial position of the Applicant, the Applicant cannot reasonably be expected to be financially responsible in the conduct of business; or

(b) the past conduct of the Applicant affords reasonable grounds for belief that the Applicant will not carry on business in accordance with law, and with integrity and honesty; or

APPLICATION OF LAW TO FACTS:

The issue for consideration by this Tribunal is, whether the Applicant's past conduct affords reasonable risk to the public to refuse his registration as a Salesperson, as per Section 5 b of the Act.

The Registrar's sole mandate is public protection. Given the nature of the Applicant's convictions the Registrar felt justified in refusing the Applicant's registration. The Registrar contends that there is a possibility the Applicant might use the personal credit information obtained by virtue of his employment to commit further offenses. The Tribunal takes a different view. While not condoning, in any way, the Applicant's past conduct, the Tribunal recognizes that the Applicant has paid his debt to society. The Applicant has a family to support and is currently on Social Assistance. The pursuit of gainful employment might in fact serve as a deterrent to life of crime.

The Registrar is also concerned about the Applicant apparently lying on his current application for registration by failing to disclose information regarding an earlier driving conviction. Extending the Applicant the benefit of the doubt, the Tribunal finds the explanation proffered by the Applicant's Representative plausible. It is acceptable that the Applicant simply did not relate a driving charge to this application, particularly a driving charge that took place in 1981, some 20 years ago. Thus, the Tribunal finds the incident an unintentional omission. Moreover, in 1996 matter the Applicant accepted responsibility for his behaviour by entering a plea of guilty, and the passage of time since 1999 has shown that he respects the law.

Since the past conduct is not industry related and there has been the passage of some time, the Tribunal finds that the Registrar has not shown that there are reasonable grounds to believe that the Applicant will not carry on business in accordance with law, integrity and honesty.

The Tribunal hereby orders that a Salesperson's licence be granted to the Applicant, with the following terms and conditions imposed to provide a measure of protection to the public:

1. The Applicant is not to be allowed to handle cash or credit cards, or be privy to customer's private information.
2. The Applicant is not to be allowed to attend auctions, on his own, and purchase or sell vehicles at auctions, on behalf of the Dealer.
3. The Applicant is not to carry on business transactions for the sale or purchase of motor vehicles outside the premises of the Dealer.
4. All transactions of trade, purchase or sale of motor vehicles are to be approved and verified by the Sales Manager, prior to the Applicant closing any deal with prospect buyers and or sellers.
5. The Applicant is to inform any prospective employers of the limitations imposed on his licence.
6. The Applicant must request that the Dealer, employer, notify the Registrar, in writing, within thirty days of offering employment to the Applicant that the Dealer is aware of the restrictions imposed on the Applicant's licence.

7. In the event of breach of any of the conditions listed above, the Applicant shall forthwith forfeit his Salesperson's licence.

DECISION:

Therefore by virtue of the authority vested in it under section 7(4) of the Motor Vehicle Dealers Act, the Licence Appeal Tribunal directs the Registrar to **not to carry out the proposal to refuse** the registrations of Nato Gratta but to issue a Salesperson's licence subject to the terms and conditions hereinto before stated.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

Released: January 29, 2003

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
AMIN MOHAMED LALANI AND 1445398 ONTARIO INC. O/A CANADIAN
AUTO WHOLESALERS AND AMIN MOHAMED LALANI

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATIONS
- Proposal dated: September 24, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

AMIN MOHAMED LALANI AND 1445398 ONTARIO INC. O/A CANADIAN AUTO
WHOLESALERS AND AMIN MOHAMED LALANI

Applicants

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by the Applicants, Amin Mohamed Lalani and 1445398 Ontario Inc. o/a Canadian Auto Wholesalers and Amin Mohamed Lalani and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicants and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: January 8, 2003

GEORGE IYAMU o/a CARERA AUTO SALES

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
MOTOR VEHICLE DEALERS ACT

TO REFUSE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair
ALBERT LONGO, Member
DONALD BENNINGER, Member

APPEARANCES: MAJEKODUNMI ADEGA, Counsel, representing George Iyamu
AVIVA HARARI, Counsel, representing the Registrar, *Motor Vehicle Dealers Act*

DATE OF HEARING: January 15, 2003 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal before the Licence Appeal Tribunal (the "Tribunal") pursuant to section 7 of the *Motor Vehicle Dealers Act* (the "Act"). The appeal is from a Notice of Proposal dated September 12, 2002 which seeks to refuse the registrations of George Iyamu (the "Applicant") as motor vehicle dealer and a motor vehicle salesperson under the Act. The proposal sets out the Registrar's reasons for seeking an order for the refusal of the Applicant's registrations. The reasons are stated as follows:

The intention and objective of the Act is to protect the public interest. The requirements of the Act include that Registrants be financially responsible in the conduct of business and that Registrants carry on business in accordance with the law and with integrity and honesty. The Applicant's past conduct is inconsistent with the intention and objective of the Act, and therefore warrants disentitlement to registration under the Act. Therefore, the Registrar is unwilling to register George Iyamu o/a Carera Auto Sales under the *Motor Vehicle Dealers Act*.

(Exhibit 4, Tab 1)

The particulars upon which the Registrar bases his proposal are stated as follows.

- 1) George Iyamu o/a Carera Auto Sales (hereinafter referred to as the "Applicant") is a sole proprietorship, which applied for registration as a motor vehicle dealer under the Act on or about June 26, 2002.

- 2) On the individual application for registration submitted by the Applicant, question 9 asks:

"Have you ever been found guilty or convicted of an offence under any law or are any charges pending? (This includes those instances where a conditional or absolute discharge has been ordered)."

- 3) A criminal record search shows that George Iyamu has the following criminal convictions:

June 30, 1992	Fraudulent Use of a Credit Card
February 11, 1994	Fraud under \$1000 (x3)

- 4) The Applicant has failed to provide full disclosure on his application for registration submitted to the Registrar.

(Exhibit 4, Tab 1)

By written Notice of Appeal the Applicant has advised the Tribunal that he requires a hearing in terms of Section 7.(2) of the Act regarding his appeal.

THE EVIDENCE:

The evidence presented to the Tribunal by the Registrar at the hearing consisted of documentary evidence as well as the testimony of Ms. Louise Gingras ("Gingras"). The evidence presented by the Applicant consisted of the Applicant's testimony.

Gingras

Gingras stated in her testimony that she is presently employed by the Ontario Motor Vehicle Industry Council ("OMVIC") as a senior inspector and complaints officer. She further stated that she had been employed with OMVIC since 1997 and that the latter is a non-profit organization that is empowered to administer the Act and its regulations. OMVIC has four main functions which are the registration of applicants under the Act, inspections of motor vehicle dealers and their premises, investigations of complaints made regarding motor vehicle dealers and salespersons and mediation of disputes between registrants under the Act and consumers. Gingras went on to state that the Act is a consumer protection statute and that the Registrar is empowered under the Act to ensure due compliance by all registrants.

Gingras confirmed that she has knowledge of the circumstances surrounding the Registrar's proposal to refuse registrations to the Applicant and confirmed that such refusal was due to the reasons stated in the particulars to the proposal.

Gingras further testified that the Applicant made written applications to OMVIC for the issuance to him of registrations as to both a motor vehicle dealer and motor vehicle salesperson. In the Applicant's written application dated April 22, 2002 for registration as a motor vehicle salesperson, in answer to question 9 therein, he answered "No." Question 9 asked the following:

Have you ever been found guilty or convicted of an offence under any law or are any charges pending? (This includes those instances where a conditional or absolute discharge has been ordered). If yes, list all charges and/or convictions, and the circumstances surrounding each (attach additional sheets if necessary).

(Exhibit 4, Tab 4)

At the foot of question 9 the following words appear:

Note: Applicants are subject to background and criminal record searches. Submitting a false or incomplete disclosure is an offence under the MVDA and will result in disqualification. Do not assume that convictions are automatically deleted from your record. If you have any questions about the information you must disclose please call OMVIC.

Pursuant to receipt of the Applicant's two applications OMVIC caused a background check to be made regarding the Applicant. Following OMVIC's enquiries a CPIC report dated July 4, 2002 was received. This report stated that the Applicant had the following criminal charges and convictions registered against him.

<u>DATE & PLACE</u>	<u>CHARGE</u>	<u>DISPOSITION</u>
JUN 30 1992 TORONTO	FRAUDULENT USE OF CREDIT CARD	SUSP SENT & PROBATION 12 MOS
FEB 11 1994 TORONTO	FRAUD UNDER \$1000 (03 CHGS)	SUSP SENT & PROBATION 2 YRS

(Exhibit 4, Tab 5)

As the Applicant's written application had not disclosed the above convictions he was asked by OMVIC to give the reason for his failure to disclose such convictions and the circumstances surrounding each charge and conviction.

(Exhibit 4, Tab 6)

The Applicant replied to OMVIC's above query by letter dated July 17, 2002 which stated as follows:

Following our discussion this morning, this to explain the situation surrounding my charge and conviction.

I was charge in February of 1995 for bank fraud along with other people. It was a case of been in the wrong place with bad friends. I was convicted for said charge in October of 1996. Ever since I have learned my lessons and have been making an honest living. This was a big mistake on my part as I was new in the country and did not know how the system works then. I thank God I know how the system works now and this will never happen again.

As for the question of not indication if I have been convicted before, it was sincerely an honest mistake for ticking the wrong box, as I am aware of the fact that there is going to be a back

ground check and you will definitely see this in my record. So I couldn't have knowing lied about it.

(Exhibit 4, Tab 7)

Gingras went on to testify that there are two issues that are of concern to the Registrar. The first issue is that the Applicant has two recent criminal convictions for "economic crimes" involving fraudulent use of a credit card and three convictions for fraud under \$1000.00. The second issue is the failure of the Applicant to disclose these convictions in his application for registration as a salesperson. Both issues involved serious questions as to the honesty and integrity of the Applicant.

The various convictions and the non-disclosure of those convictions indicates a continuing lack of honesty and integrity commencing in 1992 with the Applicant's first criminal conviction followed in 1994 by further criminal convictions and culminating in the Applicant's failure to honestly respond to question 9 in his application for registration. That application was as recent as April 2002.

Gingras felt that the Applicant's conduct was both dishonest and ongoing and that if he were to be granted registration under the Act, the public would be at risk in future dealings with the Applicant, more particularly in that all his convictions are of an economic nature.

George Iyamu

The Applicant testified at the conclusion of Gingras' evidence.

In answer to his Counsel's questions the Applicant conceded the correctness of the contents of the CPIC report and that the charges and convictions therein referred to do relate to him. He also confirmed that he had answered "no" to question 9 in his April 4, 2002 application for registration. He stated that his lawyer at his criminal trial had told him that after 3 years of the date of his convictions such convictions would no longer appear on his record and it was this advice by his lawyer that led him not to disclose the convictions in his application for registration. He went on to state, in relation to question 9, that he did not "know the right answer to take to this question." On being further questioned, he stated that he did not know whether to answer "yes" or "no" to that question.

He stated further that he operated a retail business from 1996 until 2000. this business involved his selling cell 'phones, pagers and accessories. In the course of this business he accepted either cash from customers or credit cards and there have been no allegations against him of misuse of credit cards. Since 2000 he no longer operates the cell 'phone business.

In cross examination he stated that question 9 in his April 4, 2002 application was unclear and that is why he was unsure as to whether to answer "yes" or "no". He stated that he did not call OMVIC to obtain clarification of the question as he was in a rush to complete the application.

He conceded that he signed the application on April 22, 2002 and did not dispute that such application was received by OMVIC on June 26, 2002.

Iyamu went on to state that he did not disclose his convictions "due to a mistake" and that he "thought that my convictions had been pardoned".

In closing, the Applicant stated he is 42 years of age and that he emigrated to Canada from Nigeria where he had completed some 12 years of schooling.

FACTS FOUND PROVEN:

The following are the facts found by the Tribunal to have been proven:

1. On April 19, 2002 the Applicant signed and completed a written application for registration under the Act as a motor vehicle dealer and that application was received by OMVIC on June 26, 2002.
2. On April 22, 2002 the Applicant signed and completed an application for registration under the Act as a motor vehicle salesperson which application was received by OMVIC on June 26, 2002.
3. On or about June 30, 1992 the Applicant was criminally charged with fraudulent use of credit card and was subsequently convicted on such charge and received a suspended sentence and 12 months probation.
4. On or about February 11, 1994 the Applicant was criminally charged with three counts of fraud under \$1000.00 and was subsequently convicted on such charges and received a suspended sentence and 2 years probation.
5. The Applicant, in his signed and completed application for registration as a motor vehicle salesperson dated April 22, 2002, falsely answered question 9 therein in that he did not disclose having been found guilty and convicted of any or all of the criminal charges referred to in paragraphs 3 and 4 above and which charges and convictions are more fully referred to in CPIC report dated July 4, 2002 (Exhibit 4, Tab 5).
6. At the time of his completing and signing his application for registration as a motor vehicle salesperson dated April 22, 2002, the Applicant was aware and had full knowledge of all the convictions registered against him and referred to in the CPIC report dated July 4, 2002.

THE LAW:

Section 5.(1) of the *Motor Vehicle Dealers Act* states:

5(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

...

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law, and with integrity and honesty; or

Section 6.(1) of the Act states:

(1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 5.

DECISION AND REASONS:

The issue for decision is whether the Registrar erred in his decision that the Applicant should have his applications for registration as a motor vehicle dealer and a motor vehicle salesperson refused.

Section 6.(1) of the Act states the Registrar may refuse to register an Applicant where in the Registrar's opinion the Applicant is disentitled to registration under section 5.

Section 5.(1)(b) of the Act entitles the Applicant to registration by the Registrar except where the past conduct of the Applicant affords the Registrar reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty. The Registrar has the onus of proof to satisfy the Tribunal that he has reasonable grounds to believe that the registration of the Applicant should be refused as his past conduct affords reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.

In the leading case of *Brenner 19 CRAT SCO Decisions and Orders (1971–1989) page 95 Southey J.* held that a Tribunal should only refuse to direct the Registrar to carry out his proposal if it thinks the Registrar was in error in concluding that the past conduct of an Applicant afforded reasonable grounds for belief that such Applicant would not carry on business in accordance with law and with integrity and honesty.

Brenner 19 CRAT SCO Decisions and Orders (1971-1989), page 59, is a decision issued on April 7, 1983 where the Divisional Court overruled a decision of this Tribunal. Southey J. states that the Registrar proposed to refuse registration because of the existence of the specific circumstances set out in Section 5(1)(b) of the *Motor Vehicle Dealers Act*:

The effect of Section 7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed

itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself.

In the *Brenner* case, due to the particular facts in that case, Southey J. sent it back for a rehearing. However, he adds in the third last paragraph:

The proper question at the rehearing remains, however, whether the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal.

To overrule the decision of the Registrar, the Tribunal must conclude that he was wrong in his decision and that the conduct of an Applicant does not afford reasonable grounds for the Registrar's belief that the Applicant will in the future carry on activities in contravention of the Act and its Regulations.

Turning to the matter before this Tribunal, there are two allegations made by the Registrar against the Applicant. The first allegation is his failure to disclose in his application for registration as a salesperson, that he had been found guilty and convicted of fraudulent use of credit card in 1992 and subsequently that he had been found guilty and convicted on three counts of fraud under \$1000.00 in 1994. The second allegation is that the convictions of 1992 and 1994 in and of themselves constitute and reflect a lack of integrity and honesty on the Applicant's part.

Both allegations, according to the Registrar, constitute conduct that affords reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.

An analysis of the evidence placed before the Tribunal is dealt with hereunder:

1st Allegation - NON DISCLOSURE

The Applicant admitted during his testimony that:

- (i) he was found guilty in 1992 of the criminal charge of fraudulent use of credit card,
- (ii) he was also found guilty in 1994 of three criminal charges of fraud under \$1000.00, and

- (iii) he was at all times aware of having been found guilty and convicted of the criminal charges referred to in (i) and (ii) above.

Question 9 in the April 22, 2002 application for registration which was signed and completed by the Applicant posed a simple, unambiguous question - "Have you ever been found guilty or convicted of an offence under any law?" To this simple question the Applicant answered "no" which was totally and absolutely false particularly having regard to the abundantly clear admonitions and explanations appended to this particular question which cautioned the Applicant on the absolute necessity of a full, true and correct answer. The Applicant ignored the cautions and not seek clarification from OMVIC as he was invited to do.

The Tribunal had an opportunity to observe the Applicant when he testified at the hearing and found him to be at ease with the English language, to have followed the proceedings with no difficulty, to have had no difficulty in understanding questions put to him and to have had no difficulty in expressing himself. The Tribunal finds that the Applicant's failure to honestly answer the question was not based in any misunderstanding of the question but was based upon the Applicant's fear that if he disclosed his criminal convictions he would be denied registration. The Registrar is entitled to expect that Applicants are honest in answering questions in their applications and an Applicant's failure to answer with veracity quite rightly sets alarm bells ringing in the Registrar's mind in so far as the Applicant's honesty and integrity is concerned. After all, it is the Registrar who has the duty and obligation to protect consumers and ensure their rights at law.

The Tribunal does not believe the Registrar to be in error in his belief that the past conduct of the Applicant, as evidenced by his failure to disclose material facts to the Registrar, affords the Registrar reasonable grounds for belief that in the future the Applicant will not carry on business in accordance with law and with integrity and honesty.

2nd Allegation - CRIMINAL CONVICTIONS

The criminal charges upon which the Applicant stands convicted are:

- (i) serious in nature, and
- (ii) recent in time

All the convictions registered against the Applicant relate to fraud which by its very definition indicates an intentional perversion of truth that results in injury to another. Such convictions do have a direct bearing on an individual's ability to conduct and comport himself with honesty and integrity in business. The Applicant's fraud convictions did not occur in the distant past but are recent in time. There was not one offence but a number of offences that took place, all of which indicate a course of conduct that involved dishonesty. This past misconduct, coupled with the more recent misconduct dealt with in the "1st Allegation" above do, in the Tribunal's opinion afford the Registrar reasonable grounds for his belief that the Applicant will not carry on business in accordance with law and with integrity and honesty. Having regard to all the

facts it would be unreasonable for the Tribunal to conclude that the Registrar was incorrect in his belief that the Applicant should not be registered as either a dealer or a salesperson.

DECISION:

Accordingly, by virtue of the authority vested in it under section 7.(4) of the *Motor Vehicle Dealers Act*, the Licence Appeal Tribunal directs the Registrar to carry out his proposal to refuse the Applicant's registration as a motor vehicle dealer and as a motor vehicle salesperson.

LICENCE APPEAL TRIBUNAL

Albert Longo, Member

Donald Benninger, Member

Derek Israel, Vice Chair, presiding

Released: January 28, 2003

PREHEARING

1118833 ONTARIO LIMITED O/A BOB'S CRUISES
(Claim Nos. 100840, 100842, 100843 and 100844)

APPEAL FROM DECISIONS OF THE TRAVEL INDUSTRY
COUNCIL UNDER THE TRAVEL INDUSTRIES ACT

TO DISALLOW CLAIMS

TRIBUNAL: VICTOR DREVNIG, Vice-Chair

APPEARANCES:

BOB D. KIRBY, Agent, Representing the Applicant
TREVOR C.D. BRANION, Counsel, representing the Travel Industry
Council of Ontario

DATES OF

HEARING: January 6, 2003

Toronto

ORDER

Following the attendances on January 6, 2003 at a pre-hearing by tele-conference before this Tribunal, Bob D. Kerby appearing on behalf of 1118833 Ontario Limited o/a Bob's Cruises (the "Applicant"), and Trevor C. D. Branion, Counsel on behalf of Travel Industry Council of Ontario (the "TICO").

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Thursday, February 6, 2003 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

The parties to the hearing are the Applicant and TICO.

It was agreed by the parties' respective representatives that the issues for adjudication at the hearing should be as follows:

1. Did the Applicant pay the funds in question in regards to the four claims to Renaissance Cruises in compliance with TICO and the regulations of the Travel Industry Council of Ontario and section 51(1) of Regulation 806/93 under the *Travel Industry Act* (the "Act")?

2. Did the Applicant transfer all or part of the customers' money to Renaissance Cruises in compliance with section 51(1) and (1)(f) of Regulation 806/93 under the Act?
3. Did the customers comply with section 50(3)6 of Regulation 806/93 under the Act and pay for the travel services with cash or by cheque, credit card or other similar cash payment method?
4. TICO agrees that on or before Friday January 10, 2003 it will provide the Applicant with documentation enabling the Applicant to provide its Insurance Company with proof that it has denied coverage for all four of the claims.
5. The Applicant agrees that it will obtain a decision from its Insurer as to whether or not it will accept these claims on or before the 27th day of January 2003.
6. The parties are agreed that TICO has made complete disclosure to the date hereof and TICO agrees to provide a list of the authorities that it intends to rely on before the 29th day of January 2003.
7. The parties shall fully comply with the disclosure requirements set forth in Rule 6 of the Rules of Practice of the Tribunal subject to the specific provisions set out in paragraphs 4, 5 and 6 of the preceding paragraphs.

LICENCE APPEAL TRIBUNAL

Victor Drevnig, Vice-Chair

Released: January 13, 2003

PREHEARING

YOUNG HAUSMAN

APPEAL FROM A DECISION OF THE
CORPORATION DESIGNATED FOR THE
PURPOSES OF THE *ONTARIO NEW
HOME WARRANTIES PLAN ACT*

TO ALLOW A CLAIM

TRIBUNAL: WILLIAM M. MCINTOSH
Presiding Vice-Chair

APPEARANCES: CAROL STREET,
Counsel for the Ontario New Home Warranty Program
by telephone conference
JAMES BRANCATO, Agent for the Added Party
Brancato Construction Co. Ltd.
No one appearing for the Applicant.

DATE OF PREHEARING: January 24, 2003 Toronto

ORDER

Following the appearances at a Pre-Hearing before this Tribunal on the 24th of January, 2003 of Carol Street, Counsel, representing the Registrar, Ontario New Home Warranty Program (the "Respondent") and James Brancato Agent for the Added Party Brancato Construction Co. Ltd; no one appearing for the Applicant.

And Whereas Counsel for the Respondent informed the Tribunal that the Applicant has agreed to the provisions in Minutes of Settlement and to return forthwith executed copies and upon review of the Minutes of Settlement.

The Tribunal makes the following Order:

1. Upon receipt of the above-mentioned executed Minutes of Settlement the Respondent shall so inform the Tribunal and the matter shall be considered settled and the hearing date of February 24, 2003 shall be cancelled.

2. Should no executed Minutes of Settlement be forthcoming from the Applicant the hearing scheduled for February 24, 2003 shall proceed.

LICENCE APPEAL TRIBUNAL

William M. McIntosh
Presiding Vice-Chair

Released: January 28, 2003

PREHEARING

1382614 ONTARIO LTD. o/a CONCORD HOMES

APPEAL FROM A DECISION OF THE REGISTRAR UNDER THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: WILLIAM McINTOSH, Vice-Chair

APPEARANCES:

KHERSON AMELL, representing the Applicant, Concord Homes
CAROL STREET, Counsel, and ADIL DARR representing
Respondent, Ontario New Home Warranty Program

DATE OF

PRE HEARING: January 17, 2003

Toronto
(By teleconference)

ORDER

Following appearances by Teleconference at a Pre-hearing before the Licence Appeal Tribunal on the 17th of January, 2003 of Kherson Annell for the Applicant, Concord Homes and Carol Street, Counsel and Adil Darr for the Respondent, Ontario New Home Warranty Program.

The Tribunal makes the following order:

1. The date for hearing of this Appeal from a Notice of Proposal of the Respondent dated October 7, 2002 not to renew the Applicant's Registration, originally set for February 19, 2003 is rescheduled to April 24, 2003 commencing at 9:30 a.m. at Howard Johnson Confederation Place Hotel, 237 Ontario Street, Salon "A" Room, Kingston, Ontario.
2. The Applicant will submit its financial statements for the year ending December 31, 2002 to the Respondent by March 15, 2003.
3. The Respondent will review the submitted financial statements and by March 30, 2003 inform all parties and the Tribunal of its decision to either proceed with the appeal on April 24, 2003 or discontinue the October 7, 2002 Notice of Proposal.

4. From the date of this Order to the Applicant's renewal of Registration date of February 19, 2004, the Applicant is limited to the construction and sale of no more than 3 new homes without the prior written consent of the Respondent.
5. The security now held by the Respondent on account of the Applicant in the amount of \$50,000 shall be converted to a blanket security to be applied against any obligation of the Applicant arising from its obligations under the Act.
6. The Notice provisions of the Tribunal remain in force for the new hearing date of April 24, 2003.

LICENCE APPEAL TRIBUNAL

William McIntosh,
Vice-Chair

Released: February 17, 2003

PREHEARING

711371 ONTARIO CORP. O/A OXFORD ESTATES

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

MOHINDER SUD and PAUL SUD, Agents, representing 711371
Ontario Corp. o/a Oxford Estates
CAROL STREET, Counsel, representing the Registrar, Ontario New
Home Warranty Program

DATE OF

PREHEARING: January 24, 2003

Toronto

ORDER

FOLLOWING attendances on January 24, 2003 at a prehearing before this Tribunal of Mohinder Sud and Paul Sud, Agents, appearing on behalf of 711371 Ontario Corp. o/a Oxford Estates (the "Applicant"), and Carol Street, Counsel appealing on behalf of the Registrar, Ontario New Home Warranty Program (the "Registrar");

The Tribunal makes the following Order in respect of the hearing scheduled to commence at 9:30 a.m. on Tuesday, February 25, 2003 at the Tribunal's Chambers, 1 St. Clair, Avenue West, 12th Floor, Toronto, Ontario and to continue if necessary on Wednesday, February 26, 2003 at the Tribunal's above chambers;

1. The Parties to the hearing are the Applicant and the Registrar of the Program.
2. Both parties to the hearing shall fully comply with the requirements of disclosure of documents and things as set forth in Rule 6.3 of the Rules of Practice of the Tribunal. Both parties shall also fully comply with the disclosure requirements as set forth in Rule 6.4 of the Rules of Practice of the Tribunal.

- 3.a) The Applicant shall by not later than 4:00 p.m. on February 11, 2003 provide the following written further particulars to the Program which further particulars the Tribunal considers necessary for a full and satisfactory understanding of the subject of the proceedings:
- i) REGARDING PARAGRAPH 2 OF SCHEDULE B ATTACHED TO THE APPLICANT'S WRITTEN NOTICE OF APPEAL DATED OCTOBER 24, 2002.
 - (a) Precisely what deficiencies were identified by the homeowner as deficiencies in his home.
 - (b) Precisely what deficiencies that were identified as deficiencies by the homeowner were rectified by the Applicant.
 - (c) Precisely what deficiencies identified by the homeowner in his home, did the Applicant not rectify and the Applicant's reason for not rectifying such deficiencies.
 - ii) REGARDING PARAGRAPH 3 OF SCHEDULE B TO THE APPLICANT'S WRITTEN NOTICE OF APPEAL DATED OCTOBER 24, 2002.
 - (a) Precisely of what breaches of warranty it is alleged that the Applicant was not notified.
 - (b) Precisely to what deficiencies was the Applicant refused access, and when and who refused the Applicant access.
 - (c) Precisely what deficiencies was the Applicant not given time to rectify and when and by whom was such refusal given.
 - iii) REGARDING PARAGRAPH 4 OF SCHEDULE B TO THE APPLICANTS NOTICE OF APPEAL DATED OCTOBER 24, 2002.
 - (a) Precisely when and who on behalf of the Program agreed not to invoice the Applicant for any of the Program's costs.
 - (b) Precisely what unnecessary work was authorized by the Program, by whom acting on behalf of the Program was such unnecessary work authorized and when was it authorized.
 - iv) REGARDING PARAGRAPH 7 OF SCHEDULE B TO THE APPLICANT'S NOTICE OF APPEAL DATED OCTOBER 24, 2002.

- (a) Precisely when and how did the Applicant comply with section 1.4 of Regulation 894 to the *Ontario New Home Warranties Plan Act*.
- v) REGARDING PARAGRAPH 8 OF SCHEDULE B TO THE APPLICANT'S NOTICE OF APPEAL.
 - (a) Precisely what documents has the Applicant furnished to the Registrar, when were such documents furnished and in what manner were the documents furnished.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: January 29, 2003

JASON H. TRUONG

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: JASON H. TRUONG, appeared in person

YOVANKA McBEAN, Agent, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF HEARING of Applicant's Motion for an extension of time for giving notice requiring a hearing:

January 7, 2003

Toronto

ORDER

WHEREAS, pursuant to the provisions of the Motor Vehicle Dealers Act, R.S.O. 1990, Chapter M.42, as amended (the "Act"), the Registrar under the Act has proposed to refuse to grant the registration of Jason H. Truong (the "Applicant") as a salesperson;

AND WHEREAS the Registrar's proposal to refuse registration has been served upon the Applicant;

AND WHEREAS the Applicant requires a hearing before this Tribunal in terms of section 7.(2) of the Act but failed to mail or deliver to the Tribunal and the Registrar notice requiring such hearing within the time required for such notice to be mailed or delivered;

AND WHEREAS the Applicant has brought a Motion to this Tribunal for an extension of time for giving the Registrar and the Tribunal notice requiring a hearing;

AND WHEREAS the Applicant's aforesaid Motion was set down for hearing on January 7, 2003;

AND WHEREAS upon the Applicant's Motion coming before the Tribunal, the Registrar's Agent consented to the granting of extension of time for the giving of notice by the Applicant;

NOW THEREFORE, this Tribunal orders as follows:

1. The Applicant shall by not later than 5:00 p.m. on January 10, 2003 deliver to the Tribunal and the Registrar a duly completed and signed notice in terms of section 7.(2) of the Act that he requires a hearing before this Tribunal.
2. The Applicant shall by no later than 5:00 p.m. on January 10, 2003 deliver to the Tribunal, together with the Applicant's notice requiring a hearing before this Tribunal, a certified cheque or cash for the sum of \$100.00 representing the filing fee due by the Applicant;
3. The hearing of the Registrar's proposal to refuse the registration of the Applicant as a salesperson shall commence at 9:30 a.m. on Thursday, February 27, 2003 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.
4. The Registrar and the Applicant shall fully comply with the requirements of disclosure of documents or things as set forth in Rule 6.3 of the Rules of Practice of the Tribunal a copy of which the Applicant acknowledged having been furnished with by the Tribunal.

LICENCE APPEAL TRIBUNAL

Derek Israel,
Vice-Chair

Released: January 9, 2003

1224441 ONTARIO LTD. o/a MAYBERRY-HOMES BY DESIGN

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE *ONTARIO
NEW HOME WARRANTIES PLAN ACT*

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: MICHAEL H. TURK, Vice Chair

APPEARANCES:

Brian M. Campbell, Counsel, representing the Applicant
Carol Street, Counsel, representing the Ontario New Home
Warranty Program, Respondent

DATE OF
HEARING:

December 10, 2002

Toronto

REASONS FOR DECISION AND ORDER

The Applicant brings a Motion this day by teleconference to the Licence Appeal Tribunal for an Order extending the time for filing a Notice of Appeal of the Proposal to Refuse to Renew dated April 17, 2002.

At the commencement of the Motion the Tribunal was advised by the parties that they had reached a Consent Order the particulars of which are contained in a letter delivered to the Tribunal by facsimile on December 9, 2002.

On the basis of the correspondence of the parties aforesaid, and the parties confirmation during the teleconference that the said correspondence accurately reflects the agreement reached between them, the Tribunal hereby orders as follows:

1. The Applicant shall provide to the Respondent on or before Friday January 31, 2003, the following:
 - (a) Its fully completed Application for Renewal of Registration for the registration year December 4, 2002 to December 4, 2003, together with the required renewal fee;

- (b) Financial Statements for the year end December 31, 2001;
 - (c) Updated Personal Net Worth Statement of Mike Quattrociocchi, together with all supporting documentation necessary to substantiate the assets listed therein;
 - (d) Either an updated Personal Net Worth Statement of Nick Quattrociocchi, together with all supporting documentation necessary to substantiate the assets listed therein, or evidence in the form of corporate resolutions and a Notice of Change of Directors and Officers filed with the Ministry of Consumer and Business Services confirming that Nick Quattrociocchi is no longer a participant in Mayberry;
 - (e) All outstanding enrolment forms and fees owing to the Ontario New Home Warranty Plan;
2. In the event that the Appellant fails to provide any or all of the above listed documentation to the Respondent on or before 4:00 p.m. Friday January 31, 2003, the Notice of Proposal dated April 17, 2002 will be carried out, its registration will come to an end effective Monday February 3, 2003 with no further right of appeal and thereafter if the Appellant wishes to build or sell new homes in Ontario it must reapply for registration as a new vendor and/or builder.

LICENCE APPEAL TRIBUNAL

Michael H. Turk, Vice-Chair,
Presiding

RELEASED: January 16, 2003

PREHEARING

LUIGI AND MARIANNE RACHIELE

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: VICTOR L. DREVNIG, Vice-Chair

APPEARANCES:

LUIGI and MARIANNE RACHIELE, representing themselves.

FIL CECE, Agent, and WARREN NORTHCOTT, Warranty
Representative, representing the Ontario New Home Warranty
Program.

LYNN MACLEOD, Agent, representing Mid Park Construction
(1995) Ltd., the Added Party.

DATE OF

PREHEARING: January 22, 2002

TORONTO

ORDER

Following attendances by teleconference on January 22, 2003 at a Pre-Hearing before this Tribunal of LUIGI and Marianne Rachiele, acting on their own behalf (the "Applicants"), and Fil Cece, Agent, representing the Ontario New Home Warranty Program, (the "Program"), and Lynn MacLeod, Agent, representing Mid Park Construction (1995) Ltd. (the "Added Party");

The Tribunal makes the following Order:

1. The Parties to the hearing are the Applicants, the Program and the Added Party.
2. There were no facts in evidence agreed upon by the parties, nor was there settlement of any issue or issues.

3. Due to the long-term illness of Mr. Terrence W. Burrell, the previous Counsel of the Applicants, the Applicants have agreed to retain other Counsel on or before the 13th day of February 2003 and that all parties shall be notified by fax on or before that date as to the name and details of Counsel.
4. That the new Counsel shall have until the 27th day of February to draft a list of new complaints, if necessary, and serve same on all parties which shall constitute and be headed "New List".
5. It is agreed by all parties that the Decision Letter dated October 23, 2002 sent to all parties by the Ontario New Home Warranty Program shall constitute all of the issues before the Tribunal at the continuation of the hearing save and except for paragraph 4 above.
6. That it is agreed by all parties that a further Pre-Hearing is necessitated due to the non-attendance of Counsel for the Applicants due to illness and the retaining of new Counsel to be set after this 27th day of February, 2003 by the Tribunal.

LICENCE APPEAL TRIBUNAL

Victor L. Drevnig, Vice-Chair

Released: January 24, 2003

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
JAMES WEATHERBEE

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: October 30, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

JAMES WEATHERBEE

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by James Weatherbee, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: January 15, 2003

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
789 Don Mills Road, Suite 800
Toronto, ON M3C 1T5

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON, M4V 1K6

FROM: James R. Weatherbee
167 Russell Road, Box 36
Hammond, ON K0A 2A0

In accordance with Section 4.1 of the *Statutory Powers Procedure Act*, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereinafter the "Act") the parties to the proceeding, James R. Weatherbee (hereinafter referred to as "the Applicant"), and the Registrar, *Motor Vehicle Dealers Act* (hereinafter the "Registrar") waive the requirement of a hearing and hereby consent to an Order of the Licence Appeal Tribunal (hereinafter the "Consent Order") based on the following terms and conditions to the Applicant's registration as a motor vehicle salesperson:

- 1) The Applicant agrees that if he is criminally charged or convicted in the future, he will immediately notify his employer in writing of the charges or convictions against him and provide a copy of the notification signed by his employer to the Registrar, giving the particulars of the charges or convictions.
- 2) The Applicant agrees that if he is convicted under the Criminal Code or convicted of any industry specific offences under any Statute in the future, the Registrar is directed to and shall carry out the proposal.
- 3) The Applicant agrees to provide full and accurate disclosure on any applications, documents, statements or other form of communication/information provided to the Registrar or his authorized representatives regardless of previous disclosure.
- 4) The Applicant acknowledges that the Registrar is relying upon the accuracy of the disclosure provided by the Applicant in entering into these terms and conditions.
- 6) The Applicant agrees not to be a partner, shareholder, officer, director or sales manager of a dealership.
- 7) The Applicant agrees not to be the final signatory on any sales contracts on behalf of the dealer.
- 9) The Applicant agrees not to transfer his registration as a motor vehicle Salesperson to another dealer without having first obtained the prior written consent of the Registrar.
- 12) The Applicant agrees not to be involved in the process of buying, selling or leasing motor vehicles without the benefit of registration.
- 13) The Applicant agrees not to invite the public to deal at a place other than his employer's registered premises.

- 14) The Applicant agrees to take reasonable steps to review his employer's books, records & information pertaining to prior use/condition of any motor vehicle that he sells on behalf of his employer and ensure that the information is disclosed to the purchaser in writing on the bill of sale.
- 15) The Applicant acknowledges and understands that his registration will not be used to buy or sell motor vehicles where the Applicant knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
- 16) The Applicant agrees that his registration will not prevent the Registrar from taking administrative action, including a proposal to revoke his registration, arising from matters that may have occurred or may occur in the future related to his financial circumstances and honesty and integrity.
- 17) The Applicant acknowledges that his registration as a motor vehicle Salesperson will not prevent the Registrar from taking legal action, including a Provincial Offences prosecution, arising from matters that may have occurred or that may occur in the future.
- 18) The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
- 19) The Applicant will provide a copy of this order to his employer forthwith.
- 20) The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
- 21) The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
- 22) The Applicant acknowledges that he has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____, this _____ day of _____ 2003.

(Signature) James R. Weatherbee

These Terms and Conditions are accepted by the Registrar, *Motor Vehicle Dealers Act*.

Date:

Carl Compton
Registrar
Motor Vehicle Dealers Act

PREHEARING

MILLENNIUM TRAVEL CANADA INC.

APPEAL FROM DECISION OF THE BOARD OF DIRECTOR OF
THE TRAVEL INDUSTRY COUNCIL OF ONTARIO UNDER THE
TRAVEL INDUSTRIES ACT

TO DISALLOW CLAIM

TRIBUNAL: VICTOR DREVNIG, Vice-Chair

APPEARANCES:

DANNY MAMA, Agent, representing the Applicant Millenium Travel
Canada Inc.

TREVOR C.D. BRANION, Counsel, representing the Travel Industry
Council of Ontario

DATES OF
HEARING:

January 22, 2003

Toronto

ORDER

Following the attendances on January 22, 2003 at a pre-hearing by tele-conference before this Tribunal, Danny Mama, Agent, on behalf of Millennium Travel Canada Inc. (the "Applicant"), and Trevor C. D. Branion, Counsel on behalf of Travel Industry Council of Ontario (the "TICO").

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Thursday, February 20, 2003 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

The parties to the hearing are the Applicant and TICO.

It was agreed by the parties' respective representatives that the issues for adjudication at the hearing shall be as follows:

1. Did Mr. S. Mehta ("The Customer") pay the Applicant for Travel Services to be supplied to him by Travelpack. A Travel wholesaler in respect of a trip to India in compliance with section 51(1) of Regulation 806/93 under the *Travel Industry Act* (the "Act")?
2. Did the Applicant pass all or part of the Customer's money to Travelpack in compliance with section 51(1) and (1)(b) of Regulation 806/93 under the Act?
3. Did the customers comply with section 50(3)6 of Regulation 806/93 under the Act and pay for the travel services with cash or by cheque, credit card or other similar cash payment method?
4. The parties shall fully comply with the disclosure requirements set forth in Rule 6 of the Rules of Practice of the Tribunal.
5. The parties agreed that each side could call one witness and that one half-day for the hearing would be sufficient to hear the matter in its entirety.

LICENCE APPEAL TRIBUNAL

Victor Drevnig, Vice-Chair

Released: January 28, 2003

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990, Chapter 0.31

IN THE MATTER OF a CLAIM by
KELLY GROH

AND IN THE MATTER OF the DECISION of the
Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 16(1) of the Act

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision

KELLY GROH

Applicant

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, Chapter 0.31 as amended (the "Act"), Kelly Groh (the "Applicant") initiated an appeal under section 16(2) of the *Ontario New Home Warranties Plan Act* from a Decision Letter issued by the Program dated October 23, 2002 in terms of which the Program denied the Applicant's claim;

AND WHEREAS, the Applicant has failed to pay the filing fee for this proceeding before the Tribunal, required pursuant to section 7 of the *Licence Appeal Tribunal Act*, 1999;

AND WHEREAS, the Applicant has not responded to the Tribunal's Notice of Intent to Dismiss Proceedings sent to the Applicant pursuant to section 4.6 of the *Statutory Powers Procedure Act*, R.S.O. 1990, Chapter S. 22 as amended, and Rule 2.10 of the Rules of Practice of the Licence Appeal Tribunal, whereby a proceeding before this Tribunal may be dismissed without a hearing for failure to pay the required filing fee;

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers Procedure Act*, as amended, this proceeding initiated by the Applicant's request for a hearing before this Tribunal is dismissed;
2. Pursuant to the authority vested in it under section 16(3) of the *Ontario New Home Warranties Plan Act*, this Tribunal directs the Ontario New Home Warranty Program to deny the Applicant's claim.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek, Chair

Released: January 14, 2003

HIGHWAY TRAFFIC ACT
Section 50(1) and Regulation 574, R.S.O. 1990, Chap. H8 as amended

1414-MED-DISMISSAL

IN THE MATTER of an APPEAL of A DOWNGRADING OF
A DRIVER'S LICENCE

AND IN THE MATTER OF the DECISION of
the Minister of Transportation pursuant to
section 32(12)(b)(i) of the *Highway Traffic Act*.

TO CHANGE THE CLASS OR CLASSES OF
MOTOR VEHICLE IN RESPECT OF WHICH
THE LICENCE WAS ISSUED

AND IN THE MATTER of a requirement for a hearing
respecting the said DECISION

APPLICANT

Applicant

-and-

MINISTER OF TRANSPORTATION

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended (the "Act"), the Applicant initiated an appeal under section 50(1) of the Decision of the Minister of Transportation made pursuant to section 32(12)(b)(i) of the Act, to downgrade the Applicant's driver's licence;

AND WHEREAS, the Applicant has failed to pay the filing fee as prescribed by section 3(2) of Ontario Regulation 632/98 under the *Highway Traffic Act*;

AND WHEREAS, the Applicant has not responded to the Tribunal's Notice of Intent to Dismiss Proceedings sent to the Applicant pursuant to section 4.6 of the *Statutory Powers Procedure Act*, R.S.O. 1990, Chapter S. 22 as amended, and Rule 2.10 of the

Rules of Practice of the Licence Appeal Tribunal, whereby a proceeding before this Tribunal may be dismissed without a hearing for failure to pay the required filing fee;

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers Procedure Act*, as amended, this proceeding, initiated by the Applicant's request for a hearing before this Tribunal, is dismissed;
2. Pursuant to the authority vested in it under section 50(2) of the *Highway Traffic Act*, this Tribunal confirms the Decision of the Minister of Transportation to downgrade the driver's licence of the Applicant.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek,
Chair

Released: January 13, 2003

PREHEARING

SALVATORE ASSENZA

APPEAL FROM A DECISION OF THE BOARD OF TRUSTEES OF
THE ONTARIO MOTOR VEHICLE DEALERS COMPENSATION
FUND

TO DISALLOW A CLAIM

TRIBUNAL: WILLAM McINTOSH, Vice-Chair

APPEARANCES: JEFFREY GRAY, Counsel for the Applicant
LARRY BANACK AND AVIVA HARARI, Counsel, representing the
Board of Trustees of the Ontario Motor Vehicle Dealers
Compensation Fund (Respondent)

DATES OF
HEARING: January 17, 2003 Toronto

ORDER

Following the attendance on January 17, 2003 at a prehearing before the Licence Appeal Tribunal of Jeffrey Gray, Counsel, for the Applicant Salvatore Assenza, and Larry Banack and Aviva Harari, counsel for the Board of Trustees of the Ontario Motor Vehicle Dealers Compensation Fund (the "Respondent")

Whereas the Applicant has two appeals pending before this Tribunal. The present scheduled for hearing February 20, 2003, and the other LAT No.:1323/MVDCF/02/14 scheduled for hearing January 21, 2003.

And whereas neither can proceed due to an unforeseen and unpreventable conflict of interest of Applicant's counsel.

And whereas it was agreed that new material will be presented by the Applicant for consideration by the Respondent on both matters before the Tribunal.

And whereas the Respondent has agreed to review such new material and issue new decisions on both matters.

And whereas the Applicant has agreed to withdraw his Appeal in both matters without prejudice to his rights of appeal to the new decisions in both matters.

The Tribunal makes the following Order:

1. The hearing date in the present matter scheduled for February 20, 2003, and for LAT No.:1323/MVDCF/02/14 scheduled for January 21, 2003 are both cancelled.

LICENCE APPEAL TRIBUNAL

William McIntosh, Vice-Chair

Released: January 31, 2003

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
WALID A. SAAD

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: November 22, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

WALID A. SAAD

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Walid A. Saad, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: January 22, 2003

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
789 Don Mills Road, Suite 800
Toronto, ON M3C 1T5

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Walid A Saad
8 - 6 Cox Blvd
Unionville, Ontario
L3R 4G1

Pursuant to subsection 5(2) of the *Motor Vehicle Dealers Act* Walid A Saad (hereinafter referred to as “the Applicant”) and the Registrar, *Motor Vehicle Dealers Act*, (hereinafter referred to as “the Registrar”), in accordance with section 4.1 of the *Statutory Powers Procedure Act*, do hereby waive the requirements of a hearing and consent to an Order of the Licence Appeal Tribunal based upon the following Terms and Conditions:

1. The Applicant agrees, if he is charged in the future, to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.
2. The Applicant agrees if he is convicted under any law of an industry specific offence or if he is convicted under the Criminal Code, the Registrar is directed to and shall carry out the proposal.
3. The Applicant agrees not to transfer his registration as a salesperson under the *Motor Vehicle Dealers Act* to another dealer without the prior written consent of the Registrar.
4. The Applicant agrees not to be involved in the process of buying, selling or leasing motor vehicles without the benefit of registration.
5. The Applicant agrees to provide full and complete disclosure on all future applications and discussions with the Registrar, regardless of whether disclosure has been previously provided to the Registrar.
6. The Applicant will take reasonable steps to review his employer’s books, records & information pertaining to prior use/condition of any motor vehicle that he sells on behalf of his employer and ensure that the information is disclosed to the purchaser in writing on the bill of sale.
7. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.
8. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.

- Signed in the City of _____ this _____ day of _____ 2003.

Carl Compton
Registrar
Motor Vehicle Dealers Act

1423-MED-SEIZ

Appeal under Section 50(1) of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 47(1) of that Act.

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ROSS C. BENNETT M. D., Presiding Member

APPEARANCES: LUBA NEUWIRTH
Representative for the Registrar of Motor Vehicles
Applicant,
Solicitor for the Applicant

DATE OF
HEARING: January 3, 2003 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

EXHIBITS:

- 1) Copy of the Order of Suspension of the Applicant's Driver's Licence dated June 19, 2002.
- 2) Copy of the Notice of Appeal from the Applicant dated December 2, 2002.
- 3) Copy of the File Summary prepared by the Respondent.
- 4) Copy of File Documents attached to the Notice of Appeal

FACTS:

The Applicant, a 33 year old female police officer had her driver's licence suspended on June 19, 2002 by the Ministry of Transportation for the reason that she suffers from a medical condition which might impair her ability to operate a motor vehicle safely. The Ministry letter

refers to a seizure, which it alleges is related to alcohol misuse. The Registrar of Motor Vehicles had received an unsolicited Medical Report from a neurologist, Physician #1, which outlined the circumstances of a seizure the Applicant had suffered on May 29, 2002.

The history was that the Applicant had experienced bitemporal headaches and night sweats for a week before this episode. On May 28th she had worked a 12-hour shift and during lunch break had a 10 km run. That evening she had attended a "recruits night" party and had 5 beers. The most she had previously consumed was three.

The following morning she felt queasy at breakfast and went out on the deck for some fresh air. A couple of minutes later she passed out and fell forward striking her nose. Her husband, who is also a police officer, heard her fall and went right out. She was lying on the deck and when he called her name she looked up at him. He stated in evidence that her arms were twitching for a few seconds. She felt dazed and slightly dizzy, but stood up. Her husband stated that he has witnessed several seizures in the course of his work and they were all much more violent than this one. She neither bit her tongue nor voided.

The Applicant rested during the day, had a full dinner and played a game of soccer that evening. She saw her family doctor the next day, because she was frightened it might be a tumour. He apparently thought it was a combination of too much beer, dehydration and very warm weather. To be thorough, because of her headaches he referred her to Physician #1.

A neurological examination was normal and an EEG, MRI and multiple blood tests were ordered and eventually reported to be all-normal. Physician #1 notified the Ministry that it might have been a result of alcohol withdrawal after drinking five beers the night before, which was more than usual. He did not recommend any treatment.

Physician #1 examined the Applicant again on July 3, 2002, and forwarded the results of the laboratory tests to the Ministry. He stated that he did not believe the Applicant was an alcoholic, did not consider her to be a risk on the road and was willing to sign a waiver. He also said that he would be pleased to speak to anyone at the Ministry about the Applicant's case.

On July 15th, the Applicant's family physician completed an Alcohol Assessment form, which showed a score of "2". He also ordered biochemical markers (MCV & GGT), which were both reported normal.

A letter of endorsement was sent to the Ministry on September 3rd, by the Applicant's direct supervisor. He was on the Board when she was hired by Police Services and has been her supervisor since 1999. His letter was very supportive of the Applicant and stated she has shown exemplary service and had recently been promoted to a detective position in the Break Enter and Robbery unit.

A second letter was sent to the Ministry on December 18th from a fellow officer, who is a Breathalyzer/Intoxilyzer Technician and has known the Applicant since she joined in 1995. He is also very supportive of her and states as a certified expert witness in the courts on alcohol matters, that any suggestion or accusation that the Applicant has a drinking problem is "cruelly untrue".

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffer from any mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

The Tribunal agrees that the Registrar of Motor Vehicles had no other option, but to suspend the Applicant's driver's licence, under Section 47(1) of the *Highway Traffic Act* upon receipt of the Medical Report from Physician #1, informing the Ministry of the Applicant's possible alcohol withdrawal seizure.

The Ministry immediately took the position that the Applicant had an alcohol problem as well as a potential for future seizures. These conclusions appear to be based on the Applicant drinking five beers at a party and suffering a seizure the following morning. The only resemblance to a seizure was her husband's observation that her arms twitched for a few seconds after falling on the deck and cutting the bridge of her nose. She was stunned for a few minutes, but rested during the afternoon, ate dinner and played a game of soccer that evening.

Several letters sent to the Applicant by the Ministry demanded proof of total abstinence from alcohol and being seizure free for one full year as well as a detailed assessment from a neurologist, before her licence could be considered for reinstatement.

These requests were made after Physician #1 had forwarded two complete reports containing details of two normal neurological examinations, a normal EEG, normal MRI and multiple normal blood tests as well as statements that she was not an alcoholic and does not represent a risk on the roads.

The Ministry had also received an Alcohol Assessment form with a score of 2 and the normal results of the MCV and GGT tests. In addition the Applicant's supervisor, who has known her for over seven years, stated emphatically that she did not have an alcohol problem.

Counsel for the Applicant asked the Respondent what the medical condition is that is mentioned in the letter of suspension that the Applicant suffers from, which might impair her judgement to operate a motor vehicle safely.

The only diagnosis in evidence was Physician #1's statement that the seizure may have been from alcohol withdrawal, having overdone it the night before with five beers, which was much more than usual (three beers). This could not even be considered as an inference to label someone with an alcohol problem. The Tribunal believes the two extra beers precipitated the

problem, because it was more than usual, but not because of alcohol withdrawal. The after effects of this incident could have been a result of the fall and hitting her nose.

After considering all of the evidence and the application of the facts to the law, this Tribunal finds that the Applicant does not fall within section 14 of Regulation 340/94 in that she does not suffer from a medical disability likely to significantly interfere with her ability to drive a motor vehicle.

The Tribunal did not find any evidence of the Applicant having any type of alcohol problem or any propensity for future seizures that would fall under Section 47(1) of the *Highway Traffic Act* to prohibit reinstatement of her licence.

DECISION:

Upon the application by the Applicant to appeal the decision dated June 19, 2002 of the Registrar of Motor Vehicles ("Registrar") to suspend her driver's licence pursuant to Section 47(1) of the Highway Traffic Act ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be set aside.

LICENCE APPEAL TRIBUNAL

Ross Bennett, M.D.
Presiding Member

RELEASED: January 9, 2003

HIGHWAY TRAFFIC ACT
Section 50(1), R.S.O. 1990, Chapter H.8 as amended

1461925 ONTARIO LTD.

IN THE MATTER of a SUSPENSION AND SEIZURE
ORDER ISSUED BY THE DEPUTY REGISTRAR OF
MOTOR VEHICLES

AND IN THE MATTER of the *Highway Traffic Act*,
R.S.O. 1990, Chapter H.8 as amended (the "Act");

AND IN THE MATTER of the Commercial Vehicle Operator's
Registration (CVOR) certificate # 140-384-001 issued to
1461925 Ontario Ltd.;

AND IN THE MATTER of the safety record of 1461925
Ontario Ltd.;

AND IN THE MATTER of monies owing to the Minister of
Finance and other costs assessed by the Ontario Highway
Transport Board's decision dated September 11, 2002;

AND IN THE MATTER of a requirement for a hearing
respecting the said ORDER

1461925 ONTARIO LTD.

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended (the "Act"), 1461925 Ontario Ltd. (the "Applicant") initiated an appeal under section 50(1) of the Notice of the Deputy Registrar of Motor Vehicles made pursuant to section 47 of the Act, to suspend and seize the CVOR certificate #140-384-001 and the plate portion of permits for all commercial motor vehicles registered in the name of 1461925 Ontario Ltd. effective October 8, 2002 to December 31, 2002 and until such time as payment is made to the Minister of Finance and other costs assessed by the Ontario Highway Transport Board's decision dated September 11, 2002;
AND WHEREAS, the Applicant has failed to pay the filing fee as prescribed by section 3(2) of Ontario Regulation 632/98 under the *Highway Traffic Act*;

AND WHEREAS, the Applicant has not responded to the Tribunal's Notice of Intent to Dismiss Proceedings sent to the Applicant pursuant to section 4.6 of the *Statutory Powers Procedure Act*, R.S.O. 1990, Chapter S. 22 as amended, and Rule 2.10 of the Rules of Practice of the Licence Appeal Tribunal, whereby a proceeding before this Tribunal may be dismissed without a hearing for failure to pay the required filing fee;

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers Procedure Act*, as amended, this proceeding, initiated by the Applicant's request for a hearing before this Tribunal, is dismissed;
2. Pursuant to the authority vested in it under section 50(2) of the *Highway Traffic Act*, this Tribunal confirms the Notice of the Deputy Registrar of Motor Vehicles, to suspend and seize the CVOR certificate #140-384-001 and the plate portion of permits for all commercial motor vehicles registered in the name of 1461925 Ontario Ltd. effective October 8, 2002 to December 31, 2002 and until such time as payment is made to the Minister of Finance and other costs assessed by the Ontario Highway Transport Board's decision dated September 11, 2002.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek, Chair

Released: January 30, 2003

1426-ADLS-ASTHMA

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D., Presiding Member
SIMON DANN, Member

APPEARANCES: KYLE BEIL,
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF
HEARING: January 03, 2003

DECISION
RELEASED: January 06, 2003 Toronto

REASONS FOR DECISION

A hearing was held on January 03, 2003, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on January 06, 2003, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated December 9, 2002, and was received by the Tribunal on December 9, 2002, together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

The Representative of the Ministry provided the Tribunal with original certified copies of Ministry of Transportation documents on file.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice to Registrar dated December 5, 2002, issued by the Registrar of Motor Vehicles.
- b) Exhibit # 2 Notice of Appeal Form received December 9, 2002.
- c) Exhibit # 4 Additional submissions by the Applicant, include a Medical Report from Physician #1 – received December 30, 2002.

By the Respondent:

- a) Exhibit # 3 Ministry of Transportation submissions – received December 27, 2002.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

- 50.1(1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
 - (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
 - (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

- 15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
 - (a) the name, telephone number and address, with the postal code, of the medical practitioner;
 - (b) the name, date of birth and address of the person who is the subject of the report;
 - (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner.”

Finally, section 13 of Regulation 574 (amended) provides:

“A person appealing a suspension has the onus of establishing the merit of the appeal”.

FACTS:

The Applicant’s Driver’s Licence was suspended “02/12/05” as per Notice of Appeal filed as exhibit # 2.

Applicant’s Evidence

In order to fulfil the requirements of the procedures for appeal, the Applicant had page two of the Notice of Appeal prepared by his family physician. Physician #1 confirms that she has been the Applicant’s physician for “4 years...”

Physician #1 diagnoses the Applicant with “*Chronic Rhinitis, sceptical deviation...*” and explains that the Applicant is suffering from: “*...Chronically poor air flow ...since childhood ...2º nasal injury septoplasty & cautery of the turbinates in 1992, recently symptoms of postnasal drip, snoring & air flow...*”.

Under “Relevant Details of last visit and when your patient was last seen”, Physician #1 notes: “*...Flonase Nov 7/02 ...some improvement in airflow & decreased snoring...*”

In a letter dated December 24th, 2002, Physician #1 reiterates the Applicant’s condition and adds that “*...asked to take a breathalyzer ...could not consistently blow without choking ...in recent months ...symptoms worsening ...condition may have interfered with ...ability to perform the breathalyzer test...*”

At the hearing, the Applicant testified that upon being asked to provide a breath sample he informed the Constable that he “*...had a respiratory problem and a breathing problem...*”

Being instructed by the officer “*...to give it a shot...*” the Applicant made several attempts to provide a breath sample.

The Applicant affirmed that as he cannot breathe through his nose, he is unable to take in the amount of air necessary to enable him to blow for the length of time required.

Referring to Dr. Goldstein’s report, the Applicant not only challenged Dr. Goldstein’s credentials, but also questioned whether Dr. Goldstein “*...was a medical doctor...*”. The Applicant maintains that: Dr. Goldstein has never examined him; Dr. Goldstein did not have any “*...measurements...*”; and that Dr. Goldstein’s credentials are totally irrelevant to his condition.

The Applicant feels that he has done “...*nothing wrong*...” other than he was speeding, and does not understand why he has to take time off work to deal with these issues.

Prior to concluding his testimony the Applicant questioned why the officer did not take him down to the station for a blood sample, and asked why he was not allowed to make a phone call.

In cross-examination, the Applicant admitted to telling the officer that he has “...*asthma*...”. By way of clarification the Applicant confirmed that he had been required to use an inhaler before participating in sport activities earlier in his life. In response to the Respondent’s Representative question as to when was the last time he used an inhaler the Applicant replied: “...*five or six years ...but still gasp for air ...constantly*...”

The Applicant testified that over the past several years he has seen Physician #1 with respect to his breathing problems, he is still being prescribed and uses a nasal spray, but is no longer being prescribed an inhaler. Physician #1 did “...*about a year, a year and a half ago*...” refer the Applicant to a respiratologist, but the Applicant did not follow through with the consultation due to work constraints.

The Respondent’s Representative asked how Physician #1 knew that he had been “choking” at the time of the breathalyzer. The Applicant replied that he had told her.

Witness #1 testified on behalf of the Applicant. Witness #1 was asked by the Applicant to describe the events on the night that the Applicant was asked to provide a breath sample.

Witness #1 confirmed that the room was smoky, however, not being a physician the witness was not able to comment on how the smoke affects people. Nonetheless, Witness #1 acknowledged that he, himself, was not affected by the smoke.

In cross-examination, Witness #1 declared that he did not witness the Applicant exhibiting any signs of respiratory difficulties.

In closing the Applicant highlighted that he disagreed with Police Officer #1’s evidence and complained about not being allowed to make a telephone call or being asked to provide a breath sample. The Applicant stressed “...*I did what I could*...” and accentuated that he was not able to blow into the device for the length of time required.

After listening to the Respondent’s Representative’s comments that Applicant re-iterated his position that he was not impaired, and emphasized that he needs his driver’s licence, not only for work but also because his wife is pregnant and might have to be taken to the hospital.

Respondent’s Evidence

The Respondent provided the following documents:

1. Notice to the Registrar, certified December 12th, 2002
2. Driving Record of the Applicant, certified December 20th, 2002
3. Vehicle Record Search, certified December 12th, 2002

4. Medical Report of Dr. Roger Goldstein, Respiralogist, dated December 12th, 2002

In his report dated December 12th 2002, Dr. Roger S. Goldstein, MB, ChB, FRCP(UK) FRCP(C) FCCP, Director of Program of the University of Toronto, Respiratory Divisional program in Rehabilitation, states that he has been a "...medical advisor to the pulmonary function laboratories for over 16 years..." and is "...familiar with the Alcotest and the Intoxilyzer 5000C having evaluated both machines in Pulmonary function laboratory ...have tested both the portable and the station monitor among a variety of individuals (men and women) age range 44-77 years, vital capacity range 1.6 to 4.5 litres, FEV1 range 0.4 to 2.9 litres, FEV1/FVC range 20% to 78%... The vast majority of individuals, even with an FEV1 of 0.7 are able to satisfactorily provide a breath sample notwithstanding their respiratory condition..."

After reviewing the medical information contained in the Notice of Appeal, Dr. Goldstein concluded: *"...It is my view that neither of these diagnoses prevent an adequate provision of a breathalyzer sample..."*

The Respondent called Police Officer #1, a member of the Toronto Police Services, as a witness. Police Officer #1 testified that he has been a Police Constable for "...seven years..."

Police Officer #1 described the events that led to the Applicant being stopped and the subsequent demand for a breath sample.

The Applicant was given a total of ten opportunities to provide a breath sample, but failed to do so. Each time the Applicant blew into the machine the screen registered an error message.

Police Officer #1 described in detail, for the Tribunal each of the Applicant's attempts to provide a breath sample:

"...first attempt ...cheeks puff out but he was not blowing any air out of his mouth ...cheeks not deflating...; second time ...exact same thing happened ...he puffed his cheeks out, no tone was emitted ...no air was going into the device ...he stated he has asthma...; third attempt ...did put some air into the Alcotest ...observed ...blowing air in very short bursts ...pop air into the machine, stop, immediately pop air again continuously for several seconds ...resulted in error reading ...not given a long enough sample...; fourth attempt ...blew continuously ...emitting a tone for approximately two seconds ...stopped blowing, removed his lips from the mouthpiece ...error reading...; fifth attempt he blew for approximately three continuous seconds ...tone emitted ...after three seconds he took lips off the mouthpiece expended rest of air that was in his mouth and his lungs into the air outside...; sixth attempt ...deep breath ...observed his chest expand ...exhaled into the Alcotest for approximately two seconds he then removed his lips again and blew the rest of his breath into the air ...cold night ...10 degrees below zero ...clear and dry and in the air, when he exhaled ...could see his breath ...expended a large volume of his breath into the air...; seventh attempt ...puffed some air into the Alcotest, several short bursts for one or two seconds ...resulting in error reading...; eighth try ...puff and blow again in short burst one to two seconds ...error reading...; ninth attempt ...blew continuously ...three seconds ...strong tone ...removed his lips from the mouthpiece, expelled the rest of the air out his mouth

...error reading...;tenth final attempt ...blew continuously ...approximately two seconds and then stopped ...error reading..."

Police Officer #1 was quite certain that at no time during the breathalyzer test session did he observe or detect the Applicant: to have a runny nose or discharge; to blow his nose; to be "...choking, coughing..." to be experiencing any symptoms of asthma or breathing difficulties. Further, at no time did the Applicant request medication or medical assistance.

Under cross-examination by the Applicant, Police Officer #1 disagreed with the Applicant's claim that prior to commencing the breathalyzer test session, the Applicant advised him of his asthmatic condition. Police Officer #1 was adamant that the information had been proffered after the second failed attempt.

In his closing remarks, the Respondent's Representative suggested that the Applicant has no medical condition that prevented him from complying with the demand for a breath sample.

The Respondent's Representative cited the Applicant's action of expelling breath into the air, as evidence of the Applicant's intent to not provide a breath sample. There was no indication that the Applicant had a medical problem and according to Police Officer #1 there appeared to be no difficulty with the Applicant's airflow.

Further, Mr. Beil, the Respondent's Representative continued, the Applicant testified that he is continuously gasping for air, yet at no time during the breathalyzer test session did Police Officer #1 observe any signs of breathing impairment.

In referring to Physician #1's report the Respondent's Representative points out that Physician #1 makes no mention of history of respiratory illness nor is there any indication that she has ordered Pulmonary Function Tests. Physician #1 alludes only to the Applicant's nasal problems, which, in his opinion and in the opinion of Dr. Goldstein, would not affect the ability to provide air through the mouth.

In conclusion the Respondent's Representative asked that the Tribunal uphold the Registrar's decision.

APPLICATION OF THE LAW TO FACTS:

Although all of the evidence presented was considered, the preceding notes reflect a summary of the proceedings. Evidence introduced not directly germane to the issue was not transcribed.

Prior to setting out the reasons for the decision, the Tribunal shall address concerns raised by the Applicant.

The Applicant questioned the reason a blood sample was not demanded. While subsection 48.3 (3) 1 of the Highway Traffic Act, R.S.O. 1990, Chapter H-8 as amended is clear in its provision, that the concentration of alcohol in the blood may be obtained "...by an analysis of the person's breath sample or blood taken..." the decision to request a blood sample remains

at the discretion of the officer or officers involved. According to established policy, no blood samples are to be demanded unless there are obvious visible physical signs preventing the individual from providing a breath sample. As no such signs were present, the issue of a blood sample is inconsequential.

As the Applicant made a plea for empathy and leniency, the Tribunal feels that some clarification for the benefit of the Applicant is essential. Although the Tribunal may empathize with the Applicant's current dilemma, as well as with the Applicant's emphasis that he was not drunk at the time, the Tribunal must deliberate solely on evidence as it pertains to Section 50.1 (2) (b) of the Highway Traffic Act. At issue is not the individual's state of impairment but rather whether a medical condition exists that may preclude the compliance with the demand for a breath sample.

Section 50.1 (2) (b) of the Highway Traffic Act allows for an appeal in circumstances where a:

“...person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason...”

The Applicant submitted medical reports from his family physician Physician #1 indicating the Applicant suffers from: “*Chronic Rhinitis, septical deviation* resulting in: “...*Chronically poor air flow ...postnasal drip, snoring...*”. The Applicant is being treated with “...*Flonase...*” and has showed “...*some improvement in airflow & decreased snoring...*”. In the December 24th, 2002, report Physician #1 opines that the Applicant “...*could not consistently blow without choking ...condition may have interfered with ...ability to perform the breathalyzer test...*”

The Respondent's Representative argues that there is no evidence either from Applicant, or from Police Officer #1, of the Applicant choking. According to Mr. Beil, Physician #1 is a family physician with unknown experience with breathalyzer devices whereas Dr. Goldstein is a respiratologist with vast experience in the field. The Respondent's Representative asked that the Tribunal consider Dr. Goldstein's expert view that the Applicant's condition would not “...*prevent an adequate provision of a breathalyzer sample...*”

The Tribunal must concur with the Respondent's Representative. With all due respect to Physician #1, she is not a respiratologist, Dr. Roger Goldstein is. The Tribunal, thus, must accept the evidence of the Respondent's specialist, Dr. Roger Goldstein, that there is no existing medical condition precluding the Applicant from complying with the demand for a breath sample.

This premise is corroborated by several facts. The Applicant has failed to provide the Tribunal with medical reports from any specialists. It appears that Physician #1 may have referred the Applicant to a respiratologist, but the Applicant felt his condition was not severe enough to take time off his job and follow through with the referral; by the Applicant's own admission his last use of an inhaler was “...*five or six years...*” ago; the Applicant neither requested nor sought medical assistance for his condition, during or after the incident; and lastly, at no time, was the Applicant observed by Police Officer #1 to be in an afflicted breathing state.

The onus being on the Applicant to establish the merit of the appeal, the Tribunal finds that the Applicant's testimony, failed to substantiate the basis for an appeal on medical grounds. Thus, the Tribunal finds that the Applicant does not meet the criteria of Section 50.1 (2) (b), in that he was not able to demonstrate that he suffers from a medical condition, which would prevent him from providing a breath sample.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated December 05, 2002 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal **confirms** the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

Simon Dann,
Member

RELEASED: January 10, 2003

1430-ADLS-ASTHMA

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF
HEARING: January 10, 2003

DECISION
RELEASED: January 13, 2003 Toronto

REASONS FOR DECISION

A hearing was held on January 10, 2003, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on 13, 2003, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated December 12, 2002, and was received by the Tribunal on December 12, 2002, together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

By way of Preliminary Matters, the Respondent's Representative informed the Tribunal that during a conversation with the Applicant, it was established that the Applicant had received notification to pick up a package at the courier's office, but did not do so. As the Applicant was not in possession of the disclosure information provided by the Ministry, a short recess was offered in order to avail the Applicant of the opportunity to review the documents. The offer to recess was declined by the Applicant.

The Representative of the Ministry sought to introduce a copy of the videotape of the breathalyzer session. The Applicant raising no objections, a copy of the breathalyzer session videotape was introduced and entered as exhibit # 4.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice to Registrar dated October 28, 2002 – issued by the Registrar of Motor Vehicles.
- b) Exhibit # 2 Notice of Appeal Form – received December 12, 2002.

By the Respondent:

- a) Exhibit # 3 Ministry of Transportation submissions – received January 3, 2003
- b) Exhibit # 4 Videotape of the Breathalyzer test session – received January 10, 2003.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

- 50.1(1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
 - (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
 - (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

- 15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
 - (a) the name, telephone number and address, with the postal code, of the medical practitioner;
 - (b) the name, date of birth and address of the person who is the subject of the report;

- (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

The Applicant's Driver's Licence was suspended "28/10/2002" as per Notice of Appeal (Exhibit # 2)

Appellant's Evidence

Page two of the Notice of Appeal is blank. Attached to the Notice of Appeal is a medical report dated December 04, 2002, prepared by Physician #1.

Physician #1 informs that the Applicant "...suffers from *Bronchial asthma*, and on the day ...he became nervous and anxious which made his medical condition worse." It is Physician #1's opinion: "...That is why he couldn't blow the pipe...".

At the hearing the Applicant testified as to the events preceding the demand for a breath sample.

At the time of the breath test session, the Applicant claims that he attempted to provide a sample but was unable to do so, because he has asthma and requires the use of an inhaler.

In cross-examination the Applicant clarified that he does not use the inhaler on a daily basis, but as needed. The inhaler the Applicant showed the Tribunal was purchased in June 2002. At the time of the breathalyzer session the Applicant did not ask the officers to be allowed to use the medication because he did not have the inhaler with him.

The Applicant confirmed that he did not request medical assistance but did inform the officers that he was having difficulty breathing. The Applicant did not recall telling the officers he had a problem with his heart and denying that he had asthma.

After being released the Applicant went home rather than seek immediate medical assistance.

As the Applicant became emotional while on the stand, a short recess was granted to allow the Applicant time to compose himself.

Continuing his cross-examination the Applicant testified that his physician has never sent him to a respiratologist, and stressed that he has a heart condition.

While under oath the Applicant acknowledged understanding the questions asked and responded accurately to the questions posed.

In his closing remarks, the Applicant stressed he is not happy with the situation and asked that his licence be returned to avoid further problems in his life.

Respondent's Evidence

The Respondent provided the following Documents:

1. Certified Copy of Notice to the Registrar, sealed December 13th, 2002
2. Certified Copy of the driving Record of the Applicant, sealed December 13th, 2002
3. Certified Copy of Vehicle Record Search, sealed December 13th, 2002

The Respondent called Police Officer #1, a member of the Toronto Police Services, who has been a police officer for approximately "...two years...", as a witness.

Police Officer #1 described the events that led to the Applicant being stopped, and transported to the station for a breathalyzer test.

Although the Applicant had been involved in a motor vehicle accident, he had not suffered any injuries.

During the time that Police Officer #1 spent with the Applicant, Police Officer #1 did not observe the Applicant in any apparent physical discomfort, although the Applicant stated that he had a heart condition.

Prior to calling the next witness, the Respondent's Representative offered to play a portion of the tape. The Applicant accepted the offer, and the portion of the videotape showing the interview by the Sergeant on duty was viewed. It is clear from the tape that the Applicant answered "NO" to the questions posed regarding health problems and medication.

Also called, as a witness by the Respondent's Representative, was Police Officer #2, the Breath Technician who administered the breathalyzer test. Police Officer #2 is employed with the Toronto Police Services – Traffic Services, and has been a police officer since "...15

October 1985...". In 1999, Police Officer #2 was designated as a qualified breath technician to operate the Intoxylzer 5000 C.

The Respondent's Representative asked that the videotape of the breathalyser session be played while Police Officer #2 was on the stand, thereby allowing the Constable to comment as appropriate.

Police Officer #2 explained for the record that the Intoxylzer device emits a tone when minimum pressure had been reached. If no tone is emitted it means no air is going in. In this case it is obvious the Applicant was "...chipmunking...", that is blowing out his cheeks but not blowing air into the chamber. The Applicant released the seal and blows air out the side of his mouth.

The Applicant showed no apparent sign of discomfort but suggested that he has a heart problem. Police Officer #2 then asked the Applicant if he has asthma, the Applicant denied.

In closing, Police Officer #2 confirmed that during the time he spent with the Applicant there was no indicia of a medical condition: no clutching of the heart, no sweating, no wheezing.

The Respondent's Representative, in his closing remarks, suggested that there is no medical condition that would prevent the Applicant from providing an adequate breath sample. Mr. Biel alluded to the videotape to support his argument. The videotape, Mr. Biel asserts, indicates clearly that the Applicant is not making an effort to blow into the instrument. Further the Respondent's Representative pointed out that the Applicant contradicted himself, regarding his medical condition. At the time he denied having asthma, but his medical report now states that he suffers from bronchial asthma.

With regard to the medical reports, Mr Biel highlighted that Physician #1's report does not conform with section 15 of Regulation 574 and that that Physician #1 in his brief comments does not provide any information as to the history of the Applicant's condition.

Mr. Biel emphasized that neither officer, both of whom are trained observers, noticed the Applicant to be in medical distress.

Citing insufficient information, in conclusion, the Respondent's Representative asked that the Tribunal uphold the Registrar's decision.

APPLICATION OF THE LAW TO FACTS:

Although the total evidence presented was considered, the preceding reflects a summary of the proceedings. Evidence introduced not directly germane to the issue was not transcribed.

An appeal was brought by the Applicant under Section 50.1 (2) (b) of the *Highway Traffic Act*, which prescribes:

"...person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason..."

The subject of this appeal is whether the Applicant had a medical condition that at the time could cause the Applicant to fail or not comply with the breath demand.

The Applicant submitted a medical report and produced an inhaler to support his argument that he is asthmatic.

With respect to the medical report from Physician #1, the Respondent's Representative maintains that the report does not conform with the requirements of section 15 of Regulation 574.

The Tribunal agrees. Section 15 (2) of Regulation 574 is, perhaps, the most relevant in that it prescribes:

15 (2):

"The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath sample including the results of any related tests."

The essence of this clause requires that the physician establish a link between the medical condition and the individual's inability to provide a breath sample. This clause relates specifically to the detailed information required on page 2 of the Notice of Appeal. Page 2 of the Notice of Appeal serves as a valuable guideline to the Tribunal as it is designed to provide pertinent details of the Applicant's condition, such as:

- **Details and diagnosis of the patient's present condition;**
- **History of condition;**
- **Type of Measurements or recent test taken with (date indicated):
(Reference to any pathology test (e.g.: PFT represent important corroboration of your medication opinion)).**
- **Relevant details of last visit and when ...patient was last seen**

Unfortunately page 2 of the Notice of Appeal has been left blank, therefore denying the Tribunal possibly valuable insight into the Applicant's physical condition.

The Tribunal sympathizes with the Applicant, nonetheless, the Tribunal cannot ignore the Respondent's evidence submitted by way of the videotape. The Applicant exhibits absolutely no signs of physical distress or discomfort during the breathalyser session. The Tribunal's observation is corroborated by Police Officer #1 who was with the Applicant from the time of his arrest at the scene of the accident, until his release.

The Tribunal is also perturbed by the obvious conflict in the information provided by the Applicant to the officers at the time, and the information contained in Physician #1's report. With all due respect to Physician #1 it does not appear that he is a specialist in the field of respiratory illness, therefore his opinion, albeit well intended, is insufficient to satisfy the Tribunal that the Applicant has a medical condition that would preclude him from providing a breath sample.

The onus being on the Applicant to establish the merit of his appeal, the Tribunal, has no alternative, but to find that the Applicant has failed to do so. Thus, the Tribunal, further, finds that the Applicant does not meet the criteria of Section 50.1(2)(b), in that the Applicant was not able to demonstrate that a medical condition prevented the compliance with the demand for a breath sample.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated October 28, 2002 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal **confirms** the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: January 16, 2003

KYLE A. JONES

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: MALCOLM FEALING
Presiding member

APPEARANCES: LYNDA DUNBAR
Representative for the Registrar of Motor Vehicles

KYLE A. JONES, Applicant
unrepresented

DATE OF HEARING: January 3, 2003

DECISION RELEASED: January 10, 2003 *by teleconference*

REASONS FOR DECISION

A hearing was held on January 3, 2003, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Kyle A. Jones (the "Applicant")
Motor Vehicle:	1995 Dodge Dakota , plate 1561LL (the "vehicle")
Date of Appeal:	December 17, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on January 3, 2002 and proceeded as an electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

The Tribunal made its ruling on the preliminary issue which follows.

The hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

Background leading up to this charge: While out with a group of friends and new acquaintances I admitted that I felt I had too many drinks to be driving. The person that was driving my vehicle December 6, 2002 offered to drive. I had no idea that his licence had been suspended and frankly can't believe that anyone under suspension would offer to drive. I have learned a very valuable experience from this incident and will advise everyone to always ask when offered to be given a drive if the person has a valid licence and ask to see it.

The reason I must ask for this appeal is the fact I was married on November 16h, 2002 and my wife has just learned she is pregnant. We are trying to pay for a house and the financial aspect of this impoundment is virtually impossible at this time. I need my vehicle for work and although the impoundment period is going to be a hardship to be without my truck, financially I don't know how I am going to do it but do accept the fact what happened was a terrible act of bad judgment on my part to accept a drive by someone I really didn't know.

The reason I am asking for a telephone appeal is I just cannot afford to take a day off work to attend in person and a written appeal may take too long. I work as a machinist and would appreciate knowing the procedure for a telephone appeal. As I work on machines that can't be left I would have to be told in advance of the call. Do you call during a specified time of day that I will be notified about?

I sincerely ask that my appeal will be granted.

"Kyle Jones"

Kyle Jones

Mr. Jones informed the Tribunal that he normally used his automobile for work, and making deliveries. He recently found out that his wife was pregnant and was worried that the cost of the impoundment would adversely affect his capacity to purchase baby items. He realised that he could try to get his friend to cover the cost of the impoundment, but was not sure that he would be successful.

In response to questioning by the Respondent, Mr. Jones said that he has made alternative arrangements to get to work. He gets a lift from a female friend, and occasionally is given a ride by his father or one of his workmates. His wife owns her own car. There is therefore no problem in her getting to work or getting to her Doctor's office.

Mr. Jones admitted that his main concern is how he will find the funds to get his truck out of the pound.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Jason Pellegrims;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until January 25, 2003.

The Respondent maintained that in her view the Appellant was not experiencing exceptional hardship.

The loss of his automobile had not resulted in hardship that was immediate, significant or lasting. There was no threat to his wife, because she had her own vehicle; and there was no threat to his employment. Mr. Jones admitted that he had not missed a day of work since his truck had been impounded.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
- (b) financial or economic loss to any person;
- (c) loss of employment or employment opportunity to any person; or
- (d) loss of education or training or of an educational or training opportunity to any person.

- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant appeals the Registrar's decision stating that the order will result in exceptional hardship under subsection 50.2(3) of the Act. The Applicant has not shown exceptional hardship exists in this case. Although he and his family will have some inconvenience both the Applicant and his wife have access to alternative transportation. Inconvenience is not a factor to be considered under section 22(2)(a) of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98.

The concern by the Applicant of a threat to health or safety does not apply when an alternative to the impounded vehicle is available, as in this case, pursuant to section 22(1)a) of Regulation 574.

Even if it did apply, the Applicant's concern regarding his wife's pregnancy does not constitute a threat to her safety. There is no evidence that her pregnancy is anything other than a normal pregnancy.

The financial concern expressed by the Applicant relating to the cost of the impoundment is only relevant where the Applicant establishes that no alternative to the impounded vehicle is available. Since as previously stated there is an alternative, financial loss cannot be considered under section 22(2)(b) of the Regulation.

The Tribunal sympathizes with the Applicant's predicament. He has learned from this experience and will check to ensure that the driver's licence is valid by contacting the Ontario Ministry of Transportation at 1-900-565-6555 for automated service, accessing the MTO

website at www.mto.gov.on.ca or obtaining a driver's abstract at a local MTO Driver Vehicle Licence Issuing Office or Service Ontario Kiosk, prior to giving someone the permission to drive his vehicle.

In view of the above finding the Tribunal concludes that Mr. Jones' appeal of exceptional hardship has no merit.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Malcolm Fealing, Presiding Member

RELEASED: January 10, 2003

1436-MED-ALCL

Appeal under Section 50(1) of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 47(1) of that Act.

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL ROSS C. BENNETT M.D., Presiding Member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

Applicant

Solicitor for the Applicant

DATE OF
HEARING: JANUARY 13, 2003

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

EXHIBITS:

- (1) Notice of Suspension from the Ministry dated September 13, 2002.
- (2) Notice of Appeal from the Applicant dated December 16, 2002.
- (3) File Summary introduced by the Respondent
- (4) Applicant's driving record from the Ministry dated December 30, 2002
- (5) Letter from Physician #1, psychologist dated September 22, 2002.
- (6) Letter from Physician #2, family physician, dated September 27, 2002.

FACTS:

The Applicant, a 53 year old retired male, had his licence suspended September 22, 2002 by the Deputy Registrar of Motor Vehicles under Section 47(1) of the *Highway Traffic Act*. Physician #2, the Applicant's family physician, sent an unsolicited Medical Report to the Ministry on March 27, 2002 stating the Applicant had been admitted to the hospital for intoxication with withdrawal (d.t.'s). She added that he had a 12 year history of alcoholism (87-89). He had remained sober for 12 years, but over the past two years has been on several binges.

The Applicant had worked for the City for 30 years and had been promoted to Director. When the amalgamation of the City took place he lost this position because he did not have an engineering degree. Problems with his retirement package occurred because he was short 2 years to reach the "85" factor. Eventually he was kept on the payroll in another position for the two year period, which meant he would collect an additional \$12,000 annually. At this time he had been married for 4 years and had 2 children.

The Applicant remained sober until July 1999, when he became depressed and started to drink again. His doctor prescribed tranquillizers. His wife became very angry and separated in October 1999 because she did not want to live with an unsuccessful man who was drinking.

The Applicant's routine was to go on a bender at home for 3-4 days every 6-8 weeks. He never drank outside of his home and never when driving. In the spring of 2002 he realized he was out of control and on May 16 went into detox. He did not drink for the next 2 weeks, but restarted again. He returned to detox and followed up at the inpatient treatment centre for a one month program.

He was readmitted in July of 2002 and completed the program successfully under a psychiatrist Physician #3, who wrote a very supportive letter to the Ministry. He began attending AA, 4-5 times a week and became very active in his church. Physician #3 does not feel there is any necessity for the Applicant to lose his licence for a full 12 months.

The Applicant's counsellor at the inpatient treatment centre also wrote to the Ministry on September 20, 2002 stressing the excellent recovery of the Applicant and his need to have freedom to seek help, attend meetings and partake in the fellowship of recovery. He does not see an individual in recovery, working an excellent recovery program, as a threat to society.

The former paragraph refers to the fact that the Applicant's house is in a remote area and without transportation he is unable to go to AA meetings, church meetings and appointments with his doctors. He is forced to live with his elderly father, which is not assisting in his recovery.

On September 22, 2002, Physician #1, a psychologist wrote to the Ministry (Exhibit # 5) emphasizing the Applicant's strong motivation in his recovery program. He had attended 6 sessions of psychotherapy between April and September and truly impressed Physician #1 the way in which he has strengthened his coping mechanisms.

On October 12, 2002 the Applicant went to see Physician #4, a specialist in the treatment of alcoholism and substance abuse. In a letter to the Ministry Physician #4 states he is very impressed with the Applicant's motivation to recover and his laboratory assessment shows no evidence of recent or long-term alcohol abuse. He has demonstrated his ability to work a good recovery program for 10 years before circumstances triggered a relapse. Based on his findings he recommends reinstatement of the Applicant's driver's licence.

An Medical Advisory Committee (MAC) Case Study on October 31, 2002 recommended continued suspension of the Applicant's driver's licence despite letters recommending reinstatement of his licence from a psychiatrist, a specialist in alcoholism and drug abuse, a psychologist and his counsellor from the Treatment Centre.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffer from any mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;

- (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

The Deputy Registrar was obligated to suspend the Applicant's driver's licence under Section 47(1) of the *Highway Traffic Act* on September 12, 2002, when Medical Reports were received from Physician #2 outlining a 2 year history of alcoholism with 2 recent admissions to hospital for alcohol and withdrawal effects and two visits to detox units.

Unfortunately by the time the suspension occurred, the Applicant was getting his life in order and seeking help from a number of sources. He had previously maintained sobriety for some 12 years until he suffered, what Physician #3, his psychiatrist, called "a catastrophic emotional reaction and he was just unable to maintain sobriety." The loss of his wife and his job after 30 years employment was just too much.

He was immediately admitted to the Mental Health Centre in their Concurrent Disorders Program and he returned to AA on a regular basis, as well as getting very involved in his church. He completed the program and received glowing reports from his psychiatrist and counsellor. He also attended psychotherapy sessions from a private psychologist and was treated by a specialist in alcohol and addictions.

The Tribunal was very impressed with the support offered by all of the Applicant's therapists. These specialists were all accustomed to treating alcoholics and all were impressed with the Applicant's determination to win his battle with alcohol. They individually saw him multiple times and thus, know him well. They obviously trust him and did not feel he would be a danger to society, if allowed to drive. Another point they considered is that the Applicant has a clean driving record despite his past history.

The Medical Advisory Committee (MAC) on the other hand has never met the Applicant and bases its' decision on policy, the Applicant history and a set of guidelines, from the C.M.A., which never vary. The Tribunal believes the evidence from the psychiatrist, the psychologist, the counsellor and the family physician has much more weight and is more valuable in the determination of whether the suspension should continue.

After consideration of all of the evidence and the application of the law to the facts this Tribunal does not find sufficient evidence to warrant the continued suspension of the Applicant's driver's licence under Section 47(1) in that he does not suffer from a medical disability likely to significantly interfere with his ability to drive a motor vehicle.

The Applicant has maintained sobriety since July 2002, a period of some five months, he has sought counselling and has strong letters of support from many of the individuals active in his treatment. Moreover Physician #4, a specialist in the treatment of such disorders recommended the re-instatement of the Applicant's licence as early as October last year. In view of this strong evidence the Tribunal finds that it is appropriate that the Registrar's decision be set aside.

DECISION:

Upon the application by the Applicant to appeal the decision dated September 12, 2002 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be set aside.

LICENCE APPEAL TRIBUNAL

Ross C. Bennett M.D., Presiding Member

RELEASED: January 24, 2003

BRIAN W. ARCHAMBAULT

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: CHARLES SANDIFORD
Presiding member

APPEARANCES: BRIAN W. ARCHAMBAULT, Applicant
Unrepresented

ADELAIDE PINDER
Representative for the Registrar of Motor Vehicles,
Respondent

DATE OF HEARING: January 6, 2003

DECISION RELEASED January 10, 2003

REASONS FOR DECISION

A hearing was held on January 6, 2003, at London, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Brian Archambault (the "Applicant")
Motor Vehicle:	Toyota Tercel, plate 561 ZRG (the "vehicle")
Date of Appeal:	December 19, 2003

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on January 6, 2003 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

I, Brian Archambault, am the owner of the impounded 1996 Toyota Tercel. The driver of the vehicle at the time of the offence is brother, Michael Archambault. I was unaware that my brother's driver's licence had been suspended for a prior drinking and driving conviction.

I am the father of two young children and require my vehicle to take them to school and daycare as well as other various activities through out the week. My spouse works full time and therefore it is my sole responsibility to ensure they are cared for during the day. Without my vehicle it will be very difficult, if not impossible to continue with their scheduled activities.

With the Christmas season approaching it is even more imperative we have my vehicle for transportation. With no family in London we will be travelling home to Barrie, Ontario to spend Christmas with our family. We will need our vehicle to transport myself, my spouse, our two children, dog and Christmas gifts home for Christmas morning. I am afraid that without our vehicle we will not be able to spend Christmas with our family as planned.

I hope you will take into consideration how difficult it will be for my family during this season with out our vehicle and notify us of your decision as soon as possible.

Thank you.

In an expansion of the Applicant's written submission it was found that the wife of the Applicant has a car which she uses to take her to and from work. The wife did not need this car for her job but only to commute. Apparently the time she leaves for work is half an hour before the children are scheduled to go to school and day care. This time conflict precludes the use of this car by the Applicant according to his testimony for the many other needs he has for a car. These include their children's sports activities, medical appointments and household shopping trips.

The Christmas visit to Barrie was accomplished by the use of the wife's car and the parent's vehicle who came to London to assist in the transport of the family and parcels.

The Applicant testified that his brother lived with them until the December driving incident and had been with them for over one year. The driver Michael D. Archambault, the Applicant's brother was under suspension until June 13 2003 when stopped at 0356 hours on December 15, 2002. He was charged with impaired driving and driving while under suspension for a May 12, 2002 charge for driving while impaired which would have been during the time he was living with his brother.

Because the Applicant's brother was paying little rent the Applicant stated his brother had considerable savings. A rental car to replace the impounded vehicle was not considered, as he could not afford the cost.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records, which indicates that, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar, which indicates that the vehicle at the time it was detained was being driven by Michael D. Archambault;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records, which indicates that the driver at the time of impoundment had been convicted of Impaired Driving and his licence was under suspension until June 13, 2003.

The Respondent reviewed the evidence and testimony of the Applicant more particularly to the availability of another car in the family. The Respondent indicated that with a minor change in scheduling the vehicle belonging to the Applicant's wife could serve the family's needs for a car.

The Respondent closed with a recital of the evidence required to be proven by the Applicant to establish the grounds for a successful appeal based upon exceptional hardship.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made,

within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
 - (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

- (4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
- (b) financial or economic loss to any person;
- (c) loss of employment or employment opportunity to any person; or
- (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
- (b) the loss will be immediate, significant and lasting;
- (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
- (d) the impact of the loss,

- (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant has appealed under section 50.2 (d) of the Act on the basis that the impoundment of his vehicle will and has resulted in exceptional hardship and has caused him difficulty in getting his children to and from school and day care and with other routine family duties.

Section 22 of Regulation 632/98 is very specific and provides the Tribunal with clearly defined criteria that must be met by the Applicant to establish exceptional hardship as a result of the impoundment.

The Tribunal cannot consider any other factors arising from or directly related to the impoundment itself.

Under section 22(2) of Regulation 632/98 the Tribunal cannot consider financial or economic loss or loss of employment or employment opportunity unless the Applicant demonstrates that all criteria set out in section 22(3) apply. One of those criteria is that no alternative to the impounded vehicle is available, which is not the case here. Furthermore section 22(4) of the Regulation requires the Applicant to demonstrate that every reasonable option has been explored including an alternative vehicle. This has not been shown.

In this case the Applicant has access to an alternative to the impounded vehicle. He has access to another car in his immediate family, which is used by his wife to get to and from work, but is not required while she is working. While it may require some adjustment to their present daily scheduling there has been no evidence submitted by the Applicant that the second family vehicle couldn't be used until the impounded car is released. The evidence submitted clearly reflects the availability of a replacement vehicle, which precludes any other consideration in support of the Applicant's appeal.

Inconvenience is not a factor to be considered under section 22(2)a of Regulation 574, R.R.O. 1990, as amended.

The Tribunal is sympathetic to the Applicant's situation, however, in view of the above facts, the Tribunal must conclude that the Applicant has not established exceptional hardship.

In future, before giving someone permission to drive their motor vehicle, individuals should ensure that the driver's licence of the proposed driver is valid by contacting the Ontario Ministry of Transportation at 1-900-565-6555 for automated service, or access the website at www.mto.gov.on.ca or obtain a driver's abstract at a local MTO Driver Licence Issuing Office or Service Ontario Kiosk.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Charles Sandiford, Presiding Member

RELEASED: January 10, 2003

1441-ADLS-NOMC

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding Member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF
HEARING: January 9, 2003

DECISION
RELEASED: January 14, 2003

Toronto

REASONS FOR DECISION

A hearing was held on January 9, 2003, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on January 10, 2003, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated December 02, 2002, and was received by the Tribunal on December 02, 2002, together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

The Representative for the Registrar, Ms Beintema informed the Tribunal that the Breathalyzer Technician, Police Officer #1, would not be attending the hearing and sought to introduce a copy of the videotape of the breathalyzer session instead. The Applicant raising no objections, a copy of the breathalyzer session videotape was entered as exhibit # 5.

Certified copies of the original documents on file, from the Ministry of Transportation, were provided to the Tribunal by the Respondent's Representative.

The Applicant submitted a copy of medical reports from his physician, Physician #1 and from Physician #2. As the Respondent's Representative had not received copies previously, a fifteen-minute recess was called to afford Ms Beintema an opportunity to review the reports.

After examining the medical report from Physician #1, the Respondent's Representative had no objections to the report being entered as an exhibit requesting only that it be noted that the reports were not filed in accordance with the rules of disclosure. With the consent of both parties Physician #1's report was entered as exhibit # 4.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice to Registrar Dated October 27, 2002, issued by the Registrar of Motor Vehicles.

- b) Exhibit # 2 Notice of Appeal Form – received December 2, 2002
- c) Exhibit # 4 Medical Reports from Physician #1 and Physician #2– received January 3, 2002.

By the Respondent:

- a) Exhibit # 3 Ministry of Transportation Submissions – received January 3, 2003.
- b) Exhibit # 5 Videotape of Breathalyzer session – received January 3, 2003.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* (“HTA”) states:

50.1 (1) “A person whose driver’s licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

(a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or

(b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason”.

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1), (2) and (3) requires that a medical report must contain:

15. (1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

- (a) the name, telephone number and address, with the postal code, of the medical practitioner;
- (b) the name, date of birth and address of the person who is the subject of the report;
- (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the Board from the suspension of a driver's licence under section 50.1 of the Act;
- (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
- (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
- (f) whether the medical practitioner is a specialist and, if so, the field of speciality.

(2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

The Applicant's Driver's Licence was suspended "October 27th, 2002" as per Notice of Appeal (Exhibit # 2)

Page 2 of Notice of Appeal, which is to be filled in by the Applicant's physician, is blank. The Applicant explained to the Tribunal that he had not realized the information was required.

In a letter dated "January 7th, 2002", the Applicant's physician Physician #1 comments on the Applicant's condition and attaches a letter from Physician #2, a psychiatrist also treating the Applicant.

Physician #1 confirms that he has been the Applicant's physician since 1985 and explains that the Applicant: "...Since the death of his 26 year old son ...has been feeling depressed, sleeping poorly and abusing alcohol ...referred to a psychiatrist ...prescribed antidepressants ...continues to see the Psychiatrist on a regular basis..."

In his report, Physician #2, a retired assistant Professor of Psychiatry at the University of Toronto describes his findings after examining the Applicant: "Depressed affect. Excessive self-reproach. Poor concentration. Social withdrawal. Poor anger control and impaired judgment"

At the hearing, after being sworn the Applicant asked the Tribunal to use discretion and return his driver's licence.

In cross-examination the Applicant confirmed that he understood the grounds for appeal. The Applicant attested that he appealed the suspension on medical grounds, as he refused to provide a breath sample due to a "...*heart problem*..."

The Applicant is not currently seeing a cardiologist but believes that he is on medication for a heart condition. Under further questioning from Ms Beintema, the Applicant clarified that the pills are for "...*high blood pressure*..."

The Applicant testified that he informed Physician #1 that he had been asked to provide a breath sample, and does not know why the physician made no note of this fact in his report.

The Applicant was adamant that he refused to provide a breath sample because he did not want a reoccurrence of the August incident; when after the breathalyzer session he experienced chest pain. The Applicant was feeling some pain during the October breathalyzer session but did not tell the officers and did not visit his physician until quite sometime after the incident.

In closing the Applicant confessed to regretting his behaviour, and revealed some details about his personal life as a possible cause. At the present time, The Applicant is receiving treatment for his condition.

Respondent's Evidence

The Respondent provided the following Documents:

1. Notice to Registrar, certified December 23rd, 2002.
2. Driving record of John M. The Applicant certified December 23rd, 2002
3. Vehicle record certified December 24th, 2002

The Respondent called Police Officer #2 as a witness. Police Officer #2 testified that he has been in the Police Services for "...*almost two years*..."

After relating events of the incident that led to the demand for a breath sample and the subsequent suspension, Police Officer #2 attested that at no time did he observe the Applicant being afflicted with any physical difficulty, such as clutching his chest or wheezing.

Police Officer #2 further indicated that the Applicant did not inform him that he was taking medication, or ask for medical assistance.

A videotape of the breathalyzer session was introduced as evidence. When asked by the breathalyser technician if he was suffering from any illness or injury or if he had any medical problems, the Applicant replied “No” to each question. It is clear from the tape that the Applicant stated on more than one occasion that he would not provide a breath sample until he was “...evaluated...” by his doctor.

The Respondent’s Representative, in closing, reminded the Tribunal that the Applicant appealed on grounds of a medical condition, yet asserts that there is absolutely no evidence of a medical condition.

Ms Beintema points out that Physician #1’s report refers to a visit on “23rd November, 2002. There is a considerable gap of time between the date of the incident and the date when the Applicant first appeared to have been seen by a physician.

Ms Beintema also noted that the videotape shows an “...outright refusal...” from the Applicant to provide a breath sample, due a heart problem he claims to have had some years ago. There is no evidence of a heart problem in the medical reports. Further the medical reports do not conform with the regulations, as there is no evidence that the physicians were aware as to the purpose of the reports.

The Respondent’s Representative concluded that the Applicant did not meet the onus of proof being unable to provide a breath sample because of medical grounds and asks that the Tribunal uphold the suspension.

APPLICATION OF THE LAW TO FACTS:

There is no doubt that the Applicant refused to provide a breath sample. At issue then is did the Applicant have a medical condition that could cause him to not comply with the breath demand. The Applicant brought an appeal under Section 50.1 (2) (b) of the Highway Traffic Act, alleging medical grounds for his refusal to provide a breath sample.

Section 50.1 (2) (b) of the Highway Traffic Act, prescribes:

“...person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason...”

In his testimony the Applicant alleges heart and blood pressure problems. The Applicant also submitted two medical reports to corroborate his argument.

With respect to the medical reports from Physician #1 and Physician #2, the Respondent’s Representative makes two points: one, the reports do not conform with the requirements of section 15 of Regulation 574; two, neither reports mentions a heart condition.

The Tribunal agrees. Section 15 (2) of Regulation 574 is, perhaps, the most relevant in that it prescribes:

15 (2):

“The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath sample including the results of any related tests.”

The essence of this clause requires that the physician establish a link between the medical condition and the individual's inability to provide a breath sample. This clause relates specifically to the detailed information required on page 2 of the Notice of Appeal. Page 2 of the Notice of Appeal serves as a valuable guideline to the Tribunal as it is designed to provide pertinent details of the Applicant's condition, such as:

- Details and diagnosis of the patient's present condition;
- History of condition;
- Type of Measurements or recent test taken with (date indicated): (Reference to any pathology test (e.g.: PTF represent important corroboration of your medication opinion).
- Relevant details of last visit and when ...patient was last seen.

Unfortunately page 2 of the Notice of Appeal has been left blank, therefore denying the Tribunal possibly valuable insight into the Applicant's physical condition.

The Tribunal sympathizes with the Applicant, but there is no evidence, other than the viva voce evidence of the Applicant, that he is suffering from a heart condition. Neither the report from Physician #1 or the report from Physician #2 substantiates the Applicant's claim of cardiac or blood pressure disease. Both physicians allude to an illness of a different nature. Physician #2 is quite specific in his diagnosis: “Depressed affect. Excessive self-reproach. Poor concentration. Social withdrawal. Poor anger control and impaired judgment”. While the Tribunal accepts that the disorder affecting the Applicant is quite debilitating, the report does not establish that such a disorder precludes the compliance with the demand for a breath sample.

Further, the videotape taken during the breathalyzer test session clearly demonstrates the Applicant's refusal.

The Tribunal finds that there is no indication that the Applicant has a medical condition that would preclude him from providing a breath sample.

The onus being on the Applicant to establish the merit of his appeal, the Tribunal finds that the Applicant has failed to do so. Thus, the Tribunal also finds that the Applicant does not meet the criteria of Section 50.1 (2) (b), in that he was not able to demonstrate that he suffers from a medical condition, which would prevent him from providing a breath sample.

DECISION:

Upon the application by The Applicant to appeal the suspension order dated October 27, 2002 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal **confirms** the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.
Presiding Member

RELEASED: January 15, 2003

1442-ADLS-MISTAKE

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION

TRIBUNAL: STUART CORK
Presiding Member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

Applicant

DATE OF
HEARING: January 14, 2003

DECISION
RELEASED: January 16, 2003 Toronto

REASONS FOR DECISION

A hearing was held on January 14th, 2003, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on January 16, 2003, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated December 18, 2002, and was received by the Tribunal on December 18, 2002, together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

“This is a case of mistaken identity. I am not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken.”

Preliminary Matters

There were no preliminary matters at this hearing.

Submissions of Written Material

By the Applicant:

- a) Exhibit #1: Notice to Registrar
- b) Exhibit #2: Notice of Appeal

By the Respondent:

- a) Exhibit # 3: MTO Submissions, certified original copies

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(a) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Was the Applicant whose licence was suspended the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

- 50.1(1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
 - (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
 - (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

Evidence of the Applicant:

The Applicant testified that he works at two different jobs delivering pizza, and in the kitchens of the pizza restaurants. He stated that when he was pulled over by Police Officer #1 of the Peel Regional Police Force on December 4, 2002, he was en-route to deliver food from the restaurant to a police station.

The Applicant admitted that he was administered the Breathalyzer test at the police station however, the Intoxilyzer report that was produced did not belong to him. He insisted that he was not drinking that evening, and that this was a case of mistaken identity since he believes that the report must have belonged to someone else who was processed at the station at that time, and for the reason that his last name did not appear on the report. The Applicant did have the original copy of the report in his possession that he received at the time his breath sample was taken. He further insisted that the vehicle mentioned in the report was not his since the licence was not the same.

Evidence of the Respondent:

Ms. Beintema testified that Police Officer #1 told her by phone conversation, that he observed the Applicant giving a breath sample at the police station to Intoxilyzer Technician Police Officer #2. Police Officer #2 inadvertently inserted her last name in the field for subjects last name. The Applicant's first name and drivers licence number did appear on the Intoxilyzer report. Ms. Beintema also stated that Police Officer #1 told her that the Applicant's vehicle licence number as it appeared on the report was off by one letter, "V" instead of "W", and that this was a minor typing error.

Police Officer #1's comments to Ms. Beintema were supported by his photocopied original notes (Exhibit #3). These notes also bear the signature of the Applicant, who signed for them when he received his copy.

APPLICATION OF THE LAW TO FACTS:

The Applicant testified that this was a case of mistaken identity because some of the information on the Intoxilyzer report was in error, and belonged to another individual. He argued that since he had not been drinking that evening, and that the report did not bear his last name, it must belong to someone else. However, the specific details of the Applicant's Intoxilyzer report, and whether it is his report or whether it showed him to be in excess of the legal limit for alcohol consumption at the time the test was administered, are not what is at issue in this matter.

Section 50.1(2)(a) of the Act states that in order to qualify for this ground of appeal, the person whose licence was suspended must be found not to be the same individual to whom a demand for a sample of breath or blood was made. The Applicant by his own testimony stated that he did supply a breath sample to Police Officer #2 at the Police station, and was subsequently processed, as the document in Exhibit #3 indicates.

Since the Applicant's own testimony establishes that he complied with a demand for a sample of his breath from Police Officer #2 he cannot now rely on section 50.1(2)(a) as a ground for his appeal. He is the same individual to whom a demand for a sample of breath was made. As a result, the Tribunal must find that the Applicant whose licence was suspended is the same individual from whom a sample of breath was obtained.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated December 6, 2002 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Stuart Cork
Presiding Member

RELEASED: January 22, 2003

BETTY BAIRD

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: NIVES MONTANO
Presiding member

APPEARANCES: LYNDA DUNBAR
Representative for the Registrar of Motor Vehicles

BETTY BAIRD, Applicant, unrepresented

DATE OF HEARING: January 9, 2003

DECISION RELEASED: January 15, 2003 Toronto

REASONS FOR DECISION

A hearing was held on January 9, 2003, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Betty Baird (the “Applicant”)
Motor Vehicle:	2000 Chrysler Cirrus, Plate No. AAXT 325 (the “vehicle”)
Date of Appeal:	December 16, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence (i.e. all reasonable efforts) to determine that the driver's licence was not suspended and the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(c) and (d) of the Act.

This matter came before this Tribunal on January 9, 2003 and proceeded as a teleconference.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

I am a senior citizen as I have a heart problem. I also have a broken bone in my back. I cannot walk or stand for any length of time.

The following is a summary of the Applicant's affirmed testimony.

The Applicant is a 69 year old woman, who resides alone. Her husband left her about 20 years ago. She is the youngest of 8 siblings. Since some of her siblings passed away in 2002, the remainder of the family decided to have an early Christmas dinner at a Chinese Restaurant in Trenton. As the Applicant did not want to go alone, she asked her platonic friend, Eduard Ortiz, the driver at the time the vehicle was impounded, whom she's known for the past 10 years to escort her.

Due Diligence

In her testimony, she stated that Mr. Ortiz had one drink with dinner and she only consumed water as she is on medication for a heart condition and high blood pressure. After dinner, everyone went back to the Applicant's sister's house in Trenton where the Applicant viewed Mr. Ortiz consume more alcohol. After a while, Mr. Ortiz became quite bored and he and the Applicant left for Campbellford, taking a scenic route home, at Mr. Ortiz's request. The Applicant drove her vehicle to Belleville at which time she handed over care and control of her vehicle to Mr. Ortiz. Before doing so, she asked him if he had a valid driver's licence, which he responded he had, but did not produce it and she, at no time, saw one. In her testimony, the Applicant indicated that Mr. Ortiz accused her of calling him a liar, as he stated that he would not be in a position to purchase a new vehicle without a licence.

Prior to these circumstances, Mr. Ortiz had convinced the Applicant that he had purchased a 2003 white half ton pick-up truck which he had brought her to see in Kingston, where he resides and works. When the Tribunal asked where the vehicle was located and whether she had seen Mr. Ortiz drive this vehicle, she responded that Mr. Ortiz brought her to Kingston and that she viewed it at Mr. Ortiz's employer's home. Mr. Ortiz advised her that he only used the vehicle for work and didn't drive it after hours as it was full of tools.

It is the Applicant's evidence that on or about December 9, 2002, Mr. Ortiz drove approximately 1 mile before the police pulled him over. In her testimony, the Applicant was very poorly treated by the police. Both she and Mr. Ortiz were given breath tests. She indicated that Mr. Ortiz blew over the legal limit. The vehicle was then impounded. The police drove them to a truck stop where they took a taxi back to the Applicant's home in Trenton. The Applicant's sister drove the Applicant home and Mr. Ortiz to Belleville where he caught a bus back to Kingston.

Exceptional Hardship

In her Notice of Appeal, the Applicant indicates that she is a senior citizen with a heart problem and with a broken bone in her back. She states that she cannot walk or stand for any length of time.

The Applicant testified that the first week after her vehicle was impounded; she visited her doctor 3 times. She was driven there by a friend. There are taxis in Campbellford and community care services for the elderly which she has access to. She also testified that although she has no family in Campbellford, she has a network of many friends who provide her with transportation if the need arose.

Although the Applicant has some health issues, her medication is delivered to her and the hospital is 1 block from her home. Since the impoundment, she has not missed any doctor's appointments.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Edward Ortiz;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of driving while licence is suspended under the *Highway Traffic Act* pursuant to which the driver's licence of the driver was then under suspension until February 28, 2004 and as well he was convicted of Impaired Driving for which his licence was suspended until August 20, 2003.

I note that the driver, Eduard Ortiz, has a very lengthy and serious driving record, which includes Drive while Licence suspended, Drive while Disqualified, 1 – Fail to Remain at Scene of Accident, and 2 – convictions for Impaired Driving.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(c) and (d).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. Law. The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making

arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

APPEAL – DUE DILIGENCE

The first issue to be considered in this appeal is whether the Applicant exercised due diligence in attempting to determine that Eduard Ortiz's driver's licence at the time in respect of which the order was made was not then under suspension as required by section 50.2(3)(c) of the Act.

The Applicant has conceded that she is the owner of the vehicle that has been impounded. At the time of the impoundment, the vehicle was being driven by Mr. Ortiz, whose driver's licence was then under suspension due to a conviction under the *Criminal Code of Canada* for Impaired Driving and under the *Highway Traffic Act* for Driving while Licence Suspended.

The evidence before the Tribunal was that the Applicant merely took Mr. Ortiz for his word and assumed that Mr. Ortiz had a valid driver's licence and did not take any measures to ensure that he had a valid driver's licence. But merely taking Mr. Ortiz at his word, does not constitute the due diligence required to ensure its validity. The Applicant had good intentions, but Mr. Ortiz misused her trust. Furthermore, there was no evidence heard that would confirm the Applicant's actions were anything but passive in nature.

The Tribunal therefore has no evidence that the Applicant exercised due diligence as required by section 50.2(3)(c) of the Act.

Due diligence requires that the Applicant take further steps to verify the validity of the driver's licence. This can be accomplished by contacting the Ontario Ministry of Transportation with the driver's name and driver's licence number at 1-900-565-6555 for automated service, or obtaining a driver's abstract of licence at a local MTO Driver Vehicle Licence Issuing Office, or Service Ontario Kiosk at a local mall, or accessing the MTO website at www.mto.gov.on.ca.

APPEAL – EXCEPTIONAL HARDSHIP

The Tribunal must determine whether it should set aside the Registrar's order to impound the vehicle on the basis that the owner of the impounded vehicle will suffer exceptional hardship.

The Applicant has appealed on the grounds of "exceptional hardship" under section 55.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the criteria the Applicant must meet to determine if in fact "exceptional hardship" will result from the impoundment. The Applicant in this case has argued that the impoundment will result in hardship as described in section 22(2). In order for her appeal to be considered under section 22(2), she must have demonstrated that all of section 22(3) has been met. Furthermore,

section 22(4) of the Regulations provides the criteria for demonstrating that every reasonable option has been considered respecting an alternative vehicle.

The Applicant has not demonstrated that she falls under all of the categories in section 22(3) of the Regulation:

There is an alternative to the impounded motor vehicle. A friend has driven her to the doctor and she has access to taxis. Furthermore, the inconvenience is temporary and there is no loss that is significant and lasting. Under section 22(4), the Applicant has not established that there is no alternative to the impounded motor vehicle. There are a number of other modes of transportation available to her.

The Applicant may pursue compensation from the suspended driver, Eduard Ortiz, as is stated in section 55.1(21) of the *Highway Traffic Act*:

“The owner of a motor vehicle that is subject to an order to impound under this section may bring an action against the driver of the motor vehicle at the time the order was made to recover any costs or other losses incurred by the owner in connection with the order”.

The Tribunal is sympathetic with the Applicant, but after considering the above requirements, the Tribunal finds that the Applicant has alternatives to the impounded vehicle and has managed. The impact will not be immediate significant and lasting.

Accordingly, after considering the criteria set out in section 22(3) and (4) of Regulation 340 as amended by Ontario Regulation 632/98, the Tribunal finds the Applicant has not established exceptional hardship as set out in section 50.2(3)(d) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Nives Montano, Presiding Member

RELEASED: January 15, 2003

1449-MED-CARD

Appeal under section 50(1) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Minister pursuant to section 32(12)(b)(i) of that Act.

TO CHANGE THE CLASS OR CLASSES OF
MOTOR VEHICLE IN RESPECT OF WHICH THE
LICENCE WAS ISSUED

TRIBUNAL: ROSS C. BENNETT, M.D., Presiding Member

APPEARANCES: LUBA NEUWIRTH, Respondent
Representative for the Minister

Applicant,
unrepresented

DATE OF
HEARING: January 22, 2003

Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Minister (the "Respondent") pursuant to section 32(12)(b)(i) of the *Highway Traffic Act* (Ontario).

EXHIBITS

- (1) Notice of Downgrading of Applicant's Driver's Licence dated September 29, 2002.
- (2) Notice of Appeal from Applicant received December 23, 2002
- (3) Summary of File introduced by the Respondent
- (4) Discharge Summary prepared by Physician #1 dated December 15, 2002

FACTS:

The Applicant is a 53 year old mini-bus driver, who had his driver's licence downgraded from Class ACM to Class GM on September 29, 2002.

The Ministry first received a Cyclical Driver's Medical Report from Physician #2 on June 19, 1990 indicating the Applicant was suffering from Gouty Arthritis and Peripheral Vascular Disease. The Applicant was referred to Physician #1, a cardiologist, in January, 1991. Physician #1 did not find the intermittent claudication severe enough to warrant surgery and could not detect any evidence of coronary artery disease. The gout was controlled with medications.

The Applicant was examined yearly and medical reports sent to the Ministry with little change noted until he suffered two myocardial infarctions in 1996 and 1998. Physician #1 reported in July 1999, that the Applicant had a stress thallium and a rest thallium injection and there was no evidence for reversibility of his anterior segment and therefore not at high risk. An ECG showed only modest left ventricular dysfunction. Physician #1 completed three Waiver Certificates and Medical Reports on July 22, 1999, on April 24, 2001 and on September 3, 2002 stating the Applicant has left ventricular dysfunction without evidence for provokable ischemia or dysrhythmia. In each Waiver he crossed out a sentence in the Physician's Certificates, which stated, "Reading the Relevant sections of the Canadian Medical Association's Guide for Physicians in determining fitness to drive a motor vehicle may be helpful in considering some cases." This implies that Physician #1 did not consider the guide in making his determinations.

A graded exercise test report states there is sinus rhythm, Q waves in the inferior and anterior leads and mild atrial enlargement. The conclusion was that he was symptom free and the ECG was negative for myocardial ischemia.

On December 18, 2002, Physician #1's Medical Report stated the Applicant's left ventricular function is Grade III-IV. His Holter Monitor reveals frequent isolated Ventricular Premature Beats including rare couplets and triplets. The Applicant does not demonstrate any symptoms of myocardial ischemia or symptoms of heart failure.

The Applicant is also being treated for hypertension and was advised to stop smoking, but was only able to cut down. He had a recent angiogram which revealed some blockage in his coronary vessels, but not enough for by-pass surgery.

The Ministry of Transportation rejected Physician #1's final Waiver of September 3, 2002 and notified the Applicant on October 2, 2002 that reports indicate his heart disease has been worsening and his application for reinstatement of his Class "ACM" licence has been rejected.

ISSUES:

Should the decision of the Minister to change the class or class of motor vehicles in respect of which the licence is issued in accordance with the result of the examination be varied, modified or set aside?

Does the Applicant no longer suffer from a mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffer from any mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Regulation 340/94, Section 17 and 18 states:

- 17. (1) Qualifications required by an applicant for a holder of a Class A, B, C, D, E or F driver's licence are that the applicant or holder,
 - (a) has no history or clinical diagnosis of diabetes that requires insulin for control;
 - (b) is not taking any drug that could, in the dosage prescribed or in the dosage recommended by the manufacturer, impair his or her ability to drive a motor vehicle of the applicable class safely;
 - (c) has no established medical history of myocardial infarction, angina pectoris, coronary insufficiency or thrombosis;
 - (d) has no established medical history of heart disease including arrhythmia or of respiratory dysfunction likely to interfere with the safe driving of a motor vehicle of the applicable class;
 - (e) is not suffering from an aortic aneurysm, whether resected or not;
 - (f) is not suffering from hypertension accompanied by postural hypotension resulting in giddiness when under treatment;
 - (g) has no established medical history of loss of consciousness or awareness due to a chronic or recurring condition;

- (h) has no established medical history of a disorder of the musculoskeletal or nervous system that may interfere with the safe driving of a motor vehicle of the applicable class;
 - (i) has no established medical history of an intractable psychotic or psychoneurotic disorder, having particular regard for sustained hostile, aggressive, paranoid, suicidal or other destructive tendencies or depression unless it is medically determined that the condition from which the person has suffered is corrected or controlled;
 - (j) has a visual acuity by Snellen Rating, with or without the aid of corrective lenses, no poorer than 20/30 in the better eye and 20/50 in the weaker eye; and
 - (k) has a horizontal visual field of at least 120 degrees in each eye as measured by confrontation tests.
- (2) An applicant for or a holder of a Class A, B, C, D, E or F driver's licence who fails to meet the qualifications referred to in clauses (1)(a) to (i) may, despite the failure, qualify for the class of licence applied for or held if he or she demonstrated the ability to drive a motor vehicle in the applicable class as safely as any person who meets those qualifications.
- (3) An applicant for or a holder of a Class D driver's licence who fails to meet the qualification referred to in clause (1)(c) may, despite the failure, qualify for that class of licence if it is medically determined that he or she has made a full recovery and there is no established history of a second occurrence of myocardial infraction, thrombosis or recurring angina pectoris.
- (4) An applicant for or a holder of a Class B, C, E or F driver's licence whose hearing in one ear is better than in the other must be able to perceive in the better ear, with or without a hearing aid, a forced whisper at a distance of 1.5 metres or, if an audiometer is used to test the person's hearing, must not have a loss in the better ear of more than 40 decibels at 500, 1,000 and 2,000 hertz.
- 18. An applicant for or a holder of a G, G1, G2, L, M, M1, M2, or R driver's licence must have,
 - (a) in the case of a person whose vision in one eye is better than in the other, visual acuity in the better eye that is no poorer than 20/40 as measured by Snellen Rating; and
 - (b) a horizontal visual field of at least 120 degrees as measured by confrontation tests.

Section 32(12)(b)(i) states:

- 32 No person shall drive a motor vehicle on a highway unless the motor vehicle is within a class of motor vehicles in respect of which the person holds a driver's licence issued to him or her under this Act.

- (12) An applicant for a driver's licence or a person who holds a driver's licence shall submit to the examinations that are authorized by the regulations relating to this section and required by the Minister at the time and places that the Minister may require and the Minister may,
 - (b) in the case of a person who holds a driver's licence,
 - (i) impose or remove the conditions or endorsements authorized by the regulations or change the class or classes of motor vehicles in respect of which the licence is issued in accordance with the result of the examinations, or

Section 50 states:

- 50(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or Registrar.

APPLICATION OF THE LAW TO FACTS:

The Ministry downgraded the Applicant's driver's licence under Section 32(12)(b)(i), which directs the Minister to change the class of motor vehicle in accordance with the results of requested medical examinations. A series of medical examinations over the past 4 years revealed a history of 2 myocardial infarctions, hypertension, coronary artery disease, valvular thickening and a Class III-IV left ventricular dysfunction.

The C.M.A. Guidelines for Physicians Determining Medical Fitness to Drive recommends that only Class I is acceptable for a commercial driver's licence. The Guide states that the Medical Assessment of a driver with heart disease must also take into account the risk of sudden incapacitation (due, for example to sudden death or syncope). This is very relevant when the Applicant's job is transporting people around the city in a mini van.

The Tribunal agrees with the Medical Advisory Committee that the Waivers completed by Physician #1 dated July 22, 1999, April 24, 2001 and September 3, 2002 are unacceptable because each one has one sentence in the "Physician's Certificate" crossed out. This sentence states "Reading the relevant sections of the CMA's guide for physicians in determining fitness to drive a motor vehicle may be helpful in some cases" and in this case it is essential.

The Tribunal finds that the fragile condition of the Applicant's health due to heart related problems detected in the series of examinations and tests established that the Applicant suffers from a disability likely to significantly interfere with his ability to drive a motor vehicle, which is too serious to reinstate the Applicant's Class "ACM" licence under Section 32(12)(b)(i) of the *Highway Traffic Act*.

DECISION:

Upon the application by Applicant to appeal the decision dated September 29, 2002 of the Minister ("Respondent") to change the class or classes of motor vehicle in respect of which the licence was issued pursuant to Section 32(12)(b)(i) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Respondent and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

Ross C. Bennett, M.D.
Presiding Member

RELEASED: January 28, 2003

MELANIE McKAY

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: BARBARA FRASER
Presiding member

APPEARANCES: Lynda Dunbar
Representative for the Registrar of Motor Vehicles

MELANIE McKay, Applicant
unrepresented

DATE OF HEARING: January 16, 2003

DECISION RELEASED: January 22, 2003 **Toronto**

REASONS FOR DECISION

A hearing was held on January 16, 2003 at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Melanie McKay (the "Applicant")
Motor Vehicle:	Chevrolet Blazer K15, Plate 496 VTJ (the "vehicle")
Date of Appeal:	December 17, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on January 16, 2003 and proceeded as an electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

The Applicant stated that she requires the vehicle, which is a four wheel drive, in order to attend physiotherapy sessions. She said that she must attend the therapy as a condition for Worker's Compensation. The four wheel drive vehicle explained the Applicant, is safer to drive in the winter than an ordinary car.

Ms. Dunbar declined making an opening statement.

Both parties stated that it was not their intention to call witnesses.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

I live in the country 1½ hrs. east of Toronto. I am presently involved in a Workmen's Compensation Claim, which requires me to take physiotherapy twice a week. Due to the severe weather in the winter out here, I need the 4 wheel drive to insure [sic] I make my scheduled appointments. I miss any days I risk losing my coverage from WSIB.

Thank you for your consideration.

The Applicant stated under oath that she was unaware her spouse had taken the four-wheel drive vehicle. She said that she was not well the day in question and was in bed at the time he did so. She stated that she first learned he had taken the vehicle when she received a telephone call informing her that he had been caught driving while his licence was under suspension.

The Applicant further stated that although her spouse has to travel back and forth to work, he is able to secure rides from a co-worker.

She admitted that she does have an alternate vehicle in the driveway, which is an older model car. She said that the car is in working condition and that she drives it to go shopping. However, she prefers the four-wheel drive because it is safer in wintery conditions on the highway. She reasoned that if she had to use the car, and the weather was inclement, she would have to cancel her physiotherapy appointment and re-schedule. She raised the concern that she might not be able to get another appointment right away.

The Applicant said that she is not currently in a training or educational program but that she may be in the future.

Ms. Dunbar, on behalf of the Registrar, referred to the Registrar's Exhibits 2 and 3, regarding the impoundment of the Applicant's vehicle and the driving record of the Applicant's spouse.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

- 13662. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
- 13663. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Terry Claude McKay;
- 13664. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
- 13665. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of driving with more than 80 mgs. alcohol in blood under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until Aug. 1, 2003.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

- 1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
- 2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
 - (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,

(a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or

(b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.

(2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,

- (a) inconvenience to any person;
- (b) financial or economic loss to any person;
- (c) loss of employment or employment opportunity to any person; or
- (d) loss of education or training or of an educational or training opportunity to any person.

- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Tribunal finds that the oral evidence given by the Applicant was open, consistent and credible. Having said that however, it is the Tribunal's opinion that she has not met the standard set out in section 50.2(3)(d) of *The Highway Traffic Act*.

The Applicant has not demonstrated that the Order will result in extreme hardship. She stated that she has access to an alternate vehicle which is operational and she drives it to go shopping.

She also said that she is not currently in an educational or training program . The Applicant stated that her spouse is being driven to his workplace by his co-worker.

Section 22(4) of Regulation 574 R.R.O. 1990 requires the Applicant to show that no alternative to the impounded motor vehicle is available.

The Tribunal sympathizes with the Applicant, however according to her own testimony, she has the use of an alternate vehicle. While she may prefer to operate a four-wheel drive vehicle in the winter, she still does have another vehicle at her disposal.

Furthermore, the Applicant has not shown that every reasonable option has been considered under section 22(4) of the Regulation including making arrangements to do without the impounded vehicle or obtaining a replacement.

Such options as making arrangements for transportation with neighbours, a taxi cab company, renting a four-wheel drive, or even re-scheduling the appointment in severe conditions have not been considered.

Although the Impoundment of her four-wheel drive vehicle may be an inconvenience, the Applicant has not demonstrated that it is an exceptional hardship as defined by the *Highway Traffic Act*.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Barbara Fraser,
Presiding Member

RELEASED: January 22, 2003

1460-ADLS-ANX

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding Member

APPEARANCES: LUBA NEUWIRTH
Representative for the Registrar of Motor Vehicles

Applicant

Agent for Applicant

DATE OF
HEARING: January 20, 2003

DECISION
RELEASED: January 28, 2003 Toronto

REASONS FOR DECISION

A hearing was held on January 20, 2003, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on January 22, 2003, with Reasons to follow.

THE TRIBUNAL RULED TO SET ASIDE the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, chapter H.8 as amended. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated December 30, 2002, and was received by the Tribunal on January 2, 2003, together with the prescribed fee of \$100.00, paid by cheque.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

On or about January 16, 2003, the Tribunal received, a request from the Applicant, to adjourn this matter. However, prior to the commencement of the hearing the Applicant informed the Tribunal that he wished to proceed.

The Registrar's Representative informed the Tribunal that the Registrar's Witness would not be attending; and that anticipating an adjournment, the matter had not been thoroughly prepared. As the Respondent's Representative sought no adjournment, the hearing proceeded.

After the Applicant offered his testimony and was cross-examined, the Registrar's Representative expressed a request for an adjournment, on the grounds that, based on the anticipation of the Tribunal granting the Applicant's request to adjourn, the Registrar released the witness scheduled to appear on behalf of the Registrar.

The Applicant's objection was duly noted. Nonetheless, the Tribunal taking into consideration that the Applicant precipitated the incidents by indicating his wish to seek an adjournment granted the adjournment peremptory to the Ministry.

At the hearing on January 17, 2003, the Applicant submitted a letter from the Social Services, which was entered on consent as exhibit #4.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Suspension Reminder Notice Dated December 9, 2002, issued by the Registrar of Motor Vehicles
- b) Exhibit # 2 Notice of Appeal Form – received January 2, 2003.
- c) Exhibit # 4 Letter addressed “to whom it may Concern” from the Social Worker” Received January 17, 2003

By the Respondent:

- a) Exhibit # 3 Ministry of Transportation Submissions – Received January 14, 2003

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* (“HTA”) states:

- 50.1(1) “A person whose driver’s licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
 - (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
 - (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason”.

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1), (2) and (3) requires that a medical report must contain:

- 15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
 - (a) the name, telephone number and address, with the postal code, of the medical practitioner;
 - (b) the name, date of birth and address of the person who is the subject of the report;
 - (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

The Applicant's Driver's Licence was suspended "DEC 07-02" as per Notice of Appeal (Exhibit # 2)

Applicant's Evidence

Physician #1, a family practitioner, who has been the Applicant's physician for "1 years and 3 months", prepared page 2 of the Notice of Appeal, on December 31, 2002.

Under the heading *“Details and Diagnosis of patient’s present condition”*, Physician #1, writes: *“Post-traumatic stress disorder and anxiety precipitated by stressful events suffered in his home country – when stress or afraid, ...find it hard to breathe (i.e. take a deep breath)...”*

Physician #1 goes on to clarify that the Applicant *“...sees a counsellor ...for ...anxiety – and has been in counselling for over one year...”*

Attached to the Notice of Appeal is letter dated December 23, 2002, signed by Registered Nurse #1, RN(EC), Nurse Practitioner with the Health Centre. Registered Nurse #1 confirms that the Applicant has *“...On several occasions ...reported feelings of ‘not being able to get enough breath’, particularly when he is feeling stressed ...episodes appear to be related to stress and anxiety...”*. Registered Nurse #1 goes on to express her opinion that *“...it is understandable that he was feeling frightened and anxious by his encounter with the police ...several samples were deemed inadequate ...caused him to feel even more anxious ...obvious the situation affected his ability to supply an adequate sample...”*

At the hearing, the Applicant gave an account of the events leading up to and surrounding the breathalyzer session, as well as described his employment and general life situation.

The Applicant testified that on the evening in question he had not been drinking. He asserted that he was unable to take a long enough breath to provide an adequate sample due to the fact that he was *“...afraid...”*

In cross-examination, the Applicant emphasized that he did not refuse to provide a breath sample. The Applicant claimed that he gave *“...the best sample...”* he could, and stated: *“...sometimes when I am afraid I find it difficult to breathe...”*. The Applicant explained that he was *“afraid”* because he felt *“threatened”* after the officer told him that unless he provided a breath sample he would go to jail.

The Applicant did not ask for medical assistance. With respect to medication, the Applicant takes *“...a couple of pills sometimes...”*. He is still receiving counseling, and after the incident, the Applicant immediately called his doctor for an appointment.

According to the Applicant, his physician has performed pulmonary tests and has suggested that the Applicant consult with a specialist, if the condition persists.

In closing, the Applicant’s agent asked the Tribunal to reinstate the Applicant’s licence based upon two issues: the medical evidence, and that when this matter gets before a Judge the case will be dismissed.

With respect to the Applicant's medical condition, the agent stressed that it is quite reasonable to accept that the Applicant would have been rather anxious given the situation he found himself in.

Respondent's Evidence

The Respondent provided the following Documents:

1. Certified Copy of Notice to the Registrar, sealed January 8th, 2003
2. Certified Copy of Driving Record of the Applicant, sealed January 8th, 2003

The Respondent called Police Constable #1, a member of the Toronto Police Services as a witness. Police Constable #1 testified that he has been a police officer for approximately "...*four and half years*...", and is trained in operating the roadside breathalyzer instrument.

Police Constable #1 described the circumstances that led to the demand for a breath sample.

The Applicant was given "...*over 15*..." opportunities to provide a breath sample, but failed to do so. According to Police Constable #1 the Applicant was not emitting enough air into the machine. Police Constable #1 noticed that the Applicant was taking a breath and expelling the air before he put his mouth around the mouthpiece, as well as, he appeared to be blowing around the mouthpiece.

Given his observations Police Constable #1 formulated the opinion that the Applicant "...*was able to take a deep breath*...". Police Constable #1 recalled that he asked the Applicant whether he had a medical condition that prevented him from providing a breath sample, and noted that the Applicant replied "*No*". No medical assistance was requested by the Applicant.

During the breathalyzer test process, Police Constable #1 described the Applicant's demeanour as "...*very calm*...", and not exhibiting any breathing difficulties, such as hyperventilating.

Under questioning by the Applicant's agent, Police Constable #1 confirmed there were several other officers involved in investigating the Applicant before and after he was stopped by the police and subsequently demanded a breath sample. The Applicant was actually stopped by another officer who stayed in his car until back up arrived. During the wait for back up, the Applicant was made to wait in his car without being told what was happening.

Police Constable #1 reiterated his belief that the Applicant was not having trouble breathing but did comment it would be possible for the Applicant to be "...*anxious*...", given the fact that he was in the back of a police vehicle.

The Applicant's agent suggested to Police Constable #1 that the Applicant in breathing in and exhaling before making a seal around the mouthpiece, was simply trying to catch his breath.

Police Constable #1 disagreed with the Applicant's agent, stating that in his opinion the Applicant was intentionally "...trying to avoid blowing into the device..."

Police Constable #1 denied that the Applicant was handcuffed during the breathalyzer session. Police Constable #1 also disagreed with the Applicant's agent that the Applicant was placed in handcuffs prior to the demand for a breath sample. Police Constable #1 confirmed that the Applicant was being investigated for "*hit and run*" but asserted that the Applicant "...was not handcuffed prior to being arrested..."

In her closing remarks, Respondent's Representative contends that there is no medical reason for the Applicant's failure to provide a breath sample, and that in fact the Applicant had no intention to provide a breath sample. To substantiate her argument, the Respondent's Representative relied on Police Constable #1's testimony. The Respondent's Representative noted that the Applicant showed no signs of physical distress, or breathing difficulties, or of being visibly upset.

The Respondent's Representative referred to the medical report submitted by the Applicant and pointed out that, the reports fail to link the diagnosis to the Applicant's ability to provide a breath sample. The Respondent's Representative argued that it would be impossible for either Physician #1 or Registered Nurse #1 to know the degree of anxiety the Applicant experienced on the night in question.

In addition, due to the lack of specialist's reports verifying the Applicant condition, the Respondent's Representative asked that the Tribunal uphold the Registrar's decision.

APPLICATION OF THE LAW TO FACTS:

Although the total evidence presented was considered, the preceding reflects a summary of the proceedings. Evidence introduced not directly germane to the issue was not transcribed.

An appeal was brought under Section 50.1 (2) (b) of the Highway Traffic Act. The Tribunal's mandate is to decide whether the Applicant has a medical condition that could cause, at the time of the breath sample demand, the Applicant to fail or not comply with the breath demand.

Much of the Applicant's agent's line of questioning and the bulk of his argument focused on issues that were irrelevant to the matter at issue. The Applicant's agent pursued his cross examination of Police Constable #1, challenging Police Constable #1 's notes; establishing whether or not Police Constable #1 believed the Applicant to be impaired, and whether or not the demand for a breath sample was founded.

It is imperative that the Tribunal note that the Applicant's state of intoxication or impairment is not at issue.

Further, the Applicant's agent is quite correct in his assertion that the matter of the breath demand being founded or unfounded, is a matter to be determined in a Judicial Court. As a quasi-judicial body, this Tribunal has no jurisdiction to deal with certain of the issues argued by the Applicant's agent. Furthermore, the Applicant's agent's inferences of a possible dismissal in a Court of Law are simply not relevant.

The Tribunal must deliberate the provisions of Section 50.1 (2) (b) of the *Highway Traffic Act*, which prescribes:

"...person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason..."

The Respondent's Representative contends that there is no medical condition that would prevent the Applicant from providing a breath sample. The Respondent's Representative argues that this premise is corroborated by Police Constable #1's testimony in that according to his observations the Applicant was not in any physical distress.

The Applicant maintains that he was "afraid" and that when he becomes anxious he has difficulty breathing. The Applicant's claim is substantiated by Physician #1's comments when stressed or afraid, the Applicant finds "...it hard to breathe (i.e. take a deep breath)..." and by Registered Nurse #1 who confirms in her letter that "...On several occasions ...reported feelings of 'not being able to get enough breath', particularly when he is feeling stressed ...episodes appear to be related to stress and anxiety..."

The Tribunal is faced with two opposing views. In considering the evidence, the Tribunal has no reason to dispute Physician #1's and Registered #1's comments. Thus, the Tribunal must find that the Applicant suffers from an anxiety disorder.

The question that remains then, is whether anxiety could have caused and did cause the Applicant to not be able take a deep enough breath to not provide an adequate breath sample. The Tribunal must decide whether there are enough reasons for the Tribunal to accept the affirmation that the Applicant was in a state of anxiety at the time.

According to Physician #1, the Applicant has a history of post traumatic stress disorder. The Tribunal was told by Police Constable #1 that the Applicant was made to wait in his car until Police Constable #1 arrived at the scene. There is a discrepancy between the Applicant's evidence and that of Police Constable #1, which the Tribunal will note without inferring judgment. The Applicant alleged that he was in handcuffs throughout the session, Police Constable #1 denied that the Applicant was in handcuffs and refutes this statement by saying that the Applicant "...was not handcuffed prior to being arrested...". It was not made clear as to exactly when or why the Applicant was placed under arrest. Was it on the suspicion of "hit and run" or after not being able to provide a breath sample? Regardless, it seems quite conceivable that the Applicant finding himself in a situation of peril, being kept waiting without knowledge of what was happening; and being "threatened" with jail became anxious. Police

Constable #1 supports this conclusion in his admission that under the circumstances it is possible that the Applicant was anxious.

There is no doubt that one of the symptoms anxiety often manifests, as put forward by Physician #1, is the inability to take a deep breath. Police Constable #1's evidence that the Applicant took a breath and immediately exhaled appears consistent with the symptoms of someone trying to take in enough oxygen.

Based on the evidence before the Tribunal, and on a balance of probabilities, the Tribunal finds that the Applicant meets the criteria of Section 50.1 (2) (b), in that he was able to demonstrate that at the time of the breath demand, he was suffering from a medical condition which would prevent him from providing a breath sample.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated December 9, 2002 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal orders the suspension **set aside**.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.
Presiding Member

RELEASED: January 28, 2003

1463-ADLS-PULD

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF
HEARING: January 28, 2003

DECISION
RELEASED: January 29, 2003 Toronto

REASONS FOR DECISION

A hearing was held on January 28, 2003, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on January 29, 2003, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 of the HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated January 3, 2003, and was received by the Tribunal on January 3, 2003, together with the prescribed fee of \$100.00 paid by cash.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

The Respondent's Representative informed the Tribunal that one of the Constables scheduled to testify was late, but that the Respondent was ready and willing to proceed.

A discussion ensued as to whether the Applicant had received the disclosure package forwarded to him by the Ministry. The Applicant stressed that he had not received the disclosure until the day before the hearing. The Respondent's Representative advised the Tribunal that there was evidence from Purolator Courier that a note, informing the Applicant of an attempted delivery, had been left at the Applicant's place of residence. The Applicant explained that he had been away.

The Respondent's Representative requested that the Tribunal note that the Ministry took all the necessary steps to ensure that the Applicant received disclosure within the allotted time.

Prior to giving testimony the Applicant asked that the individuals in attendance, and sitting in the body of the hearing room be identified. The Respondent's Representative confirmed that the individuals concerned were members of the Ministry's staff who were just observing the proceedings, as well as the police officers involved in the incident.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice to Registrar dated January 1, 2003, issued by the Registrar of Motor Vehicles.
- b) Exhibit # 2 Notice of Appeal Form – received January 3, 2003

By the Respondent:

- a) Exhibit # 3 Ministry of Transportation submissions – received January 27, 2003
- b) Exhibit # 4 Videotape of the Breathalyzer test session – received January 27, 2003

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* (“HTA”) states:

- 50.1(1) “A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
 - (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the *Criminal Code* (Canada) referred to in subsection 48.3(3); or
 - (b) that the person failed or refused to comply with a demand made under section 254 of the *Criminal Code* (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason”.

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

- 15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
 - (a) the name, telephone number and address, with the postal code, of the medical practitioner;
 - (b) the name, date of birth and address of the person who is the subject of the report;
 - (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

The Applicant's Driver's Licence was suspended "Jan 01 2003" as per the Notice of Appeal.

Applicant's Evidence

The Applicant had page 2 of the Notice of Appeal prepared by his physician of "7 years 2 months", Physician #1, on January 2nd 2003.

Under the heading "Details and Diagnosis of patient's present condition", Physician #1 verifies that "...*Patient may have chronic obstructive pulmonary disease (will see respirologist)*...". According to Physician #1 the Applicant has a history of "...*prior chest infections; including pleurisy...*" Physician #1 notes that PTF (*sic*) PFT are "*pending*" and that the Applicant was last seen on "*Jan 2/03 (for this reason as well as back pain)*".

At the hearing, the Applicant reiterated his position that he is appealing the suspension of his driver's licence on medical grounds as he is currently under the care of a specialist in internal medicine as well as a specialist in respiratory medicine.

The Applicant confirmed that he is undergoing exhaustive tests ordered by Physician #2, who is a respirologist. Unfortunately, there are as yet no findings, and therefore, no reports available to be presented to the Tribunal. The Applicant explained that Physician #2 gave him her card and suggested the Tribunal be informed that the Applicant is under her care at this time.

The Applicant concluded his viva voce testimony by respectfully requesting that the Tribunal make an order reinstating his licence on grounds of hardship. The Applicant drives a five-ton truck for the Post Office and has not been paid since his suspension. Further, he is the primary care giver for his daughter who is terminally ill and disabled.

In cross-examination, the Applicant confirmed that he has a history of chronic chest infections. The Respondent's Representative, asked the Applicant to tell the Tribunal the date of his last chest infection. The Applicant replied: "...*I think I have one right now. Smoke, second hand smoke really tightens me up and ...cold air...*".

In offering a history of his medical condition, the Applicant related details of his life from childhood. The Applicant was told by his sister that he was found "...*screaming in side of back yard, in cold weather, almost every day*". The Applicant believes this situation led to the development and possible worsening of his condition in later life: "...*bronchitis ...at age 14 has a disease called histoplasmosis ...at age 23 ...put in Wellesley Hospital ...for a week under observation ...at the time ...had a calcified lymph node ...at age 28 pleurisy ...repetitive bronchital situations since then, almost ...twice a year...*".

The Respondent's Representative specifically asked the Applicant if he was suffering from bronchitis on January 1st, 2003, at the time he was stopped by the police and the demand for a breath sample was made. The Applicant answered: *"Well, I don't know, I usually have something..."*.

The Respondent's Representative pointed out that neither physician prescribed an antibiotic after examining the Applicant (Physician #1 on January 2nd, 2003, and Physician #2 on January 8th, 2003). The Applicant confirmed that he is *"...medication free..."* and suggested that the Respondent's Representative *"...ask the doctors..."* why no medication

was prescribed if the doctors believed the Applicant had a respiratory tract infection.

The Applicant insisted that he has had this condition most of his life, and that *"...it comes and goes..."*, sometimes undetected, sometimes he needs medication. The Applicant continued by explaining that he *"...might have had..."* chronic bronchitis at the time of the breathalyzer session. The Applicant emphasized that he does not always know when he has chronic bronchitis: *"Sitting here now, I don't know if I have it, right now ...it can go on for a month ...not really aware of it..."*.

The Applicant contested the Respondent's Representative's statement that he appealed on medical grounds based on the fact that he suffers from chronic bronchitis. The Applicant offered the following explanation: *"No. The reason I have appealed this, is, I have a medical condition, I don't know what it is, it may be something worse, I might have TB, I don't know what I've got, I might have some obstruction, I might have scar tissue, I don't know, it might be bronchitis, ...I am not the doctor ...the specialist will tell..."*.

The Applicant emphasized that Physician #2 considers his situation *"worthy of investigation"*, and that Physician #2 instructed him to inform the Chair of the Tribunal that he is under her care at this time. The Applicant has undergone some tests and is awaiting further tests, as recommended by Physician #2, but does not *"...know when she is going to be ready to ...give a report..."*.

Asked specifically, by the Respondent's Representative, to describe the symptoms of his condition, the Applicant retorted: *"...Are you a doctor, by the way, I am not a doctor either..."*. Prodded by the Respondent's Representative to describe what happens when he is affected by the environmental stimulus, he mentioned, the Applicant testified: he may *"...cough or not cough..."*; and *"...shortness of breath is one thing ...not being able to breathe properly"*.

In response to the Respondent's Representative's question as to whether he *"breathes heavily"*, the Applicant responded: *"I don't know how I breathe, ...breathe as normally as I possibly can..."*.

According to the Applicant he visits his physician when he thinks he is not going to *"...clear up ...but ...could be having it for sometime..."*.

The Applicant is not sure whether he has had pulmonary function tests in the past. The Respondent's Representative suggested that in the seven years Physician #1 has been the Applicant's physician, he had not, until now, recommended pulmonary function tests, nor that the Applicant consult with a specialist. The Applicant became visibly agitated by the Respondent's Representative's remark and asserted: "...*I am sorry ...I was in the Wellesley under the hands of a specialist for one week ...when ...twenty three years old ...yeah, I am fifty seven ...since, during, and after, I have chronic bronchitis ...I have been sick all along...*".

The Applicant confirmed to the Tribunal that over the years he has frequently visited his physician for back pain. The Applicant is not sure why his physician never sent him for respiratory tests before, but believes it could be because he has "...*never been asked ...to have a breathalyzer...*" before.

In response to the Respondent's Representative's direct question, as to how he was feeling at the time of the breathalyzer, the Applicant's reply was: "...*Well, I can relate to you the tests that they are giving me now ...uptake ...intake ...all this complicated stuff, it is all very scientific stuff, I am not really qualified...*".

The Applicant could not recall specifically when he had last been prescribed any medication for his condition, but affirmed that he usually takes medication "...*twice a year...*", and that the doctors are trying "...*to cut back...*".

The Applicant did not ask for medical assistance because he has lived with the condition all his life.

In closing, the Applicant related the fact that his car had "...*swung around...*", and the reason that he was "...*sitting there in a daze...*", when approached by the officer, was due to the incident that took place before he was stopped by the police.

The Applicant claims that he volunteered to take the breath test, and that during the test he tried to do the "*best*" he could.

The Applicant referred to his driving abstract and pointed out that he has a clean record. The Applicant believes himself to be a good and responsible driver, who does not drink and drive.

In concluding, the Applicant repeated his previous request for leniency, asking the Tribunal to re-instate his driver's licence as he is suffering considerable hardship due to the suspension.

Respondent's Evidence

The Respondent provided the following Documents:

1. Notice to the Registrar, certified January 13th, 2003
2. Certified Driving Record of the Applicant, certified January 13th, 2003
3. Vehicle Record, certified January 14th, 2003
4. Videotape: Booking/Breath Interview

The Respondent's Representative called Police Constable #1, as the Respondent's first witness. Police Constable #1 testified that he is currently a member of the Toronto Police Services and is in his "...*thirtieth year*..." of employment as a police officer.

Police Constable #1, although a breathalyzer technician since 1981, and an Intoxylizer technician since 1993, was the arresting officer in this matter, but not the breath technician.

Police Constable #1 continued his testimony by relating the events that led to the demand for a breath sample and the subsequent suspension of the Applicant's licence.

Upon approaching the vehicle being driven by the Applicant, Police Constable #1 asked the Applicant whether he was feeling well.

The Applicant was transported to the station by Police Constable #2, while Police Constable #1 waited at the scene for the tow truck to arrive.

Police Constable #1 met up again with the Applicant at the station where he turned the Applicant over to Police Constable #3 for the breathalyzer test.

Police Constable #1 remained in the breath room during the Applicant's interview with Police Constable #3. Police Constable #1 is aware that the Applicant failed to provide a breath sample.

During his dealings with the Applicant, Police Constable #1 did not observe the Applicant exhibit any signs of respiratory distress. The Applicant at no time, advised Police Constable #1 that he had any medical problems.

The Applicant cross-examined Police Constable #1 as to whether the officer thought it possible that the Applicant was experiencing medical respiratory stress that could have gone unnoticed by the Applicant. Police Constable #1 restated that nothing was noticed.

The second witness to testify on behalf of the Respondent was Police Constable #3, also with the Toronto Police Services. Police Constable #3 has been a police officer for "*sixteen years*", and a qualified Intoxylizer technician since "*2000*".

The Respondent's Representative played the videotape of the breathalyzer session during Police Constable #3's testimony in order to allow the Constable to comment while the tape was being played.

The videotape of the Applicant's breathalyzer session showed that each time the Applicant attempted to provide a breath sample, no tone, indicative of air entering the instrument, was emitted. None of the expected signs of breathing difficulties are perceptible, in the Applicant's appearance and demeanour. The Applicant did acknowledge that he had back problems and past bouts of "...*ammonia, asthma and bronchitis*...".

Police Constable #3 explained the operation of the instrument. It was her evidence that the Intoxylizer requires minimal effort in order to register, and emit a tone. In her view, the Applicant's failure to cause the instrument to emit a tone, suggests that the Applicant was either not blowing at all, or not blowing with sufficient force to activate the instrument.

Police Constable #3 attested that at no time did she observe the Applicant being afflicted with any physical or breathing difficulty, such as wheezing or coughing.

In his cross-examination of Police Constable #3, the Applicant questioned why the Constable did not ask, as she should have done, whether he had any chest infections or chest or lung related diseases. Police Constable #3 noted that as demonstrated by the videotape, she did ask the Applicant if he had any illnesses or was on any medication.

In her closing remarks, the Respondent's Representative, Ms. Beintema, reminded the Tribunal that the matter of hardship is not a consideration for this hearing.

The Applicant appealed on medical grounds and Ms. Beintema contends that there is no medical reason for the Applicant's failure to provide a breath sample, and that in fact the Applicant had no intention to provide a breath sample.

To substantiate her argument, the Respondent's Representative relied on the testimony of both Constables. The Respondent's Representative remarked that the Applicant showed no signs of stress or breathing difficulties. Further, the Applicant did not inform, Police Constable #3 of any existing medical conditions other than "*back pain*". It was only while the Applicant was attempting to provide a breath sample that he specified he had respiratory problems. Nonetheless, having an illness as the Applicant indicated "...*at some time in my life* ..." does not support the premise that the illness is current.

According to the Respondent's Representative, there is absolutely no medical evidence by way of current medical reports to support the Applicant's argument. Physician #2, whom the Applicant saw on January 8th, 2003, did not even provide a preliminary medical report to assist the Applicant.

The Applicant seems to suggest that if "...*he could be suffering now, ...he could have been suffering then*...", yet, neither physician prescribed any medication. The Applicant's family physician Physician #1, did not even report any occurrence of wheezing or chest congestion.

The fact that the Applicant failed to cause the instrument to emit a tone is also suggestive, according to Ms. Beintema, that the Applicant was intentionally evading to incriminate himself, by deliberately not providing a suitable breath sample.

In conclusion, the Respondent's Representative referred to the medical report submitted by the Applicant and pointed to the fact that Physician #1's report fails to link the diagnosis to the Applicant's ability to provide a breath sample. Thus, the Respondent's Representative asked that the Tribunal uphold the Registrar's decision.

APPLICATION OF THE LAW TO FACTS:

Although the total evidence presented was considered, the preceding reflects a summary of the proceedings. Evidence introduced not directly germane to the issue was not transcribed.

The Tribunal feels it is imperative to explain to the Applicant that as the Applicant brought an appeal under Section 50.1 (2) (b) of the *Highway Traffic Act*, the Tribunal has no jurisdiction to deal with issues of hardship. Further at issue, is not whether the Applicant was impaired or had been drinking at all.

The subject of this appeal is whether the Applicant has a medical condition that could cause, at the time of the breath sample demand, the Applicant to fail or not comply with the breath demand. Section 50.1 (2) (b) of the *Highway Traffic Act*, states:

"...person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason..."

In dealing with the medical grounds for appeal, the Applicant takes the position that he was unable to provide a breath sample, because: he had pleurisy approximately thirty five years ago, at which time he was hospitalized for a week; and, he has suffered from recurring spells of respiratory illness all his life.

The Respondent's Representative insists that it is unreasonable for the Tribunal to accept a medical condition that occurred over thirty five years ago as a valid reason for the Applicant to have failed to provide an adequate breath sample, on January 1st, 2003.

The Tribunal must agree. It is highly unlikely that an attack of pleurisy that occurred while the Applicant was in his twenties, would still to this date, affect the Applicant's ability to provide a breath sample. Considering, as the Applicant suggests, that as a result of this and previous events, the Applicant has suffered continuously from respiratory difficulties, the Tribunal has great difficulty understanding why the Applicant would not have seen a respiratory specialist, or provided a pulmonary function test to confirm his inability to provide a breath sample.

To substantiate the second part of his argument, the Applicant attested to the fact, confirmed by Physician #1's brief comments on page 2 of the Notice of Appeal, that he is currently undergoing a series of pulmonary function tests to determine the existing condition. The Respondent's Representative contends that the Applicant presented no corroborating reports.

The Tribunal does accept the Applicant's testimony that he is under medical care and an investigation to determine his medical condition is under way.

The Tribunal would have entertained a request for an adjournment had the Applicant requested an opportunity to submit a report from Physician #2, at a later date, but he did not do so.

Of major consequence, and relevance to the breathalyzer incident, is Physician #1's opinion after examining the Applicant on January 2nd, 2003, the day after the demand for a breath sample was made: "*Patient may have chronic obstructive pulmonary disease...*". Not only does Physician #1's use of the word "*may*", appear to the Tribunal as cautionary, but the fact Physician #1 prescribed no medication whatsoever, not even of a temporary nature, could also be taken as an indication, that none was necessary.

The Applicant was examined by Physician #2 on January 8th, 2003. Again it appears that Physician #2 does not feel the situation warranted issuing a prescription, not even for an inhaler, which is the most common and immediate relief for individuals with breathing disorders. It is hard to conceive that neither physician would prescribe provisional medication, if the Applicant, as he maintains, was manifesting any signs of bronchitis or any other severe respiratory illness.

Furthermore, the Tribunal notes that Physician #2, as an expert witness for the Ministry, did not provide the Applicant with a preliminary report of her findings on examination.

The Applicant was asked several times by the Respondent's Representative to specifically describe the symptoms he experienced during the breathalyzer session. The Applicant's replies were elusive and evasive, at best. The Applicant was unable to describe to the Tribunal, any actual physical symptoms, that would have precluded the provision of an adequate breath sample.

The Applicant maintains that breathing difficulties are not discernible. The Tribunal disagrees. It is the Tribunal's experience that the signs of breathing distress, manifested by shortness of breath and wheezing are quite noticeable even to an untrained observer. The Tribunal heard and accepted the evidence presented by two well-trained and highly experienced Constables, that the Applicant exhibited absolutely no signs of physical distress or discomfort during the breathalyzer session. The Tribunal viewed the videotape and is in a position to be able to verify the Constables' assessment.

The onus being on the Applicant to establish the merit of the appeal, the Tribunal finds that the Applicant's testimony was insufficient to substantiate the basis for an appeal on medical grounds. Nor is there compelling evidence provided by his doctors to confirm a medical reason for his inability to provide a sample of his breath. Thus, the Tribunal finds that the Applicant does not meet the criteria of Section 50.1 (2) (b), in that he was not able to

demonstrate that he suffers from a medical condition, which would prevent him from complying with the demand for a breath sample.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated January 1, 2003 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal **confirms** the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.
Presiding Member

RELEASED: February 6, 2003

GINA STRATI

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: TERRENCE LORETTE
 Presiding member

APPEARANCES: KIM BIENTEMA
 Representative for the Registrar of Motor Vehicles

 GINA STRATI, Applicant
 unrepresented

DATE OF HEARING: January 20, 2003

DECISION RELEASED: January 30, 2003 Toronto

REASONS FOR DECISION

A hearing was held on January 20, 2003 at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act

to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Gina Strati (the "Applicant")
Motor Vehicle:	Honda Civic CX, plate AKJY095 (the "vehicle")
Date of Appeal:	December 30, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the driver's licence was not under suspension, the vehicle owner exercised due diligence (all reasonable efforts) to determine that the driver's licence was not suspended; and the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on January 20, 2003 and proceeded as an electronic (telephone) hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #2) identifies the three grounds of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the driver's licence was not under suspension, or that the vehicle owner exercised due diligence (all reasonable efforts) to determine that the driver's licence was not suspended; or alternatively that the loss of the vehicle so that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of her appeal states:

I (the vehicle owner) exercised due diligence to determine drivers license was not suspended. His impaired charge was withdrawn in court. Documentation is provided. The police computer system has not been corrected to reflect this.

Also, the loss of my vehicle has resulted in exceptional hardship. I live in the country with no accessibility to public transit. Due to 2 severe car accidents I am unable to walk very far. Not having a vehicle has interfered with my rehabilitation schedule and I am unable to get my medication or make long awaited doctor's appointments.

Gina Strati
Dec 30 2002

The Applicant testified that she had known the driver David J. Moir for some time and that they lived together for the past 2 years. She states that the Crown Attorney withdrew all driving related charges against David Moir on July 24, 2001 in relation to the October 25, 1996 charges. She states that his licence was therefore not under suspension at the time of the driving incident of December 21, 2002. She further stated that she believed he had a valid drivers license although she had never actually seen it. She was unaware that Mr. Moir had never held a valid drivers license, something that the Tribunal member found difficult to understand.

The Applicant also testified as to her physical health and need to periodically see a chiropractor for treatments relating to injuries resulting from a car accident some years ago. These visits to the chiropractor become necessary during cold damp weather such as we had been experiencing recently in Southern Ontario.

The Applicant went on to state that there was no public transit available in her area, the nearest being 5 km. or a \$10.00 dollar taxi trip away. She also stated that she could not afford these taxi charges, as both she and Mr. Moir were unemployed and receiving public assistance. Ms Strati also stated that there were no neighbours who could assist with transportation and that her nearest relative lived north of Toronto and could not provide any assistance.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by David J. Moir;

3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of two driving offences under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until February 4, 2003.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended

December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsections 50.2(3)(b), (c) and (d). The tribunal will consider a number of issues in regards to each ground:

Driver's Licence Suspension

Whether or not the driver's licence was under suspension is a question of fact to be determined upon the review of all of the evidence before the Tribunal.

Due diligence

What were the efforts made by the Applicant to determine if the licence was under suspension? What inquiries did she make in regards to her friend?

Exceptional Hardship

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).

- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis of one or more of the three grounds?

Driver's Licence Suspension

The Registrar has provided a certified copy of an extended driver record search for Criminal Code convictions under the seal of the Registrar of Motor Vehicles from the Ministry of Transportation. It reveals convictions for Dangerous Driving in 1991, Suspension re Unpaid Fine in 1994, convictions for Impaired Driving in 1997, Impaired Driving again July 24, 2001, and a suspension until July 24, 2003, conviction for Fail to Remain at Accident on July 24, 2001 and a suspension to July 24, 2003. Since there is no evidence of an appeal being filed the conviction is proof that the crimes were committed pursuant to the Ontario Evidence Act.

The Applicant has provided a photocopy of the Court record, which indicates that the driving offenses heard on July 24, 2001 were withdrawn. It is not a certified copy but merely a list of the matters on the docket that day. It is dated the same day as the court appearance regarding the convictions. There is no evidence of an appeal. I prefer the evidence of the Registrar since it is a certified record. Furthermore, I note that the record also refers to a previous suspension from 1994, which appears outstanding so that the licence would still appear to be previously under suspension for an unpaid fine.

Due Diligence

The Applicant had known the driver for some time and she states that she had never seen the driver's license in question but believed the driver had held a valid license. The Tribunal cannot accept that due diligence was performed in this case.

Due diligence requires that the Applicant take positive steps to confirm the validity of the driver's licence. This requires that an individual contact the Ontario Ministry of Transportation with the driver's name and driver's licence number at 1-900-565-6555 for automated service, or obtaining a driver's abstract of licence at a local MTO Driver Vehicle Licence Issuing Office, or Service Ontario Kiosk at a local mall, or accessing the MTO website at www.mto.gov.on.ca.

The evidence before the Tribunal was that the Applicant merely took Mr. Moir at his word and assumed that he had a valid driver's licence. She did not take any steps to determine whether

or not he had a valid driver's licence. Merely taking him at his word, is not enough to show due diligence.

Exceptional Hardship

Section 50.2(3)(d) of the Act provides for an appeal on this basis but Section 22(3)(a), (b), (c) and (d) provides very specific criteria that the Applicant must meet to determine if exceptional hardship under the Act will result from the impoundment. It is the Tribunal's finding that the Applicant did not provide sufficient evidence to support her appeal.

To show that no alternative to the impounded vehicle is available, section 22(4) of the Act stipulates that:

"the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person"

The Tribunal finds that the Applicant has not demonstrated that every reasonable option was explored. She has not provided adequate evidence about the alternatives. The Applicant has indicated that she needs her vehicle for an occasional visit to the chiropractor for shoulder pain arising from car accidents two years ago. This is not an exceptional hardship. Furthermore she has not filed a disability certificate from her doctor setting out the scope of her medical problem, if any.

Since she has not demonstrated that every reasonable option has been considered, and it is clear that the loss is not immediate, significant and lasting, the Tribunal cannot consider the criteria set out in Regulation 22(2) (b), (c) and (d), that is to say financial loss, loss of employment or education or training. Even if they did apply, the Applicant did not show that she would suffer significant financial loss, job loss or loss of education as a result of the impoundment.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Terrence Lorette Presiding Member

RELEASED: January 30, 2003

VISHWAH P. RAMESAR

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: SIMON DANN
Presiding member

APPEARANCES: LYNDA DUNBAR
Representative for the Registrar of Motor Vehicles

VISHWAH P. RAMESAR, Applicant
unrepresented

DATE OF HEARING: January 20, 2003

DECISION RELEASED: January 28, 2003 TORONTO

REASONS FOR DECISION

A hearing was held on January 20, 2003, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Vishwah P. Ramesar (the "Applicant")
Motor Vehicle:	Dodge Spirit LE 1998, plate ANDY 966 (the "vehicle")
Date of Appeal:	January 3, 2003

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on January 20, 2003 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

The impoundment of my vehicle incur financial hardship to me and my family, my wife uses the vehicle to drop me to work and the kids to school. Without the vehicle its difficult to reach to work on time and the fatigue and stress it causes.

The Applicant confirmed the details of his written submission and added the following:

- His wife drives him to and from work and that he works a 7:00 a.m. to 6:00 p.m. shift as a car detailer; he added that his son had some inconvenience in getting to and from school but that transit was immediately available;
- He lives in the Victoria Park and Danforth area and works in Whitby; he has public transit available and this requires him to take subway and GO train to Oshawa; at the Oshawa station there is no direct bus to his work and he completes the journey by taxi – he confirmed it was also possible to complete the journey to work by walking; the full daily transportation cost, including the use of taxis is \$35.70;
- The Applicant and his wife have 3 three children, aged 2, 10 and 13 years, and they live on one income of about \$350 to \$400 per week and incur stated living expenses of up to \$1700 per month, covering rent, auto insurance, credit debt payments and groceries;
- Mr. Ramesar testified that he felt his job was threatened by the amount of time it was now taking him to get to work;
- The Applicant clarified that he owned the vehicle but that the impound fee of \$826.15 was an amount he would not have and therefore might not be able to pick it up at the end of the impound period.

In response to questions from Ms. Dunbar, the Registrar's representative, the Tribunal learned that Mr. Ramesar did not have any family or neighbours he could call on but that other though longer (duration) means of getting to work were available.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Vishwah P. Ramesar;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;

4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of driving with more than mgs alcohol in blood under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until October 2, 2003.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in

cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether

no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,

- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.

(2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,

- (a) inconvenience to any person;
- (b) financial or economic loss to any person;
- (c) loss of employment or employment opportunity to any person; or
- (d) loss of education or training or of an educational or training opportunity to any person.

(3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,

- (a) no alternative to the impounded motor vehicle is available;
- (b) the loss will be immediate, significant and lasting;
- (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
- (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).

(4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

As the Applicant appealed on the basis of exceptional hardship (s.50.2(3)(d)), the issue is whether the loss is unusual and whether the impoundment forms an exceptional condition; also whether the impoundment creates a circumstance of severity or/and extreme privation.

The Applicant did not provide any evidence to prove that the impoundment would result in a threat to the health or safety of any person ordinarily transported by the vehicle, or a threat to public health, safety or the environment, as required by s.22(1) of Regulation 574.

The Applicant has demonstrated that there is an alternative to the impounded motor vehicle. He has access to TTC and GO Transit. Although the transportation time may be longer, there is no evidence that the loss is immediate significant and lasting

The evidence that was presented to the Tribunal showed only that the impact would be inconvenience in transportation to Mr. Ramesar, who is the owner of the vehicle and was the driver at the time of the impoundment. Since there is an alternative to the impounded motor vehicle, namely public transit and taxis, the Tribunal cannot consider inconvenience, financial or economic loss, loss of employment, or loss of education.

In summary, since the evidence does not establish exceptional hardship, the Tribunal confirms the Registrar's decision to impound.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Simon Dann, Presiding Member

RELEASED: January 28, 2003

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
BRANDON J. LUBLIN

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: December 20, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

BRANDON J. LUBLIN

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Brandon J. Lublin, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
789 Don Mills Road, Suite 800
Toronto, ON M3C 1T5

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Brandon J. Lublin
59 Warner Avenue
Toronto, ON M4A 1Z5

Pursuant to subsection 5(2) of the *Motor Vehicle Dealers Act* Brandon Jordan Lublin (hereinafter referred to as “the Applicant”) and the Registrar, *Motor Vehicle Dealers Act*, (hereinafter referred to as “the Registrar”), in accordance with section 4.1 of the *Statutory Powers Procedure Act*, do hereby waive the requirements of a hearing and consent to an Order of the Licence Appeal Tribunal based upon the following Terms and Conditions:

1. The Applicant agrees, if he is charged in the future, to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.
2. The Applicant agrees if he is convicted under any law of an industry specific offence or if he is convicted under the Criminal Code, the Registrar is directed to and shall carry out the proposal.
3. The Applicant agrees not to transfer his registration as a salesperson under the *Motor Vehicle Dealers Act* to another dealer without the prior written consent of the Registrar.
4. The Applicant agrees not to be involved in the process of buying, selling or leasing motor vehicles without the benefit of registration.
5. The Applicant agrees not to be a partner, shareholder, officer, director or sales manager of a dealership.
6. The Applicant agrees to provide full and complete disclosure on all future applications and discussions with the Registrar, regardless of whether disclosure has been previously provided to the Registrar.
7. The Applicant acknowledges that the Registrar is relying upon the accuracy of the disclosure provided by the Applicant in entering into these terms and conditions.
8. The Applicant will take reasonable steps to review his employer’s books, records & information pertaining to prior use/condition of any motor vehicle that he sells on behalf of his employer and ensure that the information is disclosed to the purchaser in writing on the bill of sale.
9. The Applicant acknowledges and understands that his registration will not be used to buy or sell motor vehicles where the Applicant knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
10. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.

11. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.
12. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
13. The Applicant will provide a copy of this order to his employer forthwith.
14. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
15. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
16. The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____ this _____ day of _____ 2003.

Brandon Lublin (signature)

These Terms and Conditions are accepted by the Registrar, *Motor Vehicle Dealers Act*.

Date:

Carl Compton
Registrar
Motor Vehicle Dealers Act

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
ROBERT J. VALLERIANI

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATION
- Proposal dated: April 22, 2002

AND IN THE MATTER of a hearing of a motion to consider an application for an order
staying the decision of the Tribunal

ROBERT J. VALLERIANI

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by, Applicant, Robert J. Valleriani and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing of a motion pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing of a motion on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: January 2, 2003

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
789 Don Mills Road, Suite 800
Toronto, ON M3C 1T5

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Robert Valleriani
164 Markville Rd.
Unionville, ON L3R 4V6

Robert Valleriani (hereinafter referred to as "the Salesperson") and the Registrar, *Motor Vehicle Dealers Act*, (hereinafter referred to as "the Registrar"), in accordance with section 4.1 of the *Statutory Powers Procedure Act*, do hereby waive the requirements of a hearing of the motion, returnable January 7, 2003 and consent to an Order of the Licence Appeal Tribunal based upon the following Terms and Conditions:

1. The revocation of the salesperson shall be stayed, pending appeal;
2. The salesperson will perfect the appeal expeditiously;
3. The salesperson agrees that he shall act as a salesperson on behalf of Michael Boyer Pontiac Buick GMC (1988) Ltd.;
4. The salesperson agrees not to be an officer, director, owner or sales manager of a dealership;
5. The salesperson agrees not to be a final signatory on any sales contracts on behalf of the dealership;
6. The salesperson agrees not to transfer to another dealership without the prior written consent of the Registrar;
7. The parties agree that the appeal may be heard on short notice;
8. The parties agree that there shall be no costs of the motion.

Signed in the City of _____ this _____ day of December, 2002.

Robert Valleriani
By his solicitor, Ronald Chapman

Registrar, Motor Vehicle Dealers Act
By his solicitor, Aviva R. Harari

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of
GLOBAL TRAVEL CENTRE ADVANTAGE

AND IN THE MATTER of a decision of the
Travel Industry Council of Ontario

TO DISALLOW A CLAIM
- Decision dated: June 28, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Decision

GLOBAL TRAVEL CENTRE ADVANTAGE

Applicant

- and -

TRAVEL INDUSTRY COUNCIL OF ONTARIO

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on December 3, 2002;

AND WHEREAS, upon consent of the parties, the hearing was adjourned to February 28, 2003;

TAKE NOTICE, upon consent of the parties, the Tribunal further adjourns the hearing *peremptory against all parties* to commence at Gillespie Reporting Services, 130 Slatter Street, Suite 200, Ottawa, Ontario at 1:30 p.m., on Tuesday, May 13, 2003.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: February 14, 2003

KERRY AND WANDA PSUTKA

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR PURPOSES OF THE ONTARIO NEW HOME
WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MICHAEL H. TURK, Vice-Chair

APPEARANCES: KAREN SPECTOR, Counsel, representing the Ontario New
Home Warranty Program

DATE OF
HEARING: February 4, 2003 Toronto

ORDER

THIS HEARING was held this day in the presence of Karen Spector, counsel, representing the Ontario New Home Warranty Program (hereinafter the "Program"),

AND UPON hearing the submissions of the Program that this matter has been settled, the parties have executed Minutes of Settlement and the Applicants have agreed to withdraw their claim, the Tribunal does hereby make the following order:

1. The claim of the Applicants be and the same is hereby withdrawn.

LICENCE APPEAL TRIBUNAL

Michael H. Turk,
Vice-Chair, Presiding

RELEASED: February 10, 2003

MICHAEL PUCHTA

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE *ONTARIO NEW
HOME WARRANTY PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL: MICHAEL H. TURK, Vice Chair

APPEARANCES:

ROBERT JAGIELSKI, Counsel, representing the Applicant
MICHAEL PUCHTA, the Applicant
CAROL STREET, Counsel, representing the Ontario New Home
Warranty Program,
NORMAN W. THOMAS, Counsel, representing Villa Lomas Resorts
Club Ltd., added party

DATE OF
HEARING: January 23, 2003 Toronto

REASONS FOR DECISION AND ORDER

The Applicant appeals to the Licence Appeal Tribunal from a decision of the Ontario New Home Warranty Program (the Program) set out in a decision letter dated August 9, 2002 denying the claim made by the Applicant for the refund of his deposit.

BACKGROUND & FACTS:

On August 27, 1988, the Applicant executed an agreement of purchase and sale in the Province of Ontario with the added party, Villa Loma Resort Club Limited (hereinafter "Villa Loma") for the purchase of Unit 806 Level 8 in a condominium project to be constructed in Acapulco, Mexico. The agreement contains a closing date of August 30, 1990.

Upon execution of the agreement the Applicant provided an initial deposit of \$5,418.00 in Canadian currency and a further deposit in January 1989 which consisted of \$2,100.00 in United States currency and \$2,898.00 in Canadian currency.

The transaction was not completed, the Applicant demanded the return of his deposit monies and has not received any monies from the added party.

In its decision letter the Program denied the Applicant's claim on five grounds. Firstly, that the *Ontario New Home Warranties Plan Act* (the "Act") does not apply to the sale or construction of dwellings located outside Ontario. Secondly, that the dwelling itself is not a "home" within the meaning of the Act. Thirdly, that the Applicant has failed to prove that the vendor is bankrupt or fundamentally breached the contract. Fourthly, that the Applicant's claim against the vendor is statute barred as he failed to commence an action against the vendor or submit a claim to the Program within six years from the date upon which the agreement did not close. Fifthly, that the Applicant did not prove payment of the second deposit.

THE EVIDENCE:

The Applicant appeared in person.

Neither the Program nor Villa Loma called any witnesses.

Michael Puchta

Michael Puchta testified that in August 1998 he responded to an advertisement in a Toronto newspaper and agreed to purchase a condominium to be constructed in Acapulco, Mexico.

The agreement of purchase and sale is contained at Tab 3 of the Program's Book of Documents which was marked as Exhibit Number 3. The agreement provides for a purchase price of \$54,180.00, first and second deposits of \$5,418.00 and a closing date of August 30, 1990.

Michael Puchta testified that upon execution of the agreement he provided Villa Loma with a deposit of \$5,418.00, provided his second deposit on January 15, 1989 and that payment of the second deposit was \$2,100.00 cash in United States currency and a cheque in the sum of \$2,898.00 in Canadian funds.

Michael Puchta continued by testifying that it was his intention to live in this unit and that following payment of his two deposits, he had difficulty contacting Villa Loma. In June 1990, he met with Mr. Maida, the principal of Villa Loma, in Toronto and was advised that the deal would not go through and was offered an alternate unit in another property.

Michael Puchta testified that he travelled to Acapulco in December 1990, viewed the proposed alternate property, that this property was not acceptable to him and he returned home disappointed.

Michael Puchta testified that as the alternate unit was not acceptable to him, on July 26, 1991 and with the assistance of a sales representative of Villa Loma he prepared and sent a letter to Mr. Maida whereby he requested the return of his deposit. This letter is contained at Tab 5 of Exhibit Number 3.

Michael Puchta testified that he did not receive a response to his July 26, 1991 letter and on April 16, 1992 through CAW Legal Services Plan sent a formal demand letter for the return of the deposit monies and interest thereon. This letter is contained at Tab 6 of Exhibit Number 3.

Michael Puchta concluded his testimony by testifying that as he did not receive a response to his letters, he travelled to Acapulco in May 1993, met with Mr. Maida, advised him that he did not wish to purchase an alternate unit and again, requested the return of his deposit. Michael Puchta testified that Mr. Maida advised that he would not receive his deposit back and that he felt threatened.

Prior to the commencement of the cross-examination of Michael Puchta, the Program acknowledged for the purpose of this appeal that Villa Loma was a registrant within the meaning of the Act.

On cross-examination by Carol Street, Michael Puchta denied that he was purchasing a unit in a hotel, stated that his intention was to live in Mexico for six months at a time and disputed the contents of correspondence that he received from Villa Loma dated October 15, 1990. This correspondence is contained at Tab 4 of Exhibit Number 3.

Upon further cross-examination, by Carol Street, Michael Puchta agreed that the agreement of purchase and sale did not refer to Ontario law and that in accordance with paragraph 8, the agreement refers to the closing being governed in accordance with the Trust Provisions of the Government of Mexico. The agreement of purchase and sale is contained at Tab 3 of Exhibit Number 3.

The remainder of Carol Street's cross-examination, the cross-examination by Mr. Thomas and re-examination did not disclose any significant facts.

ISSUES:

Whereas the decision letter of the Program denies the Applicant's claim on five grounds, there is one specific issue which in this Tribunal's view is determinative of the Applicant's claim.

This is the first issue raised by the Program in its decision letter and can be stated for the purpose of this appeal as whether the *Ontario New Home Warranties Plan Act* is applicable to the construction of dwellings outside the Province of Ontario.

Applicant's Submissions

It is the submission of the Applicant that as Villa Loma was a registrant in Ontario for the purpose of the *Ontario New Home Warranties Plan Act* RSO, 1990 Chapter O.31 (hereinafter the "Act") as amended; as a result the Applicant is entitled to seek payment out of the guarantee fund for the amount of his deposit in accordance with Section 14 of the Act.

The Applicant further submits that the Act does not specifically provide a requirement that homes within the meaning of the Act must be constructed in the Province of Ontario.

The Applicant did not provide the Tribunal with any authority or precedents in support of his position.

Respondent's Submissions

It is the submission of the Program that the Act does not apply to construction outside of the Province of Ontario and this position is based upon the legal principle of territoriality. The Program submits that the principle of territory is authority for the proposition that a province can only legislate or regulate matters within its territory. The Program provided the Tribunal with the following authorities thereon:

Pierre-Andre Cote, the author of The Interpretation of Legislation in Canada, 2nd Edition, states at page 147:

"Unless he implicitly or explicitly provides otherwise, the legislator is presumed to enact for persons, property, juridical acts and events within the territorial boundaries of his jurisdiction. As a result, it is assumed that Parliament does not wish to give its statutes an extraterritorial effect. If possible, all legislative enactments should be construed and applied to promote this presumed intention of the legislature."

Pierre-Andre Cote continues at page 148:

"...the presumption against extraterritorial effect is reinforced by another favouring a construction that validates an enactment over one that renders it invalid. Because provincial legislatures have no power to legislate extraterritorially, they are deemed to respect the constitutional limits of their powers".

He concludes at page 149 by stating:

"a third principle associated with the presumption of territoriality is that words designating persons, property, undertakings and events should, prima facie be construed as referring to persons, property, undertakings and events located within the territory over which the legislative or regulatory authority has jurisdiction".

Peter Hogg, the author of Constitutional Law in Canada, 1997, states at page 13-9:

"as a general proposition, it is plain that a province may not regulate extra-provincial activity".

THE LAW:

The *Ontario New Home Warranties Plan Act* defines "vendor" as follows:

"vendor" means a person who sells on his, her or its own behalf a home not previously occupied to an owner and includes a builder who constructs a home under a contract with the owner

Section 13 of the Act provides:

13. (1) Every vendor of a home warrants to the owner,
 - (a) that the home,
 - (i) is constructed in a workmanlike manner and is free from defects in material,
 - (ii) is fit for habitation, and
 - (iii) is constructed in accordance with the Ontario Building Code;

Section 14 of the Act provides:

- (1) Where,
 - (a) a person who has entered into a contract with the vendor for the provision of a home has a cause of action in damages against the vendor for financial loss, resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;
 - (b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty; or
 - (c) the owner suffers damage because of a major structural defect as defined in the regulations for the purposes of section 13, and the claim is made within four years after the warranty expires or such longer time under such conditions as are prescribed,

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

DECISION:

The *Ontario New Home Warranties Plan Act* (the "Act") regulates the construction of homes in the Province of Ontario. The Act is a provincial statute of the Province of Ontario.

In accordance with the principle of territoriality, the Province of Ontario's statutory and regulatory authority is limited to acts that take place within the Province of Ontario.

The protection afforded to consumers by the Act is limited to new homes that are purchased and constructed in the Province of Ontario. The entire structure of the Program pertains to registration and enrollment of new homes in the Province of Ontario and ensures inter-alia that all new homes are constructed in accordance with the Ontario Building Code.

The Province of Ontario has no authority nor ability to regulate the construction of homes in Acapulco, Mexico and therefore the Program has no jurisdiction to reimburse the Applicant for deposit monies paid for a home to be constructed in Acapulco, Mexico.

The Tribunal therefore confirms the Decision of the Ontario New Home Warranty Plan dated August 9, 2002 denying the Applicant's claim for the refund of his deposit.

On the basis of the foregoing, the Tribunal makes the following Order:

1. The Appeal of the Applicant is hereby dismissed.
2. The Tribunal makes no findings as to the remaining issues contained in the Notice of Appeal.

LICENCE APPEAL TRIBUNAL

Michael H. Turk, Vice-Chair

Released: February 17, 2003

**1381357 ONTARIO LTD. o/a LIANA CAR SALES (“LIANA”) and EMAN S. SHIHAB
AND MAZEN A. SHIHAB**

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
MOTOR VEHICLE DEALERS ACT

TO REFUSE REGISTRATION

TRIBUNAL: F. BRUCE FITZPATRICK, Vice-Chair

APPEARANCES:

Anthony Kassam, Agent for 1381357 Ontario Ltd. o/a Liana Car
Sales and Eman S. Shihab and Mazen A. Shihab

Aviva R. Harari, Counsel, representing the Registrar, *Motor Vehicle
Dealers Act*

DATES OF

HEARING: December 6, 2002 and January 22, 2003 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND

This is an appeal to the Licence Appeal Tribunal (“Tribunal”) from a notice of proposal (the “Proposal”) by the Registrar of the Motor Vehicle Dealers Act (the “Registrar”) pursuant to section 7 of the *Motor Vehicle Dealers Act* (“the Act”). The Proposal dated the 15th day of August, 2002, seeks to refuse the registrations of Liana as a motor vehicle dealer and of Eman S. Shihab (“Ms. Shihab”) and Mazen A. Shihab (“Mr. Shihab”) as motor vehicle sales persons.

The Proposal sets out the Registrar’s reasons for the Registrar seeking an order for the revocation of both the above registrations. The reasons are stated as follows.

The intention and objective of the Act is to protect the public interest. The requirements of the Act include that Registrants be financially responsible in the conduct of business and that Registrants carry on business in accordance with the law and with integrity and honesty. The Registrant’s past conduct is inconsistent with the intention and objective of the Act, and therefore warrants disentitlement to registration under the Act. Therefore, the Registrar is unwilling to register 1381357 Ontario Ltd. o/a Liana Car Sales and Eman S. Shihab and Mazen A. Shihab under the Motor Vehicle Dealers Act.

The particulars upon which the Registrar relies are stated in the Proposal as follows.

1. On or about April 19, 2002 1381357 Ontario Ltd. o/a Liana Car Sales (the "Dealer") applied for registration as a motor vehicle dealer. The Dealer was previously registered as 1381357 Ontario Ltd. o/a Liana's Sales Cars on or about February 4, 2000.
2. On or about April 22, 2002 Mazen A. Shihab ("Mazen") applied for registration as a motor vehicle salesperson. At all material times Mazen was the controlling mind of the Dealer. Mazen was previously registered on or about February 4, 2000.
3. On or about April 22, 2002 Eman S. Shihab ("Eman") applied for registration as a motor vehicle salesperson. At all material times Eman was the controlling mind of the dealer. Eman was previously registered on or about February 4, 2000.
4. On or about February 4, 2000 (as per amendment) they provided the Registrar, *Motor Vehicle Dealers Act* (the "Registrar") with an executed copy of terms and conditions for its registration which included *inter alia*:
 - E) The Dealer agrees not to invite the public to deal at a place other than their approved location.
 - K) The Dealer agrees that he is under a positive obligation to disclose all material facts about the vehicles he sells to his customers. The Dealer agrees to make reasonable efforts to research the history of all his vehicles prior to sale to ensure that all material facts are disclosed. The Dealer agrees that should any information come to light, which the Registrar deems to be a material fact concerning a vehicle the Dealer has sold, the Dealer will comply with all reasonable requests made by the Registrar to provide compensation to the purchaser.
 - L) The Dealer acknowledges and understands that its registration will not be used to buy or sell motor vehicles where the Dealer knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
5. On or about August 1, 2000 a representative of the Registrar attended at the Dealer's registered premises and found that the Dealer was not present and did not have an office and had not erected a sign identifying the dealership contrary to the *Motor Vehicle Dealers Act* (the "Act").

6. On or about May 7, 2001 a representative of the Registrar attended at the Dealer's registered premises and found that the Dealer did not have his own office separate from the other dealers and had not erected a sign identifying the dealership contrary to the Act.
7. On or about February 4, 2002 the Dealer, Eman and Shihab's registrations lapsed.
8. On or about May 10, 2002 a representative of the Registrar attended at the Dealer's registered premises, the Dealer did not have any books and records available for inspection contrary to the Act.
9. On or about February 1, 2001 the Dealer purchased a 1994 Voyageur VIN 1P4GH44RX218615 with the disclosure that the vehicle was salvage. On or about June 26, 2001 the Dealer sold the vehicle to Gloria Nkrumah without full disclosure.
10. On or about February 1, 2001 the Dealer purchased a 1996 Ford Taurus Voyager VIN 1FALP52U4SG210400 with the disclosure that the vehicle was problem vehicle body damage. On or about May 9, 2001 the Dealer sold the vehicle through GTA Auctions without full disclosure.
11. The Dealer has failed to operate from his registered premises contrary to the Act.
12. The Dealer, Eman and Mazen have failed to comply with the Act and in particular with section 5.

At the hearing, the Registrar sought and was granted a minor amendment to the particulars in the Proposal in paragraph 4 as noted above.

By written notice, Liana and Ms. Shihab informed the Tribunal pursuant to Section 7(2) of the Act, that they require a hearing regarding their appeal to the Registrar's Proposal.

The Evidence

At the opening of the hearing, counsel for the Registrar and the agent representing the Applicants indicated that they had agreed as to the facts set out in paragraphs 1, 2 and 4 of the particulars as noted above.

The evidence presented to the Tribunal by the Registrar consisted of documentary evidence (32 exhibits) as well as the oral testimony of Saul David Paton, Brian Lia and the Deputy Registrar of OMVIC Mary Jane South.

Evidence of Saul David Paton

Mr. Paton is a member of the public who purchased a used vehicle which is the subject of these proceedings. Mr. Paton testified that in May 2001, for the very first time, he attended at GTA Auctions in Toronto. At the auction he bid on a number of vehicles but ended up purchasing a 1995 dark blue Ford Taurus, serial number 1FALP52U4SG210400 (the "Taurus").

When Mr. Paton purchased the Taurus, it was towed to a mechanic he had used in the past at a garage located at Shuter and Parliament. The mechanic took Mr. Paton into the garage when the vehicle was up on the hoist. He showed the undercarriage of the vehicle to Mr. Paton which indicated to Mr. Paton's eye that there was extensive frame damage to the Taurus. As a result of that damage, Mr. Paton returned the Taurus to GTA Auctions. The damage was verified and Mr. Paton received a refund of his money. He returned all copies of the purchase documentation to GTA Auctions at the time. Mr. Paton did not recall hearing the name "Liana" or knowing from where the vehicle had originated during his dealings with GTA Auctions. Mr. Paton quite candidly admitted that he did not specifically recall the exact price, the express mileage, the exact year of the vehicle or the exact date of his purchase. However, subsequent testimony on the part of the Applicant confirmed that in fact Mr. Paton had purchased the Taurus which was the subject of the Registrar's concerns about the Applicants. Mr. Paton was extensively cross-examined about the issue and about the particulars of the vehicle, however I find from my observations of the demeanor of Mr. Paton while giving his testimony that his inability to recall precise details concerning the vehicle (the VIN for example) did not detract from his testimony. Mr. Paton was quite clear that when he purchased the Taurus there was no mention whatsoever about the fact that the vehicle had been damaged or there was any indication that the car had been in an accident. Mr. Paton described the damage as "obvious", and I find no reason to believe he would not have the capacity to make this observation.

Evidence of Brian Lia

Mr. Lia has been employed by OMVIC as an inspector for three years. Prior to his present position, he worked for OMVIC for a year in the Complaints/Mediation Department. Mr. Lia testified with the benefit of referring to notes which he had made contemporaneous to the events at issue.

On May 7th, 2001, Mr. Lia found Mr. Shihab in premises where Mr. Shihab was selling vehicles on behalf of Liana at 5 Rossdean Drive. There was no signage to indicate that it was a dealer location for Liana Car Sales. Mr. Lia directed Mr. Shihab to ensure that all books and records were kept at the registered premises, that he submit a business change form to OMVIC with regard to his address change. At the time the business was registered it was at 429 Signet Drive in North York. Mr. Lia also directed that the signage be conspicuously posted and that the business office for Liana Car Sales be separate from other business, which were on the premises.

Approximately a year later on May 10th, 2002, Mr. Lia again went to visit Liana Car Sales. At this point, the business had been registered to operate at 395 Weston Road, Toronto. At the time Mr. Shihab was not present at the site. Another appointment was set up for May 14th, 2002. When the next visit occurred, Mr. Shihab did not have his garage register. Initially he stated that he had lost it and said that his records were with his accountant.

May 10th, 2002 Visit

During the visit Mr. Lia reminded Mr. Shihab that his registration was subject to terms and conditions. One of these conditions was that the dealer had agreed to maintain a garage register in accordance with the *Highway Traffic Act*.

Mr. Lia also noted during his visit that there were a number of vehicles which were on the lot which were not registered to the dealership.

Mr. Lia again met Mr. Shihab on May 15th, 2002. Certain of the records were still missing at that time. However, Mr. Shihab was able to produce his garage register at the time.

At this time, Mr. Lia discovered that Liana had sold a vehicle, a 1994 Plymouth Voyager, which had been in an accident, was declared "salvage", but this fact did not appear on the bill of sale to a retail customer. According to Mr. Lia, Mr. Shihab indicated he did not remember whether or not the purchaser was advised that the vehicle was "salvage". This transaction is subsequently referred to this decision as the purchase by Ms. Gloria Nkrumah.

Also during this visit, Mr. Lia discovered the circumstances concerning the Ford Taurus, which had been ultimately sold to Mr. Paton. At this point, Mr. Lia discovered that when Liana purchased the vehicle from Toronto Auto Auctions it was indicated that the vehicle was a "problem" as it had been damaged.

Also during this meeting Mr. Lia questioned Ms. Shihab's role in the business. Mr. Shihab advised Ms. Shihab taught public school in Woodbridge, and was not involved in the day to day running of the business.

During the visit Mr. Lia requested certain documentation be sent or supplied to OMVIC. He also reviewed the paperwork for some twenty deals. Ten of these had complete documentation and ten were incomplete.

On or about May 24th, 2002, Mr. Lia spoke to Ms. Nkrumah. At that time according to Mr. Lia, Ms. Nkrumah said that she did not recall being advised that the Voyager she had purchased had been in an accident prior to her purchase.

There was some dispute during Mr. Lia's evidence concerning what had occurred outside the hearing room on the first day of hearing in respect of Ms. Gloria Nkrumah's expected testimony. She was initially summonsed, but then released by counsel for the Registrar, before she actually set foot in the hearing room. Ultimately, the agent for the Applicants

indicated he wished to call the witness and placed her under summons for a subsequent date of hearing.

Ultimately Mr. Lia obtained the information from GTA Auctions which indicated that when Mr. Shihab sold the Taurus, written disclosure did not include any reference whatsoever to the fact that the vehicle had been in accident and had been repaired.

On cross-examination Mr. Lia was asked why there was a delay between inspections. Mr. Lia advised this is a routine matter given OMVIC's resources, and the number of dealers that they are responsible to regulate. Mr. Lia admitted that there had been no prior complaints about Liana Car Sales prior to his initial meeting with Mr. Shihab.

Evidence of Mary Jane South

Mary Jane South is the Deputy Registrar of OMVIC and has held that position since January 1997. Prior to that time she was employed by the Ministry of Consumer and Commercial Relations.

Ms. South testified as to the reasons why the Registrar refused to renew the registration of the Applicants and confirmed the particulars of the Registrar's position as set out above. Ms. South explained the basis for the initial imposition of terms and conditions with respect to the initial application of Liana and Mr. and Mrs. Shihab. There were concerns about the business plan, and thus the reason for the imposition of terms and conditions.

Ms. South also testified that she was concerned about the application to renew based on the fact that it appeared certain portions on the face of the document had been whited out. The Tribunal examined the original document and it did appear that there had been white out used, but the document was otherwise proper and set out the information the Applicants intended to convey in their application.

Ms. South testified that she had reviewed the reports prepared by Mr. Lia. She discussed with Mr. Lia his concerns about the fact that in a number of areas the Applicants had failed to comply with the requirements to keep certain records and it also appeared Mr. Shihab was involved in selling two vehicles that had been damaged and the fact of damage had not been disclosed to the purchaser.

Ms. South testified that she had no confidence based on her review of the material in the application and her review of various reports by OMVIC officers, including Mr. Lia, that what was shown in the material provided by the Applicants, was in fact what was occurring at the dealership. Accordingly, Ms. South formed the opinion that she could not conclude that the registrants would continue to carry on business in accordance with law and with integrity and honesty.

Ms. South was the last witness called on behalf of the Registrar.

Evidence of the Applicants

Gloria Nkrumah ("Ms. Nkrumah")

Ms. Nkrumah purchased a 1994 Plymouth Voyager from Liana Car Sales in June 2001. Ms. Nkrumah paid \$5,500.00 for the vehicle. The transaction involved \$4,000.00 in cash and \$1,500.00 in financing. Ultimately, the financing cost Ms. Nkrumah some \$3,000.00. Ms. Nkrumah testified in chief that she was advised by Mr. Shihab that the car had been in an accident and that Liana had fixed it.

Ms. Nkrumah testified that when she had been initially contacted by OMVIC, she had simply "forgot" that she had been advised that the vehicle had been in an accident. She testified she had no further difficulties with the vehicle since the purchase. During cross-examination Ms. Nkrumah admitted that she had not told the inspector, Mr. Lia that she had been expressly warned that the car had been in an accident and had been repaired. She also agreed that in December of 2002 she had spoken with counsel for the Registrar at which time she again confirmed that she had not been told that the car had been in an accident prior to her purchasing it. At some point between late November 2002 and the date of the hearing on January 22nd, 2003, she "remembered" that she was told that the vehicle had been in an accident by the dealer, Mr. Shihab. She testified that she believed that Mr. Shihab would not have sold her the vehicle if it was not "fixed". There was some testimony given concerning a person who had actually brought Ms. Nkrumah to the hearing at the first date in December. Ms. Nkrumah never really answered the question as to how it was she knew this person, but she did maintain that she had not been contacted by the Applicants or their agent, Mr. Kassam, prior to giving her testimony.

Ms. Nkrumah admitted that she had purchased other vehicles prior to the 1994 Plymouth Voyager at issue.

At one point in the cross-examination, Ms. Nkrumah indicated that she was confused about the line of questioning and was not able to answer certain questions posed to her by counsel for the Registrar.

Evidence of Mazen A. Shihab ("Mr. Shihab")

Mr. Shihab testified he is 50 years old and married with five children. He had been three years in the motor vehicle business since coming to Canada in 1990. Mr. Shihab testified he had no criminal record and that he has a diploma in "building and shuttering" from an institution in Jordan. Mr. Shihab testified in chief that he did not read and write well in English.

In chief, Mr. Shihab admitted that the vehicle that had been sold to Mr. Paton had been sold to GTA Auctions by Liana Car Sales. Mr. Shihab testified that when he had brought the vehicle to sell it, he had been questioned by a "guy" working for GTA.

According to Mr. Shihab, the “guy” told him that in the event the vehicle was not labelled “salvage” that there was no need for Mr. Shihab to identify on the documentation going to GTA that the vehicle had been “damaged”. Mr. Shihab did not recall the guy’s name. Mr. Shihab testified that the Taurus was the first vehicle he had purchased that had been in an accident.

Mr. Shihab further testified in chief that when GTA Auctions had indicated to him that the purchaser had brought the Taurus back because of extensive damage, that Mr. Shihab immediately refunded the purchase price to GTA Auctions.

In chief, Mr. Shihab testified concerning the events with the 1994 Plymouth Voyager and Ms. Nkrumah. Mr. Shihab maintained that he had told Ms. Nkrumah that the Voyager had been in an accident. However, he said that he did not mention on the bill of sale that the car had been in an accident because that document was going to a leasing company. In Mr. Shihab’s opinion, if the vehicle documentation indicated it had previously been in an accident, the leasing company would not have extended the financing necessary to allow Ms. Nkrumah to purchase the vehicle.

In chief, Mr. Shihab admitted that he had been given the terms and conditions initially imposed by OMVIC and that they had been read to him by his wife and explained to him by her.

Mr. Shihab testified that when he first had been contacted by OMVIC, and specifically Mr. Lia, that he was at the Rossdean location. At that time apparently Mr. Lia was looking for another dealer and just happened upon Mr. Shihab. Mr. Shihab testified that he had asked for a change of address application.

Mr. Shihab testified that the second time he met with Mr. Lia it was sometime later, perhaps a year. At that time Mr. Shihab testified that he did not know that Mr. Lia was coming. Mr. Shihab agreed that the second time Mr. Lia met him, the garage register was not available as it had been “lost”. Subsequently, Mr. Shihab found the document.

Mr. Shihab admitted that when he was at the Rossdean location he did not have signage up. This however was explained by the fact that he was not actually operating there at the time and he was simply fixing the place up getting ready to operate there.

Under cross-examination Mr. Shihab agreed that his wife was not specifically involved in transactions involving the business. He said however that sometimes he called her when he needed her, but he admitted he was really the operating mind of the business. He also agreed that he was not an officer or director of Liana Car Sales.

Mr. Shihab indicated that during his time operating Liana, he had bought and sold some fifty to sixty cars. Only three of those had been involved in accidents.

Mr. Shihab testified that he put the Taurus into an auction because he wanted to “sell it fast”. He said he paid \$1,500.00 for the Taurus and spent \$2,000.00 in repairs. He did not recall the

name of the person who repaired the vehicle and did not have the repair documentation available for production, although apparently it had not been requested prior to the hearing.

In cross-examination Mr. Shihab said that he did in fact tell GTA that the car had been in an accident, but because the “guy” had told him not to write it down, he didn’t write it down. Mr. Shihab said that he now regretted listening to the “guy”. Mr. Shihab testified that he had told Ms. Nkrumah that the car had been in an accident, but did not tell her how bad the accident was and didn’t tell her how much he had paid to repair it.

Mr. Shihab testified that he had first commenced business at 429 Signet, then moved to 915 Weston, then moved to 5 Rossdean and finally continued the Liana business at 395 Weston Road.

Mr. Shihab mentioned that he was involved with a “partner” in the venture at 395 Weston Road. However, the “partner” is long gone. Apparently the partnership was not disclosed to OMVIC.

Mr. Shihab admitted selling cars for another dealer. The cars were on his lot, but were not registered to Liana. Mr. Shihab said that Mr. Lia did not confirm with him the fact of the terms and conditions and did not send anything with respect to them following his initial visit.

Evidence of Eman S. Shihab (“Ms. Shihab”)

Ms. Shihab is 43 years old. She is married to Mr. Shihab. They have five children and they live in Woodbridge. Ms. Shihab works in childcare and also teaches heritage language courses at an elementary school.

In chief, Ms. Shihab testified that Liana Car Sales was losing money from the beginning. She claimed that she and her husband have lost \$100,000.00 operating the business in its three years of operation. She testified that the business was not showing any signs of picking up at the time that the registration was refused.

Ms. Shihab said that she helped oversee the business, but she was not present when any specific transactions were completed. She mentioned that her husband talked to her about visits he received from OMVIC. She confirmed that she explained to Mr. Shihab the terms and conditions. She mentioned at the time that they became dealers she did not understand that there were courses available for her to take to understand how to operate a motor vehicle dealership. She also confirmed at some point in time Mr. Shihab had a partner, but in the operation of the dealership, it did not really work out. Ms. Shihab was concerned because she believed that it was not necessary for the dealership to purchase vehicles that had been in accidents and then fixed up for resale.

The Law

Section 3.(1)(a) of the *Motor Vehicle Dealers Act* states:

- 3. (1) No person shall,
 - (a) carry on business as a motor vehicle dealer unless the person is registered under this Act; or

Section 5.(1)(b) of the *Motor Vehicle Dealers Act* states:

- 5.(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,
 - (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty;

Section 6.(2) of the Act states:

- 6.(2) Subject to Section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5 if the registrant were an applicant, or where the registrant is in breach of a term or condition of the registration.

Section 16.(2)(o) of Regulation 801 as amended states:

- (2) Where a used motor vehicle is sold, the sales or purchase order shall show,
 - (o) the distance travelled by the vehicle at the time of sale;

Application of Law to the Facts

In determining these matters, the Tribunal is entitled to refuse to direct the Registrar to carry out its proposal only if it finds that the Registrar was in error in concluding the past conduct of the applicants affords reasonable grounds for the belief that the applicants will not carry on business in accordance with law and with integrity and honesty. (Brenner (1983 19 CRAT 58 (Div. Ct.)).

The Tribunal finds that the Applicants Eman and Mazen Shihab failed to comply with the Act. There was a failure to maintain the documentation required, and as well a failure to comply with the terms and conditions they had agreed to. Further, the Tribunal is concerned about Ms. Nkrumah's explanation with respect to the transaction concerning the 1994 Voyageur. Ms. Nkrumah, on two occasions, did not recall that she had been advised by the dealer that the vehicle had been in an accident. Her story changed when she was on the stand on the second day of the hearing.

The Tribunal finds that the fact that a vehicle has been in an accident is a very material consideration for a purchaser of a vehicle. The Tribunal does not believe that Ms. Nkrumah simply forgot about being advised of the accident when she was asked, on not one, but two occasions prior to the hearing.

The Tribunal finds that the dealer in fact did not tell Ms. Nkrumah that the vehicle was in an accident. Not only was the vehicle in an accident, it had been considered “salvage”. That is to say, it had been written off by an insurance company. This is a very material issue with respect to a used motor vehicle. The Tribunal finds that Mr. Shihab did not disclose a material fact about the motor vehicle when it was purchased by Ms. Nkrumah.

The incident concerning the 1995 Ford Taurus is also of concern. Obviously, the vehicle came to Liana Car Sales in a damaged condition which clearly disclosed in the sale documentation from the original auctioneer to Liana. Mr. Shihab admitted that he did not fill in the comment section with respect to the vehicle when he sold it to GTA Auctions. It appears to the Tribunal that the comment section is critical in describing any problems with a vehicle. The Tribunal does not believe Mr. Shihab when he asserts that someone from GTA Auctions told Mr. Shihab to omit a very important fact concerning the history of a vehicle.

The Tribunal accepts Mr. Paton’s evidence and believes that the vehicle, notwithstanding the repairs performed by Liana, was not in saleable condition when the car was sold to GTA Auctions, and in turn to Mr. Paton. Interestingly, Mr. Shihab mentioned that he wanted to do a “quick sale” with respect to the Taurus. The Tribunal believes the reason that Mr. Shihab was looking for a quick sale is that he was experiencing some financial difficulties in the business which was verified by the testimony of his wife in chief. Mr. Shihab was attempting to effectively double his money as he had purchased the Taurus for \$1,500.00, claims he put \$2,000.00 into it and was trying to sell it with a reserve price at \$6,900.00. The fact the vehicle was damaged and repaired, including damage to the frame, should have been disclosed. Mr. Shihab admitted he made a mistake, but in the Tribunal’s view, it was more than a “mistake”, it was an attempt by Mr. Shihab to mislead a potential purchaser in the interest of making a quick sale.

The Tribunal appreciated the forthright manner with which Ms. Shihab gave her evidence. The Tribunal finds that she was not involved in the day to day activities of the business and was not ensuring that the business complied with the terms and conditions of its registration. The Tribunal cannot understand why she wishes to pursue registration as a motor vehicle dealer sales person. She is pursuing her career in teaching in the main. The Tribunal was also concerned about the evidence that was given about the fact that the business was uneconomic for the Shihab family and losses of \$100,000.00 were incurred over a three-year period.

While the Tribunal appreciates that Mr. Shihab indicated that he wished to pursue a career as a motor vehicle dealer, his past conduct did not give the Tribunal confidence that he would carry forward in the pursuit of this line of work with honesty, integrity and in accordance with law. The Tribunal does not believe the circumstances are appropriate to allow Mr. Shihab to

maintain his registration to sell under further terms and conditions. Clear terms and conditions were imposed initially and they were not observed by

Mr. Shihab, particularly the two incidents respecting the vehicles sold to Mr. Paton and the vehicle sold to Ms. Nkrumah.

DECISION

Accordingly, pursuant to the authority vested in it by Section 7(4) of the *Motor Vehicle Dealers Act*, the Tribunal hereby directs the Registrar to carry out his proposal dated August 15th, 2002 to refuse the registrations of 1381357 Ontario Ltd. o/a Liana Car Sales, as a motor vehicle dealer under the Act and Eman S. Shihab and Mazen A. Shihab as a motor vehicle sales persons under the Act.

LICENCE APPEAL TRIBUNAL

F. Bruce Fitzpatrick
Vice-Chair

Released: February 12, 2003

WHOLESALE AUTO CENTRE INC. AND AVI WAICHENBERG

MOTION TO GRANT AN ADJOURNMENT OF THE HEARING
OF THE APPEAL WHICH IS SCHEDULED TO COMMENCE
ON MARCH 4, 2003

TRIBUNAL: CARL F. DOMBEK, Chair, presiding

APPEARANCES: JAMES D. SINGER, Counsel, representing the Applicants
A. MICHAEL ROTHE, Counsel, representing the Registrar, *Motor
Vehicle Dealers Act*

DATE OF
HEARING : February 24, 2003 Toronto

ORDER

Upon hearing the submissions of Counsel for the Applicants and the Registrar, the Tribunal orders that:

1. The hearing scheduled for March 4 and 5, 2003 is adjourned preemptory against all parties until May 12, and 13, 2003.
2. The Applicants are to restrict all vehicle sales to vehicles which do not require disclosure to the public as required under the *Motor Vehicle Dealers Act*; and
3. The Applicants shall, either jointly or severally, pay forthwith the Registrar's costs which are fixed at \$250.

LICENCE APPEAL TRIBUNAL

Carl Dombek, Chair, presiding

Released: February 24, 2003

1288918 ONTARIO INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*

TO REVOKE REGISTRATION

TRIBUNAL: Simon Dann, Member

APPEARANCES:

Colin Cockburn, Counsel, representing 1288918 Ontario Inc.

Carol Street, Counsel, representing the Registrar, Ontario New Home
Warranty Program

DATE OF
HEARING: February 12, 2003, Toronto

ORDER

Pursuant to the provisions of the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, Chapter O.31, as amended, 1288918 Ontario Inc. (the "Applicant") appealed a Notice of Proposal dated September 4, 2002 of the Registrar of the Ontario New Home Warranty Program (the "Registrar") to revoke registration of the Applicant;

WHEREAS the Applicant appealed the proposal to the Licence Appeal Tribunal requesting a hearing;

AND WHEREAS the hearing was scheduled to be held on February 12, 2003, to be continued on February 13, 2003 at the Springbank Room of the London, Ontario, Delta Armouries Hotel;

AND WHEREAS the hearing commenced on February 12, 2003 and Counsel for the Applicant advised the Tribunal that he was requesting an adjournment as he had not had any communication with his client since December 24, 2002 and did not have his instructions as to how he should proceed with the matter.

Counsel for the ONHWP, Ms. Street, argued against adjournment and submitted that:

- The Applicant knew of the Hearing schedule and was well aware of it;
- The Applicant had retained Counsel and been given full opportunity to defend itself;

- The Applicant appeared to have chosen not to proceed as he had not been in contact with his counsel;
- The request for adjournment had only been communicated to her (Ms. Street) yesterday at 3:00 p.m., February 11, 2003;
- There are claims against the Applicant which are in process and an adjournment would not be in the public interest at this time.

The Tribunal ruled that the adjournment request was denied and the hearing was to proceed;

Counsel for the Applicant then requested a short break to make another effort to contact his and obtain his instructions.

Upon his return, Mr. Cockburn advised the Tribunal he had contacted his client and that he had been instructed to withdraw the Appeal;

NOW THEREFORE this Tribunal orders, on the consent of the parties, that the proceedings in this matter are hereby concluded and that the ONHWP Registrar's Proposal to Revoke Registration of 1288918 ONTARIO INC. is confirmed.

LICENCE APPEAL TRIBUNAL

Simon Dann, Member,

Released: February 14, 2003

TUDOR SAVESCU

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE *ONTARIO NEW
HOME WARRANTIES PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL: STEPHEN J. KELLY, Vice Chair

APPEARANCES: TUDOR SAVESCU, representing himself
JEAN G. LEGAULT, Counsel, representing the Ontario New Home
Warranty Program
MICHAEL HEBERT, Counsel, representing HOLITZNER HOMES
(1995) LTD., the Added Party

DATE OF
HEARING: January 9, 2003 Ottawa

REASONS FOR DECISION AND ORDER

BACKGROUND

This is an appeal to the Licence Appeal Tribunal from a written decision of the New Home Warranty Program (the "Program") dated September 23, 2002.

The Applicant in this appeal bases his claim on the provisions of section 13(1)(a) of the *Ontario New Home Warranties Plan Act* (the "Act"). The Applicant's claim was refused by the Program.

The Tribunal heard evidence from the Applicant, David J. Egan who is a graduate in architecture from the Ryerson Polytechnical Institute and registered specification writer, and Paul Rochon the warranty representative of the Program.

FACTS

Evidence for the Applicant

The Applicant gave evidence that he has two major concerns regarding the construction of this roof. First, there was a leak in the roof at the north side of the home above or very near a window in the master bedroom. Second, the Applicant maintains that roofing shingles are lifting and roofing nails protrude significantly. The Applicant acknowledged that while there is some telegraphing of the roof (the appearance of a wave-like affect on the shingles), he is not concerned about the appearance of the roof. He is only concerned that the telegraphing may be a sign of excessive flexibility in the plywood.

With regard to the leak, the Applicant explained that he can only confirm the roof leaked on one occasion, November 30, 2001. There are two spots of water damage in the second floor master bedroom. Sometime later, he noticed signs of water damage on the first floor. He cannot say whether this damage arose as a result of the leak on November 30, 2001 or a subsequent leak.

On cross-examination the Applicant acknowledged there were no leaks prior to November 30, 2001, and that he could not confirm any subsequent leaks. He also acknowledged that eavestroughing had been installed by a contractor retained by the Applicant in May of 2000, after he took possession of the home. The eavestroughing runs around the roof, including from the northeast corner to a valley on the north side, which is over the master bedroom. The Applicant acknowledged that, after noticing the leak, he saw a small sheet of ice on the roof near the valley and above the eavestroughing. He also acknowledged that there had been a steady rain on November 29 and 30, 2001. The Applicant also confirmed that, at times, the temperature dropped below freezing on those days. Finally, he acknowledged that the builder had performed some repairs following the leak of November 30, 2001, and, again, he could not establish that there had been any leaks since that time.

With regard to the lifting shingles and protruding roofing nails, the Applicant felt these problems were the result of using plywood that was too thin. All parties agreed the builder had used 3/8" thick plywood. The Applicant pointed to Ontario Building Code table 9.23.15.6.A and interpreted it to mean that where roofing trusses were 24" inches apart, the Code requires 1/2" plywood. The Applicant acknowledged that, in coming to this interpretation, he was relying on the evidence of his expert witness, David Egan.

The Applicant felt the thin plywood meant there was excessive flexibility in the roof. He felt that, as a result of this excessive flexibility, the roofing nails were not driven completely into the plywood and/or worked themselves out. This resulted in the lifting of shingles and the potential for water penetration. He acknowledged seeing roofing clips between the panels of plywood in the attic.

The Applicant was also concerned that the Program's inspector, Paul Rochon, never actually went on to the roof during his inspections. He did not bring his own ladder. He declined the use of the Applicant's ladder. In December of 2002, Mr. Rochon called and asked to have access to the roof. Despite the fact that the Applicant gave him permission to go on the roof, Mr. Rochon did not attend to do so.

The issue regarding the securing of the trusses at the peak had not been raised prior to the Applicant filing the report of David Egan, dated October 10, 2002. The parties were content to address this issue. The Applicant deferred to the evidence given by David Egan on this point.

David J. Egan is a graduate of the architecture program at Ryerson Polytechnical Institute. He is a registered specification writer, which designation was obtained through the University of Toronto and Construction Specifications Canada. He has extensive experience in residential construction. Since 1984, he has been operating his own architectural design firm. Mr. Egan was qualified to give evidence as a residential construction specialist. His qualifications were admitted by the Program and the Third Party.

In his report of October 10, 2002, Mr. Egan confirmed that the roof sheathing (plywood) was 3/8" thick. He went on in his evidence to state that table 9.23.15.6.A of the Ontario Building Code provided that only 1/2" plywood could be used with "H" clips supports. While giving his evidence, he again reviewed the table and candidly acknowledged that he had erred. He conceded that 3/8" plywood could be used with "H" clips. He had observed "H" clip supports when inspecting the roof.

Notwithstanding the admitted error in interpreting the table, Mr. Egan indicated he found the roof to be very flexible. He noticed many areas where the roof shingles were raised. Upon further inspection, he noticed that the roofing nails had not been fully driven into the sheathing. This was confirmed when inspecting the roof from the interior through the attic and upon reviewing photographs which he had taken of the roof. The nails protruded anywhere from a 1/4" to 1/2". The protruding nails were causing the shingles to lift. In his opinion, the shingles would be subject to excessive movement which will shorten the life of the shingles and ultimately result in leaks. These are also subject to being stripped off by high winds, especially as an adhesive tab on the underside of the shingles was prevented from adhering to the shingle below due to the protruding roofing nails.

Mr. Egan had also noticed a lack of eaves protection at a number of locations, including areas above the master bedroom window and a 10' to 12' area on the west side of the home above a heated office. He explained that eaves protection usually consists of 15 lb. building paper. According to Mr. Egan, it was industry standard to put eaves protection under roofing valleys, and he did not see any protection under the roofing valley on the north side, above the master bedroom window. He felt that the lack of protection at the eaves and under the valley may have led to the leak in the master bedroom. Upon cross-examination, he acknowledged that eaves protection under

valleys is not required by the Ontario Building Code. He further acknowledged he had no information that the roof had leaked in the area of the office. Under cross-examination, Mr. Egan indicated that, while ice damming is primarily an insulation problem, it can be made worse by the installation of eavestroughing.

With regard to the securing of the roofing trusses, Mr. Egan testified that, upon a recent inspection, he could clearly see where the ridge rafters met the main truss, and these units had not been nailed together.

EVIDENCE OF THE PROGRAM

Paul Rochon gave evidence on behalf of the Program. Mr. Rochon had been a warranty representative for 13 years. It was his responsibility to mediate and conciliate disputes between the homeowner and builder. Before his time with the Program, Mr. Rochon had been a customer service manager for a builder, and an Ontario Building Code official for a local municipality. He graduated from a three-year diploma course from Algonquin College as a technologist in architecture.

Mr. Rochon did review letters written to the Program by the Applicant dated August 15 and June 22, 2002. He acknowledged that the letter of June 22, 2002 simply referred to, “. . . crappy quality of shingles on my roof and too thin plywood on my roof.” Mr. Rochon felt the complaint lacked specifics. While the Program could have asked for greater detail, it did not. He relied on what the applicant brought to his attention at the meeting of September 23, 2002.

Mr. Rochon met the Applicant at his home on September 23, 2002. At the time and during previous circumstances, the Applicant referred to the water damage in the master bedroom, as well as the lack of thickness of the plywood and wavy appearance of the roof. Specifically, there was no discussion regarding eaves protection.

Mr. Rochon confirmed that, when he attended on September 23, 2002, he looked at the roof from the ground and through the entrance to the attic. He did not go on to the roof itself. He did see telegraphing which is normal and not a defect in his opinion. From the ground, he could not see any evidence of lifting shingles or anything out of the ordinary.

From the attic, he measured the thickness of the plywood sheathing and found it to be 3/8”. He also saw the spacing of the trusses at approximately 24” and the presence of “H” clips. While not specifically looking for protruding nails, he did see that the majority of the roofing nails were protruding through the plywood into the attic.

Mr. Rochon acknowledged that he had called the Applicant in December of 2002 enquiring about obtaining access to the Applicant's roof. He explained that he was unable to take advantage of the Applicant's offer of access to the roof because of weather conditions and his schedule.

Concerning the lack of eaves protection, Mr. Rochon only heard of this upon reviewing Mr. Egan's report of January 10, 2002. Mr. Rochon pointed out that this was more than

a year from the date when the Applicant took occupancy (approximately December 21, 1999). He noted that there is a one-year warranty for incomplete work or breaches of the Ontario Building Code, and this deficiency was not raised with the Program within the one-year warranty period.

Regarding the leak into the master bedroom, Mr. Rochon noted that there had been snow and freezing rain in the area. In his opinion, the eavestroughing may fill due to ice, resulting in ice damming and a backing up of water onto the roof under the shingles. He also pointed out that the area of the roof in question faced north so it would have little melting effect from the sun. The fact the Applicant had noticed a thin layer of ice on the roof indicated to Mr. Rochon the problem was likely due to ice damming as there had not been any indication of leaks since the repairs were made by the builder. Mr. Rochon did not address the issue in detail upon his examination of the property.

ISSUES

The issue in this appeal is whether the Applicant's roof has been constructed in a workmanlike manner and in accordance with the Ontario Building Code.

THE LAW

The Act requires that the builder of a home provide certain warranties to an owner and reads as follows:

Section 13. (1) Every vendor of a home warrants to the owner,

- (a) that the home,
 - (i) is constructed in a workmanlike manner and is free from defects in material,
 - (ii) is fit for habitation, and
 - (iii) is constructed in accordance with the Ontario Building Code;...

Subsection 15(2)(a) of Regulation 892 states:

- (2) Every vendor of a new home warrants to the owner,
 - (a) that the home is constructed in a workmanlike manner and is free from defects in materials including windows, doors and caulking such that the building envelope of the home prevents water penetration;...

APPLICATION OF LAW TO FACTS:

Applicant could not establish that there had been leaks in the roof since the builder performed repairs following the leak of November 30, 2001, including in the area of the master bedroom. To the extent that there had been a defect that led to the earlier leak it seems to have been corrected by the repairs made by the third party. As to the issue of the lack of eaves protection, this was not raised until Mr. Egan's report of October 10, 2002, which is well outside of the one-year warranty period provided by the Act. As a result, the complaint cannot be allowed.

Finally, concerning the lifting of shingles and the protruding roof nails, counsel for the third party submitted that Mr. Egan's evidence cannot be relied upon in light of his mistaken interpretation of the provisions of the Ontario Building Code with regard to the use of 3/8" plywood sheathing with "H" clip supports. The Tribunal does not accept this submission. While Mr. Egan made an error, he candidly acknowledged his error. He has a great deal of experience in residential construction. He went on the roof to conduct his examination. He observed numerous loose shingles that had lifted and many protruding nails. When he examined the roof from the attic, he was specifically looking at whether or not the roofing nails penetrated entirely through the plywood and, in many cases, they did not. Mr. Egan's observations are confirmed by photos 10 and 11 of exhibit 14 which show the underside of the roof through the attic. A regular pattern of nails is not seen. It was suggested that perhaps the nails were hammered through and then worked themselves back out one way or another. If this had happened then one could assume that the nails would have displaced some of the plywood when being driven through it and this would still be visible, but it is not. The Tribunal accepts that the roofing nails were not hammered through the plywood sheathing, rather these were left protruding on the exterior. This may well have been due to the fact that the sheathing was spongy, as described by Mr. Egan, making it difficult to hammer the nails through. Whatever the reason, the roof nails do protrude causing the lifting of shingles and the inability of the shingles to adhere to one another. This amounts to a breach of the warranty to construct the home in a workmanlike manner.

DECISION:

Pursuant to the authority vested in it by subsection 16(3) of the Act, the Tribunal directs that the Program remedy the problem of protruding nails and lifting shingles. The work is to be carried out at the first reasonable opportunity, likely in late spring or early summer when the air temperature will be warm enough to assist in having the tiles adhere to one another. The Program shall have the option of properly hammering the existing roofing shingles into place and retabbing the existing roofing shingles. If this option is chosen, this work will be subject to the further one-year warranty that applies to all repairs performed under the Act. Alternatively, the Program can remove the existing roofing nails and shingles and install new shingles. Again, this work will be subject to the further one-year warranty.

Concerning the securing of the ridge rafters to the main truss, while this issue was only just raised, the Program and Third Party agreed to investigate and, if they found matters to be as described by Mr. Egan, to remedy the situation. They are directed to take these steps as soon as possible.

THE LICENCE APPEAL TRIBUNAL

Stephen J. Kelly, Vice-Chair, Presiding

Released: February 21, 2003

CHRISTINE RICKSNEUWOEHNER

APPEAL FROM A DECISION OF THE BOARD OF TRUSTEES OF
THE ONTARIO MOTOR VEHICLE DEALERS COMPENSATION
FUND

TO DISALLOW A CLAIM

TRIBUNAL: DOUGLAS MACKINTOSH, Vice-Chair

APPEARANCES: ESI CODJOE, representing the Applicant, Christine Ricksneuwoehner
AVIVA HARARI, Counsel, representing the Ontario Motor Vehicle
Dealers Compensation Fund

DATE OF
HEARING: 14 January 2003 Kingston

REASON FOR DECISION AND ORDER

BACKGROUND:

This is an appeal by the Applicant, Christine Ricksneuwoehner, from a decision by the Board of Trustees for the Ontario Motor Vehicle Dealers Compensation Fund. By letter dated September 24, 2002 the Board denied her claim of \$3,402.97 for compensation. The Board based its denial on four reasons.

1. The Bill of Sale for the vehicle in question indicates the total price paid was \$900.
2. With respect to the amounts paid for the vehicle, the documentation provided is inconsistent, as some of the receipts do not indicate that these payments relate to a trade in a motor vehicle.
3. The Bill of Sale indicates that the vehicle was sold in "as is" condition.
4. The fund does not cover claims related to the quality of the vehicle.

ISSUE:

Was the Board of Trustees of the Ontario Motor Vehicle Dealers Compensation Fund in error in denying the claim of Christine Ricksneuwoehner?

THE EVIDENCE:

Two witnesses gave sworn evidence, the Applicant Christine Ricksneuwoehner and Yvonne Hallitt, administrator of the fund.

The Applicant testified that she is 35 years old, has two children, 6 and 14 years old, and has worked for a number of years in health care. The relevant evidence she gave is as follows.

She stated that she had owned five motor vehicles, most of them coming down to her from her mother Marlene. The only one she had obtained from a dealer was the vehicle in question.

In the summer of 1999 she sold her previous car for \$1000 privately and she then went to a couple of dealers looking for another Grand Am, since she had owned one before. She found the vehicle in question at Midland Motors. She was well acquainted socially with the two owners over a period of 13 years and she trusted them. They gave her a test drive in the vehicle.

The vehicle seemed good except for the passenger seat and a bit of bodywork. It was a good running car, she testified, judging from the previous Grand Am she had owned.

The Applicant stated the purchase price was \$3,000. She paid \$1,000 cash and got her mother Marlene to borrow \$1,400 from Associates Financial Services. Marlene paid this to Midland Motors and as well gave Midland Motors a post-dated cheque made payable to and cashed by D. Barkley (one of the two owners of Midland Motors) for \$167.50, which total together came to \$2,567.50.

The documents in evidence submitted supported this testimony. There was a copy of the cheque of \$1,400 made payable to the Applicant's mother, Marlene Ricksneuwoehner, from Associates Financial Services endorsed over to Midland Motors. There was a copy of the post-dated cheque and a receipt for \$2,400 signed by Sherry Gibbs (the other owner of Midland Motors) although the receipt made no reference to the sale of a motor vehicle.

Finally, there were notes on a scratch pad which the Applicant stated were made by the co-owner Debbie Barkley for the purpose of showing what was owed on the vehicle.

The notes read as follows:

2900

\$135.00 taxes on 900.00

\$3035.00

2400.00 cash

\$635.00

However, the Bill of Sale from Midland Motors shows a very different set of circumstances. The Bill of Sale is dated 31st August 1999 and purports to sell a 1990 Pontiac Grand Am with 177, 287 kms on it to the Applicant for \$900.00 plus \$72.00 P.S.T. and \$63.00 G.S.T., totalling \$1,035. 00.

The Applicant states she signed this document without reading it. On the other hand, she acknowledges that she initialled the Bill of Sale in two places. Firstly, she initialled paragraph 3 which reads:

2. VEHICLE SOLD "AS IS": I agree that if the appropriate space below is initialled by me, the vehicle is sold "as is" and is not represented as being in a roadworthy condition, mechanically sound or maintained at any guaranteed level of quality. The vehicle may not be fit for use as a means of transport and may require substantial repairs at my expense.

CR

.....

Purchaser's initials

To the side of paragraph 3 is an empty box in which was written in conspicuous handwriting As is As seen@.

The Applicant also initialled the vehicle information box on the Bill of Sale. That box contains a line as follows: "the vehicle will be delivered with a safety standards certificate" with one of two boxes to choose from, one indicating "YES" and the other "NO". It is curious that a cross was put in the "NO" box yet the documentary evidence shows that the vehicle was indeed provided with such a certificate.

The Applicant admitted she was dishonest because the Bill of Sale was reduced so that she avoided being charged P.S.T. and G.S.T. on the actual purchase price of the vehicle. But she said both owners had told her that it (the \$900 purchase price) would be a lot easier on taxes for their business. She admitted that tax had not been charged on \$2,100 and she did not dispute that she had received the benefit of not paying these taxes. But she implied her participation was innocent repeating that the co-owner, Debbie Barkley, had said it would be cheaper on her, the owner, not to pay the taxes on the whole price of \$3,000.

Another document in the evidence was an application made to Lubrico for "limited power train protection" which the Applicant stated her mother paid for. On that document the purchase price of the vehicle is shown as \$3000.

To be valid, the Lubrico application form set out a requirement under the caption of customer obligations as follows: "B. If you have not received your Lubrico warranty contract in the mail within 21 days, please contact your selling dealer and Lubrico immediately". The Applicant did not receive the contract within 21 days and failed to contact either the dealer or Lubrico.

Soon after the sale it became obvious the vehicle was a lemon. There were a string of major problems such as a leaking gas tank, exhaust seepage into the interior, and then its engine seized with a piston through the motor and the vehicle has not been used since.

However, Midland Motors did fix the leaking gas tank and claims to have fixed the exhaust problem, which they did not, but thereafter the company refused to remedy any other problem.

The result was the Applicant ended up paying another \$204.08 to have the exhaust system fixed and another \$68.95 to have the vehicle made roadworthy totalling \$273.03.

To resolve these problems, the Applicant went to Queen's Legal Aid to seek a remedy. With their help, she obtained a default judgement on June 14, 2001 in the Small Claims Court against the dealer for \$2,900.53 plus interest and \$100.00 costs. In addition, the Court ordered the vehicle to be returned to the dealer. This was done and the registration was put in the glove box signed over to the dealer. It should be noted that in her statement of claim she made no mention of the false purchase price in the Bill of Sale.

After the Applicant's evidence, the Tribunal heard from Yvonne Hallitt for the Board of Trustees. As already indicated, she is the administrator of the compensation fund.

She gave the present value of a 1990 Grand Am and its value at the time of purchase. To do so, she referred to what is known in the industry as the Black Book, Old Car Market Guide. This is a book that provides the wholesale value of vehicles by their year and condition.

The valuation in the 1999 Black Book shows:

1990 Pontiac	clean	average	rough
Grand Am 2d coupe LE	3800	2800	1600

The valuation in the October 2002 Black Book shows:

1990 Pontiac	clean	average	rough
Grand Am 2d coupe LE	1750	1000	750

Ms. Hallitt also explained how the compensation fund, which was set up by the Province with \$1.5 million, is sustained by dealers who pay a one-time fee of \$320.00 to enable them to become a participant.

THE LAW:

The schedule to regulation 801 pursuant to the *Motor Vehicle Dealers Act* provides as follows:

Section 1

"claim" means a claim for pecuniary loss arising out of a transaction involving a trade in a motor vehicle.

Section 12

(3) A customer may make a claim against the fund where the customer gives written notice of the claim to the Registrar within two years of the participant's refusal or failure to pay, even if the motor vehicle dealer with respect to whom the claim is being made ceased to be a participant after the refusal or failure to pay, and where the claim meets one of the following requirements:

1. The customer has recovered in any court in Ontario a judgement in respect of the claim and the judgement has become final by reason of the expiration of the time for appeal or having been confirmed by the highest court to which the appeal may be taken and the customer makes an application supported by the judgement and statement of claim, for payment of the unsatisfied portion of the judgement and costs as assessed.

Section 15

(3) Where a claimant requires a hearing before the Tribunal the Tribunal after affording the claimant an opportunity to be heard, may confirm the determination of the Board or may set aside the determination of the Board with respect to all or part of a claim and direct the Trustee to pay the amount determined by the Tribunal.

POSITION OF THE PARTIES:

The law student acting for the Applicant presented her arguments with exceptional skill. She stated that her client was seeking an equitable remedy of \$3,000, that the dealer's misrepresentations were high-handed and evasive, and that her client received a defective motor vehicle. Her client was misled, she said, by the dealer as to the meaning of "as is" and that after the finding of civil wrong in the judgement of the Small Claims Court, her client should be entitled to full compensation.

Counsel for the Board of Trustees, on the other hand, noted that while the organization is not unsympathetic, it is governed by the law. In this case, the Applicant got exactly what she bargained for. The best evidence was the Bill of Sale for \$900 for an automobile sold "as is". The Applicant is experienced in the work force but simply failed to review the contract. She raised concern about the Applicant's conduct in the scheme to avoid paying the P.S.T. and G.S.T. and noted the inconsistencies in the documents with the testimony of the Applicant including the term on the Bill of Sale acknowledging that the Applicant had read all the terms of the contract.

APPLICATION OF THE LAW TO THE FACTS:

To succeed in her claim for compensation from the fund the Applicant must submit a claim for pecuniary loss arising out of a transaction involving a trade in a motor vehicle.

This issue was covered in the Divisional Court in *Didaskalou* [1995] O.J. No. 98 DRS 95-07634 Court File No. 135/94.

"The Board of Trustees cannot look behind the judgement to decide if the judge erred in awarding damages or in fixing the amount of those damages. Instead, pursuant to the definition of "claim" in section 1 of the Schedule, the Trustees are simply required to decide (a) whether the damages awarded amount to a claim for pecuniary loss and, if so, (b) whether they arose out of a transaction involving a trade in a motor vehicle.

....

"In order to amount to a pecuniary loss under s. 12(3)1, the loss must simply be one which is capable of evaluation on a monetary basis. While such a loss would not, by way of example, include damages for pain and suffering, it would, as the tribunal found, include damages referable to the excessive price paid for a motor vehicle and the cost of repairs.

"However, mere pecuniary loss will not of itself lead to a successful claim under s. 12(3)1. The loss must be shown to have arisen out of a transaction involving the trade in a motor vehicle.

....

" We take a different view of the repair costs. In the particular circumstances of this case, we are not persuaded that those costs were sufficiently linked to the transaction such that they could be said to have arisen from it."

Based on all the evidence before it, the Tribunal agrees that the Applicant suffered a pecuniary loss ending up with nothing when the vehicle she bought had to be returned to the dealer by order of the Small Claims Court. However, the Tribunal does not find that this loss arises out of the purchase of the Grand Am. The Applicant purchased a nine year old Pontiac Grand Am with three month warranty on it which she never claimed, and which was sold to her on an "as is" basis in a contract which she claims she never read. She simply made a bad deal.

The same point was addressed in *Re McMullen [2002] OLAT 91* where the Tribunal concluded with these words, "Unfortunately she (the Applicant) made a bad deal and she has had to pay the consequences of that. The Motor Vehicle Dealers Compensation Fund was not drafted to protect consumers from such errors of judgement".

Yet the Applicant says she was deceived by the dealer as to the meaning of "As is As seen" on the Bill of Sale and made the allegation in the Small Claims Court that she was told it would save her money in taxes. Based on her evidence alone, the Court awarded her damages. As it was not mentioned in the statement of claim, the Court was apparently unaware of the conditions in the Bill of Sale and the false purchase price to avoid taxes.

The Tribunal has to take into account the Applicant's conduct in signing a false Bill of Sale to avoid taxes. The Bill of Sale showing \$900 as the purchase price for the 1990 Grand Am instead of the real purchase price of \$3,035 which deprived the Province of \$170.80 in Provincial Sales Tax and the Federal Government of \$149.45 making a total of \$320.25.

The Applicant now wishes to claim from the fund set up by the very Province, which she participated in defrauding. As a matter of public policy, the Tribunal finds this alone is fatal to

her claim. She is after all, as her representative says, making an equitable claim but in the circumstances, this claim is made without clean hands.

DECISION:

Accordingly, pursuant to the authority vested in it by section 15(3) of the schedule in Regulation 801 of the *Motor Vehicle Dealers Act*, the Tribunal directs the Board of Trustees of the Motor Vehicle Dealers Compensation Fund to disallow the claim of the Applicant.

LICENCE APPEAL TRIBUNAL

Douglas Mackintosh
Vice-Chair

RELEASED: February 11, 2003

711371 ONTARIO CORP O/A OXFORD ESTATES

MOTION TO GRANT AN ADJOURNMENT OF THE HEARING
OF THE APPEAL WHICH IS SCHEDULED TO COMMENCE
ON FEBRUARY 25, 2003

TRIBUNAL: MICHAEL H. TURK, Vice-Chair

APPEARANCES: PAUL SUD and MOHINDER SUD on behalf of the Applicant
KAREN R. SPECTOR, Counsel, representing the Ontario New
Home Warranty Program

DATE OF
HEARING: February 14, 2003 Toronto

ORDER

THIS MOTION by the Applicant, for an adjournment of the hearing scheduled for February 25 and 26, 2003 was heard this day at Toronto.

FOLLOWING attendance and submissions before this Tribunal of Paul Sud and Mohinder Sud on behalf of the Applicant and Karen Spector, Counsel, appearing on behalf of the Ontario New Home Warranty Program, the Tribunal makes the following Order:

1. The hearing of this Appeal is hereby adjourned to May 14, 15 and 16, 2003 at 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario commencing at 9:30 a.m.
2. As a term of the adjournment, the re-scheduling of the hearing to May 14, 15 and 16, 2003 is peremptory on the Applicant.
3. As a further term of the adjournment the Applicant shall deliver a certified cheque in the sum of \$24,500.00 payable to the solicitors for the Program, Messrs. Eberts Symes Street & Corbett in trust no later than 6:00 p.m. on February 17, 2003.

4. The sum of \$24,500.00 shall be held in trust by Messrs. Eberts Symes, Street & Corbett and shall only be paid out in accordance with a final order of this Tribunal or the disposition of any appeal of this Tribunal's final order.

LICENCE APPEAL TRIBUNAL

Michael H. Turk, Vice-Chair

Released: February 24, 2003

PREHEARING

GREG CAERS

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR PURPOSES OF THE ONTARIO NEW
HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MICHAEL H. TURK, Vice-Chair

APPEARANCES:

GREG CAERS, the Applicant
KAREN SPECTOR, Counsel, representing the Ontario New
Home Warranty Program
RICHARD JOHNSTON, warranty representative for the Ontario
New Home Warranty Program
CHARLIE CHANG, Counsel, representing the added party,
Mattamy (Upper Glen Abbey) Limited
JANICE KOCHAN, director of customer service for the added
party, Mattamy (Upper Glen Abbey) Limited

DATE OF
PRE-HEARING: February 3, 2003 Toronto

ORDER

THIS PRE-HEARING was held this day by teleconference in the presence of Greg Caers, the Applicant, Karen Spector, counsel, representing the Ontario New Home Warranty Program (hereinafter the "Program"), Richard Johnston warranty representative for the Program, Charlie Chang, counsel, representing Mattamy (Upper Glen Abbey) Limited, added party (hereinafter "Mattamy") and Janice Kochan, director of customer service for Mattamy.

NOW THEREFORE the Tribunal makes the following Order:

1. A re-inspection of the Applicant's home shall take place on February 7, 2003 at 3:00 p.m. at 2376 Cornerbrook Crescent, Oakville, Ontario. All parties hereto shall be permitted to attend thereon.

2. Richard Johnston shall deliver a Supplementary Decision Letter no later than February 17, 2003.
3. The Applicant shall provide the Program and Mattamy with access to his home located at 2376 Cornerbrook Crescent, Oakville, Ontario, during the week of February 24, 2003 if requested in advance by either the Program or Mattamy.
4. The Applicant shall deliver all of his documentation and expert reports no later than February 24, 2003.
5. The Program and Mattamy shall deliver all of their documentation and expert reports no later than March 3, 2003.
6. As it relates to the Decision Letter of the Program dated October 31, 2002, the Applicant advises that items 1 and 5 have been remedied and therefore the Appeal of items 1 and 5 and hereby withdrawn.
7. The hearing presently scheduled to take place on March 11, 2003 at 9:30 a.m. at 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario be and the same is hereby re-scheduled to March 12, 2003 at 9:30 a.m. at 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

Michael H. Turk,
Vice-Chair, Presiding

RELEASED: February 10, 2003

RELIABLE SERVICE TRANSPORT INC.

IN THE MATTER OF an application by Reliable Service Transport Inc. dated November 14, 2002 for a hearing before the Licence Appeal Tribunal pursuant to section 50(1) of the *Highway Traffic Act*, to consider the appeal of the Cancellation and Seizure Order and Refusal to issue a Permanent Operating Licence of the Deputy Registrar dated November 12, 2002;

AND IN THE MATTER of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8 as amended;

AND IN THE MATTER of the Commercial Vehicle Operator's Registration CVOR certificate 141-691-521 issued to Reliable Service Transport Inc.;

AND IN THE MATTER of the Notice of Cancellation and Seizure issued to Reliable Service Transport Inc. on the 18th day of October, 2002;

AND IN THE MATTER of the safety record of R&S Transportation Inc., 590029 B.C. Ltd., and Harj-Min Express Carriers Inc.;

TRIBUNAL: SIMON DANN, Presiding Member

APPEARANCES: PATRICK MOORE, Counsel for the Respondent
RELIABLE TRANSPORT SERVICE INC.
No one appearing for the Applicant

DATE OF
HEARING: February 3, 2003

Toronto

DECISION AND REASONS

An oral hearing was held on February 3, 2003 at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.(1) of the *Highway Traffic Act*, R.S.O., 1990, Chap, H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Suspension and Seizure Order imposed by the Registrar of Motor Vehicles pursuant to sub-section 47(1) and subsection 17(4) of the HTA.

BACKGROUND:

This is an appeal under section 50.(1) of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

EXHIBITS:

1. Cancellation and Seizure Order
2. Notice of Appeal
3. Respondent’s Appeal Book

References within Exhibit 3:

• Tab 3	• Tab 10	• Tab 17	• Tab 22
• Tab 4	• Tab 11	• Tab 18	pgs 161-69, 172-76,
• Tab 5	• Tab 13	• Tab 19	• Tab 23
• Tab 6	• Tab 14	• Tab 20	pgs 178, 179, 180, 192,
• Tab 8	• Tab 15	• Tab 21	194-97, 198, 199, 200,
• Tab 9	• Tab 16	pgs 109, 111-19,	207, 208
		121, 128, 129,	• Tab 24
		131, 132,134,	• Tab 25
		136, 145,146, 147	

4. 3 Photos of trailer with R&S markings
5. 1 Photo of tractor unit driver door with R&S marking

Preliminary Matter:

The Registrar of Motor Vehicles (the “Registrar”) made a decision to issue a suspension and seizure order under section 47(1) of the Act. The Applicant filed an appeal of this suspension and seizure order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 filing fee. The Tribunal conducted a prehearing on December 17, 2002 and sent the prehearing order to the parties on January 3, 2003 by fax, which indicated that the date of the hearing before the Tribunal was February 3 and 4, 2003.

Counsel for the Applicant notified the Tribunal by a fax dated January 31, 2003 that he had not received instructions from his client and would therefore not be attending the hearing on February 3, 2003.

The Tribunal contacted the Applicant by telephone that same day and left a voice mail message advising that the hearing would proceed as scheduled. At the opening of the hearing before this Tribunal on February 3, 2003, no one appeared for the Applicant.

After an initial delay of 15 minutes and then a second delay of an additional 20 minutes, the hearing proceeded. The Tribunal heard from Ms. Ranjit Lal, Hearings Co-ordinator who testified that she had contacted the Applicant by telephone on January 31, 2003 and was only able to access a recorded message asking the caller to leave a message. Ms. Lal did this.

Ms. Lal testified that she also attempted to call three numbers prior to the commencement of the February 3, 2003 hearing, namely (604-520-1807, 604-841-3938, 888-554-3454). The 841 number was out of service and there was no answer on either of the other two.

The hearing then proceeded with the evidence of the Registrar in the absence of the Applicant.

FACTS:

The Deputy Registrar of Motor Vehicles' grounds for cancellation, seizure, and refusal are set out in the Notice of Cancellation and Seizure Order dated November 12, 2002, as follows:

- a) Concern for highway safety regarding the safety record of the Applicant;
- b) I am of the opinion that Mohinder and/or Harjeet Virk directly or indirectly control or manage Reliable Service Transport Inc.

The first witness was Ms. Bernadette McKenna who testified that she is a Carrier Safety Rating Administrator with the Ontario Ministry of Transportation and has had 26 years of experience. Her role in this matter was to prepare the file with a complete review and analysis. Ms. McKenna had also previously prepared analysis files regarding R&S Transportation Inc. ("R&S"), 590029 B.C. Ltd. ("590029", and Harj-Min Express Carriers Inc. ("Harj-Min").

Ms McKenna was asked if the Ministry had a position regarding a relationship between all the companies. She replied "Yes" and referred to the fact that Mr. Wong represented R&S, 590029 and Harj-Min at the March 6, 2002 Show Cause Meeting.

Ms McKenna was then asked if the case hinged on this relationship. She replied that it did and that the three companies were under a CVOR Cancellation and Seizure Order. The original Order had been dated March 7, 2002 and it was confirmed after the Licence Appeal Tribunal Hearing of July 15 and 16, 2002.

Ms. McKenna added the following:

- At the Show Cause meeting of March 6, 2002 for R&S Transportation Inc., 590029 B.C. Ltd., and Harj-Min Express Carriers Inc., Art Wong was introduced as the Vice President of Operations for these companies;
- Art Wong was present as a representative of these companies at the Licence Appeal Tribunal hearing for R&S Transportation Inc., 590029 B.C. Ltd., and Harj-Min Express Carriers Inc., on July 15 and 16, 2002; the outcome of that hearing confirmed the Cancellation and Seizure Order;
- Reliable was incorporated March 21, 2002 and issued a temporary CVOR on May 27, 2002;
- Mohinder Virk and his wife Harjeet Virk are principals in R&S Transportation Inc., 590029 B.C. Ltd., and Harj-Min Express Carriers Inc.
- In May 2002, the Ministry was advised of a new address for R&S Transportation at #2-20075 100A Ave., Langley BC, V1M 3G4
- The October 18, 2002, Notice of Cancellation and Seizure to Reliable Service Transport ("Reliable") was sent to the R&S Transportation location at the Langley Avenue address via Purolator courier and Art Wong signed the Purolator delivery slip at that address;
- At the Show Cause meeting of November 7, 2002, Mr. Wong is noted to have at first claimed he received the Notice information package at his Burnaby home address but then changed his story when he was shown the Purolator delivery slip
- Drivers working for Reliable were identified as also working for R&S Transportation;
- Reliable was using trucks that had previously been licenced to R&S;
- Inspections of Reliable trucks found freight waybills showing the carrier to be listed as R&S Transportation.

Ms. McKenna also testified that on October 21, 2002 she called the telephone numbers provided by Reliable and the first, 604-841-3938, was Mr. Wong's answering machine. The second number being 888-554-3454 was answered by a female voice who responded by saying "R&S".

Ms. McKenna then said she asked if the voice was "Harjeet Virk" and the voice answered "yes". She testified she then hung up and called back. Again the voice answered with "R&S" and when Ms. McKenna asked for Art Wong she was given another number to call, which was 604-841-3938.

When she subsequently called that number she heard a message saying it was Art Wong at Reliable.

From notes taken by Ms. McKenna at the November 7, 2002 Show Cause meeting, the Tribunal learned:

- Mr. Wong had said Reliable, which was incorporated on March 21, 2002, was his own company and that he started it as an opportunity for himself when he saw that R&S was getting into trouble in Ontario;
- Reliable applied for a CVOR on March 27, 2002 and was issued a temporary CVOR on May 27, 2002;
- Mr. Wong had confirmed that Reliable employed R&S drivers but that he did not know the names of the drivers even though he claimed to be doing the dispatching and signing of all cheques; he also confirmed he has become reliant upon R&S to provide him with drivers;
- That he leases trucks from R&S but did not have copies of leases;
- That when Mr. Wong was presented with copies of permits showing the vehicles were owned by Reliable, he could not provide an explanation;
- That as R&S still has a relationship with their former customer base, Reliable is piggybacking on them to get his business established;
- At one point of the meeting, Mr. Wong stated R&S was providing him with brokerage services but later withdraw this statement;
- Mr. Wong presented to the meeting a copy of the Reliable Articles of Incorporation but the register sections for directors and shareholders were blank.

The Tribunal also heard that the CVOR safety records of the companies showed that as of January 7, 2003, Reliable had a violation rate of 28.2%; as of October 3, 2002, R&S, which was under sanction, had a violation rate of 94%; and as of October 3, 2002, 590029 B.C. Ltd had a violation rate of 130.6%

The next witness was Lynda McArthur, a Transportation Officer who is based in Wasi, Ontario, and has been with the Ministry for more than 25 years.

Ms. McArthur testified regarding a vehicle inspection she conducted on September 17, 2002. She stated she initially intended to do a standard document inspection only.

During the inspection she found that not all documents were available and that the name R&S Transportation was on both the trailer and the bill of lading (photos of the truck and trailer were entered as Exhibits 4 and 5). As she had previously seen the R&S

name on an 'Alert Memo' indicating the company was not authorized to operate in Ontario, she initiated a more thorough document inspection and determined to contact the Carrier Sanctions and Investigation office to discuss this with the Deputy Registrar's office.

Ms. McArthur then reviewed the following:

- The driver told her he worked for Reliable and that the load was being hauled for R& S;
- The driver advised that he reported to "Harj";
- Documents collected included log records, commercial waybill and a B.C. Commercial Vehicle Inspection Report and each listed R&S Transportation;
- Ms. McArthur called the Deputy Registrar's office in St. Catherines to express concern that Reliable and R&S might be related companies and was subsequently advised to put the vehicle out of service;
- The driver then called his boss who he had identified as Harj;
- Ms. McArthur then spoke with Harj and after advising that the driver did not have proper documents, Harj offered to send them by fax; these were subsequently received from fax number 604-882-8730;
- Ms. McArthur also asked Harj for her complete name and was given the full name of "Harjeet Virk"

The next witness was Jason Leeman, a Transportation Officer who is based in Halton, Ontario, and has been with the Ministry for 2 years.

Mr. Leeman testified regarding a vehicle inspection he conducted on November 15, 2002 at the Trafalgar station in Oakville.

He stated that his intention was to carry out a Level 1 inspection of documents and during the course of the document review found (1) the log book record to be incomplete, (2) that Reliable had never been issued a permanent authority to operate in Ontario, and (3) he noted the R&S name on the Driver's Daily Log record, and on the commercial bill of lading.

Mr. Leeman also testified that as the driver did not have accurate driving time log records, the driver was advised to take 8 hours off to reset his hours and log book. The driver was directed to park at the back of the inspection station.

Mr. Leeman testified he was not aware of any sanctions at the time but that he did call the St. Catherines office to suggest that an investigation might be warranted. At that time he learned about R&S and was asked to forward copies of documents.

In closing argument, Mr. Moore submitted that all the companies were related and in referencing Section 47(1) and subsection 17(4), he asked the Tribunal to consider that:

- Arthur Wong was common to all companies;
- Harjeet Virk as a principal of R&S Transportation Inc., 590029 B.C. Ltd., and Harj-Min Express Carriers Inc. is in the background as the operating manager;
- R&S was evident as being “all over the affairs of Reliable”.

LAW:

47(1) Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) CVOR certificate, on the grounds of,
- (d) misconduct for which the holder is responsible directly or indirectly, related to the operation or driving of a motor vehicle;
- (e) conviction of the holder for an offence referred to in subsection 210(1) or (2); or
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

(10) The Registrar may, at any time for misconduct or contravention of this Act, the Truck Transportation Act, the Public Vehicles Act or of any regulation thereunder by an owner or lessee of one or more motor vehicles or trailers for which permits have been issued by a jurisdiction or jurisdictions other than the Province of Ontario, order that the permit and number plates issued for the vehicle or vehicles be seized and any police officer or any officer appointed for carrying out this Act or the enforcement of the Public Vehicles Act or the Truck Transportation Act may seize the permit and number plates and deliver them to the Ministry which shall return them to the authority that issued them.

17. (1) The Registrar shall issue a CVOR certificate to every person who applies therefore in the prescribed form and meets the requirements of this Act and the regulations.

(2) The Registrar may refuse to issue a CVOR certificate to an applicant if the Registrar has reason to believe, having regard to the applicant's safety record and any other information that the Registrar considers relevant, that the applicant will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety.

(3) The Registrar may refuse to issue a CVOR certificate to an applicant if the applicant is related to,

(a) a person whose CVOR certificate has been cancelled, is or has been under suspension or is or has been subject to a fleet limitation;

(b) a person whose CVOR certificate suspension, cancellation or fleet limitation is under appeal; or

(c) a person who the Registrar has reason to believe, having regard to the person's safety record and any other information that the Registrar considers relevant, will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety.

(4) An applicant is related to a person for the purpose of subsection (3) if,

(a) the applicant and the person are related individuals...

(c) either the applicant or the person, directly or indirectly, controls or controlled or manages or managed the other; ...

50(2) The Tribunal may confirm, modify or set aside the decision of the Minister or Registrar.

The *Truck Transportation Act*, R.S.O. 1990 Chapter T.22 as amended states the following:

6(1) An operating licence shall not be issued or an operating authority granted unless the applicant demonstrates fitness to carry on the business of carrying goods for compensation as described in the application for the licence...

(3) Every applicant for an operating licence shall file with the Registrar, with respect to the business for which authority is sought, a description of the proposed transportation service and evidence that the applicant, ...

(c) holds a Commercial Vehicle Operator's Registration Certificate issued under the *Highway Traffic Act* that is not under suspension or subject to a fleet limitation.

7(2) Where the Registrar finds that an applicant is not fit to hold an operating licence, the Registrar shall give the applicant written notice thereof with reasons, and the applicant may, within thirty days after receiving the notice, appeal the decision to the Licence Appeal Tribunal as defined in the *Highway Traffic Act*.

APPLICATION OF FACTS TO THE LAW:

Based on the evidence, the Tribunal finds that Mohinder and or Harjeet Virk directly or indirectly control or manage the Applicant, Reliable Service Transport Inc.

Among the evidence points which call for particular attention, from the simple to those which attract more weight, there is...

- The timing of Reliable's March 21, 2002 incorporation and March 27, 2002 CVOR application and the March 7, 2002 Cancellation and Seizure Order issued to R&S, 590029 and Harj-Min;
- The attendance of Mr. Wong as the Vice-President of Operations for these companies at the March 6, 2002 Show Cause Meeting as well as attending the Licence Appeal Tribunal hearing of July 15 and 16, 2002, as the companies' representative;

- The matter of the 2 different addresses for Reliable, one being Mr. Wong's home address and the other being the same as the one declared to be for R&S; that Mr. Wong received a package from the Ministry at the R&S address – which he first denied receiving there and then acknowledged that he had after being shown the Purolator slip with his signature;
- That as Reliable's owner and its operations manager he did not know the names of his drivers and that he was unable to produce lease documents for his company's trucks;
- That Reliable was dependent upon R&S for its loads and drivers;
- That a Reliable truck was stopped with R&S markings on both trailer and tractor; in addition, Reliable drivers were found, during road inspections, to be carrying loads, with waybills marked for R&S; and that one driver, in particular, referred to his boss as being "Harj" who turned out to be Harjeet Virk, a principal of R&S;
- The contacts by Ms. McKenna and Ms. McArthur with Harjeet Virk;
- The incomplete corporate documents;

The Tribunal also finds it not unreasonable to question the credibility of Mr. Wong's statement, as noted in the Show Cause Meeting notes, that he saw the R&S problems in Ontario as an opportunity for himself.

This would in ordinary circumstances seem to put him in competitive conflict with his employers and therefore it is difficult to understand how he would be in a position to incorporate a freight transport company, in March, while still employed with R&S and then also still represent the company at a July appeal of a cancellation and seizure order of his employer's CVOR.

Further, Mr. Wong also acknowledges that he is completely reliant upon R&S for drivers and freight loads. Then there is also uncertainty about where the responsibility for Reliable's truck equipment lies – who holds it is left unclear.

The Tribunal also finds compelling, the failure of the Applicant or his representative to appear at the hearing to dispute the evidence and clarify the numerous questions which point to control of Reliable by Mohinder and or Harjeet Virk, the owners of R&S Transportation Inc., 590029 B.C. Ltd., and Harj-Min Express Carriers Inc.

Therefore, the Tribunal finds that the Applicant, Reliable Service Transport Inc. is related to R&S Transportation Inc., 590029 B.C. Ltd., and Harj-Min Express Carriers Inc. pursuant to subsection 17 (4) of the Highway Traffic Act. Since the CVOR certificate of R&S Transportation Inc., 590029 B.C. Ltd., and Harj-Min Express Carriers Inc. is under cancellation, the Registrar had valid grounds to cancel the Applicant's CVOR in accordance with subsection 17(4) of the Highway Traffic Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50(2) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the decision of the Registrar of Motor Vehicles to issue a cancellation and seizure order of Reliable Service Transport Inc.

LICENCE APPEAL TRIBUNAL

Simon Dann, Presiding Member

RELEASED: February 24, 2003

CIVIC AUTOS INC. AND RASHID DASOO

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATIONS

TRIBUNAL: JOHN ORT, Member

APPEARANCES: RASHID DASOO, Agent, representing Civic Autos Inc.
and Applicant, representing himself

A. MICHAEL ROTHE, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF HEARING: February 10, 2003 Toronto

DECISION AND REASONS

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") by Civic Autos Inc. and Rashid Dasoo (the "Applicants") respecting a Notice of Proposal to Revoke Registration of the Registrar, *Motor Vehicle Dealers Act* (the "Registrar"), dated November 5, 2002.

ISSUE:

Should the Tribunal direct the Registrar to carry out the Registrar's proposal or to refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with the *Motor Vehicle Dealers Act* (the "Act") and the regulations?

PRELIMINARY MATTER:

There were two preliminary matters, namely:

- 1) a request for an adjournment, and
- 2) a request for an interpreter.

Adjournment

On Sunday, February 9, 2003, the Tribunal received a letter dated February 9, 2003, from Jerome H. Stanleigh, Barrister and Solicitor, stating that he represents the Applicants and requesting an adjournment on the grounds that he has a conflict with two pre-trial dates.

John Ripley, Hearings Co-ordinator for the Licence Appeal Tribunal, testified that a Notice of Hearing dated December 16, 2002, set the date of this hearing for February 10, 2003. Mr. Ripley stated that the Tribunal on December 16, 2002, has fax confirmation advising Jerome H. Stanleigh, Barrister and Solicitor, of the hearing date of February 10, 2003.

The Tribunal ruled that the hearing shall not be adjourned. The *Motor Vehicle Dealers Act* is a public-protection statute. The public has an interest in speedy resolution of licence-revocation matters. Also, there would be inconvenience to the Respondent, the two summoned witnesses, and the Tribunal in adjourning the hearing. Rule 11.2 of the Licence Appeal Tribunal Rules of Practice states, "where the motion [for an adjournment] is to be heard on the same date as that scheduled for the hearing, the party shall serve notice of the motion and any supporting documentation on all other parties and file with the Tribunal a copy...at least 10 days before such hearing date." The rules of the Tribunal have not been complied with. Further, Applicants need not be represented by Counsel before the Tribunal.

Interpreter

Rashid Dasoo then asked for an interpreter. Mr. Dasoo immigrated to Canada from India in 1989. He had completed grade 12 in India with English as a second language. In Canada, he completed a full-time twelve-week auto mechanics course in English as well as a two-month part-time English course. Mr. Dasoo has run a business in Ontario since 1994. It is the practice of the Tribunal to require Applicants to provide their own interpreter. Rashid Dasoo stated that he could not find one quickly.

The Tribunal ruled that the hearing would proceed in the absence of an interpreter since Mr. Dasoo appeared to have a very good command of the English language. The Tribunal instructed the Applicant Rashid Dasoo to ask for assistance whenever he had difficulty understanding oral or written material during the hearing.

EXHIBITS:

- Exhibit #1 - Notice of Proposal to Revoke Registration dated November 5, 2002, issued by the Registrar, *Motor Vehicle Dealers Act*;
- Exhibit #2 - Notice of Appeal received by the Tribunal on November 18, 2002, filed by the Applicants;

Exhibit #3 - Notice of Further and Other Particulars dated January 22, 2003, issued by the Registrar, *Motor Vehicle Dealers Act*;
Exhibit #4 - Respondent's Book of Documents; and
Exhibit #5 - Letter from Jerome H. Stanleigh, Barrister and Solicitor, to the Ontario Motor Vehicle Industry Council and the Licence Appeal Tribunal dated February 9, 2003, together with fax cover sheet.

FACTS:

The evidence on behalf of the Registrar consisted of the testimony of Marilyn Blazevic, Robert Rotondo, and Jean Cameron together with documents introduced through them. The testimony of Rashid Dasoo was the evidence on behalf of the Applicants.

Marilyn Blazevic

Ms. Blazevic has been a Field Collections Officer for the Ministry of Finance since 1991. She has worked for the Ministry for twenty-one years.

A retail sales tax vendor permit was issued to Civic Autos Inc. on November 24, 1994, following an interview of the Ministry of Finance with Rashid Dasoo. The corporation's first return for March 1995 was filed late and without payment. The last filed return pertains to October 2001. Retail sales tax trust funds collected from customers on the sale of taxable items during about fourteen months are outstanding. Both oral and written warnings were given to Civic Autos Inc. A payment arrangement was entered into, but cheques were returned marked NSF. The Ministry of Finance asked Civic Autos Inc. to provide new cheques, but none were received. No repayment arrangements were made within the last two years. A few hundred dollars were obtained from the bank account of Civic Autos Inc. by legal action. A *Personal Properties Security Act* (PPSA) lien and a Writ of Seizure and Sale have been registered against the Applicant Civic Autos Inc.

\$61,011.99 was the balance owing as at October 28, 2002, as shown on Schedule B of tab 5 of exhibit 4. \$46,216.31 of that amount is retail sales tax collected and not remitted based on returns filed by the Applicant Civic Autos Inc. Currently, there is owing \$84,193.23, including an estimated \$28,000.00 for November 2001 to December 31, 2002.

Robert Rotondo

Mr. Rotondo is the Client Service Manager with the Family Responsibility Office. He supervises twenty-five enforcement officers.

In 1993 Rashid Dasoo was ordered to pay \$700.00 per month as child support. He paid about \$1,000.00 in 1993-94. No payment has been received since then. Mr. Dasoo now owes about \$18,200.00 to the Ministry of Community, Family, and Children's Services for family benefits paid out. Later, a court ordered Mr. Dasoo to make payments of

\$500.00 per month; however, no payments were made. Mr. Dasoo's drivers licence was suspended for nonpayment two years ago. Garnishment is in place.

Jean Cameron

Ms. Cameron has been a Senior Inspector with the Ontario Motor Vehicle Industry Council (OMVIC) since 1997.

Rashid Dasoo is the sole owner of Civic Autos Inc. He is the only administrator and director of the corporation, as shown at tab 4 of exhibit 4. According to tab 1 of exhibit 4, Civic Autos Inc. was registered as a motor vehicle dealer and Rashid Dasoo was registered as its only motor vehicle salesperson on about January 22, 1997.

Mr. Dasoo failed to comply with the *Retail Sales Tax Act* and is indebted to the Ministry of Finance for failing to remit tax due and to pay assessments when due. He also owes money to the Family Responsibility Office.

Rashid Dasoo

Mr. Dasoo asked for another chance. He admitted that he owes at least \$46,000.00 to the Ministry of Finance. He was never up to date in filing and paying. Mr. Dasoo is willing to pay \$1,500.00 per month.

Rashid Dasoo claimed that his lawyer had advised him that he owes only about \$8,000.00 to the Family Responsibility Office. He offered to pay it \$300.00 per month.

No payments were made since the early 1990s on either indebtedness.

LAW:

The *Motor Vehicle Dealers Act* states the following:

5(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

(a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law, and with integrity and honesty; or

(c) the applicant is a corporation and

(i) having regard to its financial position, it cannot reasonable be expected to be financially responsible in the conduct of business, ...

(ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law, and with integrity and honesty; or

6. (2) Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5 if the registrant were an applicant, or where the registrant is in breach of a term or condition of the registration.

7. (4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

APPLICATION OF LAW TO FACTS:

Having regard to the financial position of Rashid Dasoo, he cannot reasonably be expected to be financially responsible in the conduct of business in accordance with subsection 5(1)(a) of the Act. Mr. Dasoo testified that he owes \$8,000.00 to the Ministry of Community, Family, and Children's Services. No payment on account has been received since 1994. Garnishment is in place. Mr. Dasoo's driver licence has been suspended because of the nonpayment.

The past conduct of Rashid Dasoo affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty, as required by subsection 5(1)(b) of the Act. Mr. Dasoo received retail sales tax trust funds from customers upon sale of taxable items by Civic Autos Inc. He has failed to forward the trust funds collected over fourteen months to the Ministry of Finance. He has never been up to date with filings and payments of collected retail sales tax. Mr. Dasoo admitted that Civic Autos Inc. owes at least \$46,000.00 to the Ministry of Finance.

Having regard to the financial position of Civic Autos Inc., the corporation cannot reasonably be expected to be financially responsible in the conduct of its business, as prescribed by subsection 5(1)(c)(i) of the Act. The Applicant Civic Autos Inc. owes at least \$46,000.00 to the Ministry of Finance. A PPSA lien and a Writ of Seizure and Sale have been registered against it.

Further, the past conduct of Rashid Dasoo, the director of Civic Autos Inc., affords reasonable grounds for belief that the corporation's business will not be carried on in accordance with law and with integrity and honesty, as required by subsection 5(1)(c)(ii) of the Act. Mr. Dasoo has failed to forward at least \$46,000.00 of retail sales tax trust funds collected from customers to the Ministry of Finance.

According to subsection 6(2) of the Act, the Registrar may revoke a registration for any reason that would disentitle the registrant to registration under section 5 if the registrant

were an applicant. Rashid Dasoo and Civic Autos Inc. are not in compliance with section 5 of the Act. The Registrar's proposal to revoke the Applicants' registrations conforms with subsection 6(2) of the Act and it is correct and reasonable.

ORDER:

Accordingly, by virtue of the authority vested in it under section 7 of the *Motor Vehicle Dealers Act*, the Tribunal directs the Registrar to carry out the Notice of Proposal to Revoke Registration dated November 5, 2002, to revoke the registrations of Civic Autos Inc. and Rashid Dasoo.

LICENCE APPEAL TRIBUNAL

John Ort, Member

RELEASED: February 25, 2003

MILLENIUM TRAVEL CANADA INC.

APPEAL FROM DECISION OF THE BOARD OF DIRECTOR OF
THE TRAVEL INDUSTRY COUNCIL OF ONTARIO UNDER THE
TRAVEL INDUSTRIES ACT

TO DISALLOW CLAIM

TRIBUNAL: CARL F. DOMBEK, Chair

APPEARANCES:

DANNY MAMA, Agent, representing the Applicant Millenium Travel
Canada Inc.

TREVOR C.D. BRANION, Counsel, representing the Travel Industry
Council of Ontario

DATES OF

HEARING: February 20, 2003

Toronto

ORAL DECISION

Danny Mama operates Millenium Travel Canada Inc. In order to keep his good clients' business Millenium extended credit to some of its clients including a valued client and friend Soli Mehta. On September 7, 2001, Mr. Mehta called Mr. Mama to book a ticket to travel to India in December on Canada 3000. The trip was booked with a company called Travelpack Marketing and Leisure Services (Travelpack). Unfortunately Millenium paid for the ticket through its Trust Account even though it had not received payment from Mr. Mehta. This was a breach of the rules governing Trust Accounts. However, I do not find that Millenium breached these rules in bad faith. It was clear in cross-examination that Mr. Mama did not understand the concept of not using Trust Account funds for payment of tickets when payment has not been received by the travel agent. I would suggest that a representative of Travel Industry Council of Ontario (TICO) assist Millenium in understating the rules in relation to Trust Accounts.

The Tribunal finds and there was no dispute that Millenium paid \$1518.97 to Travelpack. Section 51 of Ontario Regulation 806/93 enacted under the *Travel Industry Act* outlines the provisions for a travel agent to claim against the Compensation Fund. Section 51(1) states that a travel agent is entitled to be reimbursed for money paid by the travel agent to reimburse a customer or to provide alternate travel services to the customer if the customer paid the travel agent and if the travel agent passed all or part of the customer's money to

the travel wholesaler. Section 51(2) states that a travel agent is entitled to be reimbursed only for the portion of the customer's money that the travel agent passed to the travel wholesaler. From the documentation submitted it appears that Millenium paid Travelpack on September 10, 2001, however, Mr. Mehta did not pay Millenium Travel until December 15, 2001, 2 months after the failure of Travelpack. Thus the Tribunal finds that there was no customer monies forwarded to Travelpack.

In fact, the December 15th payment was actually made by Darmich Enterprises Ltd. which is another company operated by Mr. Mama. Mr. Mama's evidence was that Mr. Mehta paid him in cash and he then paid Millenium through Darmich.

There is no receipt for the cash payment to support Mr. Mama's claim.

The other significant regulation, which disentitles this claim, is found in Section 51(2) of Ontario Regulation 806/93. This section only entitles a travel agent to be eligible for reimbursement if its customer would have had a claim against the Compensation Fund. Section 50(3) 6 of Ontario Regulation 806/93 clearly provides that to have a claim the customers had to pay by cheque, credit card or other similar cash payment.

Unfortunately for Millenium this was not done and thus Mr. Mehta would not have a claim against the Fund and by operation of the Regulation neither does Millenium.

This Tribunal is sympathetic to Mr. Mama's case. However, it is bound by the statutory framework. There is no discretion for the Tribunal to make a finding, which would be in contravention of the Act and its Regulations.

Therefore, the Tribunal upholds the Decision of the Travel Industry Council of Ontario to deny compensation.

Costs were requested by TICO however, due to the findings that Mr. Mama did not make the claim in bad faith, there will be no order for costs. Indeed, the Tribunal found Mr. Mama to be forthright in his evidence even when the facts did not help his case.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek, Chair

Released: February 24, 2003

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
Scuba International Inc. o/a Ultimate Holidays
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: November 15, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

SCUBA INTERNATIONAL INC. O/A ULTIMATE HOLIDAYS

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by Scuba International Inc. o/a Ultimate Holidays, the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule 'A';

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule 'A'.

LICENCE APPEAL TRIBUNAL

Carl Dombek, Chair

Released: February 25, 2003

LICENCE APPEAL TRIBUNAL

BETWEEN:

SCUBA INTERNATIONAL INC. O/A ULTIMATE HOLIDAYS

Applicant

- and -

REGISTRAR, TRAVEL INDUSTRY ACT

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

1. The Registrant is registered as a travel agent (Registration No. 50006874/R).
2. On September 18, 2000, the Registrant filed its financial statements for the year ended May 31, 2000, which were due by August 31, 2000.
3. By letter dated October 23, 2000, the Registrant was advised of the working capital shortfall of \$25,219 reflected in its financial statements for the fiscal year ended May 31, 2000, and given a due date of November 9, 2000 to provide evidence of correction.
4. On November 3, 2000 TICO conducted a site inspection. It was revealed during the visit that trust accounting was not properly maintained. It was agreed upon during the visit that an interim financial statement would be submitted for the period ending October 31, 2000. It was further agreed that should the interim financial statements reflect a working capital shortfall, the shortfall would be corrected and evidence submitted to TICO by December 15, 2000.
5. By letter dated November 27, 2000, the Registrant was advised by TICO that the inspection visit revealed that its trust account had been overdrawn, and that it was required to submit a trust reconciliation by December 15, 2000, in addition to interim financial statements to October 31, 2000. The letter confirmed that if the interims reflect a working capital shortfall, that evidence of correction must be submitted by December 15, 2000.
6. By letter dated January 10, 2001 the Registrant was issued a second request reminder letter to submit interim financial statements, and a trust reconciliation.
7. By letter dated February 27, 2001 the Registrant was issued by the Registrar, a final due date of March 16, 2001, to address its working capital shortfall, and file its trust reconciliation, failing which administrative action would be taken, including a possible proposal to revoke registration.
8. On March 27, 2001, the Registrant filed a trust reconciliation to November 30, 2000, and an interim financial statement for the six months ended November 30, 2000. The statements reflected a working capital deficiency of \$3,400, or a total shortfall of \$8,400, based on sales less than \$1.5 million. The

Registrant submitted evidence on March 27, 2001 that it had injected funds totalling \$29,000, as correction of the working capital shortfall.

9. On April 23, 2001 the Registrant was requested by TICO to file its financial statements for the fiscal year ending May 31, 2001, by August 31, 2001.
10. On April 27, 2001, TICO conducted a site inspection to ensure that the funds injected to satisfy working capital for May 2000 were not removed. The visit revealed that trust accounting was being properly maintained, and that the shareholder advances injected had not been removed.
11. By letter dated September 20, 2001, the Registrant was issued a reminder letter to file its financial statements for May 31, 2001 by September 30, 2001.
12. By letter dated October 3, 2001 the Registrant was issued a final due date of October 11, 2001, by the Registrar, to file its financial statements for May 31, 2001, which were due by August 31, 2001.
13. On December 3, 2001 the Registrant filed its financial statements for the fiscal year ended May 31, 2001. The statements revealed a working capital deficiency of \$13,973, or a total shortfall of \$18,973, based on sales less than \$1.5 million.
14. By letter dated December 7, 2001 the Registrant was advised of its working capital shortfall of \$18,973, and given a due date of December 31, 2001 to provide evidence of correction.
15. On January 2, 2002, the Registrant advised TICO that he had faxed the required information.
16. On January 8, 2002, TICO called the Registrant to advise that TICO had not received evidence of correction from the Registrant. The Registrant informed TICO that it had a problem with its fax machine.
17. On January 15, 2002 the Registrant telephoned TICO to advise that he still had a problem with its fax machine, and that he would mail evidence of correction of its working capital shortfall.
18. By letter dated February 1, 2002, the Registrant was issued a final due date of February 8, 2002, by the Registrar, to provide evidence of correction of its working capital shortfall.
19. On February 12, 2002, TICO telephoned the Registrant and left a message on its answering machine to contact TICO, as the required evidence of correction had not been received.
20. On February 13, 2002 the Registrant telephoned TICO and advised that he had previously mailed the evidence of correction. TICO advised that this information had not been received and asked that the Registrant fax the evidence.
21. On February 13, 2002 the Registrant filed interim financial statements for the seven months ended December 31, 2001. It appeared that working capital requirements were met as at December 31, 2001.
22. By letter dated May 10, 2002 the Registrant was requested by TICO to file its financial statements for the fiscal year ended May 31, 2002 by August 31, 2002.
23. By letter dated September 3, 2002 the Registrant was issued a reminder letter to file its financial statements by September 20, 2002.
24. By letter dated September 24, 2002 the Registrant was issued a final due date of October 1, 2002, by the Registrar, to file its financial statements, failing which administrative action would be taken, including a possible proposal to revoke registration.

25. On October 11, 2002 the accounting firm for the Registrant faxed TICO a letter advising that financial statements would be filed by October 31, 2002.
26. By fax dated October 15, 2002, TICO advised the Registrant that an October 31, 2002 submission date had been noted on file.
27. To date the Registrant has failed to file its financial statements for the fiscal year ended May 31, 2002.
28. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsections 6 (4) and (5) of the *Travel Industry Act* directing that:

1. the Registrar refrain from carrying out the Proposal to Revoke Registration dated November 15, 2002;
2. the Registrant's registration is to be subject to the following terms and conditions:
 - (a) The Registrant shall at all times maintain sufficient funds to cover its customer obligations. Such funds shall be maintained in a properly designated "Travel Industry Act Trust Account" and in accordance with the trust accounting requirements as stipulated in section 36 of the Regulation or such subsequent provision as may be in force from time to time;
 - (b) The Registrant shall submit a monthly trust account reconciliation with corresponding bank statements to the Registrar beginning with the month of April, 2002, no later than 30 days after the end of each calendar month, for so long as the Registrar shall so require;
 - (c) The Registrant shall file complete financial statements, including a reconciliation of customer funds and customer obligations, as required by section 24 of the Regulation, for its fiscal year ended May 31, 2002, no later than March 31, 2003;
 - (d) If the above-noted statements reflect a working capital deficiency, the Registrant shall correct any and all working capital deficiencies and provide evidence of its current working capital position, which shall be certified by a licensed public accountant, by April 30, 2003. At all times thereafter, the Registrant shall maintain the minimum working capital as required by section 25 of the Regulation or such subsequent provision as may be in force from time to time;
 - (e) The Registrant shall file complete financial statements, including a reconciliation of customer funds and customer obligations, as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for its fiscal year ending May 31, 2003, no later than August 31, 2003;
 - (f) The Registrant shall file complete financial statements, including a reconciliation of customer funds and customer obligations, as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time for its fiscal year ending May 31, 2004, no later than August 31, 2004; and
 - (g) If the above-noted financial statements as filed are incomplete, the Registrant will have 14 days from the date of notice of the deficiency to fully and completely address the deficiency and produce proof of such correction to the Registrar. Notice of the deficiency, if any, shall be sent by registered mail to the Registrant.

3. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) to (g) inclusive during the two (2) year period immediately following this order of the Tribunal, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.
4. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by its signature below that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED at Mississauga this ____ day of February, 2003

Mr. Mark Schwartz
Scuba International Inc. o/a Ultimate Holidays
I have authority to bind the corporation

Mr. Michael Pepper
Registrar, *Travel Industry Act*

1428-MED-DRUG

Appeal under Section 50(1) of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 47(1) of that Act.

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ROSS C. BENNETT, Presiding Member

APPEARANCES: KEIL BIEL
Representative for the Registrar of Motor Vehicles

Applicant
Unrepresented

DATE OF
HEARING: February 5, 2003

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

EXHIBITS:

- (1) Notice of Suspension from the Ministry of Transportation dated August 2, 2002
- (2) Notice of Appeal from the Applicant received December 10, 2002
- (3) File Summary introduced by the Respondent.

FACTS:

The Applicant, an unemployed roofer, had his driver's licence suspended on August 2, 2000. The Ministry had received a Medical Report from the Applicant's family physician Physician #1, on May 9, 2000 reporting that the Applicant was having episodes of disassociation, which may interfere with his ability to safely operate a motor vehicle.

Physician #1 referred the Applicant to Physician #2, a clinical and cerebrovascular neurologist, who first saw him in May 2000 and again on October 26, 2000. Physician #2's neurological investigation, including an EEG and CT scan, was completely negative and he believed the probability of these spells being seizures is low.

In the course of his investigation Physician #2 determined the Applicant had a past history of alcoholism and drug use. When the Ministry received his Medical Report, the Applicant was notified on November 15, 2000 that his licence would remain under suspension until a detailed positive assessment was received from a specialist in addiction medicine.

The Applicant attended the Inpatient Addiction Program (HADS) and saw Physician #3 on a referral from an Addiction Counsellor in the Community Addiction Division of the Health Centre. Information was elicited that the Applicant had been a binge drinker and a frequent user of cocaine, acid, speed, opiates, benzodiazepines and marijuana. He has not used cocaine or marijuana since 1996 and none of the others since 1989. He had attended a one-month program at HADS in 1996 and an Aftercare Program for a short time. That is how he got off the drugs and stopped his heavy drinking. He was also a member of AA and attended at "12 step meetings".

Physician #3's physical and laboratory examinations were completely negative. MCV was normal at 90.4 and GGT was normal at 25. The Applicant's last drink of alcohol was May 16, 2001.

Her diagnosis on July 22, 2001 was:

Alcohol Dependency in early remission, Cocaine Dependency in remission, Polysubstance Abuse in remission (Hallucinogens, THC, opiates and benzodiazepines), Nicotine Dependency.

Psychological and environmental problems: loss of driver's licence, grief issues.

Plan and Recommendations

1. Continue to be abstinent from all mind-altering chemicals.
2. Continue to use supports, communicate in a healthy way and ask for help regarding any life issues.
3. Follow-up with Physician #3 on a regular basis to monitor continued abstinence and recovery program. If the Applicant continues to do well and remain abstinent from alcohol for 3 months, reinstatement of his driver's licence will be supported. Follow-up reports will include blood-work and urine and alcohol screens.

4. Reinstatement conditional on the Applicant remaining compliant with follow-up assessments for a period of 12 months.

At this time the Applicant was operating a metal roofing company and travelling around southwestern Ontario doing jobs. He apparently had a confrontation with Physician #3 when she contacted him in Owen Sound and wanted him to drive back for tests. He refused and she became very angry and told him that was it. He never went back because he owed her money and he believed she did not want to see him.

Subsequent to this the Applicant lost his business and he and his wife separated. At the present time he is unemployed. He said that he was drinking a couple of beers every once and awhile, but that was all.

The Applicant's driving record in the past was very bad. He was convicted of impaired driving in 1987, 1989, 1992 and 1995, as well as dangerous driving in the 1995 incident and driving while his licence was suspended in 2001.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from any mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

The Deputy Registrar of Motor Vehicles was obligated to suspend the Applicant's licence under Section 47(1)(g), when the Medical report from Physician #1 was received with information that he was experiencing episodes of disassociation.

Physician #1 referred the Applicant to Physician #2, a clinical and cerebrovascular neurologist. Physician #2's examinations and laboratory tests ruled out the possibility of seizures, but elicited a past history of alcoholism and drug use. He referred the Applicant to the Addiction and Recovery Assessment Unit at the Addiction Centre, as requested by the Ministry, after his report had been received. The Applicant had already attended a month long session in the Inpatient Addiction Program (HADS) in 1996 and had stopped drugs and reduced his alcohol intake, but started drinking 1-2 beers a month after several months.

The Applicant stated that his driver's licence had just been reinstated, when he was notified in August 2000 that his licence was under suspension again. The Applicant had stopped drinking in May 2001, just before he saw Physician #3 and had not used any drugs for the previous 5 years, so he was quite surprised, because he thought he had served his time.

The Tribunal was concerned about the chronology of the events leading up to the suspension in August 2000. This suspension was because of possible little seizures and these were ruled out by Physician #2 in October 2000. In November 2000, the Ministry notified the Applicant

that his licence would remain under suspension until a detailed assessment was received from a specialist in addiction medicine. This was based on his past history of drinking and yet the Ministry had recently returned his licence after a suspension in 1995, so his alcohol problem was known.

The Applicant had attended a month long inpatient session at the Addiction Centre in 1996, likely ordered by the courts, but continued to drink 1-2 beers a couple of times a month. Does this warrant a continued licence suspension after 5 years? His GGT

and MCV were reported normal in Physician #3's Medical Report in July 2001, so he was not drinking much at that time.

There is no evidence that indicates that the Applicant currently suffers from any mental, emotional, nervous or physical disability, or is addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his ability to drive a motor vehicle safely in accordance with section 14 of Regulation 340/94.

After consideration of all of the evidence presented and the application of law to the facts, Tribunal does not find sufficient evidence to warrant a continued suspension of the Applicant's driver's licence under Section 47(1) of the *Highway Traffic Act*.

DECISION:

Upon the application by the Applicant to appeal the decision dated August 2, 2000 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the Highway Traffic Act ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be set aside.

LICENCE APPEAL TRIBUNAL

Ross C. Bennett M.D., Presiding Member

RELEASED: February 11, 2003

1432-MED-DOWN

Appeal under Section 50(1) of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 47(1) of that Act.

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ROSS C. BENNETT, Presiding Member

APPEARANCES: LUBA NEUWIRTH
Representative for the Registrar of Motor Vehicles
Applicant,

DATE OF
HEARING: January 8, 2003 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

EXHIBITS:

- 1) Notice of Downgrading of Driver's Licence dated December 12, 2002.
- 2) Notice of Appeal, dated December 13, 2002 from the Applicant.
- 3) File Summary introduced by the Respondent.

FACTS:

The Applicant, a bus driver had his licence downgraded from a Class "C" to a Class "G" on December 12, 2002 by the Deputy Registrar of Motor Vehicles, on a recommendation from the Medical Advisory Committee based upon the view that a longer period of stability is required. Physician #1, a neurologist, had forwarded a Medical Condition Report to the Ministry on June 10, 2002, reporting that the Applicant had an episode of "confusion and not understanding verbal communication."

The Ministry responded by requesting an up-to-date detailed assessment from Physician #1.

Physician #1 did a follow-up examination on July 12 and ordered an EEG, MRI, and a CT scan. The EEG disclosed a mild focal disturbance of the cerebral function in the left frontal region of non-specific etiology. A sleep deprived EEG was later reported as normal. His neurological examination was normal and she reported the Applicant had not experienced any more episodes since his last visit.

Evidence revealed the Applicant had been having these episodes for two years before he sought medical help. They usually occurred while he was watching television. His tongue felt as if it was swollen and as if he was unable to move it, but in reality it was normal size and his speech was normal. He also said that he would be unable to follow the story line in the TV program he was watching. If he happened to be talking to someone, he would have an odd feeling that his words did not make much sense to himself, but they apparently made sense to the recipient. These episodes lasted about an hour and occurred 1 to 2 times a week. Neither his wife nor anyone else in his presence had any idea that he was experiencing any problems. He would carry on as if nothing was happening and the sensations would disappear spontaneously.

The Applicant gave evidence that he was under a great deal of pressure at that time, in that he had just been married; had a new job and was on probation; was having a problem with obesity and his father in law had just died. Once he got over these issues the spells stopped and he has not experienced any since May, 2002. The Applicant has been driving commercial vehicles for five years and has never had one of these episodes while driving.

Physician #1 gave evidence at this Hearing to try and assist her patient. She stated that she does not have a diagnosis for these spells, but she does not believe that they indicate anything serious. She was concerned at first, but she is not concerned at the present time. Her initial thought was that they might be complex partial seizures in origin, triggered by the TV. She rejected this theory after all of the radiological tests were reported normal and the cessation of these spells once the problems creating stress were reduced.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from any mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

Although neither the Registrar of Motor Vehicles nor the MAC recorded the sections in the *Highway Traffic Act*, *wh ich* authorized the downgrading of the Applicant's driver's licence, the Tribunal notes the application of the following:

Section 14 of Regulation 340/94, which states:

An applicant for or holder of a driver's licence must not,

- (a) suffer from any mental, emotional, nervous or physical disability likely to significantly interfere with his ability to drive a motor vehicle of the applicable class safely.

or Section 17(1) states:

Qualifications required by an applicant or holder of a Class A, B, C - driver's licences are that the applicant or holder,

- (g) has no established medical history of loss of consciousness or awareness due to a chronic or recurring condition;

or Section 32(12)(b) states:

In the case of a person who holds a driver's licence,

- (1) impose or remove conditions or endorsements authorized by the regulations or change the class of motor vehicles in respect of which the licence is issued in accordance with the results of the examinations,

The Applicant experienced these spells over a two-year period, while driving a bus and never had one while driving. His last episode was in May, 2002 and although Physician #1 notified the Ministry about these spells in June, no action was taken until December 12, 2002. This could not have been a high priority on the Ministry's agenda.

During the period the Applicant was having these episodes he was experiencing a great deal of stress in his life. He had been recently married; he was on probation at work, because he was a new employee and his father-in-law died very suddenly. With time these problems resolved and the spells ceased. The Tribunal finds that they were a result of stress and not as a result of any pathology, since his neurological examinations and the entire laboratory and radiological tests were reported normal. The fact that they never occurred while he was driving would also add to the likelihood of stress at home.

After consideration of all of the evidence and the application of the facts to the law, this Tribunal finds that the Registrar has not established that the Applicant falls within Regulation 340/94, Section 14 and Section 47(1) or the sections noted above, in that he does suffer from any medical disability likely to significantly interfere with his ability to drive a bus safely nor has any evidence been adduced by the Registrar to satisfy the Tribunal that the Applicant will not operate a commercial motor vehicle safely to warrant prohibiting the reinstatement of his "C" licence. As previously stated, the Applicant has not experienced any further episodes since May, 2002 and has never had any episodes while driving. Furthermore, he has a perfect driving record. The Tribunal finds that sufficient time has elapsed to dispel concerns from a medical perspective.

DECISION:

Upon the application by the Applicant to appeal the decision dated December 12, 2002 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant.

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be set aside.

LICENCE APPEAL TRIBUNAL

Ross C. Bennett M.D., Presiding Member

RELEASED: *January 17, 2003*

1455-MED-DOWN

Appeal under section 50(1) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Minister pursuant to section 32(12)(b)(i) of that Act.

TO CHANGE THE CLASS OR CLASSES OF
MOTOR VEHICLE IN RESPECT OF WHICH
THE LICENCE WAS ISSUED

TRIBUNAL: ROSS BENNETT, M.D., Presiding Member

APPEARANCES: LUBA NEUWIRTH, Respondent
Representative for the Minister

Applicant,
Unrepresented

DATE OF
HEARING: January 24, 2003

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Minister (the "Respondent") pursuant to section 32(12)(b)(i) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended (the Act).

EXHIBITS

- (1) Decision Letter from the Ministry of Transportation Dated November 22, 2002.
- (2) Notice of Appeal received at the Tribunal December 27, 2002.
- (3) File Summary introduced by the Respondent.

FACTS:

The Applicant, a 57 year old truck driver, had his Class "ACZ" driver's licence downgraded by the Ministry on November 22, 2002, after receiving a Medical Report from Physician #1 on January 21, 2002. The report stated that the Applicant has a history of ischemic heart disease, with multiple risk factors, which are currently well controlled on medication. The Applicant was examined by Physician #2, a cardiologist, on August 19, 2002. The findings were:

- 1) Ischemic Heart Disease
- 2) Hypertension
- 3) Hyperlipidemia
- 4) Obesity
- 5) Venous insufficiency of the legs.

Physician #2 completed a Medical Waiver Certificate on that date.

The Applicant returned to see Physician #2 on September 19th for a cardiac stress test, which was positive. The ECG showed some ST changes, suggestive, but not diagnostic of ischemia. As a result he made arrangements for a nuclear cardiac stress test on October 2, 2002. This revealed partially reversible decreased activity present in the portion of the inferior wall extending through the apex. This was possibly due to a prior myocardial infarction with some additional exercise induced ischemia. The Applicant had no knowledge of having had a heart attack or even chest pain at any time.

The Medical Advisory Committee determined the Applicant did not meet the requirements for a commercial licence or Waiver due to exercise induced ischemia on stress testing. Physician #2's Waiver was denied and the Applicant's driver's licence was downgraded from Class "AC" to Class "G".

The Applicant's job is driving an eighteen wheeler hauling general freight, which includes dangerous and hazardous goods. He drives approximately 100,000 miles a year on trips from Toronto to New York and Chicago. Each trip is about 1,000 miles and he drives 10 hour a day.

ISSUES:

Should the decision of the Minister to change the class or class of motor vehicles in respect of which the licence is issued in accordance with the result of the examination be varied, modified or set aside?

Regulation 340/94

Does the Applicant suffer from a mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffer from any mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Regulation 340/94, Section 17 and 18 states:

- 17. (1) Qualifications required by an applicant for a holder of a Class A, B, C, D, E or F driver's licence are that the applicant or holder,
 - (a) has no history or clinical diagnosis of diabetes that requires insulin for control;
 - (b) is not taking any drug that could, in the dosage prescribed or in the dosage recommended by the manufacturer, impair his or her ability to drive a motor vehicle of the applicable class safely;
 - (c) has no established medical history of myocardial infarction, angina pectoris, coronary insufficiency or thrombosis;
 - (d) has no established medical history of heart disease including arrhythmia or of respiratory dysfunction likely to interfere with the safe driving of a motor vehicle of the applicable class;
 - (e) is not suffering from an aortic aneurysm, whether resected or not;
 - (f) is not suffering from hypertension accompanied by postural hypotension resulting in giddiness when under treatment;
 - (g) has no established medical history of loss of consciousness or awareness due to a chronic or recurring condition;
 - (h) has no established medical history of a disorder of the musculoskeletal or nervous system that may interfere with the safe driving of a motor vehicle of the applicable class;
 - (i) has no established medical history of an intractable psychotic or psychoneurotic disorder, having particular regard for sustained hostile, aggressive, paranoid, suicidal or other destructive tendencies or depression unless it is medically determined that the condition from which the person has suffered is corrected or controlled;

- (j) has a visual acuity by Snellen Rating, with or without the aid of corrective lenses, no poorer than 20/30 in the better eye and 20/50 in the weaker eye; and
 - (k) has a horizontal visual field of at least 120 degrees in each eye as measured by confrontation tests.
- (2) An applicant for or a holder of a Class A, B, C, D, E or F driver's licence who fails to meet the qualifications referred to in clauses (1)(a) to (i) may, despite the failure, qualify for the class of licence applied for or held if he or she demonstrated the ability to drive a motor vehicle in the applicable class as safely as any person who meets those qualifications.
- (3) An applicant for or a holder of a Class D driver's licence who fails to meet the qualification referred to in clause (1)(c) may, despite the failure, qualify for that class of licence if it is medically determined that he or she has made a full recovery and there is no established history of a second occurrence of myocardial infraction, thrombosis or recurring angina pectoris.
- (4) An applicant for or a holder of a Class B, C, E or F driver's licence whose hearing in one ear is better than in the other must be able to perceive in the better ear, with or without a hearing aid, a forced whisper at a distance of 1.5 metres or, if an audiometer is used to test the person's hearing, must not have a loss in the better ear of more than 40 decibels at 500, 1,000 and 2,000 hertz.
- 18. An applicant for or a holder of a G, G1, G2, L, M, M1, M2, or R driver's licence must have,
 - (a) in the case of a person whose vision in one eye is better than in the other, visual acuity in the better eye that is no poorer than 20/40 as measured by Snellen Rating; and
 - (b) a horizontal visual field of at least 120 degrees as measured by confrontation tests.

Section 32(12)(b)(i) states:

- 32 No person shall drive a motor vehicle on a highway unless the motor vehicle is within a class of motor vehicles in respect of which the person holds a driver's licence issued to him or her under this Act.
- (12) An applicant for a driver's licence or a person who holds a driver's licence shall submit to the examinations that are authorized by the regulations relating to this section and required by the Minister at the time and places that the Minister may require and the Minister may,
 - (b) in the case of a person who holds a driver's licence,
 - (i) impose or remove the conditions or endorsements authorized by the regulations or change the class or classes of motor vehicles in respect of which the licence is issued in accordance with the result of the examinations, or

Section 50 states:

50(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.

(2) The Tribunal may confirm, modify or set aside the decision of the Minister or Registrar.

APPLICATION OF THE LAW TO FACTS:

The Deputy Minister of Motor Vehicles was obligated to downgrade the Applicant's driver's licence under Section 32(12)(b)(i) of the *Highway Traffic Act* after investigating the information contained in a Medical Report received from the Applicant's family physician. This letter stated that the Applicant had a history of ischemic heart disease with multiple risk factors. A series of cardiac stress tests confirmed this information.

The investigating cardiologist had completed a Medical Waiver before all of the tests results were available. The Medical Advisory Committee denied the Waiver because it was determined the Applicant did not meet the requirements for a commercial licence or Waiver consideration, due to exercise induced ischemia on stress testing (National Safety Code 3.1). This particular Section covers "Cardiovascular Diseases and Driving" and is written by the Canadian Cardiovascular Society.

A physician should be able to offer, based on clinical finding and the results of non-invasive testing, an opinion on the probability of sudden incapacitation significant enough to cause loss of control of a vehicle. The classification takes into consideration both symptoms and objective evidence (exercise-induced ECG changes).

The Applicant falls into their Functional Class II:

Clinical or objective diagnostic evidence of mild functional impairment and symptoms only on major physical effort, may be eligible for a Class 5 vehicle and to drive a taxicab.

After consideration of all of the evidence, the Tribunal agrees with the findings of the Ministry that the exercise-induced ECG changes are quite significant, considering the Applicant's occupation; driving long distances over long hours and transporting dangerous and hazardous goods. The Tribunal finds that this disability is likely to significantly interfere with his ability to drive a commercial motor vehicle and is too serious to reinstate the Applicant's Class "ACZ" licence under Section 32(12)(b)(i) of the *Highway Traffic Act*.

DECISION:

Upon the application by Applicant to appeal the decision dated September 29, 2002, of the Minister ("Respondent") to change the class or classes of motor vehicle in respect of which

the licence was issued pursuant to Section 32(12)(b)(i) of the Highway Traffic Act ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Respondent and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

Ross C. Bennett M.D.
Presiding Member

RELEASED: February 10, 2003

GARCHA TRANSPORT INC.

IN THE MATTER OF an application by Garcha Transport Inc. dated December 26th, 2002 for a hearing before the Licence Appeal Tribunal pursuant to section 50(1) of the *Highway Traffic Act*, to consider the appeal of the Notice of Refusal to Issue an Operating Licence by the Deputy Registrar of Motor Vehicles dated November 28th, 2002;

AND IN THE MATTER of the *Motor Vehicle Transport Act*, 1987, S.C. 1987, Chapter 35, as amended by R.S. 1989, Chapter 29 and the *Truck Transportation Act*, R.S.O. Chapter T.22 as amended;

AND IN THE MATTER of an Application for Operating Licence by Garcha Transport Inc;

AND IN THE MATTER of the *Highway Traffic Act*, R.S.O. Chapter H.8 as amended;

TRIBUNAL: CARL F. DOMBEK, Chair, presiding

APPEARANCES: MURRAY FORBES, Counsel for the Respondent
No one appearing for the Applicant

DATE OF
PRE-HEARING: February 18, 2003 Toronto

ORDER

Upon hearing the sworn evidence of John Ripley, Hearings Co-ordinator of the Licence Appeal Tribunal, that the Applicant was contacted and verbally advised Mr. Ripley that he was withdrawing his appeal and,

Upon hearing the submissions of Counsel for the Registrar,

The Tribunal Orders that:

1. The Appeal is dismissed as abandoned by the Applicant.
2. The Applicant's filing fee shall be returned to him.
3. There shall be no order as to costs.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek, Chair, presiding

RELEASED: February 18, 2003

REAL ESTATE AND BUSINESS BROKERS ACT
Revised Statutes of Ontario 1990, Chapter R. 4

IN THE MATTER OF
ROBERT M. JESSIMAN

AND IN THE MATTER of the PROPOSAL by
the Registrar, *REAL ESTATE AND BUSINESS BROKERS ACT*
TO REVOKE REGISTRATION
- Proposal dated: December 16, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

ROBERT M. JESSIMAN

Applicant

-and-

REGISTRAR, *REAL ESTATE AND BUSINESS BROKERS ACT*

Respondent

ADJOURNMENT ORDER

WHEREAS the Tribunal appointed a time and place for a pre-hearing by teleconference in the above matter on February 10, 2003;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the pre-hearing *peremptory against all parties* to commence, by teleconference, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario at 10:30 a.m. (EST), on Wednesday, February 19, 2003.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: February 5, 2003

PREHEARING

ROBERT M. JESSIMAN

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Member

APPEARANCES:

DANIEL V. GUNN, Counsel representing Robert Jessiman, by
teleconference

GEORGE P. DRAMETU, Counsel, representing the Registrar,
Real Estate and Business Brokers Act

DATE OF
PREHEARING: February 19, 2003 *by teleconference*

ORDER

Following attendances on February 19, 2003 at a prehearing before this Tribunal of Daniel V. Gunn, Counsel, appearing by teleconference on behalf of Robert M. Jessiman (the "Applicant"), and George P. Drametu, Counsel, appearing on behalf of the Registrar, *Real Estate and Business Brokers Act* (the "Registrar");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Wednesday, July 2, 2003 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario and to continue, if necessary at 9:30 a.m. on Thursday, July 3, 2003 at the Tribunal's aforesaid chambers;

1. The parties to the hearing are the Applicant and the Registrar.
2. The Applicant and the Registrar record that there is no resolution of any of the issues in this matter.

3. The Applicant's Counsel confirmed to the Tribunal at the prehearing that the Applicant admits the allegations made in the following paragraphs in the Registrar's Notice of Proposal to Revoke:

paragraph #1
paragraph #2
paragraph #3
paragraph #4
paragraph #5
paragraph #6
paragraph #9

paragraph #12 insofar only as the statement "the Registrant was scheduled to appear for sentencing hearing on April 22, 2002" in that paragraph is concerned.

paragraph #17
paragraph #18
paragraph #19
paragraph #20

paragraph #22 save for the date of July 23, 2002 referred to in that paragraph.

paragraph #23

paragraph #24 insofar as the quotation in the Honourable Mr. Justice P. Bishop's Reasons for Judgement has been accurately and correctly transcribed in paragraph #24

paragraph #25
paragraph #26

paragraph #27 insofar as the quotation in the Probation Order has been accurately and correctly transcribed in paragraph #27.

paragraph #28

paragraph #29

paragraph #30 only insofar as the first sentence in paragraph #30 is concerned.

4. All the parties to the hearing shall fully comply with the requirements of disclosure of documents or things as set forth in Rule 6.3 of the Rules of Practice of the Tribunal. All parties shall also fully comply with the disclosure requirements set forth in Rule 6.4 of the Rules of Practice of the Tribunal dealing with expert witnesses.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: February 24, 2003

1462-ADLS-RESP

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: KYLE BIEL,
Representative for the Registrar of Motor Vehicles

Applicant
Unrepresented

DATE OF
HEARING: February 3, 2003

DECISION
RELEASED: February 5, 2003

REASONS FOR DECISION

A hearing was held on February 3, 2003, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on February 5, 2003, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated January 2, 2003, and was received by the Tribunal on January 2, 2003, together with the prescribed fee of \$100.00, paid by cash.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

“I was unable to provide the required breath sample because of a medical reason.”

Preliminary Matters

As Police Officer #1, the witness for the Respondent's Representative, arrived late, the Respondent's Representative asked for a five-minute recess in order to confer with the witness. The Respondent's Representative's request was granted.

Certified copies of original documents on file were submitted by the Respondent's Representative.

The Respondent's Representative asked the Tribunal to have the Applicant present a piece of identification with a photograph. Given the fact that his driver's licence was taken, the Applicant was able to present only a library card with his name on it, which was found acceptable by the Respondent's Representative.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Suspension Reminder dated December 24, 2002 – issued by the Registrar of Motor Vehicles.
- b) Exhibit # 2 Notice of Appeal Form – received January 2, 2003.

By the Respondent:

- a) Exhibit # 3 Ministry of Transportation submissions – received January 28, 2003

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is:

Did the Applicant fail or refuse to comply with a demand to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

- 50.1(1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
- (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
- (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

- 15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
- (a) the name, telephone number and address, with the postal code, of the medical practitioner;
- (b) the name, date of birth and address of the person who is the subject of the report;

- (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

The Applicant's Driver's Licence was suspended "22 Dec 2002" as per Notice of Appeal.

Applicant's Evidence

In lieu of Page 2 of the Notice of Appeal, which is left blank, the Applicant submitted a hand written note from a physician.

Physician #1 wrote: *"...This gentleman is suffering from chronic rhinitis and deviated septum L side. He had nasal congestion and cold on 2/Dec 02 (at time of spot-check). The above medical condition would cause his inability to provide a breath sample..."*

At the hearing the Applicant related to the Tribunal that he was stopped by the R.I.D.E. programme and subsequently demanded a breath sample. The Applicant tried to provide an adequate sample but was not able to do so.

After the incident, the Applicant went to his family physician and was given a letter as to the reasons the physician thought he could not provide a sample.

The Tribunal asked the Applicant why his physician had not completed page 2 of the Notice of Appeal. The Applicant explained that he filed the Appeal prior to going to his family physician and that he thought the note would suffice.

Under cross-examination the Applicant confirmed that he did not know the exact medical reason he was unable to provide a breath sample, but he recalled telling the officer that he had a cold and that his “...nose is always plugged...”

The Applicant confirmed that he was not taking any medication for his cold, and that Physician #1 did not prescribe any medication when he saw the Applicant on December 28, 2002.

The Applicant also confirmed that he did not ask for medical assistance.

For clarification the Tribunal asked the Applicant if he suffered from breathing difficulties. The Applicant answered that his physician has told him that he has allergies.

In his closing remarks the Applicant stated that he was not drunk and that he needs his driver's licence for his convenience.

The Applicant emphasized that he did try to blow several times, but did not understand the officer's instructions.

Respondent's Evidence

The Respondent provided the following Documents:

1. Certified Notice to the Registrar, sealed January 7, 2003
2. Certified Driving Record of the Applicant sealed January 6, 2003
3. Certified copy of Vehicle Record, sealed January 7, 2003
4. Medical Report of Dr. Roger S. Goldstein, MB,ChB,FRCP(UK)FRCP(C) FCCP

Dr. Roger S. Goldstein, MB,ChB,FRCP(UK)FRCP(C) FCCP, Director of the University of Toronto, Respiratory Division and Program in Rehabilitation, states that he is “...in practice since 1979 with particular interest in chronic respiratory conditions such as: asthma, emphysema and chronic bronchitis ...medical advisor to the pulmonary function laboratories for over 16 years ...familiar with the Alcotest and the Intoxilyzer 5000C having evaluated both machines in ...Pulmonary function laboratory ...have tested both the portable and the station monitor among a variety of individuals (men and women) age range 44-77 years, vital capacity range 1.6 to 4.5 litres, FEV1 range 0.4 to 2.9 litres, FEV1/FVC range 20% to 78% ...The vast majority of individuals, even with an FEV1 of 0.7 are able to satisfactorily provide a breath sample notwithstanding their respiratory condition...”

After reviewing the letter from Physician #1, Dr. Goldstein points out that “...A deviated septum would not influence The Applicant's ability to provide a satisfactory breathalyzer test...”

The Respondent called Police Officer #1, a police officer with the Toronto Police Service— 54 Division, as a witness.

Police Officer #1 being on duty as a member of the R.I.D.E. programme had occasion to stop the Applicant, and establish that there were enough grounds to demand a breath sample. He testified that the Applicant was allowed to blow into the device about "...*twenty times*..." Each time the instrument registered an error reading. Police Officer #1 noticed that the Applicant would puff his cheeks, start to blow and then "...*suck back in*...", or just stop blowing.

During the breathalyzer test session, Police Officer #1 did not notice the Applicant showing any signs of breathing difficulties. According to Police Officer #1, the Applicant did not inform him of any medical condition that would prevent him from providing a breath sample, nor did the Applicant ask for medication or medical assistance.

In cross-examination Police Officer #1, re-iterated his previous comments that the Applicant had acknowledged understanding the instructions, as well as his observations of the Applicant 's several attempts to provide a breath sample.

In closing, the Respondent's Representative stated that it is the Registrar's submissions that the Applicant had no intention to provide a breath sample, and that his failure to do so, had nothing to do with a medical condition. Police Officer #1's testimony supports the Registrar's position, in that Police Officer #1 observed the Applicant "...*was sucking and blowing on the mouthpiece during his attempts*...". Furthermore, Police Officer #1 saw absolutely nothing wrong with the Applicant at the time of the breathalyzer test.

Further, the Respondent's Representative maintains that the note provided by the Applicant's physician, does not comply with the requirements of Section 15 of Regulation 574, which is specific as to the information required in a medical report. Physician #1's report also fails to link the illness noted with the Applicant's inability to provide a breath sample.

The Respondent's Representative referred to the report of the Registrar's expert witness, Dr. Goldstein and pointed out Dr. Goldstein's conclusion that "...*A deviated septum would not influence The Applicant's ability to provide a satisfactory breathalyzer test*..."

The Respondent's Representative concluded by asking the Tribunal to uphold the decision of the Registrar.

APPLICATION OF THE LAW TO FACTS:

Although the totality of the evidence presented was considered, the preceding notes reflect a summary of the proceedings. Evidence introduced not directly germane to the issue was not transcribed.

The Tribunal accepts the Applicant's argument that the Applicant was not impaired and that he needs his licence. An appeal was brought by the Applicant under Section 50.1 (2) (b) of the Highway Traffic Act, which prescribes:

"...person failed or refused to comply with a demand made under

section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason...”

Thus, at issue, is not whether the Applicant was impaired, had been drinking or needs his licence. At issue, as the Respondent’s Representative asserted, is, did the Applicant have a medical condition that could cause the Applicant to fail or not comply with the breath demand?

The Applicant opted to submit notes from his physician Physician #1 in lieu of having page 2 of the Notice of Appeal completed by his physician.

The Respondent’s Representative claims that the information contained in this note, does not meet the criteria set out in Section 15 of Regulation 574, in that it provides none of the information required, such as the Applicant’s medical history. The Tribunal agrees with the Respondent’s Representative.

Sections 15 (1) (a) (b) (c) (d) and 15 (2) of Regulation 574 prescribe as follows:

15 (1)

“A report of a legally qualified medical practitioner that is submitted in evidence shall clearly state:

- a) the name, telephone number and address, with postal code, of the medical practitioner;
- b) the name, date of birth and address of the person who is the subject of the report;
- (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the Tribunal from the suspension of a driver’s license under section 50.1 of the Act.”
- (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;

15 (2):

The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath sample including the results of any related tests.”

Physician #1’s note complies with the requirement of Section 15(1)(a) but not with Section 15 (1) (b) which requires the Applicant’s complete information, i.e. address and birth date.

It appears that Physician #1 was aware of the purpose of his report, therefore Section 15(1)(c) is met, yet Physician #1 offers no information as to how long the Applicant has been his patient or any details of last visit. Thus, Section 15 (1)(d) of Regulation 574 is not met.

Section 15 (2) of Regulation 574 is, perhaps, the most relevant. The essence of this clause requires that the physician offer support to establish that there is a relationship between the medical condition and the incapacity to provide a breath sample. This clause relates specifically to the detailed information required on page 2 of the Notice of Appeal, which serves as a valuable guideline to the Tribunal as it is designed to provide pertinent details of the Applicant's condition, such as:

- Details and diagnosis of the patient's present condition;
- History of condition;
- Type of Measurements or recent test taken with (date indicated): (Reference to any pathology test (e.g.: PTF represent important corroboration of your medication opinion).
- Relevant details of last visit and when ...patient was last seen.

The Tribunal is left unsure as to why page 2 of the Notice of Appeal is blank, but the fact is, that Physician #1's note fails to meet the test of establishing the grounds for appeal under section 50.1.

Physician #1 does not offer any explanation of how the Applicant's condition affects the Applicant's breathing pattern. Nor, does Physician #1 provide any justification as to how the medical problem could have affected the Applicant's ability to provide a breath sample, other than to say "*...The medical condition would cause his inability to provide a breath sample...*"

Dr. Goldstein, after reviewing the letter from Physician #1, stresses that "*...A deviated septum would not influence The Applicant's ability to provide a satisfactory breathalyzer test...*" With all due respect to Physician #1, the Tribunal must accept the evidence of a prominent respiratologist, who is also an expert on the requirements of the Alcotest.

At the hearing the Applicant was unable to coherently explain why he was unable to provide a breath sample, other than to state that he had a cold, and his nose "*...is always plugged...*"

There are certain unmistakable indicators of respiratory impairment that are visible even to an untrained person. The Tribunal must rely on the testimony, of the eyewitness involved in the incident. Police Officer #1 was in direct contact with the Applicant, he did not notice, at any time, the Applicant suffering from any type of respiratory distress.

The Tribunal finds that there is insufficient evidence, medical and viva voce, to satisfy the Tribunal that the Applicant has a medical condition, which would have prevented the Applicant from providing the demanded breath sample.

The onus being on the Applicant to establish the merit of the appeal, the Tribunal finds that the Applicant has failed to do so. Thus, the Tribunal finds that the Applicant does not meet the criteria of Section 50.1 (2) (b), in that he was not able to demonstrate that he suffers from a medical condition, which would prevent him from providing a breath sample.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated December 22, 2002 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: February 11, 2003

1473-ADLS-PULD

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF
HEARING: February 12, 2003

DECISION
RELEASED: February 13, 2003

Oshawa

REASONS FOR DECISION

A hearing was held on February 12, 2003, at Oshawa, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on February 13, 2003, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated January 05, 2003, and was received by the Tribunal on January 07, 2003, together with the prescribed fee of \$100.00, paid by cash.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

The Representative of the Ministry provided the Tribunal with original certified copies of Ministry of Transportation documents on file.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Suspension Reminder Notice dated November 4, 2002, issued by the Registrar of Motor Vehicles.
- b) Exhibit # 2 Notice of Appeal Form – received January 7, 2003.

By the Respondent:

- a) Exhibit # 3 Ministry of Transportation submissions – received February 7, 2003.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

- 50.1(1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
 - (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
 - (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

- 15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
 - (a) the name, telephone number and address, with the postal code, of the medical practitioner;
 - (b) the name, date of birth and address of the person who is the subject of the report;
 - (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;

- (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
- (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

The Applicant's Driver's Licence was suspended "October 22, 2002" as per Notice of Appeal.

Applicant's Evidence

In lieu of Page 2 of the Notice of Appeal, which is left blank, the Applicant submitted a hand written note from a physician.

Physician #1 wrote: *"...Pulmonary Function Testing indicates asthma. This could adversely affect his ability to blow into a breathalyzer machine..."*

The results of a Pulmonary Function Test performed on the Applicant on "04/11/2002" attached read as follows: "Diagnosis: Asthma; Computerized Interpretation: Mild restrictive disease; Medication: Salbutamol; Additional Information: Airways resistance is in the normal range. Maximum Inspiratory Pressure is reduced; Maximum Expiratory Pressure is reduced. Good effort by patient.

At the hearing, the Applicant testified that he suffers from asthma and after seeing his physician he was sent to a specialist.

The Applicant pointed out to the Tribunal that he has been driving for twenty-five years without committing any offence.

By way of clarification, the Tribunal asked the Applicant if he had given the Notice of Appeal form to his physician. The Applicant replied that he thought that the handwritten note would suffice.

In cross-examination the Applicant confirmed that he has had asthma for approximately nine years. The Applicant had not in the past been referred to a respiratologist. The Applicant believes that the physician was unwilling to provide the report himself, as he was too busy. Further, the Applicant assumes that being a family physician, the doctor felt his words would have less weight than those of a specialist.

The Applicant confirmed that he did not have an inhaler on him at the time. The Applicant had his own prescription for an inhaler given to him approximately eight years ago, but now mainly uses his children's medication, when needed.

The Applicant described his symptoms at the time as shortness of breath, due to the anxiety he was experiencing at the time.

In closing the Applicant reiterated his previous comments that in the twenty-five years he has been driving in North America, he has never committed any traffic violations.

The Applicant noticed that he was wheezing after the breathalyzer, for that reason he consulted with his physician to find out the cause. The physician confirmed the previous diagnosis of asthma, and sent the Applicant to a specialist for further tests.

Respondent's Evidence

The Respondent provided the following Documents:

1. Certified Copy Notice to the Registrar, sealed January 3rd, 2003.
2. Certified Copy Driving Record of the Applicant, sealed January 13th, 2003.
3. Certified Copy of Vehicle Record, sealed January 13th, 2003.
4. Medical Report of Dr. Roger S. Goldstein, MB,ChB,FRCP(UK)FRCP(C) FCCP.

Dr. Roger S. Goldstein, MB,ChB,FRCP(UK)FRCP(C) FCCP, Director of the University of Toronto, Respiratory Division and Program in Rehabilitation, states that he is "...in practice since 1979 with particular interest in chronic respiratory conditions such as: asthma, emphysema and chronic bronchitis ...medical advisor to the pulmonary function laboratories for over 16 years ...familiar with the Alcotest and the Intoxilyzer 5000C having evaluated both machines in ...Pulmonary function laboratory ...have tested both the portable and the station monitor among a variety of individuals (men and women) age range 44-77 years, vital capacity range 1.6 to 4.5 litres, FEV1 range 0.4 to 2.9 litres, FEV1/FVC range 20% to 78% ... The vast majority of individuals, even with an FEV1 of 0.7 are able to satisfactorily provide a breath sample notwithstanding their respiratory condition..."

After reviewing the letter from Physician #1 and the pulmonary function tests interpreted by Physician #2, Dr. Goldstein points out: "...the force expired volume is within normal range that the FEV 1/FVC ratio (an important measure in airflow) is very close to normal range. Flow at mid and low lung volumes are almost entirely normal. In my view, it is extremely unlikely that this patient has asthma based on the above measurements ...the finding is consistent with some restriction in ventilatory mechanics with a slight reduction in total lung capacity, functional

residual capacity and vital capacity ...it might be worthwhile advising the physicians involved that any abnormalities are more consistent with a restriction than obstruction. The pulmonary function measurements are unlikely to preclude satisfactory delivery of a breath sample if indeed the abnormality is restrictive, then it is relatively mild, most likely attributable to obesity...”

The Respondent, called Police Officer #1, who has been a police officer “...*about three years...*”, as a witness.

Police Officer #1 detailed the events that led to the Applicant’s vehicle being stopped, and the Applicant subsequently being demanded a breath sample.

According to Police Officer #1, the Applicant was given approximately thirteen attempts to provide a breath sample. Each time the Applicant attempted to blow into the Alcotest, the machine showed an “E/O” reading, indicating the breath sample was not suitable. An error message is suggestive that the individual is not breathing hard enough to activate the device.

During the breathalyzer test session, the trip to the station, and during the time that Police Officer #1 spent with the Applicant at the station, Police Officer #1 did not observe the Applicant exhibiting any of the usual signs of breathing difficulties, such as coughing or wheezing. The Applicant never advised the Constable that he suffered from an asthmatic condition.

In cross-examination by the Applicant, Police Officer #1 confirmed that he did not recall asking, or being told by the Applicant, about the Applicant being afflicted with asthma. Police Officer #1 also did not recall swearing at the Applicant.

In his closing remarks, the Respondent’s Representative emphasized that it is the Registrar’s position that the Applicant does not suffer from a medical condition, which would have prevented him from providing an adequate breath sample. Mr. Biel argued that the Applicant simply had no intention of providing a breath sample. This argument is substantiated by the observations of Police Officer #1, who at no time noticed any signs of breathing difficulties.

The Applicant has introduced no evidence whatsoever to substantiate his position, the PFT results do not link the Applicant’s condition to the Applicant’s ability to comply with the breath demand. Physician #1 attempts to make a connection, but Physician #1’s comment that the condition “*could*” affect the Applicant, is basically a guess. Both the PFT report and Physician #1’s letter were sent to Dr. Goldstein, who is a respirologist. Dr. Goldstein noted that “...*the force expired volume is within normal range that the FEV 1/FVC ratio (an important measure in airflow) is very close to normal range. Flow at mid and low lung volumes are almost entirely normal...*” and surmises that the Applicant could have provided an adequate breath sample.

Further, Mr. Biel maintains that the note provided by the Applicant’s physician, does not comply with the requirements of Section 15 of Regulation 574, which is specific as to the information required on a medical report.

The Respondent's Representative concluded by asking the Tribunal to uphold the decision of the Registrar.

APPLICATION OF THE LAW TO FACTS:

Although the total evidence presented was considered, the preceding notes reflect a summary of the proceedings. Evidence introduced not directly germane to the issue was not transcribed.

The Tribunal accepts and commends the Applicant for his spotless driving record, nonetheless, the Tribunal must point out, to the Applicant, that it is not within the Tribunal's mandate to consider the Applicant's driving record. The Applicant brought an appeal under Section 50.1 (2) (b) of the Highway Traffic Act, which prescribes:

"...person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason..."

Thus, as the Respondent's Representative asserted, at issue is whether the Applicant has a medical condition that could cause the Applicant to fail or not comply with the breath demand.

The Applicant opted to submit a note from Physician #1 in lieu of having page 2 of the Notice of Appeal completed by the physician, as required.

The Respondent claims that the information contained in this note, does not meet the criteria set out in Section 15 of Regulation 574, in that it provides none of the information required, such as the Applicant's address and date of birth. The Tribunal agrees.

Sections 15 (1) (a) (b) (c) (d) and 15 (2) of Regulation 574 prescribe as follows:

15 (1)

"A report of a legally qualified medical practitioner that is submitted in evidence shall clearly state:

- a) the name, telephone number and address, with postal code, of the medical practitioner;
- b) the name, date of birth and address of the person who is the subject of the report;
- (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the Tribunal from the suspension of a driver's license under section 50.1 of the Act."
- (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;

15 (2):

The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath sample including the results of any related tests.”

Physician #1's handwritten notes complies with the requirement of Section 15 1(a) but not with Section 15 1 (b) which requires the Applicant's complete information, i.e. address and birth date.

The criteria of section (c) of Regulation 574 is met, but the requirements under Section 15 (1)(d) are not, in that Physician #1 offers no information as to how long the Applicant has been his patient or the details of the Applicant's last visit.

Section 15 (2) of Regulation 574 is, perhaps, the most relevant. The essence of this clause requires that the physician establish a connection between the condition and the individual's inability to provide a breath sample. This clause relates specifically to the detailed information required on page 2 of the Notice of Appeal, which serves as a valuable guideline to the Tribunal as it is designed to provide pertinent details of the Applicant's condition, such as:

- Details and diagnosis of the patient's present condition;
- History of condition;
- Type of Measurements or recent test taken with (date indicated): (Reference to any pathology test (e.g.: PTF (sic) represent important corroboration of your medication opinion).
- Relevant details of last visit and when ...patient was last seen

The Tribunal does not know the degree of familiarity that Physician #1 has with the Applicant's condition. Physician #1's note does not confirm the length of time that the Applicant has been his patient. Further, Physician #1's note fails to provide a history of the Applicant's condition.

The Tribunal is left unsure as to why page 2 of the Notice of Appeal is blank, but the fact is, that Physician #1's note fails to meet the test of establishing the grounds for appeal under section 50.1, and will be accorded the weight merited.

Physician #1's comments are, it appears, based on the results of the Applicant's recent pulmonary function test. The Tribunal agrees with the Respondent's submission that Physician #1's explanation, does not provide justification. Physician #1's chosen words that asthma “...could adversely affect his ability to blow into the breathalyzer machine...”, clearly demonstrate ambivalence. After reviewing the same pulmonary function results, Dr. Goldstein, concludes that: “...it is extremely unlikely that this patient has asthma ...the pulmonary function measurements are unlikely to preclude satisfactory delivery of a breath sample...”. With all due respect to Physician #1, the Tribunal prefers and adopts the conclusions of Dr. Goldstein, who is a well known respiratologist.

At the hearing the Applicant was unable to articulate why he was unable to provide a breath sample, other than to state that he felt anxious. By his own admission the Applicant confirmed that he did not have an inhaler with him. The Tribunal finds this surprising, as it is the Tribunal's experience that most asthma sufferers are extremely reluctant to be found without an inhaler.

There are certain unmistakable indicators of respiratory impairment that are visible even to an untrained person. In order to further assess the evidence at the time, the Tribunal refers to the testimony of the eyewitness who was involved in the incident. Police Officer #1 was in direct contact with the Applicant. He did not notice, at any time, the Applicant suffering from any type of respiratory distress.

It appears that the Applicant's condition was not severe enough to warrant seeking medical assistance immediately after the incident.

The Tribunal finds that there is insufficient evidence, medical and viva voce from the Applicant, to satisfy the Tribunal that the Applicant has a medical condition, which would have prevented the Applicant from providing the demanded breath sample.

The onus being on the Applicant to establish the merit of his appeal, the Tribunal finds that the Applicant has failed to do so. Thus, the Tribunal finds that the Applicant does not meet the criteria of Section 50.1 (2) (b), in that he was not able to demonstrate that he suffers from a medical condition, which would prevent him from providing a breath sample.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated November 4, 2002 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal **confirms** the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D
Presiding Member

RELEASED: February 18, 2003

GALT CHRYSLER DODGE LTD.

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: NIVES MONTANO
Presiding Member

APPEARANCES: ADELAIDE PINDER
Representative for the Registrar of Motor Vehicles

MICHAEL R. LONGO
Agent for the Applicant

DATE OF
HEARING: January 30, 2003

DECISION
RELEASED: February 6, 2003 *by teleconference*

REASONS FOR DECISION

A hearing was held on January 30, 2003, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Galt Chrysler Dodge Ltd. (the "Applicant")
Motor Vehicle:	2002 Chrysler Neon, plate 563 NSW (the "vehicle")
Date of Appeal:	January 10, 2003

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on January 30, 2003 and proceeded as an electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

The Applicant's written submission filed with the Tribunal in support of appeal states:

DRIVER ADVISED US THAT HE HAD A VALID DRIVERS LICENCE WHEN IN FACT HE DID NOT. HE CONTINUED TO DRIVE FOR THE SHORT PERIOD OF TIME HE WAS EMPLOYED BY GALT CHRYSLER DODGE LTD., UNTIL STOPPED BY POLICE AND CHARGED WITH DRIVING WHILE UNDER SUSPENSION.
THE LOSS OF THIS VEHICLE WILL RESULT IN EXCEPTIONAL HARDSHIP.

The following is a summary of Mr. Longo's affirmed testimony.

The Applicant is a full service car dealership which has been in business for the past 33 years in Cambridge, Ontario. Mr. Longo's brother opened the dealership in January, 1970 and Michael Longo commenced working there in February, 1970. Michael Longo currently holds the position of Secretary/Treasurer. The Applicant employs approximately 50 persons. Its number of vehicles consists of 75 new and 50 used vehicles for sale. It operates 6 days a week, Mondays to Saturdays.

The Applicant is the registered owner of the impounded vehicle. The Applicant permits some of its employees to drive the demonstration vehicles or rentals for their own personal use.

In early November, 2002, Mr. Gligor, the driver at the time the vehicle was impounded, called the sales manager employed by the Applicant, to apply for a sales job. He and the sales manager have known each other for many years. Mr. Gligor had been in the car business for some time. He was unfortunately experiencing difficult times with his spouse, a sick child and a business he had lost. Mr. Gligor was hired on November 13, 2002 by the Applicant. His salesman's licence was transferred immediately. All relevant information was obtained. When asked to produce his driver's licence to ensure its validity, Mr. Gligor had indicated that he had left it at home and would produce it the next day. The next day, Mr. Gligor called in sick and did not return to the dealership for 2 weeks. On his return, the administration staff neglected to obtain Mr. Gligor's driver's licence. He worked for approximately 3 weeks before the impoundment.

The Applicant was advised of the impoundment by the sales manager who received a call at home from Mr. Gligor the evening the vehicle was impounded.

Neither the Applicant, Mr. Longo nor the Tribunal are aware of the circumstances surrounding the impoundment, but in reviewing the Notice to Registrar (within Exhibits 3 and 4), it appears that Mr. Gligor was driving while under the influence of alcohol.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows (Exhibits 3 and 4):

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by John Gligor;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until July 25, 2004.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional: Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making

arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Tribunal must determine whether it should set aside the Registrar's order to impound the vehicle on the basis that the owner of the impounded vehicle will suffer exceptional hardship.

The Applicant has appealed on the ground of "exceptional hardship" under section 50.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the criteria the Applicant must meet to determine if in fact "exceptional hardship" will result from the impoundment. The Applicant, in this case, has argued that the impoundment will result in exceptional hardship as described in section 22(2). In order for its appeal to be considered under section 22(2), it must have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulations provides the criteria for demonstrating that every reasonable option has been considered respecting an alternative vehicle.

The Applicant has failed to meet the burden of proof and has failed to establish exceptional hardship.

There was no evidence adduced by the Applicant to indicate whether or not there was an alternative to the impounded vehicle, under section 22(1) or a threat to health or safety of any person ordinarily transported under section 22(1)(a). Since the Applicant failed to show that there was no alternative to the impounded vehicle, under section 22(3), the Tribunal cannot consider the criteria in sections 22(2)(b), (c) and (d). Nor was there evidence regarding section 22(2) namely inconvenience, financial or economic loss, loss of employment or of education or training.

The Applicant may nonetheless pursue compensation from the suspended driver, John Gligor, as provided by in section 55.1(21) of the *Highway Traffic Act*:

"The owner of a motor vehicle that is subject to an order to impound under this section may bring an action against the driver of the motor vehicle at the time the order was made to recover any costs or other losses incurred by the owner in connection with the order".

Accordingly, after considering the criteria set out in section 22 of Regulation 340 as amended by Ontario Regulation 632/98, the Tribunal finds the Applicant has not established exceptional hardship as set out in section 50.2(3)(d) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Nives Montano, Presiding Member

RELEASED: February 6, 2003

STEVE P. SAMKO

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: STUART CORK
Presiding member

APPEARANCES: LYNDA DUNBAR
Representative for the Registrar of Motor Vehicles

STEVE P. SAMKO, Applicant
unrepresented

DATE OF HEARING: February 3, 2003

DECISION RELEASED: February 11, 2003 *by teleconference*

REASONS FOR DECISION

A hearing was held on February 3, 2003, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Steve P. Samko (the “Applicant”)
Motor Vehicle:	1998 Chevrolet GM4 Pickup, plate 2365DY (the “vehicle”)
Date of Appeal:	January 16, 2003

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on February 3, 2003 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

The Respondent submitted a set of copies of documents bearing original copy certification seals, which were entered into evidence, and all documents entered into evidence were with the consent of both parties.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant’s request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant’s appeal.

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant’s evidence follows.

Applicant’s written submission filed with the Tribunal in support of appeal states:

I Steve Samko am appealing the dismission of impoundment of my 1998 chev pickup due to the fact I will suffer great losses and financial hardships. I cannot rely on my family members or taxis services to transport me to work. If I cannot fulfill my job requirements my employer will terminate me. Which will result in financial hardship loss of my family as we will have no place to live. I am law biding citizens in community of lambton country where I have community ties. I will due every thing in my power to prevent others from having accessibility to my vehicle. I never new it was my responsibility to inquire other drivers abstract as this has never happened to me before. So once again I am pleading with you to release my truck into my custody.

(sic)

The Applicant testified that he works as a truck driver, and drives large tractor trailer rigs for a living. He relies upon the impounded vehicle for his primary means of getting back and forth to his job, as well as for shopping and other errands.

He stated that on some occasions, such as when he has an early delivery, his employer allows him to drive the company tractor home, and back to his job the next day. He also stated that he currently has the use of a friend and co-workers second vehicle, that has been loaned to him for the balance of the impoundment period. Furthermore, he could also ask his mother to assist him in his transportation needs if necessary, but only if there were no other alternatives.

Since the impoundment period began, the Applicant testified that he has been able to find alternative means of transportation, either by getting rides from friends, or through the use of his friends borrowed vehicle. He has not lost any time at work since the impoundment of his vehicle began, nor does he expect to. He finds the use of a borrowed vehicle, as well as having to ask others for assistance to be less preferable to having his own vehicle, since he misses having it.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Janice L. Graham;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Fail to Provide Breath or Blood

Sample under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until June 25, 2004.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,

- (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant has appealed on the grounds of exceptional hardship, in accordance with section 55.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the specific criteria the Applicant must meet to determine if in fact exceptional hardship will result from the impoundment. The Tribunal is precluded from considering any other factors not arising from or directly related to the impoundment itself.

In order for the Applicant 's claims to be considered under section 22(2)(a), (b), and (c), he must also have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered for an alternative vehicle. The Applicant has made no specific claims of exceptional hardship as described by section 22(1)(a) or (b) regarding a threat to health or safety of any person ordinarily transported by the motor vehicle, or to public health and safety.

The Tribunal may consider economic loss only if no alternative to the impounded vehicle is available (see subsection 22(3)(a) of that Regulation). The Applicant has established that there are alternatives to the impounded motor vehicle; an alternative vehicle has been kindly provided to him by his friend. Failing that, he indicated that he often can use his company truck to get back and forth to his job or, could still get a ride from his mother. Therefore, as stated, sections 22(2)(a), (b) and (c) cannot be considered.

The Applicant has not presented the Tribunal with any evidence that would demonstrate that every reasonable alternative option has been considered and inquired into as required under section 22(4) of the Regulation. In fact, the testimony of the Applicant was that an alternative was readily available, therefore no further options need be considered.

The Applicant has been able to maintain his daily activities through the use of various alternatives that he has at hand. The Tribunal recognizes that the Applicant has been inconvenienced by the loss of his vehicle, however no evidence was heard that would support a finding of exceptional hardship, nor a loss that was significant or lasting, as required by the Act.

Therefore, the Tribunal finds that the Applicant has failed to meet the onus under section 22(4) of the Regulation and is therefore precluded from considering the Applicant's claim of exceptional hardship under section 22(2) of the Regulation.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

RELEASED: February 11, 2003

1485-ADLS-RESP

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ELIZABETH L. SPROULE
Presiding Member

APPEARANCES: KIM BEINTEMA

Applicant
unrepresented

DATE OF
HEARING: FEBRUARY 20, 2003

DECISION
RELEASED: FEBRUARY 21, 2003

REASONS FOR DECISION

A hearing was held on February 20, 2003, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on February 21, 2003, with Reasons to follow.

THE TRIBUNAL RULED TO SET ASIDE the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated January 15 and 21, 2003, and was received by the Tribunal on February 17 and 22, 2003, together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

“I was unable to provide the required breath sample because of a medical reason.”

Preliminary Matters

The Registrar provided the Tribunal with the original certified copies of the Notice of Registrar and driver record.

Submissions of Written Material

By the Applicant:

- a) Exhibit #1 Suspension Reminder Notice dated January 3, 2003
- b) Exhibit #2 Notices of Appeal dated January 15 and 21, 2003

By the Respondent:

- a) Exhibit #3 Materials and Submissions of the Respondent dated February 13, 2003

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

50.1(1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

(a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or

(b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The Tribunal may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

15. (1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

(a) the name, telephone number and address, with the postal code, of the medical practitioner;

(b) the name, date of birth and address of the person who is the subject of the report;

(c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;

- (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner.

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

The Applicant was stopped by Police Officer #1 at approximately 6 a.m. on January 1, 2003. The Applicant was on his way to work having slept over at a friend's house the night before.

Police Officer #1 testified that he pulled The Applicant over because his vehicle appeared to be weaving, although not crossing the centre line. After giving his licence to the officer The Applicant sat in his car for a few minutes with the window down, exposed to the cold January air. He was then asked to get into the police cruiser to provide a breath sample.

The Applicant testified that he tried to provide a breath sample but began to cough. He stated he attempted a number of times, around 5 or 6, and that his ability to blow decreased with each effort. It was The Applicant's evidence that he tried his best but could not provide a sample due to his coughing and that he had asked the officer if he could be given some other test to show that he was not drunk as he could not provide the breath sample.

The evidence given by The Applicant was not contradicted in any significant way by the evidence of Police Officer #1. He testified that The Applicant was not able on his first attempt to provide a sample that The Applicant did not blow but only made a grunting or groaning sound. He testified that The Applicant did cough during some of his 5 attempts to provide a sample and that these coughing bouts lasted between 5 to 10 seconds. Police Officer #1 confirmed that The Applicant requested he be subjected to some other test to prove his sobriety however it was Police Officer #1's opinion at the time that this was not a genuine cough rather it was merely theatrics on the part of The Applicant.

In support of his appeal The Applicant submitted a letter dated January 14, 2003, from his family physician, Physician #1, who has treated The Applicant since 1985. Physician #1 states in his letter that The Applicant was seen in his office on January 21 and January 27th, 2000, complaining of choking coughs related to cold dry air. The Applicant was then referred to, and subsequently seen by, respirologist Physician #2 on April 13, 2000. He was also referred to and seen by allergist Physician #1 on July 30, 2001. Copies of Physician #2's and Physician #1's assessments were also submitted to the Tribunal. Both reports make reference to The Applicant's symptoms of coughing triggered by cold air.

Exhibit # 3, the Respondents materials, includes a report of respirologist Dr. Roger S. Goldstein who reviewed the reports of Physician #1, Physician #2 and Physician #1. Dr. Goldstein concludes:

"In my view, The Applicant likely does have mild asthma presenting as cough (rather than wheeze) and triggered predominantly by cold air and possible by house dust as well. It is unlikely that asthma of this nature would preclude The Applicant from providing a satisfactory breath sample unless he were exposed to cold air, immediately prior to that sample being requested. This being the case, it is conceivable that repeated coughing might interfere with the delivery of an adequate sample."

The Representative for the Registrar did not make reference to Dr. Goldstein's report. She argued however, that the medical reports provided by The Applicant should be given less weight than the observations and opinion of Police Officer #1 at the time of the breath test.

APPLICATION OF THE LAW TO FACTS:

In order to succeed in this appeal the onus is on The Applicant to establish that he was unable to provide a breath sample for a medical reason. The Tribunal found both The Applicant and Police Officer #1 to be credible witnesses. The differences in their evidence lay primarily in the interpretation of the facts: Police Officer #1 simply believed The Applicant's coughing to be intentional and within his control.

The medical evidence provided by The Applicant supports his claim that he has a medical condition that causes him to cough when exposed to cold air. The Applicant claims this is what prevented him from providing a breath sample and the medical evidence provided by the Respondent suggests this is a possibility.

Based on the sworn testimony and medical evidence provided the Tribunal finds that The Applicant has established the merits of his appeal.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated January 3, 2003 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal orders the suspension set aside.

LICENCE APPEAL TRIBUNAL

Elizabeth L. Sproule
Presiding Member

RELEASED: February 26, 2003

KATHLEEN SUSAN CLARK

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: KENNETH KOPROWSKI
Presiding member

APPEARANCES: ADELAIDE PINDER
Representative for the Registrar of Motor Vehicles

KATHLEEN SUSAN CLARK, Applicant
unrepresented

DATE OF HEARING: February 14, 2003

DECISION RELEASED: February 24, 2003 Toronto

REASONS FOR DECISION

A hearing was held on February 14, 2003, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Kathleen Susan Clark (the "Applicant")
Motor Vehicle:	Plymouth Voyageur, plate 059 YHC (the "vehicle")
Date of Appeal:	January 7, 2003

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on February 14, 2003 and proceeded as a written hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of the Appeal states:

I am a single mother caring for two school age children. My estranged husband has left the country and has not pay court ordered child support on a regular basis nor any costs of the

children for medical or dental. My income barely covers the necessities and there is no money left over for extras.

Having the van impounded has caused extreme financial difficulties for my children and myself and I am now forced to sell it to cover costs and expenses. I have been fortunate enough to be approached by Mr. Bruce Johnston who has offered to purchase the vehicle if it can be available by January 20, 2003. I am enclosing the Offer to Purchase that the Purchases has signed/

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Kathleen Susan Clark;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of impaired driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until March 22, 2003.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
 - (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d), exceptional hardship.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
- (b) financial or economic loss to any person;
- (c) loss of employment or employment opportunity to any person; or
- (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
- (b) the loss will be immediate, significant and lasting;

- (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

In order for the applicant to succeed on the ground that the impoundment order will result in exceptional hardship, she must prove, first, that there was no alternative available to the impounded vehicle, as required by section 22(1) of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98 (the "Regulation").

However, in her letter, the Applicant does not state that there is no alternative available to her impounded vehicle. The Applicant would have to demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to her, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

This the applicant has not done.

Even if the contents of her letter could be interpreted as proving that there was no alternative available, she must also prove that any loss to her of the kind described in section 22(2)(b), (c) and (d) will be immediate, significant and lasting. Here, there is no such evidence.

Furthermore, if no alternative is available, the Applicant would have to show that the impoundment will result in a threat to the health and safety of anyone transported by the vehicle. In addition, the Applicant would have to prove that the impoundment would result in a threat to the public health and safety or to the environment or property of a community in whose service the vehicle is ordinarily used.

The applicant has provided no evidence relating to these criteria.

The Licence Appeal Tribunal was created by the *Licence Appeal Tribunal Act, 1999*. Having been created by statute, the Tribunal has only those powers as are assigned to it under any Act or regulation. The *Highway Traffic Act*, R.S.O. 1990 Chap. H8, with which we are dealing in this case, is one of those acts.

The Tribunal is, therefore, able to consider only that evidence which the *Highway Traffic Act* allows it to consider, as outlined earlier in these Reasons. The Tribunal has no discretion to add to or to delete from any of those provisions.

In effect, this means, among other things, that even though this Tribunal may have some sympathy for the circumstances of the Applicant in this case, this Tribunal must, nevertheless, make its decision solely in accordance with the requirements of the above provisions.

That being the case, this Tribunal concludes, on the evidence before it, that the Applicant has not satisfied the onus of proving, on a balance of probabilities, that the impoundment of her motor vehicle will result in exceptional hardship, because she has failed to prove the elements of "exceptional hardship" as defined earlier in these Reasons.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Kenneth Koprowski,
Presiding Member

RELEASED: February 24, 2003

1488-MED-CARD

Appeal under section 50(1) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Minister pursuant to section 32(12)(b)(i) of that Act.

TO CHANGE THE CLASS OR CLASSES OF
MOTOR VEHICLE IN RESPECT OF WHICH THE
LICENCE WAS ISSUED

TRIBUNAL: ROSS BENNETT, M.D., Presiding Member

APPEARANCES: KIM BEINTEMA
Representative for the Minister

Applicant,
unrepresented

DATE OF
HEARING: February 18, 2003

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Minister (the "Respondent") pursuant to section 32(12)(b)(i) of the *Highway Traffic Act* (Ontario).

EXHIBITS:

- (1) Notice of Change of Class of Driver's Licence effective December 4, 2002 issued by the Ministry of Transportation.
- (2) Notice of Appeal Form received at the Tribunal January 20, 2003.
- (3) Driving Records of the Applicant from the Ministry of Transportation.
- (4) File Summary prepared by the Respondent.

FACTS:

The Applicant, a 58 year old plumber, had his driver's licence downgraded on December 4, 2002 under Section 32(12)(b)(i) of the *Highway Traffic Act* by the Ministry of Transportation. The Applicant had been monitored by the Ministry since 1991, after a Medical Report was received from Physician #1, advising that the Applicant had suffered a Myocardial infarction on April 26, 1990.

The Ministry requested an assessment and a Medical Waiver from a cardiologist in order for the Applicant to maintain his Class "F" licence. A waiver was completed by Physician #2, a cardiologist, on May 16, 1991 and an assessment on May 24, 1991. The waiver was approved by the Medical Advisory Committee and a request was made for an annual assessment. In the following 2 years waivers were approved and the period was extended to every 2 years and then every 3 years and could be completed by his family physician.

In 2002 the Ministry again requested a full assessment and a waiver by a cardiologist. Physician #3 complied with an assessment and a waiver on November 15, 2002. He reported some non-specific ST-T wave abnormalities and ST depressions in the Applicant's ECG suggestive of myocardial ischemia. There was also a dilated left ventricle and the left ventricular ejection fraction was only 25 %. Previous records indicated he had a normal ejection factor in 1991.

Physician #3's crossed out one sentence in the "Physician's Certificate" of the waiver, which stated "Refer to enclosed information sheet in respect to Ontario's licence class structure and related medical requirements." Physician #3's report, however, indicated the Applicant is stable from a cardiac standpoint with no symptoms suggestive of myocardial ischemia.

A Stress Myoview report accompanied Physician #3's assessment with the radiologist's impression:

1. There is no jeopardized myocardium identified.
2. Large dilated left ventricle with low left ventricular ejection fraction and increased end systolic volumes in keeping with left ventricular remodelling.
3. Due to the markedly elevated sum stress score and low left ventricular ejection fraction, the patient is at increased risk of a subsequent cardiac event. The patient would most likely benefit from intervention as opposed to medical therapy alone. The Ministry downgraded the Applicant's driver's licence, because the Applicant's left ventricular ejection is graded below standards for the criteria used as a guideline in assessing fitness to retain the waiver provision.

For a commercial driver the “Determining fitness to Drive” guide for physicians, prepared by the C.M.A. states:

Left ventricle

Class 1: Ejection fraction 50% or more

Class 2: Ejection fraction 35-49%

Class 3: Ejection fraction 20-39%

The Applicant maintains that he has never suffered any chest pain, inspite of maintaining a rigorous exercise program regularly. This includes walks and cycling on a stationary bike 10 miles a day, ball hockey, “Reebok” Spin Classes, golfing, baseball and working out in a gym. His work as a pipe fitter in a factory involves heavy lifting and climbing.

His commercial driving is transporting children in a 15 passenger van twice weekly to church and for recreational activities. It is a volunteer job with no remuneration.

ISSUES:

Should the decision of the Minister to change the class or class of motor vehicles in respect of which the licence is issued in accordance with the result of the examination be varied, modified or set aside?

Does the Applicant no longer suffer from a mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffer from any mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Regulation 340/94, Section 17 and 18 states:

- 17. (1) Qualifications required by an applicant for a holder of a Class A, B, C, D, E or F driver's licence are that the applicant or holder,
 - (a) has no history or clinical diagnosis of diabetes that requires insulin for control;

- (b) is not taking any drug that could, in the dosage prescribed or in the dosage recommended by the manufacturer, impair his or her ability to drive a motor vehicle of the applicable class safely;
 - (c) has no established medical history of myocardial infarction, angina pectoris, coronary insufficiency or thrombosis;
 - (d) has no established medical history of heart disease including arrhythmia or of respiratory dysfunction likely to interfere with the safe driving of a motor vehicle of the applicable class;
 - (e) is not suffering from an aortic aneurysm, whether resected or not;
 - (f) is not suffering from hypertension accompanied by postural hypotension resulting in giddiness when under treatment;
 - (g) has no established medical history of loss of consciousness or awareness due to a chronic or recurring condition;
 - (h) has no established medical history of a disorder of the musculoskeletal or nervous system that may interfere with the safe driving of a motor vehicle of the applicable class;
 - (i) has no established medical history of an intractable psychotic or psychoneurotic disorder, having particular regard for sustained hostile, aggressive, paranoid, suicidal or other destructive tendencies or depression unless it is medically determined that the condition from which the person has suffered is corrected or controlled;
 - (j) has a visual acuity by Snellen Rating, with or without the aid of corrective lenses, no poorer than 20/30 in the better eye and 20/50 in the weaker eye; and
 - (k) has a horizontal visual field of at least 120 degrees in each eye as measured by confrontation tests.
- (2) An applicant for or a holder of a Class A, B, C, D, E or F driver's licence who fails to meet the qualifications referred to in clauses (1)(a) to (i) may, despite the failure, qualify for the class of licence applied for or held if he or she demonstrated the ability to drive a motor vehicle in the applicable class as safely as any person who meets those qualifications.
- (3) An applicant for or a holder of a Class D driver's licence who fails to meet the qualification referred to in clause (1)(c) may, despite the failure, qualify for that class of licence if it is medically determined that he or she has made a full recovery and there is no established history of a second occurrence of myocardial infarction, thrombosis or recurring angina pectoris.
- (4) An applicant for or a holder of a Class B, C, E or F driver's licence whose hearing in one ear is better than in the other must be able to perceive in the better ear, with or without a hearing aid, a forced whisper at a distance of 1.5 metres or, if an audiometer

is used to test the person's hearing, must not have a loss in the better ear of more than 40 decibels at 500, 1,000 and 2,000 hertz.

18. An applicant for or a holder of a G, G1, G2, L, M, M1, M2, or R driver's licence must have,
- (a) in the case of a person whose vision in one eye is better than in the other, visual acuity in the better eye that is no poorer than 20/40 as measured by Snellen Rating; and
 - (b) a horizontal visual field of at least 120 degrees as measured by confrontation tests.

Section 32(12)(b)(i) states:

- 32 No person shall drive a motor vehicle on a highway unless the motor vehicle is within a class of motor vehicles in respect of which the person holds a driver's licence issued to him or her under this Act.
- (12) An applicant for a driver's licence or a person who holds a driver's licence shall submit to the examinations that are authorized by the regulations relating to this section and required by the Minister at the time and places that the Minister may require and the Minister may,
- (b) in the case of a person who holds a driver's licence,
 - (i) impose or remove the conditions or endorsements authorized by the regulations or change the class or classes of motor vehicles in respect of which the licence is issued in accordance with the result of the examinations, or

Section 50 states:

- 50(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or Registrar.

APPLICATION OF THE LAW TO FACTS:

The Minister of Transportation was obligated to downgrade the Applicant's driver's licence under Section 32(12)(b)(i) of the *Highway Traffic Act* when the Medical Report was received from Physician #3 outlining the deteriorating condition of the Applicant's left ventricle.

Regulation 340/94, Section 14 (a) of the *Highway Traffic Act* states:

An applicant for or a holder of a driver's licence must not,

- (a) suffer from any mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely;

In addition, Section 17 (1) states:

- 17. (1) Qualifications required by an applicant for a holder of a Class A, B, C, D, E or F driver's licence are that the applicant or holder,
 - ...
 - (c) has no established medical history of myocardial infarction, angina pectoris, coronary insufficiency or thrombosis;
 - (d) has no established medical history of heart disease including arrhythmia or of respiratory dysfunction likely to interfere with the safe driving of a motor vehicle of the applicable class;

The Applicant has a history of a myocardial infarction in 1990, but no identifiable problems since that time. Medical records indicate that in 1991 he had a normal left ventricular ejection factor. Twelve years later, in November 2002, the Applicant's LV ejection factor is down to 25%, which is in Class # 3 and unacceptable for a commercial driver.

The Tribunal finds that the medical reports disclose a heart condition that does not satisfy the above noted legislation or the guide for "Determining Medical Fitness to Drive". The Tribunal agrees with the Ministry that it would be too much of a risk to reinstate his Class F licence, since he is transporting children.

DECISION:

Upon the application by the Applicant to appeal the decision dated December 4, 2002 of the Minister ("Respondent") to change the class or classes of motor vehicle in respect of which the licence was issued pursuant to Section 32(12)(b)(i) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Respondent and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

Ross Bennett, M.D.
Presiding Member

RELEASED: February 27, 2003

1494-ADLS-ASTHMA

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: LYNDA DUNBAR,
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF
HEARING: February 11, 2003

DECISION
RELEASED: February 12, 2003

REASONS FOR DECISION

A hearing was held on February 11, 2003, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on February 12, 2003, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated January 22, 2003, and was received by the Tribunal on January 22, 2003, together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

The Applicant informed the Tribunal that his witnesses would not be present as they were unable to take time off work. He had not made arrangements to summons them.

The Respondent's Representative asked that the Tribunal delay the start of the hearing until eleven o'clock, in order to allow time for the officer involved in this matter to arrive. Police Officer #1 was summoned, but attended another court. The Tribunal proceeded with the hearing.

The Respondent's Representative subsequently sought permission to introduce into evidence, the Constable's Affidavit, regarding the Applicant's breathalyzer session. No objection being raised by the Applicant, the Tribunal entered PC Police Officer #1's Affidavit as Exhibit #4.

The Applicant claimed that he did not receive the disclosure package forwarded to him by the Ministry. Ms. Dunbar, the Respondent's Representative confirmed that the Registrar's submissions had been sent by Courier to the Applicant's current address, as shown on his driver's licence. Purolator Courier provided the Ministry with confirmation of delivery, signed by Name. The Applicant stated no one by that name lived at his house. Copies of the disclosure documents were given to the Applicant.

The Applicant declined the opportunity to adjourn this matter, in order to have further time to review the disclosure.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Suspension Reminder Notice dated December 12, 2002, issued by the Registrar of Motor Vehicles.
- b) Exhibit # 2 Notice of Appeal Form – received January 22, 2003.

By the Respondent:

- a) Exhibit # 3 Ministry of Transportation submissions – received January 31, 2003
- b) Exhibit # 4 Sworn Affidavit of Police Officer #1 – received February 11, 2003.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

- 50.1(1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
 - (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
 - (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

- 15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
 - (a) the name, telephone number and address, with the postal code, of the medical practitioner;
 - (b) the name, date of birth and address of the person who is the subject of the report;
 - (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

The Applicant's Driver's Licence was suspended "Dec 10 2002" as per Notice of Appeal.

Applicant's Evidence

The Applicant had page 2 of the Notice of Appeal prepared by his physician of " 1 years 6 months", Physician #1.

Page 2 of the Notice of Appeal, prepared by Physician #1, reads as follows:

"Details and Diagnosis of patient's condition ...*Asthma since childhood*);

History of Condition ...*childhood asthma. Getting worse last 3 years...*

Type of Measurements or recent tests taken with (date indicated): Reference to any pathology tests (e.g. PTF (SIC) represent important corroboration of your medical opinion) ...*Referred to a Respiratologist. Spirometry was not performed...*

Relevant details of last visit and when your patient was last seen? ..*30 Dec.02 ...Shortness of breath at times. Using Ventolin inhaler regularly."*

At the hearing, the Applicant testified that he was unable to provide an adequate breath sample due to his deteriorating health. Physician #1, the Applicant's physician has now referred him to a respiratologist.

The night in question was very cold, which, according to the Applicant, aggravated his condition. The Applicant wondered why the officer could not have given him an "eye test" or a blood test.

The Applicant claimed that he had not read what his physician had written in the Notice of Appeal, and could not provide an explanation as to why he did not have a report from the specialist.

The Applicant feels that he is "*qualified*" to appeal as he feels that his condition falls within the category of medical grounds.

In cross-examination the Applicant confirmed that he was given several opportunities to blow into the device, and that he did the best he could, but was not able to satisfy the demand.

The Applicant stated that he was exhausted from work, that he had been in smoke filled prior to being stopped, and described his symptoms at the time of breathalyzer, as "*...short of breath, nauseous...*"

When asked if he had told the officer about suffering from asthma, the Applicant first asserted that he had, then recanted and stated that he was "*...pretty sure...*" and that he "*...must have...*" told the officer.

The Applicant stated that he was coughing and wheezing at the time, not exactly in pain, but feeling some discomfort. Furthermore, being in the back of the cruiser, and fearing being arrested, increased the Applicant's anxiety level. The Applicant repeated several times that he was "*...terrified ...very scared ...very, very scared ...feeling very troubled, very, very troubled...*".

The Applicant stated that he went to his physician, about three weeks later, to find out why he could not provide a breath sample. The Applicant was referred to Physician #2, a specialist, by his family physician as Physician #1 needed "...back up ...to feel comfortable..." about signing the Notice of Appeal form. The Applicant has not in the past been seen by a respiratologist.

The Applicant did not have the inhaler with him at the time of the breathalyzer test, but does use the inhaler about three times a week.

By way of clarification the Tribunal asked the Applicant the date of his last asthma attack. The Applicant replied: "...asthma attack, I do not know what that is ...you mean shortage of breath..."

In his closing remarks the Applicant stated that he was asked to provide a breath sample and did the best he could. The Applicant suggested that there should be alternate methods available to people like him who are unable to provide a breath sample.

The Applicant rebutted the Respondent's Representative closing remarks by repeating his closing remarks.

Respondent's Evidence

The Respondent provided the following Documents:

1. Notice to the Registrar, certified January 28^h, 2003
2. Certified Driving Record of the Applicant, certified January 28th, 2003
3. Vehicle Record, certified January 28^h, 2003

In an Affidavit sworn on February 10th, 2003, Police Officer #1, stated as follows:

" 2. ...trained in the use of the ALCO-TEST since they first came into use... 6. ...stopped the vehicle ...the male driver, identified as The Applicant... 10. ...read the male the approved screening device demand... 11. The Applicant was given a total of 9 attempts using 3 separate mouthpieces to provide a breath sample... 13. ...2nd attempt ...allowed most of the air to go around the mouthpiece ...not creating a seal... 14. ...3rd attempt ...same thing ...did briefly activate the tone but ...stopped for no reason... 15. 4th attempt ...blowing around the mouthpiece ...blowing air so hard past the mouthpiece that I could feel the air on my cheek in the front seat... 16. 5th and 6th attempts ...either not blowing hard enough, or allowing air to escape out of the sides of the mouth piece... 18. ...7th attempt ...observed ...blowing around the mouthpiece ...also puffed out his cheeks to pretend blowing fully... 21. 8th attempt ...was not trying at all... 23. 9th attempt ...results being the same as the 8th ...my opinion he was pretending to blow... 25. ...never stated ...he suffered from any medical condition ...observed no respiratory distress such as coughing, wheezing or being out of

breath... 28. At no time ...advise ...that he had Asthma or that he required a ventilator... 29. ...observed nothing to suggest ...refusal to provide ...due to medical problem...”

For the record, as there was no objection from the Applicant, the Tribunal recessed for a brief period, after the completion of the Applicant's testimony, to wait for Police Officer #1.

Police Officer #1 graduated from the Police College in 1992. Every year, except for two years, since 1992, Police Officer #1 has been involved in the R.I.D.E. programme, which, takes place from November 29th or 30th until January 1st. Police Officer #1 is fully trained in all breathalyzer devices.

Police Officer #1 detailed the events that led to the demand for the breath sample, and basically re-iterated the information contained in his Affidavit.

According to Police Officer #1, the Applicant was given a total of nine attempts to provide a breath sample. Initially, the Applicant was not blowing at all, later, Police Officer #1 observed that the Applicant was blowing around the mouthpiece.

Police Officer #1 is familiar with the symptoms of asthma and has had occasion to test individuals who required the use of inhalers. During the breathalyzer test session, Police Officer #1 did not notice the Applicant showing any signs of discomfort. The Applicant did not ask for medical assistance nor to be allowed to use the ventilator.

The Applicant cross-examined Police Officer #1 by asking the Constable to describe the physical area, where the breathalyzer session took place. The Applicant tried to ascertain whether any exterior noises could have prevented the Constable from hearing the wheezing in the Applicant's breath. Police Officer #1 replied that due to the close proximity, he would have been able to detect any wheezing.

The only medical training that Police Officer #1 has, is sport training, which involves CPR, and is regularly updated. Police Officer #1 is familiar with the symptoms of asthmatics as his wife suffers from the condition.

Police Officer #1 recalled the Applicant asking for an alternate method to provide a sample, but denied the Applicant's contention that the Applicant informed him of being asthmatic.

The Applicant asked the Constable to detail, and the Constable did so, under what circumstances a blood sample could be obtained.

By way of closing remarks, the Respondent's Representative emphasized that it is the Registrar's position that the Applicant does not suffer from a medical condition, which would have prevented him from providing an adequate breath sample. The Applicant has introduced no evidence whatsoever to substantiate his position, no detailed medical reports, and no PFT results.

The officer did not observe any respiratory difficulties. The Applicant did not inform the officer that he was in any type of respiratory distress.

The Respondent's Representative concluded by asking the Tribunal to uphold the decision of the Registrar.

APPLICATION OF THE LAW TO FACTS:

Prior to setting out the reasons for the decision, the Tribunal will address the Applicant's issue as to why he was not asked to provide a blood sample. Subsection 48.3 (3) 1 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H-8 as amended is clear in its provision, the concentration of alcohol in the blood may be obtained "...by an analysis of the person's breath sample or blood taken..." However, the decision to request a blood sample is at the discretion of the officers, according to established policy. At the time, the Applicant showed no visible signs of respiratory impairment, such as wheezing or choking. Thus, the issue of a blood sample is inconsequential.

At issue, is not whether the Applicant was impaired or had been drinking at all. At issue, is did the Applicant have a medical condition that could cause the Applicant to fail or not comply with the breath demand.

The Applicant believes that by virtue of his asthmatic condition, he has sufficient grounds for appeal.

Section 50.1 (2) (b) of the *Highway Traffic Act* allows for an appeal in circumstances where a

"...person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason..."

The Tribunal would like to emphasize, that in the event a medical condition, is established as a fact, the onus is still upon the Applicant, to demonstrate that the condition prevented the Applicant from complying with the demand for a breath sample.

The Applicant would have the Tribunal accept the fact that his asthma is severe enough to prevent him from providing an adequate breath sample. To support his premise, the Applicant submitted a brief report from his family physician confirming that he has had "...*Asthma since childhood ...Shortness of breath at times.*"

When asked if he had seen a respiratologist in the past, the Applicant admitted that his physician had never been concerned enough about the condition to refer the Applicant to a specialist. The Applicant was, further, able to explain for the Tribunal, the reason that, although, according to the physician, the condition is "...*Getting worse last 3 years...*", Physician #1 made no prior referrals until now. Although it appears that the Applicant has

asthma, the Tribunal accepts the observations of the Respondent noting the Applicant's lack of symptoms of asthma and his pretending to blow into the mouthpiece as evidence that the Applicant did not fail or refuse to comply with a brief demand for a medical reason.

In his viva voce evidence, the Applicant stated that he was "...*anxious ...coughing and wheezing...*" at the time of the breathalyzer. As the Respondent's Representative pointed out, at no time, was the Applicant observed, by Police Officer #1, in an afflicted breathing state, nor did the Applicant request medical assistance.

The onus being on the Applicant to establish the merit of the appeal, the Tribunal finds that the Applicant has failed to substantiate the basis for an appeal on medical grounds. Thus, the Tribunal finds that the Applicant does not meet the criteria of Section 50.1 (2) (b), in that he was not able to demonstrate that he suffers from a medical condition, which would prevent him from providing a breath sample.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated December 10, 2002 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal **confirms** the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.
Presiding Member

RELEASED: February 19, 2003

LESLIE JOHN WRIGHT

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: CHARLES SANDIFORD,
Presiding member

APPEARANCES: ADELAIDE PINDER,
Representative for the Registrar of Motor Vehicles

No one appearing for the Applicant

DATE OF HEARING: February 20, 2003

DECISION RELEASED: February 26, 2003 Toronto

ORDER

PURSUANT to the provisions of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8 as amended, Leslie John Wright (the "Applicant"), appealed a decision of the Registrar of Motor Vehicles (the "Registrar") as set out in the Order to Impound, dated January 10, 2003;

WHEREAS the Tribunal set a hearing by teleconference for 2:00 p.m. Thursday, February 13, 2003;

AND WHEREAS the Applicant did not attend in person at the Tribunal's Chambers nor participate in the teleconference;

AND WHEREAS the Tribunal determined that the Notice of Hearing had been served by courier but had not been brought to the attention of the Applicant and therefore did adjourn the hearing until February 20, 2003, by means of an Order dated February 14, 2003.

AND WHEREAS the Applicant was contacted in accordance with the Tribunal's Order of February 14, 2003;

AND WHEREAS on February 20, 2003 no one appeared for the Applicant, nor participated in the teleconference;

THIS TRIBUNAL finds that the Applicant has abandoned his application due to his failure to attend the hearing and failure to participate in the teleconference.

NOW THEREFORE, pursuant to the authority vested in it under section 50.2(5) of the *Highway Traffic Act*, this Tribunal confirms the Order of the Registrar of Motor Vehicles dated January 10, 2003, to impound the Applicant's motor vehicle for a period of 45 days.

LICENCE APPEAL TRIBUNAL

Charles Sandiford, Presiding Member

RELEASED: February 26, 2003

LESLIE JOHN WRIGHT

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: CHARLES SANDIFORD
Presiding Member

APPEARANCES: ADELAIDE PINDER
Representative for the Registrar of Motor Vehicles

LESLIE JOHN WRIGHT, Applicant
Not present

DATE OF
HEARING: February 13, 2003 *by teleconference*

ORDER

A hearing by teleconference was held on February 13, 2003, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended ("HTA" or the "Act").

WHEREAS, at the commencement of the hearing the Applicant could not be contacted at the telephone number supplied to the Tribunal by the Applicant.

AND WHEREAS, upon examining the records of the courier company used by the Tribunal to deliver the Notice of Hearing it was discovered the Applicant had not received notice of the time and date of the hearing;

NOW THEREFORE the Tribunal Orders that:

- 1) The hearing scheduled for February 13, 2003 is adjourned to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 2:00 p.m., on Thursday, February 20, 2003 by teleconference call.
- 2) The Tribunal shall send this order to the Applicant via courier to the address supplied to the Tribunal by the Applicant, and shall also call both telephone numbers supplied to the Tribunal by the Applicant to inform the Applicant of the adjournment of the hearing to the above time and date.
- 3) In the event that the Applicant is not available on the above hearing date the Tribunal shall deem that the Applicant's appeal has been abandoned by the Applicant.

LICENCE APPEAL TRIBUNAL

Charles Sandiford, Presiding Member

Released: February 14, 2003

ZAHARO AIVALIOTOU

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: MALCOLM FEALING, Presiding member

APPEARANCES: LYNDA DUNBAR
Representative for the Registrar of Motor Vehicles

ZAHARO AIVALIOTOU, Applicant
unrepresented

DATE OF HEARING: February 12, 2003

DECISION RELEASED: February 18, 2003 Hamilton

REASONS FOR DECISION

An oral hearing was held on February 12, at Hamilton, Ontario, to consider the Applicant's appeal pursuant to subsection 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to subsection 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under subsection 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under subsection 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Zaharo Aivaliotou (the "Applicant")
Motor Vehicle: 1999 Chrysler, Plate AMSN927 (the "vehicle")
Date of Appeal: January 28, 2003

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in subsection 50.2(3)(d) of the Act.

This matter came before this Tribunal on February 12, 2003, and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of the appeal states:

"On Thursday January 23, 2003, I was awoken by an officer of the Hamilton department that a Rick James had been arrested for being under a suspension. My 1999 Entrepid had been impounded.

I was very upset with what had happened. The officer was saying that the car would be there for 45 days. I am a single mother of a young child and also the sole provider for her. Without the vehicle it makes things very difficult especially with work. I had to miss work and that means no money. I work a very difficult shift and I need transportation. My vehicle is my livelihood and it is very important that I have my vehicle. I had been very worried about how I would be getting to work. I have not been sleeping very good, especially when I can't get a ride.

I work out of town. I worked hard to purchase this vehicle. Mr. James doesn't reside at my residence nor do I want him around. He has betrayed my trust when he took my keys without my permission. I'm a very sensible person. I'm still making my payments on the vehicle and I have no one to turn to."

In her oral evidence Ms. Aivalotou stated that Mr. James had been residing with her when he took the car. According to her, Mr. James knew that he did not have permission to use the automobile.

He waited until she went to sleep after coming off night shift to take the automobile. As a result of her not having the car, Ms. Aivaliotou has lost four days of work. She said that there is no direct bus route to her place of employment, which is in an industrial area near Guelph. She has had to depend on the kindness of friends who have to go out of their way to drive her to work. None of these friends live in Cambridge.

The city bus from Kitchener stops running at 9.00 p.m., and taking a cab from home would cost at least \$40.00 one-way.

When asked about the possibility of her using a visa card to pay for the cab, Ms. Aivaliotou replied that she does not have a card. She has applied for one, but does not expect to get it for at least three weeks.

Besides missing work, Ms. Aivaliotou explained that she has additional expense such as baby-sitting for her thirteen-year-old daughter who she does not like leaving home alone at night.

Ms Aivaliotou said that her monthly expenses consisted of rent: \$760.00; car lease, \$400.00 per month plus other incidental expenses such as groceries, her daughters' extracurricular activities, and household bills. She can make these payments but the additional expense as well of the constant fear that she will not be able to get to work was a hardship.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner.
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Rick James.
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of driving while disqualified under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until 03 October 2004.
5. The Registrar stated that not having use of the car did not pose a threat to the health and safety of either Ms Aivaliotou or her daughter. The financial loss was not significant and lasting. The Applicant had been successful in getting rides to work, although she did say that she had missed four days. She had friends who were driving her to work, and was able to get a credit card if necessary to pay for a cab
6. The Registrar also noted that Ms. Aivaliotou's daughter could walk to school.

LAW:

Subsection 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and subsection 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in subsection 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under subsection 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
 - (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under subsection 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under subsection 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and

- (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Tribunal has found that although the Applicant did not have immediate access to a vehicle, and has been experiencing some inconvenience she has been getting a lift to work. She therefore does have an alternative to her impounded motor vehicle.

The Tribunal notes that Ms. Aivaliotou was indeed experiencing some inconvenience and expense in adjusting to life without her automobile. She was concerned that she was inconveniencing her friends who had to go out of their way to pick her up and drive her to work. She had already lost four days wages and was afraid that if she missed more days, she would not only lose wages but would also get in trouble with her employer. Mere inconvenience cannot be considered.

Since an alternative to the impounded motor vehicle exists, the Tribunal cannot consider subsection 22(1)(a) and (b): threat to health and safety, nor can it consider subsection 22(2): inconvenience, financial or economic loss, loss of employment or of education.

The only other person immediately affected is Ms. Aivaliotou's daughter. The Applicant has stated that her daughter can walk to school.

Although the applicant has experienced some inconvenience and financial loss, there is no evidence before the Tribunal to indicate that she has experienced exceptional hardship as a result of the impoundment of her automobile as defined by the Act and the regulations.

The Applicant does have a claim against the suspended driver for her financial loss and expenses pursuant to subsection 55.1(21) of the *Highway Traffic Act*:

"The owner of a motor vehicle that is subject to an order to impound under this section may bring an action against the driver of the motor vehicle at the time the order was made to recover any costs or other losses incurred by the owner in connection with the order".

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under subsection 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Malcolm Fealing, Presiding Member

RELEASED: February 18, 2003

LUIS CARRILLO

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR
VEHICLE ISSUED BY THE REGISTRAR OF MOTOR
VEHICLES

TRIBUNAL: TERENCE LORETTE
Presiding member

APPEARANCES: ADELAIDE PINDER
Representative for the Registrar of Motor Vehicles

LUIS A. CARRILLO, Applicant
unrepresented

DATE OF HEARING: February 20, 2003

DECISION RELEASED: February 24, 2003 Toronto

REASONS FOR DECISION

A hearing was held on February 20, 2003, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO SET ASIDE the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: 1343185 Ontario Inc. (the “Applicant”)
Motor Vehicle: Ford MHV, plate 2510JY (the “vehicle”)
Date of Appeal: February 3, 2003

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on February 20, 2003 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant’s request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant’s appeal.

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant’s evidence follows.

Applicant’s written submission filed with the Tribunal in support of appeal states:

I, Luis A. Carrillo did not know about the driver's suspension. If I had any idea about it, I would have never let him drive the truck.
The truck is my business, that's how I make a living, support my family and pay my bills.

That is why I'm appealing. I need my truck back. (A.S.A.P.) I will have a lot of financial problems, specially if the holidays just ended.

Both Mr. Luis Carillo (the Applicant) and his son Christopher Carillo (driver of the vehicle) were in attendance at the hearing.

The Applicant testified that in 1999 he and his young son joined forces in expanding the family owned delivery and courier business. At that time the Applicant purchased a second vehicle for his son to drive and both set about securing new clients. They were successful and the business was soon keeping them and the two delivery vehicles busy. The Applicant further testified that their current business was steady, from long standing clients and the result of a good work ethic. The Applicant expressed his surprise and disappointment at discovering that his son, who lives on his own, had deceived him about his driving record and stated that his son would never be allowed to drive for him again.

The Applicant went on to testify that the impoundment of one of the business's trucks had put a severe strain on the business's ability to perform for its clients and the business was in jeopardy of losing some of its delivery contracts. He further stated that while many of his customers were sympathetic to his loss they had goods that needed to be shipped under contract and they could not wait for him to get his business back in order.

The Applicant also stated that he had investigated replacing the impounded vehicle with a rental unit but concluded that the operating costs (rental fee, insurance, fuel and driver) were far too expensive and would mean that he would be losing money daily and he needed this money to support his family.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of 1343185 Ontario Inc. as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Christopher Paul Carrillo;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving with more than 80 mgs

Alcohol in Blood under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until August 22, 2003.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional: Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,

- (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis of exceptional hardship?

Section 50.2(3)(d) of the Act provides for an appeal on this basis and Section 22(3)(a), (b), (c) and (d) provide very specific criteria that the Applicant must meet to determine if exceptional hardship under the Act will result from the impoundment and it is the Tribunal's opinion that the Applicant did provide sufficient evidence to support his appeal. The Tribunal is satisfied that

the Applicant examined all reasonable options with regards to using an alternative vehicle and that the Applicant's business has suffered losses that are immediate, significant and lasting. The impact of these losses will be upon the Applicant's business and in as much as he is self employed the losses will adversely affect him and his family.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal sets aside the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Terrence Lorette, Presiding Member

RELEASED: February 24, 2003

HIGHWAY TRAFFIC ACT
R.S.O. 1990, Chap. H.8 as amended

IN THE MATTER of the ORDER to IMPOUND a MOTOR VEHICLE Order # 3601801 OWNED BY: Andex Xpress Inc. of: 320 Vansickle Road, Unit 9-12, St. Catharines, Ontario, L2R 6P7 made pursuant to section 55.1 of the *Highway Traffic Act*, effective on: January 20, 2003.

AND IN THE MATTER of a requirement for a hearing respecting an appeal of the said Order to Impound, pursuant to section 50.2 of the *Highway Traffic Act*.

ANDEX XPRESS INC.

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

CONSENT ORDER

Upon the application to the Tribunal by the Andex Xpress Inc., Applicant, and by the representative for the Registrar of Motor Vehicles, for the issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22, and having reviewed the written settlement signed by the Applicant and the Registrar of Motor Vehicles as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the facts and on the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: February 7, 2003

Schedule "A"

LICENCE APPEAL TRIBUNAL

Between:

ANDEX XPRESS INC.

Applicant

-and-

THE REGISTRAR OF MOTOR VEHICLES

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

1. On January 20th, 2003, the motor vehicle described in **Order to Impound #3601801** was impounded in accordance with subsection 55.1(3) of the *Highway Traffic Act*, RSO 1990, c. H. 8 as amended.
2. The Applicant, Andex Xpress Inc., whose name is shown on the plate portion of the permit for the impounded motor vehicle, is the owner of the said vehicle.
3. No other order to impound under section 55.1 of the Act has ever previously been made with respect to any motor vehicle then owned by the Applicant.
4. The Applicant filed an appeal to the impoundment order, in accordance with the grounds permitted under clause 50.2(3)(c) of the *Highway Traffic Act*, stating **that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension.**
5. Materials provided to the Registrar and investigations conducted by the Registrar indicate that the Applicant did exercise due diligence to determine that the driver's licence was not suspended.
6. The Applicant has had the opportunity to obtain independent legal advice with respect to consent to this Order.

7. The parties agree that this agreement does not bind the Ministry of Transportation or the Registrar of Motor Vehicles in any way, with respect to future hearings or consent orders.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsection 50.2(5) of the *Highway Traffic Act* that the Tribunal set aside the order to impound.

**Chris Cavallin,
Representative for Andex Xpress Inc.**

The Registrar of Motor Vehicles

(signature of Applicant)

(signature of Registrar)

(date)

(date)

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
JOSEPH FINE CAR SALES LTD. AND RIADH JIRJIS

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATIONS
- Proposal dated: February 6, 2003

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal
JOSEPH FINE CAR SALES LTD. AND RIADH JIRJIS

Applicants

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Joseph Fine Car Sales Ltd. and Riadh Jirjis, Applicants, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicants and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: February 13, 2003

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
789 Don Mills Road, Suite 800
Toronto, Ontario M3C 1T5

AND TO: Licence Appeal Tribunal
1 St. Clair Avenue West
12th Floor
Toronto, Ontario M4V 1K6

From: Joseph Fine Car Sales Ltd.
50 Arrow Road, Unit 5
Weston, ON M9M 2L8

Riadh Jirjis
322 Beverly Glen Blvd.
Thornhill, ON L4J 7S7

In accordance with Section 4.1 of the *Statutory Powers Procedure Act*, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereinafter the "Act") the parties to the proceeding, Joseph Fine Car Sales Ltd Inc. (hereinafter referred to as "the Dealer") and Riadh Jirjis (hereinafter referred to as the "Salesperson"), and the Registrar, *Motor Vehicle Dealers Act* (hereinafter the "Registrar") waive the requirement of a hearing and hereby consent to an Order of the Licence Appeal Tribunal (hereinafter the "Consent Order") based on the following terms and conditions to their registrations as a motor vehicle dealer and salesperson:

1. The Dealer will comply with all aspects of the Retail Sales Tax Act with regards to filing, and ensuring all tax collections are accurately reported and remitted to the Minister of Finance when due.
2. The Salesperson agrees that he shall successfully complete the OMVIC certification course within 4 months of the date of this order.
3. The Dealer and Salesperson acknowledge and understand that the Dealer will not retain the services of a salesperson unless the salesperson is registered as a salesperson to the Dealer.
4. The Dealer and Salesperson agree that they will not be involved in the process of buying, selling and leasing motor vehicles without the benefit of registration.
5. The Dealer and Salesperson further acknowledge that the restrictions concerning the activities of a salesperson referred to in these terms and conditions applies to buying, selling and leasing on behalf of a dealer. "Buying, selling and leasing" refers to showing a vehicle to a prospective purchaser or any form of negotiation concerning the purchase, sale or lease of a motor vehicle and is not limited to the signing of contracts. This further includes attendance at auctions on behalf of the Dealer.
6. The Dealer and Salesperson agree to maintain a garage register in accordance with the Highway Traffic Act and will maintain all books and records as required by the Motor Vehicle Dealers Act. The Dealer and Salesperson further agree to provide free access to the books and records of the Dealer to any authorized representative of the Registrar.
7. The Dealer and Salesperson agree that all books and records shall be kept at the Dealer's registered premise, and shall be available to an inspector or investigator appointed by the Registrar, at all reasonable times.
8. The Dealer agrees to maintain a sign at the Dealer's registered premise that will be visible to the

public.

9. The Dealer agrees to operate exclusively from the location approved by the Registrar. The Dealer agrees to apply for the Registrar's approval, by way of prior written notice, of any change in location in the form required by the Registrar.
10. The Dealer and Salesperson agree not to invite the public to deal at a place other than his approved location.
11. The Dealer will not conduct any purchases with anyone who is in the business of buying, selling and leasing motor vehicles without confirming that the person is registered as a Dealer under the Motor Vehicle Dealers Act.
12. The Dealer will ensure that all advertisements placed by or on behalf of the Dealer will identify the registered name and the address of the location approved by the Registrar.
13. The Dealer will ensure that any vehicle sold is registered in the name of the purchaser in the records of the Ministry of Transportation before releasing the vehicle to the purchaser.
14. The Dealer will not purchase a vehicle without ensuring that the vehicle is registered to the seller in the records of the Ministry of Transportation.
15. The Dealer agrees to register all vehicles purchased within 6 days in accordance with the Highway Traffic Act.
16. The Dealer and Salesperson agree that they are under a positive obligation to disclose in writing, on the bill of sale, all material facts about the vehicles he sells to his purchasers. Purchasers include both retail and wholesale buyers. Material facts such as, but not limited to: salvage, previous salvage, accidented and repaired, theft recovery, previous taxi cab, previous police car, previous daily rental, write off, unibody damage, frame damage and any other material fact that may affect one's decision whether or not to purchase said vehicle. The Dealer and Salesperson agree to make reasonable efforts to research the history of all the Dealer's vehicles prior to sale to ensure all material facts are disclosed. The Dealer and Salesperson agree that should any information come to light, which the Registrar deems to be a material fact concerning a vehicle the Dealer has sold, the Dealer will comply with all reasonable requests made by the Registrar to provide compensation to the purchaser.
17. The Dealer and Salesperson agree that they will make full disclosure to all purchasers regarding the distance travelled of vehicles sold. The Dealer and Salesperson agree to make full disclosure with respect to the distance travelled of vehicles sold in accordance with the Standards of Business Practice.
18. The Dealer and Salesperson will not directly or indirectly cause the odometer reading on any vehicles, purchased or sold, to be altered in any way.
19. The Dealer and Salesperson acknowledge and understand that their registrations will not be used to buy or sell motor vehicles where the Dealer or Salesperson knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
20. The Dealer will comply with the Ontario Motor Vehicle Industry Council's Code of Ethics and Standards of Business Practice.
21. The Dealer and Salesperson acknowledge that the Registrar may take further administrative action in the form of a proposal to revoke his registration, arising from any matters that have occurred or may occur related to honesty, integrity, financial position and/or compliance with these terms and

conditions.

22. The Dealer and Salesperson acknowledge that the Registrar may take legal action, including Provincial Offences prosecution arising from actions related to the purchase, sale or lease of motor vehicles that may have occurred in the past or that may occur in the future.
23. The Dealer and Salesperson agree and acknowledge that should they breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
24. The Dealer and Salesperson hereby consent to an Order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
25. The Dealer and Salesperson hereby withdraw their appeals to the Licence Appeal Tribunal.
26. The Dealer and Salesperson hereby acknowledge that they have obtained or have had the opportunity to obtain independent legal advice with respect to the their consent to the terms and conditions set out in this document.

Signed in the City of _____ this _____ day of _____ 2003.

Joseph Fine Car Sales Ltd
I have the Authority to bind the dealership.
(Signature)

Riadh Jirjis (Signature)

These terms and conditions are acceptable to the Registrar, *Motor Vehicle Dealers Act*.

Date:

Carl Compton
Registrar

ONTARIO HISTORICAL SOCIETY

IN THE MATTER OF the *Cemeteries Act (Revised)*,
R.S.O. 1990 Chapter C.4 as amended;

AND IN THE MATTER OF an Application by the Ontario
Historical Society dated June 29, 2001 for a hearing before
the Licence Appeal Tribunal pursuant to Section 10 of the
Cemeteries Act (Revised) appealing an Order to Close Part
of the St. Alban's Cemetery of the Registrar, *Cemeteries Act*,
dated June 8, 2001;

AND IN THE MATTER OF St. Alban's Cemetery, Palgrave,
Ontario.

TRIBUNAL: JOHN ORT, Presiding Member
SIMON DANN, Member
MALCOLM FEALING, Member

APPEARANCES: CATHERINE BRAY, Counsel, representing the Applicant,
the Ontario Historical Society,
JAMES STEBBING, Counsel, representing the Registrar,
Cemeteries Act,
MELISSA BARNETT, Agent, later Counsel, representing the
Added Parties, the Incorporated Synod of the Diocese of
Toronto (the "Diocese") and Gordon Barr

DATES OF HEARING: April 22, 23, 24, 25 and 26, 2002;
September 17, 18, 19, and 20, 2002;
December 9 and 10, 2002; and
January 13, 14, and 15, 2003. Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") by the Ontario Historical Society ("OHS" and the "Applicant") pursuant to Section 10 of the *Cemeteries Act (Revised)* (the "Act") respecting an Order to Close Part of the St. Alban's Cemetery dated June 8, 2001 (the "Order") made by the Registrar, *Cemeteries Act* (the "Registrar" and the "Respondent").

The Order states the following:

THEREFORE IT IS ORDERED, pursuant to Section 9(1) of the *Cemeteries Act (Revised)* that St. Alban's Cemetery, part of the west half of Lot 27, Concession 7, Township of Albion, Town of Caledon, and more specifically identified as Lots 3 and 4 of the Plan of Subdivision of the Village of Palgrave, Region of Peel, Province of Ontario is closed, save and except for the part situated on the northwest corner of the cemetery that is sufficient in size to retain all of the human remains and their associated artifacts and grave goods that remain in the entirety of the cemetery, in the same style of burial that they are currently in (i.e. single interment to be retained as single interment, multiple interments to be retained as multiple interments, etc.) and that the minimum size to be retained as cemetery is the size proposed by the owner, 25' by 25'".

The Order further specifies that the location, the disinterment and the re-interment of human remains is to be done by skilled, experienced, and licensed archaeologists. No forensic or scientific analysis of the human remains, the associated artifacts, and the grave goods is to be permitted.

St. Alban's Cemetery is inactive. A church building remains on the grounds.

ISSUE:

Is the partial closing of St. Alban's Cemetery in the public interest pursuant to subsection 8(2) of the *Cemetery Act*? What action, if any, should the Tribunal direct the Registrar to take?

EXHIBITS:

Exhibit #1 - Notice of an Order and Order to Close Part of the St. Alban's Cemetery issued by the Registrar, *Cemeteries Act*, dated June 8, 2001;

Exhibit #2 - Notice of Appeal received at the Tribunal June 28, 2001, filed by the Applicant;

Exhibit #3 - Pre-hearing Order released by the Tribunal October 6, 2001;

Exhibit #4 - Motion Ruling released by the Tribunal March 4, 2002;

Exhibit #5 - Further Pre-hearing Order released by the Tribunal April 5, 2002;

Exhibits #6 - #11 - Documents of the Registrar, *Cemeteries Act (Revised)*:

Exhibit #6 - Volume 1, Tabs 1 - 25;

Exhibit #7 - Volume 1, Tabs 26 - 50;

Exhibit #8 - Volume 2, Tabs 1 - 30;

Exhibit #9 - Volume 2, Tabs 31 - 50;

Exhibit #10 - Volume 3, Tabs 1 - 50; and

Exhibit #11 - Volume 4, Tabs 1 - 17;

Exhibit #12 - Exhibits of the Added Parties;

Exhibits #13 - #15 - Documents of the Ontario Historical Society:

Exhibit #13 - Tabs 1 - 15,

Exhibit #14 - Tabs 16 - 19, and

Exhibit #15 - Tabs 20 - 26;

Exhibit #16 - Curriculum vitae of Paul Johnston;

Exhibit #17 - Witness statement of Paul Johnston;

Exhibit #18 - Fax transmittal sheet of Barr & Associates dated May 3, 2000;

Exhibit #18A - Appointment for and Notice of Hearing issued by the Tribunal dated January 4, 2002, and attached Notice of Motion;

Exhibit #19 - Public interest memo, provided by the Registrar;

Exhibit #20 - Curriculum vitae of Heather Broadbent;

Exhibit #21 - Sketch made by Heather Broadbent;

Exhibit #22 - Curriculum vitae of David Ostler;

Exhibit #23 - Corporation of the Town of Caledon memo regarding Public Information Meeting on September 4, 1996;

Exhibit #24 - Letter from Town of Caledon to Juli Laudadio dated June 1, 1996;

Exhibit #25 - Curriculum vitae of Bonnie Glencross;

Exhibit #26 - Site Plan;

Exhibit #27 - Notes of the Registrar regarding May 30 or 31, 2001, meeting;

Exhibit #28 - Proposal for archaeological assessment of cemetery;

Exhibit #29 - Affidavit of Katherine Kiang;

Exhibit #30 - Resume of Dorothy Duncan;

Exhibit #31 - Resume of Marjorie Stuart;

Exhibit #32 - Real estate closing documents, provided by Mr. Barr;

Exhibit #33 - Curriculum vitae of Douglas Leighton;

Exhibit #34 - Unsworn affidavit of James E. Rowley and Darlene Rowley;

Exhibit #35 - Affidavit of Robert Charles Rowley;

Exhibit #36 - Curriculum vitae of Diane Clendenan;

Exhibit #37 - Motion Record of the Added Party Respondents, the Moving Parties;

Exhibit #38 - Motion Record of the Responding Party, the Applicant; and

Exhibit #39 - Letter from Catherine Bray to the Ministry of Attorney General; Osler, Hoskin & Harcourt LLP; and the Tribunal.

PRELIMINARY MATTER:

The Tribunal was concerned that witnesses may change their testimony upon hearing the evidence of others. Thus, the Tribunal ordered the exclusion from the hearing room of witnesses other than experts and parties.

FACTS:

The evidence presented by the Registrar consisted of the testimony of Michael D'Mello, Registrar, *Cemeteries Act*, Heather Broadbent, David Ostler, and Bonni Glencross as well as documentary evidence introduced through them. Testimony of the Venerable

Archdeacon Huskins, retired Rev. Canon Donald Bone, and Gordon Barr together with documentary evidence introduced through them constituted evidence on behalf of the Added Parties. The Applicant's evidence consisted of the testimony of Dorothy Duncan, Marjorie Stuart, Paul Johnston, and Dr. Douglas Leighton and evidence introduced through them.

Michael D'Mello, Registrar, Cemeteries Act

Mr. D'Mello was a police officer from 1976 to 1987 and an investigator for the Ministry of Consumer and Business Services from 1994 to May 2001. In May and June of 2001, he job-shadowed the preceding Registrar, Cora dela Cruz. Mr. D'Mello has been Registrar since June 1, 2001. He issued the Order, exhibit 1, on June 8, 2001, after reviewing the file and discussing the matter with his predecessors.

On August 21, 1996, the Registrar received a Notice of Intention to Apply for an Order to Close a Cemetery from St. Alban's church, as shown at tab 21 of exhibit 6.

Mr. D'Mello stated that notice of the intention to make the Order was given in the manner and to the persons prescribed. His staff advised him that such was the case. The initial notice stated that the entire cemetery was to be closed.

Tab 21 of exhibit 6 contains a letter from Isabella Hyndman, Church Warden, St. Alban's Anglican Church, asking the Ontario Gazette to publish the first notice. Exhibit 29 contains a copy of the notice published in the Ontario Gazette. Tab 33 of exhibit 7 is a letter dated October 17, 1996, from Isabella Hyndman stating that a notice was published in the Ontario Gazette and for two consecutive weeks in The Caledon Citizen. An invoice from the Caledon Citizen for a "display Aug. 21 & 28" is enclosed. Ms. Hyndman also says that the notice was posted at the entrance to the cemetery.

Tab 41 of exhibit 7 contains a letter dated November 1996 from Coira dela Cruz, Deputy Registrar, *Cemeteries Act*, stating that the notice that is posted at the entrance to the cemetery, being 8 ½" by 14", is too small to be conspicuous and advising that a sign of 4' by 4' at that location would be conspicuous. A notice of 12' by 4' was posted on December 13, 1996, as stated at tab 43 of exhibit 7.

On February 28, 1997, a public meeting was held in Palgrave to discuss the application to close the cemetery.

In about 1997 Gordon Barr purchased the cemetery lands.

Notification of the intention to order the closure of the cemetery was sent by a registered mail letter from Cora dela Cruz, A/Registrar, dated July 20, 2000, set out at tab 26 of exhibit 8. It was sent to the Town of Caledon, the municipality in which the cemetery is located, Local Architectural Conservation Advisory Committee, Downsview, ON, the Ontario Historical Society, the Ontario Archaeological Society, the Ontario Genealogical

Society, but not to the Archives of Ontario or the Minister of Culture and Communications. A Cemetery Closure Application Summary Sheet, tab 39 of exhibit 7, shows to whom notice was sent. Copies of various registered mail receipts are provided. The letter of July 20, 2000, states, "If you intend to make submissions, please forward them...before August 15, 2000."

On August 18, 2000, Gordon Barr submitted an Application to Close a Cemetery, tab 34 of exhibit 9, substantially repeating information in the Application to Close a Cemetery of St. Alban's Church.

By letter dated January 26, 2001, Gordon Barr advised the Registrar that he wishes to provide the option of closing only part of the cemetery. That option was chosen. Mr. D'Mello testified that no new Application to Close a Cemetery for closure of only part of the cemetery was required because the change in area being closed was not significant enough.

A second notification was sent by Cora Dela Cruz, A/Registrar, on February 26, 2001, tab 50 of exhibit 9. It was sent to the same parties as on June 20, 2000, as shown by the list at tab 26 of exhibit 8. Copies of various registered mail receipts are at tab 1 of exhibit 10. This second notification letter proposes that a portion of the cemetery, 25' by 25', is to remain open. The letter invites submissions as follows: "If you intend to make submissions, please forward your submissions in writing to the attention of the Registrar on or before March 15, 2001."

Written submissions were received from Alan Potts of Toronto, who objected to the closing of the cemetery, as shown in letter dated June 26, 1997, at tab 5 of exhibit 8; Rita Reid of Bolton, who expressed no objection to moving the remains of her uncle to Morningside Cemetery, as stated at tab 26 of exhibit 7; the Ontario Historical Society, tabs 6 and 19 of exhibit 8; the Ontario Genealogical Society, tab 29 of exhibit 7 and tab 7 of exhibit 8; Marjorie Stuart, tabs 8 and 18 of exhibit 8; the Halton-Peel Branch of the Ontario Genealogical Society, tab 10 of exhibit 8; the Ontario Archaeological Society, tab 25 of exhibit 6; the Diocese of Toronto, Anglican Church of Canada, tab 1 of exhibit 8 and tab 42 of exhibit 9; Michael Reed, Counsel for Gordon Barr, tab 44 of exhibit 7; Catherine Bray, Counsel for the Ontario Historical Society, tab 37 of exhibit 9 and tab 37 of exhibit 9; as well as Glenn Barr on behalf of Gordon Barr, tab 20 of exhibit 8, tabs 41 and 44 of exhibit 9. Mr. D'Mello testified that he took into account all submissions before making the Order.

The letter from Canon Bone of the Diocese dated October 17, 2000, tab 42 of exhibit 9, states the following:

While there have been many arguments put forward as to why the cemetery should be closed and why it should not, one thing that seems to have been forgotten here is that the cemetery was supposed to have been closed in the 1920's. This was between seventy and eighty years ago!...The Church has a strong desire to complete the closure...

The Registrar also reviewed and considered the St. Alban's Anglican Church & Cemetery Assessment (the "Assessment") prepared by Bonnie Glencross and Karla Bondy, tab 48 of exhibit 7; the unsigned draft Site Plan Agreement among the Town of Caledon, the Regional Municipality of Peel, and Gordon Barr, tab 20 of exhibit 8; and letters from the Town of Caledon, tab 49 of exhibit 7 and tab 9 of exhibit 8. The letter from the town dated March 3, 1997, states, "The fact that burials have been relocated from this cemetery in the past regrettably makes it a poor candidate for preservation. Consequently this office and the heritage advisory committee to Council, after due consideration, did not have an objection to this closing." The July 2, 1997, letter from the town adds the following:

It is with some relief that the Town of Caledon now hears that the owner has proposed that the entire cemetery will be closed at this location, and that all remaining and previous grave sites will be identified, evaluated and if necessary, excavated and re-interred. I am pleased to inform you that the municipality is much happier with this arrangement than previous scenarios.

Mr. D'Mello also considered the Act, regulations under the Act and the *Ontario Historical Society (Re)*, a decision of the Licence Appeal Tribunal released February 24, 1999, (the "Clendennen Decision"). He concluded that closure of part of the cemetery is in the public interest. Mr. D'Mello states in the Order, exhibit 1, that such closure will,

- result in a reorganization of human remains remaining in the cemetery and enable land that will no longer be used for cemetery purposes to be used for other purposes.
- result in the remaining cemetery lands being better marked and more readily identified and commemorated by future generations;
- ensure that the cemetery, although reduced in size, will continue to be in the same location, more visible and accessible to the public and properly cared for and maintained; and
- will result in the restoration and preservation of the historical church structure and the designation under the *Ontario Heritage Act*;

Exhibit 1 includes a list of recipients of the Order. A copy was sent to the LACAC to a Downview, Ontario address. No copy of the Decision was sent to Mr. Potts of Toronto, although he sent a letter opposing closure of the cemetery, tab 5 of exhibit 8.

Mr. D'Mello testified that he received no new information that would now persuade him to make a different order.

St. Alban's Cemetery has no interment rights holders.

Heather Broadbent

Ms. Broadbent's curriculum vitae appears at tab 16 of exhibit 11. She was the president of the Ontario Historical Society from 1982 to 1983 and remains a member. She was also chair of the Caledon Heritage Committee and LACAC from 1981 to 2000. Further, Ms. Broadbent has been Heritage Resource Officer for the Town of Caledon, as a volunteer for eleven years and as an employee for an additional fourteen years. Her

position with the town included looking after the town's cemeteries. The Tribunal accepted Ms. Broadbent as an expert in heritage resources for the Town of Caledon, including Palgrave.

Heather Broadbent personally attended St. Alban's Church. She is familiar with the cemetery.

St. Alban's church was constructed in 1882. The cemetery may have been used even earlier. Burials at the cemetery stopped in 1919 during a typhoid outbreak. It was thought that dead bodies could cause the disease. In the 1960s a Sunday school on stilts was added. Still later, a little building containing a kitchen and a washroom was added to the Sunday school. In the eighties, a septic system was put in with the septic field installed about three to four feet below ground. Services at St. Alban's Church ceased in the 1990s. The Sunday school was used until 1995 or 1996. Past members of the church continued to look after the grounds. On occasion, Ms. Broadbent picked up empty beer bottles on the site.

The church building remains on the lands. Heather Broadbent described it as a local landmark that is not terribly significant architecturally. She knows of no other cemetery that had a septic field installed.

Ms. Broadbent testified that another cemetery in Palgrave had buried bodies removed and reinterred elsewhere.

Heather Broadbent believes that the construction on the site proposed by Gordon Barr would not affect the value of the cemetery as a historical resource. Ms. Broadbent supports the Registrar's Order.

David Ostler

Mr. Ostler has been the City Solicitor for the Town of Caledon since 1981. The Tribunal accepted him as an expert in planning law.

Before 1989 the Palgrave area was not zoned. In 1989, while the Diocese owned the cemetery, the site was zoned institutional. In June 1996, the town received a rezoning application from Gordon Barr to allow the existing church to be converted to a commercial building for the purposes of a business office and dwelling unit. The construction of an addition on the north side of the church was also proposed.

Planning staff recommended approval of the application subject to site plan approval and the owner fulfilling the requirement of the Act for the relocation of graves, as set out at tab 14 of exhibit 11. The planning comments state, "since the existing building and the addition are proposed to be designed with the merits of the existing heritage features of the building, the building and addition will be in keeping with the existing development of the area and the existing church on the property."

In reviewing the rezoning application, the Caledon Heritage Committee, the LACAC, and the Heritage Resource Office at tab 4 of exhibit 12, "expressed support for the application as it provided for the retention of the historic church, and addressed the existence of the unknown number of burials under the Provincial Regulations of the *Cemetery Act*."

In October 1996, a zoning by-law, tab 6 of exhibit 12, was passed changing the zoning of the site to village commercial. No appeals were made to the rezoning by-law, as stated at tab 14 of exhibit 11. Tab 13 of exhibit 11 sets out the uses permitted in a Village Commercial Zone. Allowed non-residential uses include a business office, a parking lot, a professional office, and a retail store. An accessory residence is also permitted.

The proposed building of an addition on the site triggered the site plan process. The Town of Caledon had a draft Site Plan Agreement, tab 20 of exhibit 8, prepared by an outside solicitor. The draft agreement among Gordon Barr, the Town of Caledon and the Regional Municipality of Peel assumed that the entire cemetery would be closed. The usual procedure would be for Gordon Barr to sign the agreement first. Mr. Ostler has not seen a copy of the agreement with Mr. Barr's signature on it.

The Site Plan, exhibit 26, shows the church building, the proposed addition, the proposed garage, and the existing septic tank tile system at the back of the church. The zoning by-law required six parking spaces to be included.

The draft Site Plan Agreement (the "Draft"), tab 20 of exhibit 8, required Mr. Barr to gratuitously convey to the region a five metre road widening. He did so. The five metres extend over the part of the cemetery that the Registrar proposes be retained on the site. Mr. Ostler testified that the region wanted the five metres of land to conform to its official plan. The Draft requires that prior to issuance of building permits for the addition, the cemetery be closed. It also states that Mr. Barr agrees to apply to have the church building designated pursuant to the *Ontario Heritage Act*. Mr. Ostler said that Mr. Barr wanted that clause included. He added that the town cannot deal with architectural details in a site plan agreement. The Draft also requires the owner of the site to maintain the buildings on the lands in a good state of repair and to maintain the exterior of the buildings in a reasonably clean and tidy condition. Mr. Ostler called those requirements pretty standard.

The site is about 1,500 square meters. It is surrounded by a single-family residential development to the north, south and east. Highway 50, a regional road, lies to the west. On the west side of the highway are buildings used for commercial and residential uses. Municipal water is available via a water main on Highway 50. Municipal sanitary sewer service is not available at the site. There is a three-foot-high concrete retaining wall at the front of the property that constrains access. The Town of Caledon has no requirement or parking for the cemetery. Street parking is available in front of the site.

Bonnie Glencross

Ms. Glencross obtained a Master of Arts in Anthropology in 1992. She is now a Ph. D. Candidate at the Department of Anthropology of the University of Toronto. The Tribunal accepted Ms. Glen-cross as an expert in archival research.

Bonnie Glencross is the senior of the two authors of the St. Alban's Anglican Church & Cemetery Assessment (the "Assessment"), tab 48, exhibit 7. The Assessment was undertaken on behalf of the St. Alban's Church wardens.

Two stone markers at St. Alban's for James Rowley and John E. Rowley are the only visible physical evidence of interments still present. Both markers have been moved.

Upon consulting various sources, including the *Beeton and Tottenham, St. Alban the Martyr Palgrave Parish Register* and *Baptisms, Marriages, Burials, Christ Church Bolton*, the authors of the Assessment prepared a list of thirty possible burials at St. Alban's Cemetery. Ms. Glencross admitted that there could be other burials that were not listed in the sources.

The Assessment quotes Perkins Bull's 1937 book *From Strachan to Owen* as follows: "In the eighties [1880s] complaints were made that wells in the neighbourhood were being polluted." The Assessment continues, "In 1890 an inquiry was made by the Board of Health but, no decision was reached. Use of the cemetery continued until 1925 when Morningside Cemetery was purchased. Shortly after, the majority of interments were removed..."

To confirm removal and relocation, the authors of the Assessment checked each name on their burial list against various records. Dates of birth and dates of death were also checked.

The Assessment concludes, "From our original burial list of thirty interments, we have confirmation of burial elsewhere for fifteen persons and three (Lipsett's) that are thought to have likely never been buried at St. Alban's. This leaves us with twelve burials that we cannot locate at other cemeteries in the area and, that are possibly still buried at St. Alban's."

Ms. Glencross testified that there was conflicting information about removal of one corpse and that person's name was left on their list of burials possibly still at St. Alban's Cemetery.

Venerable Archdeacon Harry Huskins

The Tribunal accepted Archdeacon Huskins as an expert in Anglican canon law, custom and usage, including the Anglican tradition regarding cemeteries. His curriculum vitae appears at tab 1 of exhibit 12.

The Archdeacon's testimony primarily relates to the time period in question, 1880 to 1930. The church building and the churchyard were consecrated separately. No differentiation was made between the part of the churchyard that would be used as a cemetery and the other part. The words of the consecration, "And we do pronounce, decree, and declare that the said land shall remain so consecrated, set apart, and dedicated for ever...", are a declaration of intent, not a binding obligation. They are analogous to the words "as long as you shall live" in a marriage ceremony. Deconsecrating of a burial ground exists.

Anglican canon law, custom, and usage allow the sale of cemetery lands as well as their partial closure. Such partial closure, narrowing, was not uncommon.

Burial has never been deemed final. Very simply, a trustee relationship, a moral trust, is created. In good stewardship, both corpses and monuments may be moved. Tombstones were considered to be property of whoever erected them and of the heirs at law; however, the church had power to move or destroy them. In canon law, corpses belong to no one.

Rev. Canon Donald Robert Bone, Retired

Canon Bone had been a parish priest for over twenty-four years. From 1987 to 2001, he was Director of Planning and Development for the Diocese. He looked after buildings, property, planning for growth or lack of growth, opening and closing of churches, and the demolition of unused churches.

St. Alban's was brought to Canon Bone's attention when the local rector, the parish priest, approached him.

Canon Bone directed the rector to speak to the bishop. An attempt was then made to understand why people were not coming to St. Alban's. Demographics of the area were examined.

St. Alban's Cemetery was not on the list of cemeteries of the Diocese. There was no perpetual care fund for the cemetery.

It is common to close a church. Both the vestry, the members of the local church, and the diocese must approve a sale. An approval to close and sell is only an approval in principle. When an offer to purchase is received, it also must be approved by the vestry and the diocese. Proceeds from the sale go to the parish.

Many attempts were made to sell the St. Alban's church property (the "Property"). The Diocese advised the Inter-Church Regional Planning Association of the availability of the Property, but no other religious organization was interested. The vestry offered the Property for sale through a local real estate agent and it was listed with MLS.

Without a sale the condition of the church building would decline. The property would likely be vandalized. Eventually, the church building would have to be demolished.

In March 1996, an offer to purchase the Property was received from Gordon Barr. An agreement of purchase and sale (the "APS"), tab 13 of exhibit 8, calling for relocation of all graves off the Property was entered into. In due course, the agreement was approved by the vestry and the Diocese. As shown at tab 5 of exhibit 12, endless amendments were made to the APS. At the time that the application for closure of the cemetery was changed to request partial closure only, the vestry no longer existed. The congregation had dispersed to other churches. Only the St. Alban's Churchwardens existed and they had asked the Diocese to take over the Property. In 1998 the sale of the Property to Gordon Barr closed. \$9,000.00 was paid on closing in addition to a \$1,000.00 deposit. An additional \$15,000.00 is to be paid when graves are removed. At closing, the Incorporated Synod of the Diocese of Toronto granted to Mr. Barr a \$55,000.00 mortgage on the Property. According to its original terms that mortgage matured December 3, 2000; however, the Diocese continues to hold a mortgage on the Property.

Canon Bone urged the closing of the St. Alban's Cemetery to "finish the job" as previously stated in his letter at tab 42 of exhibit 9.

Gordon Barr

Mr. Barr is a construction estimator and the manager of a construction company. He is close to retirement. Mr. Barr was born in 1935, as shown in exhibit 32.

Gordon Barr is a former member of the vestry of St. Alban's. He purchased the Property because he loves the church building and the Property is located on a main road where he can get business off the street. Mr. Barr wants to build a home and a garage on the Property. He wants to fix up the church and to open an office and, perhaps, a flower or antique shop.

Mr. Barr made the original offer to purchase the Property, tab 13 of exhibit 8, in 1996. Tab 5 of exhibit 12 contains all the amendments to the offer to purchase. He became the owner in 1998. The deed appears at tab 28 of exhibit 8. The mortgage granted to him by the vendor appears at tab 8 of exhibit 13. Mr. Barr confirmed the terms of the purchase stated by Mr. Bone. He clarified that \$15,000.00 is to be paid by the purchaser when the graves are moved off the property because the expected cost of doing so is about \$15,000.00 to \$20,000.00, as shown in Exhibit 28. Mr. Barr knows that he took a risk in purchasing the Property with an unclosed cemetery. As set out in exhibit 32, on closing of the purchase, he received an undertaking from the Diocese to remove all graves within one year.

Mr. Barr purchased the Property to be able to enter into a Site Plan Agreement. He has not returned a signed copy of the Site Plan Agreement, tab 20 of exhibit 8, to the municipality, because a \$4,000.00 cheque must accompany it and the graves on the Property have not been relocated. An unsigned copy of the Site Plan Agreement was forwarded to the Registrar.

In 1999 or 2000 Mr. Barr took down the sign of the Notice of Intention to Apply for an Order to Close a Cemetery. He has removed the Sunday school building from the Property. Tab 9 of exhibit 12 shows the Property as it looked in about 1996. Tab 10 of exhibit 12 contains photographs of the Property taken in the spring of 2000.

The church building has no plumbing. Mr. Barr lives in Oakville. He maintains the cemetery by cutting the grass and keeping it tidy. If the cemetery is partially closed, he plans to build a small monument on the Property.

Gordon Barr sent in a Notice of Business/New Officer or Director Change Under the Cemeteries Act to the Registrar. He has not applied for an inactive cemetery licence. He has not made annual filings under the Act. He is therefore not in compliance with the Cemeteries Act.

Mr. Barr believes that a partial closure of the cemetery as set out in the Order is in the public interest.

Dorothy Duncan

Ms. Duncan was a teacher. More recently, she was active in museum and heritage organizations.

Ms. Duncan was Executive Director of the Ontario Historical Society from 1982 to 2002, and remains a Life Member of the OHS. From 1980 to 1982 she was the Supervisor of the Museums Section of the Ministry of Citizenship and Culture. From 1975 to 1980 she was a Museums Advisor to the Province of Ontario. Ms. Duncan was also Chair of the Ontario Heritage Foundation from 1991 to 1994. She was a Governor of Heritage Canada from 1985 to 1991. Dorothy Duncan received an Honorary Doctor of Laws Degree from the University of Waterloo in 1996.

Ms. Duncan was accepted as an expert in heritage matters, cemeteries, and the public interest regarding heritage and cemeteries. In weighing her testimony, the Tribunal undertook to take into account that her expertise is greatest in heritage matters and least in the area of public interest regarding heritage and cemeteries.

Ms. Duncan argued that cemeteries are a heritage resource, an educational, historical, artistic, and cultural resource. She referred extensively to a Policy Statement issued under the *Planning Act*, tab 16 of exhibit 14, in support of the proposition that

conservation of significant cultural heritage resources is important. Ms. Duncan argued that to move a cemetery is to destroy it.

Cemeteries can be used as a teaching aid. The art forms on stones, the designs and markings, can be examined. The birth dates and dates of death of the deceased are especially helpful where municipal records have been destroyed. The notations of what the deceased died of can also provide clues about epidemics. On the Property resources include the church, one monument, the size of the plots and the original positions of cornerstones.

Dorothy Duncan knew St. Alban's Cemetery in a general way when she was Director of the Peel County Museum and Art Gallery. She first visited the cemetery after she received notice of the application to close it. She walked through the cemetery and took some photographs. Ms. Duncan has never visited the near-by Morningside Cemetery to which the Registrar originally had proposed moving graves.

Ms. Duncan is familiar with the St. Alban's Anglican Church and Cemetery Assessment at tab 48 of exhibit 7. Ms. Duncan asserted that there is no evidence that bodies were moved out of St. Alban's cemetery.

She argued that the burial ceremony in the Anglican Book of Common Prayer contains the word *forever* and that people expected to remain buried in St. Alban's cemetery forever. She emphasized that when a cemetery has been moved in Ontario many more remains were found than anyone expected.

Dorothy Duncan argued that closing even a part of the St. Alban's Cemetery is not in the public interest. There is no health or safety issue.

Closing this cemetery would open the door to development on cemetery lands throughout the province.

Ms. Duncan commented on the reasons for partly closing St. Alban's Cemetery set out by the Registrar on page 3 of the Order, exhibit 1. The use of the Property as a cemetery is sufficient. There is no reason for it to be used for any other purpose. The church building could be used as an office, a bookstore, a dress shop, a hair dresser shop, or headquarters for a business or nonprofit organization. Reorganization of human remains is not desirable.

"We do not know what portion of the Property was used as a cemetery. Moving graves to a corner of the Property may move them out of the cemetery grounds. It will not make them more visible or accessible. The cemetery is sufficiently accessible now. Putting in a plaque and a chain around moved graves will not improve things. The Act itself requires proper care and maintenance of a cemetery."

Designating the church structure under the *Ontario Heritage Act* will provide limited protection. If the municipality does not purchase a designated structure within one

hundred eighty days of being advised of the owner's intention to demolish it then the owner may destroy it.

Marjorie Stuart

Ms. Stuart is a member of the Ontario Historical Society and the Ontario Genealogical Society. She is the editor of the "Cemetery News" column in the bi-monthly *OHS Bulletin*. Ms. Duncan was accepted as an expert by the Tribunal in connection with the *Ontario Historical Society (Re)* decision released February 24, 1999.

While counsel for the OHS attempted to qualify Marjorie Stuart as an expert in cemeteries, the value of cemeteries to the community, the public interest regarding cemeteries, and genealogy Ms. Stuart stated that she considers herself to be an advocate for the Ontario Historical Society on this issue, the closure of St. Alban's Cemetery. Marjorie Stuart's statement is reasonable based on the facts. Ms. Stuart had sent a letter to the Registrar opposing closure of the cemetery, tab 18 of exhibit 8.

Counsel for the Ontario Historical Society at this hearing had represented Ms. Stuart in this matter, as shown in letter at tab 5 of exhibit 10.

The Tribunal did not accept Ms. Stuart as an expert. An advocate cannot be an expert. An expert should be impartial and objective.

Although Ms. Stuart does not have formal training in the area, she appears to be knowledgeable in the field. Thus, the Tribunal admitted her testimony.

Ms. Stuart stated that cemeteries are a cultural and heritage resource. They have very special meaning for descendants. They are valuable to historians, members of the community, school groups, and genealogists. The trees, the location of plantings, the types of stones making up the monuments and the tombstone inscriptions and markings are all valuable.

Ms. Stuart was aware of the St. Alban's Anglican Church and Cemetery Assessment at tab 48 of exhibit 7 when she researched past removal of remains from the Property. She consulted the same sources as the authors of the Assessment as well as additional materials. She found that Morningside Cemetery records said that only two graves were moved there from St. Albans. Ms. Stuart concluded that only two bodies were moved out of St. Alban's Cemetery.

James Rowley is the name of the deceased on a monument at the Property. Ms. Stuart and her team started looking for his descendants in the fall of 2001. She did not start earlier because of other commitments. She did not look for descendants of others identified by the Assessment as possibly still buried at the Property.

James Rowley died in Simcoe County, but he asked to be buried at St. Alban's in Palgrave. Ms. Stuart met Ron Rowley, a descendant of James Rowley, at the cemetery. Ron Rowley was shocked and horrified that the remains of James Rowley may be moved. Ms. Stuart located descendants of James Rowley in Alberta and British Columbia. She had spoken to two of them, Robert Charles Rowley and James E. Rowley, as well as Darlene Rowley, the wife of James. They were distressed to hear that the remains of their ancestor may be moved. Neither has ever been to Palgrave.

Ms. Stuart argued that any closing of St. Alban's cemetery is not in the public interest. There is no public safety or public health reason. Religious beliefs of the buried and of the community should be respected. There would be destruction of a cultural and heritage resource. The implication of closing the cemetery would be unfavourable for other cemetery closures. If the cemetery is partially closed, remains may be moved to a location that is not part of the cemetery.

Ms. Stuart commented on the reasons for partially closing St. Alban's Cemetery set out by the Registrar on page 3 of the Order. The Property is in use now. It is a cemetery. Restoration of the church structure will not affect the cemetery. Delineating the plots and building an appropriate marker would be nice, but is not important. The cemetery is where it has been and should remain there. The cemetery must be properly maintained anyway. There is access to the cemetery now. Being able to build an addition on the property should not be a factor.

Paul Johnston

Mr. Johnston has appeared as an expert before the Ontario Municipal Board. His curriculum vitae is exhibit 16. The Tribunal accepted Paul Johnston as an expert in land use planning.

Mr. Johnston referred to various planning documents in support of the proposition that one of the goals of land use planning is preservation of significant, important, or unique heritage resources. One of the objectives of the Town of Caledon Official Plan, tab 18 of exhibit 14, is to ensure that development within settlements, such as Palgrave, has regard for cultural heritage resources. One of the goals of the Official Plan is to preserve and protect important cultural heritage resources and provide for the stewardship of these resources.

Paul Johnston testified that the public gets no notice of a Site Plan Agreement and that such an agreement is not enforceable by the public

Mr. Johnston argued that there is nothing crying out for changing the current use of the Property as a cemetery. The site is small and the return from movement of graves would be limited. The Property is not in a central urban area where one wants efficient use of land.

Mr. Johnston was not sure whether a municipal sanitary sewer runs along the site. He argued that a septic system would have to be put in, probably with a reserve bed. Apparently, he did not know that a septic system exists on the Property. He stated that after a septic system and a dwelling are put in, the Property could not be used for other purposes.

Paul Johnston concluded that the use of the Property as a cemetery is its best use and preservation of its present use is in the public interest. The change proposed in the Order is not good land use planning.

Dr. Douglas Leighton

Dr. Leighton has taught history at university level since 1967. Occasionally, he also taught university theology courses. He is an Anglican priest and is active in parish ministry.

He has not taught courses on cemeteries, but did take a course on death and dying. From 1986 to 1988, Dr. Leighton was president of the Ontario Historical Society.

The Tribunal accepted Dr. Leighton as an expert in Canadian history, comparative Christian religions regarding death rites and rituals, Anglican religion and process, first nations, Anglican custom and usage, Anglican tradition regarding cemeteries, and the historical value of cemeteries.

Dr. Leighton testified that Anglicans had a literal view of the resurrection of the dead at the time that the cemetery was active. People took bodily integrity seriously and attempted to bury all body parts together. Moving graves was almost never done. People were afraid that they would appear before God in an incomplete way. On cross-examination, Dr. Leighton answered that it is quite possible that Anglicans had a less literal view of resurrection than some other denominations.

Dr. Leighton admitted that he is not an expert in canon law. He did not disagree with statements of canon law that had been made by Archdeacon Huskins. Dr. Leighton agreed that the church has power to alter or to move monuments. He admitted that the interpretation by Archdeacon Huskins of *for ever* in a ceremony as being an expression of intent only may be correct, but he added that such would not be the understanding of the common parishioner.

Dr. Leighton suggested such uses for the church building as a gift shop, a tearoom, or a heritage tourism office.

Dr. Leighton granted that a cemetery could be closed for a public safety reason, such as desire to widen a road.

Dr. Douglas Leighton opposed the partial closing of St. Alban's cemetery. He stated that the desired places in the cemetery would be away from the road, not close to it. He testified that if the Order were carried out bodies "would be stacked up like cord-wood".

Diane Clendenan

Ms. Clendenan was a teacher in kindergarten before she retired. Recently, she obtained a Bachelor's Degree in Sociology. She has been active in genealogy and family history studies since 1977. Exhibit 36 is her curriculum vitae. Diane Clendenan was accepted by the Tribunal as an expert in genealogy, family history and the transcription of cemeteries.

Ms. Clendenan had visited fifty to sixty cemeteries in Ontario. She described St. Alban's cemetery as at the lower end of the scale in terms of upkeep.

The main monument on the Property is that of James Rowley. Ms. Clendenan traced his descendants. Great grandchildren of the deceased were located. Robert Charles Rowley of Alberta and James Rowley of British Columbia, as well as his wife Darlene, were not in favour of moving the remains of their ancestor.

The unsworn affidavit of James E. Rowley and his wife Darlene Rowley, apparently received by Counsel on or about November 26, is exhibit 34. The Affidavit of Robert Charles Rowley sworn November 15, 2002, is exhibit 35. Counsel for the Added Parties filed a Notice of Motion to exclude the two documents from evidence. The Tribunal heard the motion on December 9, 2002.

Rule 6.3 of the Rules of Practice of the Licence Appeal Tribunal states the following:

Except for the report of an expert witness to which Rule 6.4 applies or expedited hearings to which Rule 6.5 applies or where a document or thing is to be used by a party solely for the purpose of the cross-examination of another party or another party's witness, a party to a hearing shall at least 10 days before the hearing:

(1) Disclose to all other parties the existence of every document and thing that the party will refer to or tender as evidence at the hearing and shall deliver a copy of such documents to the other parties, ...

Exhibits 34 and 35 were not submitted ten days before the start of the hearing in accordance with the Rules of Practice. The Tribunal rejects the argument of Counsel for the OHS that *at least 10 days before the hearing* in Rule 6.3 refers to ten days before the continuation of the hearing. The words of the rule are plain. According to prior testimony, the OHS started to look for descendants in the fall of 2001. No reasonable excuse has been given for not providing statements from descendants earlier.

By Rule 2.7 the Tribunal may waive any of its Rules of Practice. Although the contents of the documents have not been subjected to cross-examination, the Tribunal has heard testimony from Marjorie Stuart that James E. Rowley, Darlene Rowley, and Robert Charles Rowley oppose moving the remains of James Rowley. Thus, the Tribunal

accepted the documents, exhibits 34 and 35, as evidence that the authors oppose the relocation of the remains of James Rowley and for no other purpose.

Ms. Clendenan found the will of James Rowley. Although he died away from Palgrave, he wanted to be buried at St. Alban's Cemetery and to have a monument erected.

Even though Ms. Clendenan was looking for descendants rather than investigating the number of bodies moved from St. Alban's Cemetery, she concluded that not many people were relocated.

Ms. Clendenan stated that moving bodies from the St. Alban's Cemetery is not in the public interest. The cemetery is part of the identity of Palgrave. James Rowley wanted to be buried at St. Alban's and his descendants do not want his body moved. People have a right to remain where they were buried.

LAW:

The *Cemeteries Act (Revised)* states the following:

1. In this Act,
"cemetery" means land set aside to be used for the interment of human remains and includes a mausoleum, columbarium or other structure intended for the interment of human remains;
"inter" means the burial of human remains and includes the placing of human remains in a lot;
"interment rights" includes the right to require or direct the interment of human remains in a lot;
"interment rights holder" means a person with interment rights with respect to a lot and includes a purchaser of interment rights under the *Cemeteries Act*, being chapter C.3 of the Revised Statutes of Ontario, 1990, or a predecessor of that Act;
"lot" means an area of land in a cemetery containing, or set aside to contain, human remains and includes a tomb, crypt or compartment in a mausoleum and a niche or compartment in a columbarium;
"marker" means any monument, tombstone, plaque, headstone, cornerstone, or other structure or ornament affixed to or intended to be affixed to a burial lot, mausoleum crypt, columbarium niche or other structure or place intended for the deposit of human remains;
"Registrar" means the Registrar appointed under this Act;
"Tribunal" means the Licence Appeal Tribunal;
"trust fund" means a trust fund established for the purpose of this Act.

8.(1) In this section and in sections 9, 10, 11, 12 and 13, a reference to a cemetery includes any part of a cemetery.

(2) The Registrar may order a cemetery closed if the closing is in the public interest.

(3) An order shall not be made under subsection (2) until,

(a) a notice of the intention to make the order is given in the manner and to the persons prescribed; and

(b) interested persons are given the opportunity to make submissions to the Registrar within such time as is prescribed.

9. (1) In an order to close a cemetery, the Registrar may,

(a) declare a cemetery or a portion thereof closed;

(b) require the owner to disinter all human remains therein and specify the manner of disinterment and the manner and place of reintering or dealing with the remains;
(c) require the owner to remove any markers and relocate them to a specified place; and
(d) require the owner to provide or acquire equivalent interment rights for all holders of interment rights with respect to unused lots in the cemetery.

(2) In an order to close a cemetery, the Registrar may designate another person to do anything that the owner may be required to do.

(3) The Registrar shall give every person who made a submission notice of the order and at the same time advise the person of the right of appeal.

(6) An order that is appealed comes into force upon being upheld by the Tribunal.

10. A person with an interest therein may appeal, to the Tribunal,

(a) an order to close a cemetery any time before the order comes into force; or

(b) a refusal to order a cemetery closed.

14. No person shall own a cemetery or crematorium unless licensed under this Act to own the cemetery or crematorium.

44. (1) Every cemetery owner shall maintain, without charge to interment rights holders, the grounds of the cemetery, including all lots, structures and markers, to ensure the safety of the public and to preserve the dignity of the cemetery.

47. No person shall inter human remains except in a cemetery that has been consented to by the Registrar and is owned by an owner licensed under this Act.

59. (1) A municipality may order a cemetery owner who does not keep the cemetery in good order and repair to restore it to good order and repair.

60. (1) An application to declare a cemetery abandoned may be made to a judge of the District Court if the owner of the cemetery,

(b) is unable to maintain it;

(d) is not licensed as an owner under this Act.

82. (2) After holding a hearing, the Tribunal may by order direct the Registrar to take an intended action or to refrain from taking an action or to take such action as the Tribunal considers that the Registrar ought to take and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

(3) The Tribunal may attach such conditions to its order or to the licence as it considers proper to give effect to the purposes of this Act.

Ontario Regulation 130/92 made under the *Cemeteries Act (Revised)* adds this:

17. The owner shall ensure that buildings not be erected in a cemetery within 4.57 metres (fifteen feet) of an in-ground grave.

49. (1) For the purposes of clause 8(3)(a) of the Act, an owner who wishes to obtain an order closing a cemetery shall give notice, in accordance with this section, of the owner's intention to apply for the order.

(2) The notice shall be published,

(a) once in *The Ontario Gazette*; and

(b) once a week for two consecutive weeks in a newspaper with general circulation in the locality in which the cemetery is located.

(3) The notice shall be sent by registered mail to,

(a) each interment rights holder whose lot is situated in the portion of the cemetery subject to the order, mailed to the rights holder's last address known to the owner;

- (b) the municipality in which the cemetery is located;
 - (c) the Local Architectural Conservation Advisory Committee, if any, established under the *Ontario Heritage Act* for the locality in which the cemetery is located;
 - (d) the Archives of Ontario, the Ontario Historical Society, the Ontario Archaeological Society and the Ontario Genealogical Society; and
 - (e) the Minister of Culture and Communications.
- (4) The notice shall be conspicuously posted on a sign at the entrance to the cemetery before publication of the first notice under clause (2)(b) and shall remain posted until the Registrar makes, or refuses to make, the order sought by the owner.

50. For the purposes of clause 8(3)(b) of the Act, the time within which interested persons may make submissions to the Registrar is forty-five days after the later of,
(a) the day on which the final notice under clause 49(2)(b) is published; or
(b) five days after the day on which the final notice is mailed under subsection 49(3).

CASELAW:

The leading case in this area is *Ontario Historical Society (Re)* released by the Ontario Commercial Registration Appeal Tribunal on February 24, 1999 (the "Clendennen Decision"). The Tribunal found, as set out in paragraph 430 of the decision, that the notice contemplated under subsection 8(3)(a) of the Act was not given by the owner. Subsection 8(3) of the Act provides that the Registrar shall not make an order closing a cemetery until notice under subsection 8(3)(a) is given. Thus, the Tribunal held that the Registrar's order with respect to the closing of the cemetery should be set aside.

The Tribunal went on to consider whether closing the cemetery is in the public interest. The decision states in paragraph 452 that "public interest" means the best possible accommodation of all interests and purposes of the Act. It continues in paragraph 453, "the Act's context, objects and purposes provide a guide to the Tribunal in determining the meaning of 'public interest' under the Act." The Tribunal concluded that compliance with the Act, maintenance of the cemetery, safety of the public, and preservation of the dignity, quiet and good order of the cemetery are all elements of the public interest to be considered. Since there was noncompliance with the Act, the Tribunal held that the closing of the cemetery is not in the public interest.

APPLICATION OF LAW TO FACTS:

The Tribunal finds that there has not been compliance with the *Cemeteries Act (Revised)*.

Subsection 8(3)(a) of the Act requires notice of the intention to make the Order to be given in prescribed manner before the Order is made. Subsection 49(4) of Ontario Regulation 130/92 made under the Act (the "Regulation") requires notice to be conspicuously posted on a sign at the entrance to the cemetery before publication of the notice. The Tribunal finds that the notice was published in *The Caledon Citizen* on August 21 and August 28, 1996. The notice was first conspicuously posted much later,

on December 13, 1996. Clearly, there has not been compliance with subsection 49(4) of the Regulation.

Subsection 49(3) of the Regulation requires that notice required to be made under subsection 8(3)(a) of the Act be sent by registered mail to specified parties including the Local Architectural Conservation Advisory Committee (LACAC). Both the July 20, 2000, notice and that of February 26, 2001, were sent to the LACAC at an incorrect address. However, the notices were also sent to the Heritage Resource Officer and counsel for the OHS conceded that such notice would have reached the LACAC. On the basis of the evidence including registered mail receipts and the testimony of the Registrar, the Tribunal finds that notice was properly sent to the other parties specified in subsection 49(3) of the Regulation. Thus, the Tribunal finds that there has been compliance with that subsection of the Regulation.

Subsection 8(3) of the Act further requires that interested persons be given the opportunity to make submissions to the Registrar within such time as is prescribed. Section 50 of the Regulation specifies that the time within which interested persons may make submissions to the Registrar is the later of forty-five days after the final notice is published or fifty days after the day on which the final notice is mailed under subsection 49(3) of the Act.

The notice of July 20, 2000, asked that submissions be forwarded before August 15, 2000, which is less than forty-five days after the final notice was published on August 28, 1996, and is less than fifty days after the notice was mailed. The notice of February 26, 2001, requested that submissions be forwarded before March 15, 2001, which is less than fifty days after that second, final notice was mailed. Some interested persons may have been discouraged from forwarding their submissions within the time period prescribed by the Regulation because the notice specified a shorter period. Since the notices failed to specify the correct time for making submissions, notice of intention to make the Order was not made in accordance with subsection 49(3) of the Regulation and subsection 8(3) of the Act.

Subsection 49(3) of the Act states, "the Registrar shall give every person who made a submission notice of the order and at the same time advise the person of the right of appeal".

The Registrar received a submission dated June 26, 1997, from Mr. Alan Potts of Toronto that opposes closure of St. Alban's Cemetery. The first notice of July 20, 2000, asked for submissions to be forwarded before August 15, 2000. Therefore, the submission by Mr. Potts was timely. No additional submission was received from Mr. Potts and no evidence was presented that he knew of the Order or his right to appeal it to this Tribunal. Notice is fundamental. Since the Registrar did not send Mr. Potts notice, he was deprived of his right to a hearing. This serious noncompliance with the Act is sufficient by itself for the Tribunal to find that the Registrar's Order is not correct and is not reasonable.

The Tribunal makes the following additional observations:

Subsection 8(2) of the Act states: "The Registrar may order a cemetery closed if the closing is in the public interest." The Tribunal agrees with the Clendennen Decision that compliance with the Act is an important element of the public interest to be considered. That aspect of the public interest has been dealt with above.

The Registrar considered the wishes of the community. The religious community, the vestry and the Diocese, agreed to close the cemetery. According to Canon Bone, tab 42 of exhibit 9, the cemetery was supposed to have been closed in the 1920s. The Tribunal finds on the evidence of Bonnie Glencross that the majority of interments were removed from St. Alban's Cemetery at that time.

Likewise, the local community wanted the cemetery to be at least partially closed. The Town of Caledon expressed relief and happiness with the proposal to close the entire cemetery in a letter dated July 1997, tab 9 of exhibit 8. The heritage value of the cemetery to the community has been considered.

The Caledon Heritage Committee writes at tab 49 of exhibit 7, "The fact that burials have been relocated from this cemetery in the past regrettably makes it a poor candidate for preservation." Rita Reid, a local descendant of a person interred at the cemetery, does not object to its closure. Heather Broadbent, a local resident, who is a past president of the Ontario Historical Society, also supports the Registrar's Order.

Counsel for the OHS argued that the Registrar must consider the closure from a Planning Act point of view. The Tribunal disagrees. Neither the Act nor the regulations specifically require such analysis. In any event, the Tribunal has the benefit of comments regarding the Site Plan made by the planning staff of the Town of Caledon: "the building and addition will be in keeping with the existing development of the area and the existing church on the property." The Town has people with expertise in this area and the Town does not oppose the Registrar's order.

James Rowley wanted to be buried at St. Alban's Cemetery. Several of his descendants expressed opposition to moving his remains.

Their position is understandable; however, the Tribunal agrees with the Clendennen Decision that the wishes of descendants is only one factor among many to be considered. Further, Archdeacon Huskins testified that it is not uncommon for an Anglican cemetery to be narrowed and that canon law allows human remains together with monuments to be moved.

Maintenance of the cemetery is a factor to be considered in determining the *public interest*. There is a septic field at the back of the Property. It is distressing that there probably are human remains buried under the septic system. The Tribunal agrees with the Registrar that there should be removal, reorganization, of such remains.

The Tribunal finds that the partial closing of the Cemetery involving the relocation of human remains and markers to a front corner of the Property is not in the *public interest*. That part is more likely subject to noise and physical disturbance. The dignity, quiet and good order of the cemetery are an important consideration.

Dr. Leighton testified that the desired places in the cemetery would be away from the road, not close to it. Mr. Ostler testified that the Regional Municipality of Peel wanted the front of the Property for a possible road widening. There is danger that human remains moved to the front portion of the Property would be disturbed in the future for a road widening in the interest of public safety.

In addition, section 14 of the Act requires the owner of a cemetery to be licensed. Mr. Barr does not hold the required licence; thus, he should not be entrusted with maintenance of a reduced cemetery on the Property. The Tribunal finds that it would be more in the *public interest* to close the entire St. Alban's Cemetery rather than a portion of it.

In summary, the Tribunal finds on the evidence that there has been noncompliance with the Act and further finds that the partial closing of St. Alban's Cemetery is not in the public interest. The Registrar's Order is not correct and is not reasonable.

If there were compliance with the Act, the Tribunal would have ordered the closing of the entire cemetery and relocation of human remains and markers to Morningside Cemetery, Palgrave.

DECISION:

Accordingly, by virtue of the authority vested in it under section 82 of the *Cemeteries Act (Revised)*, the Tribunal directs the Registrar, *Cemeteries Act*, not to carry out his order of June 8, 2001, which orders closure of a part of St. Alban's Cemetery, Palgrave.

LICENCE APPEAL TRIBUNAL

John Ort, Presiding Member

Simon Dann, Member

Malcolm Fealing, Member

RELEASED: March 5, 2003

OSKAR T. TANKOVITZ

IN THE MATTER OF THE DECISION
OF THE ONTARIO NEW HOME WARRANTY PROGRAM

DECISION DATED MAY 30, 2002

TRIBUNAL: MARJORIE HILEY
VICE-CHAIR

APPEARANCES: OSKAR TANKOVITZ, Applicant
KAREN SPECTOR, Counsel, representing the Ontario New
Home Warranty Program
WALTER KAIRETZ, Agent, representing the Added Party,
Ballymore Building (Oak Ridges) Corp.

DATE OF HEARING: October 1, 2002 Toronto

REASONS FOR DECISION AND ORDER

Background:

The Program by its decision of May 30, 2002 denied the claim for compensation by the Applicant as it related to 18 different items. The Applicant by his Notice of Appeal dated June 14, 2002 requested a hearing before the Tribunal. Attached to his Notice of Appeal was a copy of a letter dated November 22, 2001 entitled Response to ONHWP Conciliation Inspection Report. The builder, Ballymore Building (Oak Ridges) Corp. was added as an Added Party.

No pre hearing was held. There was a hearing scheduled for October 1, 2002. All the parties were in attendance at that time.

Issue:

Are there any breaches of warranty under the *Ontario New Home Warranties Act*?

Evidence:

The Applicant testified as to his complaints on each of the eighteen different claims, which had been denied by the Program.

He presented in evidence photographs taken by the Applicant on each of these claims. All the photographs were taken in September, 2002 prior to the date of hearing.

1. Pot Light Switches: Mr. Tankovitz testified that he had paid extra to have a number of pot lights installed in his house. He felt that each pot light should have its own switch. Instead the two pot lights in the master bedroom were on one switch; the two pot lights in the media loft were on one switch and the two pot lights in the front bedroom were on one switch. As well he had ordered a pot light for over the kitchen sink. It had been installed close to the bulb light with both being on the same switch. He had an electrician correct that situation. It was not possible to correct the switches for the pot lights in the other rooms. The builder had not responded to his requests in this matter and Mr. Tankovitz felt it was a defect in workmanship.
2. Exterior Dirt: Mr. Tankovitz testified that there was construction dirt on the stonework of his house. When the dirt was removed scratches were visible. The builder put a coating on the stonework but that coating is now coming off. Though the builder did correct the second story windowsill the repair was not satisfactory.
3. Front Door Beam: Mr. Tankovitz stated this was a case of bad workmanship and poor materials. The photograph shows the poor quality of the paint, which was not rust proof.
4. Exterior Finish: The concrete foundation has not been brush coated in a satisfactory manner according to Mr. Tankovitz. There is a gap between the end of the coating and the level of gravel.
5. Driveway Painting: Initially there was an issue as to tire marks on the paving. But now the issue is one of the interface between the lawn and the driveway. This is not an issue of grading but of the interface. Soil is now exposed between the driveway and the lawn.
6. Wall Between Front Bedroom And Media Loft: Mr. Tankovitz testified that there had been changes made to the Agreement of Purchase and Sale. Part of those changes included a design change for the angle of the wall in that location. This was not done in accordance with the contract and though he pointed out the problem to the builder it was not changed.
7. Opening Between Family Room and Dining Room: Mr. Tankovitz said this was a similar problem to item #6; the builder did not comply with the design changes. Mr. Tankovitz disputes any suggestion that he verbally agreed to changes in the design for item #6 or item #7.
8. Telephone Wires: The Tribunal did not find this to be an issue as the telephones now work.

9. Survey Pins: The Tribunal did not find this to be an issue as the Applicant has an updated survey.
10. Linen Closet Door: This is an issue of defect in workmanship according to Mr. Tankovitz. The door opening is too small and there is no accessibility to parts of the closet.
11. Front Door Paint: There had been dents repaired on the door. The paint used was not as glossy as the original paint.
12. Scratched Family Room Window: This had been reported within the first year though it was not on the pre delivery inspection report. Mr. Tankovitz stated that it was impossible to note all problems at the PDI and write them down then. When he noticed the problem he reported it to the Program.
13. Front Porch Concrete: It is not uniform due to obvious bubbles in the concrete.
14. Kitchen Exhaust Fan: Mr. Tankovitz stated that the fan is not powerful enough to suck out the odors. He never was provided with specifications on it though he had asked for them.
15. Warped Siding: Mr. Tankovitz stated that this siding is metal and yet it is warped. It should not shrink. It was defective and warped when installed.
16. Grading: There is an ongoing problem of water pooling between the houses. Then this water seeps into the ground.
17. Roof Shingles: Mr. Tankovitz had worries as to the future effectiveness of some of the roof shingles, which had marks on them.
18. Ceiling Panels on Balcony: In the front NE corner of the balcony heavy winds had caused the panels to blow off three times. As well there was a gap in the ceiling panel, which was unacceptable workmanship.

Under cross-examination Mr. Tankovitz could not remember if he sent a copy of the Agreement of Purchase and Sale (APS) to the Program. He does acknowledge that his signature is on two sheets dated May, 1999 entitled Customer Extras. The diagram on page 2 of the Agreement of Purchase and Sale lists whether or not each pot light has its own switch. That is not the case for the diagram on page 3 of the APS, which only specifies for the balcony pot light. The diagram on page 5 of the APS does not specify pot lights for the media room, master bedroom or front bedroom.

On the document entitled customer request for extras there is a specification of separate switches for the two exterior pot lights but no such specification for the media room, bedroom #2, master bedroom or main bathrooms.

Mr. Tankovitz agreed that there was nothing in the Agreement of Purchase and Sale stating the front door was to be painted with rust proof paint. He recalls that the problem was evident quite early in his occupancy of the house. His first written complaint on it was June, 2000.

Regarding the wall between the front bedroom and media loft Mr. Tankovitz recalls having a meeting with the builder on May 6, 1999, but does not recall saying to leave the angle alone. He disagrees with the position of the builder that instead of the angle Mr. Tankovitz was getting a number of other extras. He testified that there was no written or verbal deal in which he accepted the 45% angle.

Regarding the opening between the family room and the dining room and the linen closet opening Mr. Tankovitz agreed that no dimensions are specified on the diagrams.

Mr. Tankovitz agreed that there is nothing in the pre delivery inspection form dealing with the scratched window or the warped siding. He has not observed any water leakage as a result of the problems with the roof shingles or the ceiling panels.

Testimony of Wendy Skyba:

Ms Skyba has been a warranty representative for three years. Prior to that she worked as a building official and as a constructive site supervisor. She was involved with the conciliation inspection on September 13, 2001 and she issued the decision letter that is the subject of this appeal.

Regarding the issues:

1. Pot light switches – denied this, as nothing in the documentation to show he was to get separate switches for these pot lights. Other pot lights are mentioned in the Agreement of Purchase and Sale as requiring separate switches but there is nothing on these particular pot lights. Ms Skyba stated that Mr. Tankovitz had been deliberate about a number of pot lights and their switches. It was the industry standard to put all the pot lights in a room on the same switch.
2. She was unaware of any further complaints regarding the 2nd story windowsill after it had been repaired. She was not asked to return to view it.
3. She stated that rust paint is not used on angle iron. You can either not paint the angle iron or paint it with exterior latex paint. In this case the builder had painted the angle irons with white paint. That will last for approximately one year in this climate. It is a normal wear and tear item and is excluded under section 13(2)(c) of the Act. Regarding the concrete foundation it is poured concrete with a brush coat application. She had viewed it about a year ago. The front step has now settled and has exposed an inch of the foundation with no brush coating. The defects are typical and there is no evidence of improper application. It is a wear and tear item excluded under s. 13(2)(c) and under the subsidence exclusion of 13 (2) (h) of the Act.

4. Ms Skyba had no recollection of there being a gap between the driveway to the grass. The grass meets the pavement but is higher than the level of the driveway.
5. The wall between the bedroom and media loft comes under the substitution provision of Regulation 892 section 19.
6. Regarding the wall between the family room and dining room the builder moved it to make the family room larger. It also comes under section 19 of Regulation 892.
10. Linen closet – the drawings are without specification as to the size of the opening. It is functional for a linen closet.
11. The front door paint matches the paint on the garage door.
12. Family room window scratches were not mentioned in the pre delivery inspection yet the latches were mentioned. She does not know who is responsible for these scratches.
13. Front porch concrete: The epoxy concrete topping has adhered to the surface of the concrete. There are some bubbles but that does not impair the surface and is typical for concrete.
14. There are no supply performance standards mentioned for the kitchen exhaust fan. It is extracting air and is vented to the outside.
15. Ms Skyba stated that this house has vinyl siding attached to wood. The wood framing has shrunk and caused some bowing, as the vinyl siding is not rigid. This is an exclusion item as shrinkage under section 13 (2)(d) of the Act. The siding has not detached or deteriorated and there has been no report of water penetration.
16. Lot grading is the responsibility of the municipality. Settlement of earth is an exclusion item under section 13 (2) (h). Ms Skyba has not been told of any water penetration of the building envelope.
17. There are marks on perhaps ten roof shingles. This is in an area over the garage, which could be seen from the window. It was not mentioned on the pre delivery inspection report and Ms Skyba does not know who is responsible for the damage. There have been no reports of water penetration.
18. The ceiling panels, which were loose, were warranted, as they had to be securely attached to the building. The last panel fits against the second panel with no notch. It is not as visually evident as would appear from the photograph. This is a minor defect and is not warranted.

Ms. Skyba stated that she was not permitted to take photographs when doing her conciliation report.

Testimony of Walter Kairetz:

Mr Kairetz is the vice president of construction for Ballymore Building (Oak Ridges) Corp. He has worked at a variety of positions in the construction industry since 1973. He is a registered builder. He did the pre delivery inspection with Mr. Tankovitz.

Mr. Kairetz testified that angle iron would rust unless you clad it. He stated that there is a grade variation between the driveway and the lawn due to the curb depression. It cannot be made flat.

Mr. Kairetz testified that he was present at a meeting on May 6, 1999 with Mr. Tankovitz and Mr. Morra the carpentry contractor. The angles in the wall were discussed and ultimately Mr. Tankovitz said to leave it as it was. Mr. Tankovitz requested additional pot lights, which Mr. Morra agreed to do at cost. Then on May 10, 1999 at another meeting of the parties the other issues such as the pot light switches, exterior dirt, front door beam, driveway painting were resolved. Regarding the opening between the family room and dining room there was a structural column there so the wall could not be shortened.

Regarding the linen closet the railing is angled due to the order of the building inspector and the opening for the linen closet is within the normal range of 16 to 20 inches.

He recalls the tissue test being done on the kitchen exhaust fan. Regarding the grading there is a positive slope and it was inspected by the city engineer prior to laying of the sod.

Under cross-examination Mr. Kairetz stated that there was no deficiency notice from the Town of Richmond Hill. As the builder has to comply with the Building Code there was no notice given to Mr. Tankovitz regarding the change on the railing near the linen closet.

Mr. Kairetz stated that it was Mr. Morra who negotiated the items with Mr. Tankovitz at the May 6th, 1999 meeting.

Closing Statements:

Mr. Tankovitz reiterated his testimony on the items in question. He felt that if there was lack of clarity on the diagrams it was the responsibility of the builder to provide that clarity. He felt that the builder did not tell him of changes nor did the builder negotiate with him.

The Program stated that the builder did not have to meet a standard of perfection. Many of the items would be excluded under the various clauses found in section 13 of the Act. As well there were substitution items under section 19 of Regulation 892 of the Act. Many of the items were normal wear and tear items. Some of the items were not noted on the pre delivery inspection report and it is impossible for the Program to allocate responsibility for the damage. Some items such as the warped siding and the ceiling panels were matters of aesthetics as there was no problem with functionality and no evidence of water penetration.

Legislation:

The relevant legislation is the *Ontario New Home Warranties Plan Act* and its Regulations:

- s. 13 (1) Every Vendor of a home warrants to the owner,
- (a) that the home,
 - (i) is constructed in a workmanlike manner and is free from defects in material.
 - (ii) Is fit for habitation, and
 - (iii) Is constructed in accordance with the Ontario Building Code...
 - (2) A warranty under subsection (1) does not apply in respect of,
 - (c) normal wear and tear.
 - (d) normal shrinkage of materials caused by drying after construction;
 - (h) subsidence of the land around the building or along utility lines, other than subsidence beneath the footings of the building.
- s. 14
- (3) Subject to the regulations, an owner of a home is entitled to receive payment out of the guarantee fund for the cost of the remedial work required to correct a breach of warranty if,
 - (b) the person has a cause of action against the vendor or the builder, as the case may be, for damages resulting from the breach of warranty.

Regulation 892

- s. 19 Every vendor of a new home warrants to the purchaser that, where the vendor makes a substitution with respect to an item that is referred to in the purchase agreement that is not an item that is to be selected by the purchaser, the item will be of equal or better quality than the item referred to in the purchase agreement.

Analysis:

This is a case that would have benefited from a pre hearing conference. Many of these issues could have been resolved if the parties had participated in a pre hearing conference.

There were eighteen different items, which were in dispute at the beginning of the hearing. The Tribunal held that items #8 the telephone wires and #9 the property marking pins had no merit. Mr. Tankovitz had a problem with intermittent telephone signals over two years ago. The telephone system has worked with no problems since that time. The Tribunal can only deal with current problems not speculative ones. Regarding the survey pins the builder is under no obligation to expose them for Mr. Tankovitz. The builder has supplied Mr. Tankovitz with a current survey as is required under the Agreement of Purchase and Sale.

The Tribunal will deal with the remaining sixteen items using the numbering for items as stated in the decision letter.

1. Pot Lights:

Mr. Tankovitz claims he is entitled to have the additional pot lights each on its own separate switch. The Tribunal denies this claim. It is evident that Mr. Tankovitz put some thought into separate switches when he initially negotiated his Agreement of Purchase and Sale. Unfortunately he was not as specific when dealing with extras as the home was being constructed. There is nothing in writing or on the diagrams attached to the Agreement of Purchase and Sale, which would substantiate these claims.

2. Exterior Dirt:

The Tribunal denies this claim. A repair was made to the second story windowsill. Mr. Tankovitz has not complained of that repair to the Program. If he has a problem he must go through the formal channels as the Program does provide a warranty of a year on such repairs.

3. Front Door Beam:

The Tribunal denies this claim. There is nothing in the Agreement of Purchase and Sale that specifies rust paint. This is a maintenance item and is excluded under section 13 (2) (c).

4. Exterior Finish:

The Tribunal denies this claim. The foundation had a brush coating. The area that Mr. Tankovitz complained of is the result of settling of the dirt around the foundation and is excluded under section 13 (2) (h).

5. Driveway:

Mr. Tankovitz had initially complained of tire marks on his driveway. But at the hearing his complaint was of the interface between the lawn and driveway. The lawn is higher than the surface of the driveway. The builder has explained that this is due to a curb depression and it cannot be corrected. The Tribunal accepts the explanation of the builder. This is not a defect that can be corrected under the legislation nor did Mr. Tankovitz follow through with this complaint to the Program. The Tribunal denies this claim.

6. Wall Between Front Bedroom and Media Loft:

There is an inconsistency in the testimony of Mr. Tankovitz and Mr. Kairetz as to whether or not this matter was settled at the meeting of May 6, 1999. The Tribunal accepts the evidence of Mr. Kairetz over Mr. Tankovitz on this issue. As well the Tribunal agrees that this is a matter of substitution permitted under section 19 of Regulation 892. This claim is denied.

7. Opening Between Family Room and Dining Room:

This is a further matter of substitution permitted under section 19 of Regulation 892 and under the wording of the Agreement of Purchase and Sale. As well the Tribunal accepts the evidence of Mr. Kairetz that this substitution was necessary due to the structural column. This claim is denied.

8. Linen Closet Door:

The Tribunal agrees that the drawings do not give specifications for the size of the linen closet door.

Though Mr. Kairetz testified that he had to change the positioning of the upstairs railing due to the Ontario Building Code it would have been prudent of the builder to inform Mr. Tankovitz of this change. The Tribunal does not agree with the Program that the current opening is functional. There is restricted access to the portion of the linen closet closest to the railing. This is a case of poor workmanship. Either the door needs to be repositioned or more likely it needs to be expanded as a sliding door to allow access to all of the closet area. The Tribunal accepts this claim.

11. Front Door Paint:

The Tribunal denies this claim. The Tribunal accepts the testimony of Ms Skyba that this paint matches the paint on the garage door.

12. Scratches on Family Room Window:

This claim is denied. It is impossible to determine who is responsible for the scratches as this problem was not mentioned on the pre delivery inspection report. This same report does mention fixing of window catches so it is evident that Mr. Tankovitz was examining windows when doing his pre delivery inspection.

13. Front Porch Concrete:

This claim is denied. The defects complained of by Mr. Tankovitz are not due to poor workmanship or defects in materials.

14. Kitchen Exhaust Fan:

This claim is denied. No performance specifications are provided. The Tribunal accepts the testimony of Ms Skyba that the fan is extracting air and is vented to the exterior.

15. Warped Siding:

This claim is denied. The Tribunal accepts the testimony of Ms Skyba that this is excluded under section 13 (2) (d) of the Act. There is no report of functional defects.

16. Grading:

This claim is denied. The Tribunal accepts the evidence of Mr. Kairetz that the municipality approved the lot grading. There is a positive slope and no report of water penetration.

17. Roof Shingles:

This claim is denied. Though there are some marks to a few shingles the Applicant is more concerned with future effectiveness than aesthetics. The Tribunal cannot deal with what may or may not happen in the future. There is no water penetration reported at this time.

18. Ceiling Panels on Balcony:

Mr. Tankovitz and Ms Skyba agree that the panels were warranted for not being securely attached to the building. The photographs show a gap between the second panel and the first panel. The past history of loose attachment plus the current gap illustrates poor workmanship.

The second panel needs to be repaired so it will fit securely against the first panel. The Tribunal accepts this claim.

Order:

Accordingly under the authority vested in it under section 16 (3) of the *Ontario New Home Warranties Plan Act* the Tribunal orders the following:

1. The Tribunal directs the Program to disallow the claims as numbered in the decision letter of May 30, 2002 as Claim numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, and 17.
2. The Tribunal directs the Program to allow claim numbers 10 and 18. The linen closet door is to be repaired to allow access to all of the closet area. As there was no discussion at the hearing as to the method of repair for this matter the Program has full authority as to what would be the best method of repair to allow full accessibility to all parts of the closet. The ceiling panel is to be repaired so that the second panel fits securely to the adjacent panels with no gap. Again there was no discussion at the hearing regarding the method of repair. The Program has full authority as to what would be the best method of repair to have the second panel fit securely to the adjacent panels with no gap.

LICENCE APPEAL TRIBUNAL

Marjorie Hiley
Vice Chair

Released: March 3, 2003

JOHN ZIMMER AND PHYLLIS ZIMMER

APPEAL FROM A DECISION OF THE REGISTRAR UNDER
THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL: Simon Dann, Member

APPEARANCES:

No one appearing on behalf of John Zimmer and Phyllis Zimmer, the Applicants

Karen R. Spector, representing the Ontario New Home Warranty Program

No one appearing on behalf of Salcor Construction Ltd., the Added Party

DATE OF
HEARING:

March 3, 2003,

Toronto

CONSENT ORDER

Upon the application to the Tribunal by John Zimmer and Phyllis Zimmer, Applicants, and Karen R. Spector for the Ontario New Home Warranty Program, for the issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicants and Counsel for the Ontario New Home Warranty Program as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Simon Dann, Member

Released: March 7, 2003

BELA BERTA

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE *ONTARIO NEW
HOME WARRANTIES PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, Vice Chair

APPEARANCES:

BELA BERTA, representing himself
KAREN SPECTOR, Counsel, representing the Ontario New Home
Warranty Program
CAROL NEWMAN, Agent, representing Empire Yonge Heath Ltd.,
the Added Party,

DATE OF
HEARING: February 11 and 12, 2003 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") from a written decision of the Ontario New Home Warranty Program (the "Program") dated July 9, 2002 wherein the claim of Bela Berta (the "Applicant") was denied.

THE ISSUES:

The Applicant's appeal is based upon the provisions of section 13(1)(a) of the *Ontario New Home Warranties Plan Act* (the "Act") as well as section 14(3) of that Act.

The Applicant claims that he entered into an Agreement of Purchase and Sale with Empire Yonge Heath Ltd. (the "builder") regarding a residential home to be constructed by the builder at 19 Oak Avenue, Richmond Hill, Ontario (the "home"). The home was duly constructed by the builder and after the Applicant took possession of the home on February 22, 2001, he became aware of defects in the home which he contended were due to the defective workmanship of the builder. Certain of the defects were attended to by the builder to the satisfaction of the Applicant.

However, there were certain defects complained of by the Applicant which were disputed by the builder. The Applicant then sought the assistance of the Program to attempt to mediate the impasse that resulted from the dispute. Two inspections were then held by the Program at the home to investigate the alleged defects and to determine the builder's liability, if any, therefore. Pursuant to the first inspection, the conciliation inspection held on February 22, 2002, the Program determined in its written report issued pursuant to such inspection, that all twenty-five alleged defects complained of by the Applicant were for various reasons not warranted under the Act. The Applicant was not satisfied with the conclusions of the Program and at the request of the Applicant a second inspection of the home, termed a reinspection, was held by the Program. At this reinspection held on May 15, 2002, certain of the Applicant's complaints that had been dealt with in the conciliation inspection report were re-examined by the Program and pursuant to this reinspection a further written report was made by the Program. In this reinspection report, the Program confirmed the findings and conclusions that it had arrived at pursuant to the conciliation inspection at the home. The Applicant was not satisfied with the findings of the Program in both its conciliation meeting report and its reinspection meeting report. Accordingly, pursuant to section 16(1) of the Act, the Program issued its formal written decision by way of a letter addressed to the Applicant dated July 9, 2002. This is the decision of the Program that the Applicant now appeals. Pursuant to section 16(4) of the Act, the builder has been added as a party to the proceedings.

The Program's decision letter of July 9, 2002 dealt with 13 claims of the Applicant. During the hearing, the Applicant abandoned and withdrew 5 of those 13 claims. Those 5 abandoned claims are claims 3, 5, 7, 10 and 11 as enumerated on the Program's decision letter. This appeal therefore relates to claims 1, 2, 4, 6, 8, 9, 12 and 13 set forth in the Program's decision letter of July 9, 2002.

THE EVIDENCE

The evidence presented to the Tribunal consisted of documentary evidence, as well as the oral testimony of the Applicant, two warranty representatives of the Program namely, Wendy Skyba and Jim Fortune and the builder's representative Carol Newman.

The following is a summary of the testimony of the above persons and the documents admitted into evidence.

There was no disagreement that the Applicant and the builder entered into an Agreement of Purchase and Sale whereby the latter was to construct for the Applicant a residential home at 19 Oak Avenue, Richmond Hill. (Exhibit 3, Tab 2). The home was duly constructed and the Applicant took possession of the home on February 22, 2001. Subsequent to taking possession, the Applicant had certain concerns with the home. He reported certain concerns to the builder and in November 2001 he brought his concerns to the Program's notice. Certain concerns of the Applicant were not addressed to his satisfaction by the builder and on December 13, 2001 he advised the Program that he required the Program to conduct a conciliation inspection in regard to his outstanding concerns.

On March 18, 2001, a conciliation inspection meeting was held at the home at which meeting the Applicant was present as well as the builder's representative, Carol Newman, and the program's warranty representative, Wendy Skyba. Dealt with at that meeting were 25 concerns or complaints of the Applicant. The Applicant was not satisfied with the conciliation inspection report dated April 2, 2002 issued by the Program pursuant to the meeting. (Exhibit 3, Tab 16) The report stated that none of the 25 complaints was warranted by the Program. However, of those 25 complaints, 12 complaints were withdrawn by the Applicant at the time of the conciliation inspection. Dissatisfied with the report of April 2, 2002, the Applicant requested a reinspection of the home by the Program and the Program appointed another warranty representative to conduct the reinspection that was held on May 15, 2002 with another warranty inspector, Jim Fortune, as well as the Applicant and Carol Newman of the builder. A written report regarding the reinspection was issued by the Program dated May 16, 2002 in which report the Program confirmed that all the Applicant's complaints remained "not warranted". (Exhibit 3, Tab 17)

The Program thereafter issued its decision letter of July 9, 2002.

Insofar as the complaints of the Applicant were concerned, they were dealt with at the hearing and the various testimonies of witnesses are referred to hereunder.

CLAIM 1 – All thermal windows are sweating

The Applicant stated that all windows in the home have water accumulating on the inside. The water accumulation was so bad originally that water was running from the interior of the windows onto the floors or carpeting. The Applicant went on to state that the "sweating", as he termed it, is due to the builder having failed to install "a bleeding system" when the home was constructed. If such a system had been installed by the builder, at a cost of some \$360.00, there would have been no problem with water accumulating on the inside of the home's windows. The Applicant did concede that the amount of water forming on the windows is now less than it was after he took possession of the home. He stated further that when the weather is cold outside there is more water accumulation on the windows and the higher he turns up the heat, the more the "sweating" occurs on the windows.

In her testimony given on behalf of the Program, Wendy Skyba stated that she was assigned the Applicant's file and she was present at and conducted the conciliation inspection meeting at the home on March 18, 2002. Skyba testified as to her qualifications within the building industry which she stated to be as follows: she has been a warranty representative with the Program for the past four years during which she has inspected many homes where there have been various concerns of an owner and has issued many conciliation reports following conciliation meetings which she had conducted. Prior to her being a warranty representative, she was a building official in Sudbury where she conducted inspections of residential properties for the municipal authority. Before she held the latter position, she was construction supervisor for a construction company that constructs new residential homes and which position she held for some 5 years.

She went on to state that when she was present at the conciliation inspection, she noted that there was no condensation of water on the home's windows. The outside temperature at the time was 3 degrees centigrade. Skyba did state that condensation occurs when warm moisture laden air comes into contact with a cold window. The materials in a newly constructed home, including the lumber used in the home and the concrete, typically contain moisture. As a home slowly dries out, the air in the home absorbs the moisture from the materials used in its construction. If the home is not properly ventilated so as to vent the moist air within the home, condensation will occur and appear on the windows. To prevent condensation the homeowner should run fans to exhaust the moist air. Skyba noted that there are fans to vent air in the home which are situated in the bathroom and in the range in the home's kitchen.

This claim of the Applicant was denied by the Program, according to Skyba, because she noted no water condensing on any windows at the time of her inspection, there was no defect in either the materials used or workmanship insofar as the home's windows were concerned and there was no violation of the Ontario Building Code (the "Code"). She also stated that under section 13(2)(e) of the *Act*, warranty coverage is excluded where an owner fails to maintain adequate ventilation of his home and which the Applicant failed to do.

Jim Fortune, the Program warranty representative testified that he conducted the reinspection of the home on May 15, 2002. He stated that he has been a warranty representative with the Program since 1989, as well as a client service representative. Prior to being with the Program he was a building inspector and official. Prior to 1986, he conducted his own construction business for some 5 years.

Fortune stated that on reinspection of the home he did not observe any problem with water accumulating on the home's windows.

In February 2003, Fortune testified that he did return to the home to ascertain if there was condensation on the windows. When he visited the home, it was 10:30 a.m. and the outside temperature was -5°C to -10°C. He did not enter the home and stood at the street from where the only window he could adequately observe was one front window which was some 30 to 35 feet away from where he stood. He did not observe condensation on that window.

He contended that the Applicant needed a dehumidifier or a vent recovery ventilator to control the excessive humidity in his home. This would cost him about \$350.00 to install. However, neither the Act nor the Code required such installation and it is not standard practice in the building industry to provide such installation unless the contract calls for it or it is an extra for which the homeowner agrees to pay. There was nothing in the Agreement of Purchase and Sale that called for, or required the builder to install a dehumidifier or vent recovery ventilator in the home. There was also no agreement for the builder to install the latter at an extra cost to the Applicant.

Fortune stated that he denied warranty coverage on the basis that the home had been constructed in a workmanlike manner, free from defects in material, and that there was no violation of the Code.

Carol Newman testified on behalf of the builder and stated she is employed by the builder as its customer service manager. She is responsible for overseeing customer complaints and attending all home inspections. Her experience extends to being employed by the builder as customer service manager for the past 5 years and prior thereto she was a warranty representative with the Program. She has been involved in the building industry for the last 14 years.

Newman stated that after the Applicant called for a conciliation inspection meeting she visited the home to familiarize herself with the issues. She was not able to decipher the Applicant's handwriting regarding his concerns and wished to obtain clarity from the Applicant himself insofar as the issues were concerned. Newman stated she was in the home when both the conciliation inspection took place and the reinspection meeting took place. On no occasion when she was at the home did she observe any problem with water condensation on any windows in the home.

CLAIM 2 – Squeaking Floors

The Applicant stated that when he walked on the floors of the home he could hear "cracking". He complained to the builder who sent an employee to the home and applied caulking to the underneath of the floors with a caulking gun. This has helped to reduce the noise where the caulking was applied but it was not applied to all areas where there was noise. There is presently noise from the hallway floor as well as from the floors in one bedroom and the eating area.

Under cross-examination, the Applicant stated there was no longer a problem with the floor in the master bedroom, or with the floors in the kitchen and living room.

Skyba testified that during the conciliation inspection she asked the Applicant to demonstrate the problem with the floors. She and the Applicant walked over various floors including those in the master bedroom and living room. She observed a very narrow area of minor creaking in both rooms. The creaking was faint and isolated but there was no movement under foot.

Skyba stated that the minor squeaking was caused by the normal shrinking of the wood floor joists which occurs where the lumber dries out and the moisture dissipates into the air. When this occurs a minor gap appears at the floor joist which typically reflects shrinkage. She denied warranty coverage as normal shrinkage of materials caused by drying after construction is excluded from warranty under section 13(2)(d) of the Act. Furthermore, no defect in either work or material was observed nor was there any violation of the Code.

Fortune also testified as to his observations on reinspection and noted that he observed minor noises and was told by the Applicant that squeaks from the floors were more apparent at some times and not at other times. This indicated that the problem lay with humidity levels in the home. Shrinkage of materials is excluded from warranty under section 13(2)(d) of the Act. He observed no Code violations nor was there any defect in materials or in workmanship.

Newman stated in her testimony that when she visited the home in preparation for the conciliation inspection, she noted minimal squeaks in the master bedroom floor and the living room floor. She authorized remedial work to be carried out not because there was a defect but because the Applicant was disturbed by the minor noise. She ordered shimming and the application of glue to the complete underside of the living room and master bedroom floors. No other floor areas of concern were pointed out to Newman by the Applicant.

CLAIM 4 – Dining room walls and kitchen walls – too broken up

The Applicant stated in his testimony that he has “no problem with this at present but I fear in the future there will be a problem”. His fear related to the integrity of the kitchen wall and its ability to support the weight of the roof.

Skyba stated that when she was in the home during the conciliation inspection the Applicant pointed to some drywall repairs that had been completed by the builder in around the archway to the kitchen and living room. She identified the area of drywall repairs by reference to a photograph (Exhibit 3, Tab 21, first of 4 photographs).

Skyba stated that the Applicant's complaint prior to the time of the conciliation inspection was that the drywall was "broken-up". The Applicant had at the time of the inspection pointed out to her that the drywall had by then been repaired by the builder but that the portion repaired had not been primed or painted. She pointed out to the Applicant that this was not a complaint that was warranted under section 13(2)(d) of the Act as the complaint was consistent with normal shrinkage caused by drying out of materials.

The Applicant at no time prior to the meeting or at the meeting mentioned to Skyba that he had concerns that related to aspect of construction itself.

Skyba stated that she denied warranty coverage as there were no defects in work or materials, no violation of the Code and that the cause of the cracks in the drywall were due to normal shrinkage which is excluded from warranty coverage under section 13(2)(d) of the Act.

Skyba stated that at the time of the conciliation inspection, no concerns were expressed by the Applicant as to possible future failure of the supporting upright sections of the kitchen wall. Skyba disputed that the construction of the two upright sections of wall that support the roof trusses had caused any damage to the drywall that was repaired by the builder nor is there any danger to the integrity of the home itself.

In his evidence, Fortune testified that he took a photograph of the wall in question when he attended at the reinspection. (Exhibit 3, Tab 21). At this reinspection, the Applicant raised his concern regarding the construction and integrity of the wall. This was not the same issue that the Applicant had previously raised and which Skyba had to deal with at conciliation. Fortune had prior to his testimony determined, by reference to the building plans which he had inspected, that the roof of the Applicant's home was engineer designed and posed no risk to the structural integrity of the home. At present, the Applicant was experiencing no problem and was satisfied with the builder's repairs to the drywall itself.

CLAIM 6 – Slim lights under kitchen cabinets

The Applicant stated that the home does not have what he termed as "slim lights" under the cabinets in the kitchen. Other homes that the Applicant had seen in the neighbourhood did have these lights installed under the cabinets. He went on to state that when he was in the builder's sales office prior to the sale being concluded he was assured by a representative of the builder that the home would have such lights.

In cross-examination, the Applicant was shown a copy of the Agreement of Purchase and Sale (Exhibit 3, Tab 2), the original of which he conceded signing. He was not able to point to any provision in that agreement to the effect that such lights would be supplied and installed by the builder. He was shown the following clause in the agreement which he conceded is a clause in the agreement he signed.

30. The Purchaser(s) acknowledge(s) and agree(s) that the Vendor's model home(s) presentation may, where applicable, include features, finishes and upgrades (either inside or outside) which may not be included as standard features in the home being purchased. Accordingly, the Purchaser's attention is drawn to SCHEDULE "B" QUALITY APPOINTMENTS which forms part of this Agreement of Purchase and Sale and which sets out therein the items which will be included in the home as standard features. The Purchaser(s) hereby acknowledge(s) that the new home will only include those standard features and, accordingly, if the Purchaser(s) require(s) any clarification of the explanation as to terms, features or finishes as referred to in the SCHEDULE "B" or anywhere else in this Agreement of Purchase and Sale or with respect to any matters whatsoever which the Purchaser(s) had discussed with the Vendor's Sales Representatives such matters, clarifications, features or representations must be made in writing and included in this Agreement of Purchase and Sale, failing which the Purchaser(s) shall be stopped from making a claim for any such matters, clarifications, features or representations, other than set out in writing in this agreement. The Purchaser(s) hereby acknowledge(s) that there are no representations, warranties, collateral agreements or conditions whatsoever affecting the Agreement of Purchase and Sale or the real property or supported hereby other than as is expressed in writing in this Agreement.

The Applicant was also shown Schedule "B" to the Agreement and was not able to point in the home's listed standard features to any reference to "slim lights" or valance lights being supplied as a standard feature.

Skyba confirmed in her testimony that the agreement did not call for the builder to supply or install valance lights in the kitchen. Fortune in his evidence supported Skyba's position. Both Skyba and Fortune concurred in their opinions that there was no requirement in the Agreement for valance lights to be installed by the builder and their absence in the home did not indicate the builder had breached the warranties as stated in section 13(i)(a) of the Act.

Newman stated that valance lights were not supplied and installed and as such were not required under the agreement, and the Applicant did not purchase such valance lights as an extra.

CLAIM 8 – GROUND FAULT RECEPTACLE MISSING IN THE KITCHEN

The Applicant testified that there was no ground fault receptacle installed in the kitchen. He stated that the home should have been constructed according to the CSA Standard which he claimed does require such receptacle to be installed in the home's kitchen. Under cross-examination the Applicant stated he could not substantiate his statement regarding CSA Standard nor could he indicate where in such CSA Standard there is a requirement for this receptacle to be installed in the home's kitchen.

Skyba, in dealing with this claim in her evidence, stated that there is no ground fault receptacle in the home's kitchen. She went on to state that the Ontario Building Code does not require such receptacle in the kitchen, nor does the Ontario Electrical Safety Code require such receptacle to be installed under the latter Code which is the governing Code relative to electrical installations. The Ontario Electrical Safety Code does require such ground fault receptacles to be installed in only bathrooms and combination laundry/bathrooms. The latter Code prohibits such receptacle being installed directly behind or in front of a kitchen sink. Skyba further stated that she denied this claim as there was no violation of either of the above Codes, the home did pass all necessary electrical inspections prior to an occupancy permit being granted and the home was constructed in a workmanlike manner and is free from defects in material.

Fortune testified that he supported and confirmed Skyba's position. He did add that although the Ontario Electrical Safety Code in force at present and at the time of the home's construction does not require a ground fault receptacle in a home's kitchen, there is possible legislation pending, but not in force, that may amend the requirements for such receptacle in home's kitchens.

CLAIM 9 – FLAT CONCRETE SLAB MISSING OUTSIDE OF STAIRS OF SLIDING DOOR

The Applicant claimed that there is no slab outside the home's sliding patio door and he requires the builder to place one outside that door.

Skyba conceded in her testimony that there was no concrete slab outside the patio door. However, she observed during the conciliation inspection, that there was a wooden deck that had been constructed by the builder and which deck leads from the patio door of the home. From the deck itself there were steps down to grade. There was no requirement in the agreement that the builder was to construct a deck outside the patio door. However, a deck was supplied and built by the builder in lieu of the concrete slab. Such deck, which was not stipulated in the agreement to be supplied, was in fact supplied by the builder in substitution of the slab. The substituted deck, according to Skyba was of equal or better quality than the slab and complies with section 19 of the regulation 892 under the Act.

Fortune stated in his evidence that if a side or patio door is more than 2 foot above grade, as is the case of the home's patio door, the builder shall supply either patio stones at the door's exit or a deck with stairs to grade. The builder chose the latter in substitution of patio slabs which Fortune testified is in conformity with section 19 of Regulation 892.

This claim according to Fortune, was denied by the Program as there was no violation of the Code and the deck was constructed in a workmanlike manner and is free from defects in material.

CLAIM 11 – TURF FOR GRASS UNIT BADLY LAID ON GROUND

At the hearing, the Applicant stated that his complaint was that turf or grass sod was laid down by the builder one day and that the very next day the Applicant found such turf had been rolled up and stacked on his neighbour's property. The turf that was removed was subsequently replaced and relaid by the builder with turf that was "no good".

Skyba in her testimony stated that when she attended at the home at the time of the conciliation inspection, the Applicant's complaint was that there was a hole in the front yard that had been dug by Bell. The Applicant also complained of a second hole at the southwest corner of the home that had been dug by the builder at the request of the local municipal authority and then filled and sod installed. On the basis of this information, the Program denied warranty coverage as the damages complained of were caused by municipal services which are specifically excluded from warranty coverage under section 13(2)(k) of the Act. (Exhibit 3, tab 16).

The complaints of the Applicant as expressed in his testimony before the Tribunal is, according to Skyba, a new complaint that had not previously been raised by the Applicant. It is therefore a new claim made by the Applicant during his testimony before this Tribunal and is denied as it was not made within one year after the warranty took effect on the Applicant's possession of the home.

CLAIM 12 – DRIVEWAY HAS OIL SPOTS ON IT (100 PLACES OR MORE)

The Applicant stated that whatever oil spots were apparent on the surface of the driveway are no longer apparent, as the driveway has, at the end of 2002, had a further surface applied to it by the builder. Now his complaint related to 5 pin points of rust, no larger than the tip of a ball point pen that have appeared since the further driveway surface has been applied. The Applicant stated that when he noticed the pin points of rust he reported same by telephone to the builder.

Skyba in her testimony related that when she attended at the conciliation inspection, she was told by the Applicant that when the driveway was wet there were oil spots noticeable on the asphalt surface. No oil spots were apparent at the time of her inspection. Skyba stated that, typically, asphalt is laid in two stages with the second layer being applied about a year after the first layer. The second layer is not a repair job but normal completion of a driveway. Skyba denied this claim as there were no oil spots observed by her on inspection and the driveway had been constructed in a workmanlike manner and was free from defects in material. There was no question of there being a Code violation.

Fortune stated that on reinspection he observed no oil spots on the driveway and saw no defect in work or materials used. He also stated that at no time has the Program received a report from the Applicant, either in a writing or orally, that there are rust spots on the driveway surface.

CLAIM 13 – SOUTH EAST CORNER LEAKING BADLY – NEEDING REPAIR
DOWNSPOUT OR EAVESTROUGH

The Applicant stated that the eavestrough is completely installed but without a downspout. He conceded that he had at no time made a report or complaint in writing to the Program regarding overflowing of water from eavestrough. He stated that he told both Skyba and Newman of overflow of water only when the latter persons attended at the conciliation inspection and that he never made a report to the Program in writing.

Skyba confirmed that the Applicant verbally reported this complaint to her when she was at the home at the conciliation inspection. Prior thereto there had been no report of this complaint either orally or in writing.

FACTS FOUND PROVEN:

The following are the facts found by the Tribunal to have been proven.

1. The Applicant took possession of the home on February 22, 2001.
2. A conciliation inspection of the home took place on March 18, 2002 at which inspection the Applicant, Skyba and Newman were present.
3. A reinspection of the home took place on May 15, 2002 at which inspection the Applicant, Fortune and Newman were present.
4. At the hearing of this matter before the Tribunal, the Applicant abandoned and withdrew claims 3, 5, 7, 10 and 11 as enumerated in the Program's Decision Letter of July 9, 2002.
5. The Applicant's complaint of all thermal windows sweating, is caused by dampness or condensation due to the failure of the Applicant to maintain adequate ventilation in the home. The sweating is not due to the builder's workmanship nor is it due to defects in materials used by the builder.
6. The squeaking of the floors in the Applicant's home is due to normal shrinkage of materials used by the builder in the home's construction. This shrinkage of materials is due to and caused by drying out of the moisture in the materials used in the home's construction.
7. The builder has repaired the cracks and other blemishes in the drywall in or about the home's kitchen. The drywall existant in or about the kitchen does not exhibit damage. There is no evidence to support a claim that there is damage to the home's roof support or that the roof or any portion of the structure is unstable, damaged or in danger of collapse.

8. Slim lights or valance lights in the kitchen cabinets were not stipulated in the Agreement of Purchase and Sale as standard items or features nor as extras to be paid for by the Applicant. The aforesaid lights are not required by the Code and the lack of such lights does not reflect a lack of workmanship by the builder.
9. The Agreement of Purchase and Sale did not require the builder to install a ground fault receptacle in the home's kitchen, nor does the Code itself require such installation nor is it a requirement under the presently existing Ontario Electrical Safety Code. The lack of such receptacle does not reflect a lack of workmanship by the builder.
10. The builder did supply and install, without additional charge to the Applicant, a wooden deck leading from the home's patio door together with steps from the deck to grade. The wooden deck was not called for in terms of the Agreement of Purchase and Sale and was supplied and installed by the builder in lieu of patio stones at the patio door exit. The wooden deck was a substitution made by the builder that is of equal or better quality than patio stones.
11. The Applicant's original complaint made prior to the conciliation inspection and at such inspection related to two holes in or about the home's ground. The two holes in the ground, identified by the Applicant at the conciliation inspection, have been repaired and no longer exist. The claim made by the Applicant at the hearing was that sod had been removed from his property and had been replaced by the builder with sod that subsequently died. This latter claim had not been brought to the Program's notice either in writing or verbally prior to the hearing.
12. Any oil spots that may have existed on the home's driveway no longer exist due to an additional asphalt surface having been applied by the builder in the normal course of the finishing of the driveway's construction. The Applicant had prior to the hearing not brought to the Program's notice, either in writing or verbally, that any rust spots exist on the final surface of the home's driveway.
13. The Applicant's complaint regarding the "southeast corner leaking badly – needing repair downspout or eavestrough" being claim #13 on the program's decision letter of July 9, 2002, was only brought to the Program's notice at the time of the conciliation inspection on March 18, 2002 which is beyond the one year warranty in terms of section 13.(4) of the Act.

THE LAW:

The Act's relevant portions are:

Section 13. (1) Every vendor of a home warrants to the owner,

- (a) that the home,
 - (i) is constructed in a workmanlike manner and is free from defects in material,
 - (ii) is fit for habitation, and
 - (iii) is constructed in accordance with the Ontario Building Code;
- (b) that the home is free of major structural defects as defined by the regulations; and
- (c) such other warranties as are prescribed by the regulations.

(2) A warranty under subsection (1) does not apply in respect of,

- (a) defects in materials, design and work supplied by the owner;
- (b) secondary damage caused by defects, such as property damage and personal injury;
- (c) normal wear and tear;
- (d) normal shrinkage of materials caused by drying after construction;
- (e) damage caused by dampness or condensation due to failure by the owner to maintain adequate ventilation;
- (f) damage resulting from improper maintenance;
- (g) alterations, deletions or additions made by the owner;
- (h) subsidence of the land around the building or along utility lines, other than subsidence beneath the footings of the building;
- (i) damage resulting from an act of God;
- (j) damage caused by insects and rodents, except where construction is in contravention of the Ontario Building Code;
- (k) damage caused by municipal services or other utilities;
- (l) surface defects in work and materials specified and accepted in writing by the owner at the date of possession. R.S.O. 1990, c. O.31, s. 13 (2).

Section 13. (4) A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed.

Section 14. (3) Subject to the regulations, a person who has entered into a contract to purchase a home from a vendor is entitled to receive payment out of the guarantee fund for the amount that the person paid to the vendor as a deposit to be credited to the purchase price under the contract on closing if,

(b) the person has a cause of action against the vendor or the builder, as the case may be, for damages resulting from the breach of warranty.

Regulation 892 to the Act states:

Section 4.(1) Each person with a claim under the Plan shall give written notice of the claim to the Corporation.

Section 16. Where a home was enrolled after the 31st day of December, 1990, the claim for damages because of a major structural defect may be made within seven years of the date specified in the certificate of completion and possession.

DECISION AND REASONS:

The onus of proof rests upon the Applicant to prove that he is entitled in terms of section 14(3)(b) of the Act to receive payment from the Program for the cost of remedial work required to correct breaches of warranty. Having had the benefit of listening to the oral evidence of various persons who testified and of observing their demeanour, the Tribunal has no hesitation in accepting the testimonies of witnesses Skyba, Fortune and Newman. They gave their evidence in a straightforward manner without embellishments. Skyba and Fortune impressed the Tribunal with their expertise in relation to the issues and their logical and reasoned testimony. The Applicant, on the other hand, showed no expertise on the various issues upon which he testified and brought no person or persons whatsoever to dispute the evidence of Skyba and Fortune. Additionally, he produced no photographs that could have supported his contentions. As a result, the Tribunal found no difficulty in accepting the evidence of the Program and the builder and preferring such evidence to that of the Applicant. The following is the Tribunal's analysis of the evidence and the reasons for the Tribunal's decision.

CLAIM 1

The Program's two warranty representatives who inspected the home on separate occasions did not observe condensation on the inside of the windows of the house. The Applicant brought no evidence, other than his own testimony, to support his allegation that condensation was present. No photographs were presented nor was there objective independent evidence placed before the Tribunal on behalf of the Applicant to support his allegations. The Tribunal finds the Applicant has failed to discharge the onus of proof to satisfy the Tribunal on a balance of probabilities that condensation did occur or was present. On that basis the Applicant's claim must fail.

However, even if the Applicant had proven that condensation occurred and manifested itself in water accumulating on the inside of the home's windows (which the Tribunal does not find), the Tribunal accepts the evidence of the Program's two witnesses who both independently and jointly have many years of experience, dealing with excessive humidity in a home. The Tribunal finds that the Applicant failed to properly ventilate the home so as to control excessive humidity which is common in a newly constructed home due to the drying out process of building materials used in construction. The Tribunal therefore finds in the alternative, that this claim if it had been proven, is excluded from warranty coverage in terms of section 13(2)(e) of the Act.

The Tribunal finds this claim of the Applicant therefore fails.

CLAIM 2

The Applicant testified that he was aware of "cracking" or squeaking noises from certain floors in the home when walked upon. The noises have greatly abated in certain areas due to remedial measures taken by the builder after the Applicant complained. Presently, there are only minor noises emanating from the floors in one bedroom and the hallway. Both warranty representatives of the Program, when they paid independent inspection visits to the home, stated that they heard minor faint noises from certain isolated floor areas.

While the Applicant brought no evidence before the Tribunal, other than his own testimony, the Program's evidence introduced through its two warranty representatives was that the minor small squeaks that they heard were a manifestation of a common occurrence in newly built homes experiencing humidity problems from the drying out of materials used in the home's construction. The Program's witnesses asserted that the minor squeaks were consistent with normal shrinkage of materials used in the home's construction and caused by those materials drying out.

The Tribunal accepts the uncontroverted evidence of the Program's two witnesses as to the cause of minor noises and finds that this claim falls into a warranty exclusion under section 13(2)(d) of the Act.

The Tribunal finds this claim of the Applicant fails.

CLAIM 4

The Tribunal finds that there were repairs to the kitchen's drywall carried out by the builder after the Applicant took occupation of the home. These repairs were successfully completed and satisfactorily dealt with certain cracks and nail pops about which the Applicant had complained.

Possession or occupation of the home was given to the Applicant on February 22, 2001 and on March 18, 2002, a conciliation inspection took place. At the time of the conciliation inspection, the complaint of the Applicant related to the cracks in the drywall and the nail pops. There was at that inspection no question raised about the structural integrity of the wall or walls in the kitchen. The latter allegation was only expressed verbally by the Applicant after the Conciliation inspection report of April 2, 2002 has been issued.

The one year period within which the Applicant was obliged in terms of section 13(4) of the Act to report claims to the Program expired on February 21, 2002. At that latter date, the Applicant's claim related to cracks and nail pops which were subsequently repaired by the builder. It was only after February 21, 2002 that the Applicant registered his verbal complaint to the Program regarding his fears of the structural integrity of the kitchen wall or walls. At no time has the Applicant made this latter claim in writing. The Applicant brought no evidence before the Tribunal at the hearing that there is a failure of the structural integrity of the home's walls. He asserted that he only fears that in the future there may be problems due to the possible collapse of the roof of the home and kitchen wall. The Program's two representatives disputed the Applicant's opinion that the home was in any way without structural integrity. They also disputed that the Applicant's fears were valid.

The Program finds that the original complaint of the Applicant, which was reported to the Program in terms of section 13(4) of the Act as read with section 4.(1) of Regulation 892 to the Act, related to cracks in the kitchen drywall that has now been repaired by the builder and in which respect the Applicant has no further claim. His claim in that regard therefore fails.

The Act does not legislate for possible future claims that an applicant fears may arise at some future date. However, if in the future the Applicant's home does manifest a major structural defect as defined in Regulation 892 to the Act, and the Applicant can establish a valid claim for damages due to such defect within seven years of the home's completion and possession, he may be able to bring a claim for damages. However, at this stage there is no proven major structural defect and no valid claim made in that regard.

CLAIM 6

There is nothing in the Agreement of Purchase and Sale that entitles the Applicant to receive slim lights (or commonly referred to as valance lights) in the home's kitchen. There is no document to indicate that such lights were to be supplied as an extra. Even if the Applicant has been verbally promised such lights by an employee of the builder prior to the execution of the agreement, such promise is not binding on the Program or the builder by virtue of the disclaimer in paragraph 30 of the Agreement of Purchase and Sale referred to earlier in this decision. The absence of such valance lights does not indicate a lack of workmanship or a defect in materials nor does it indicate a violation of the Code. This claim of the Applicant therefore fails.

CLAIM 12

This claim relates to oil spots that the Applicant stated in his testimony had appeared on the driveway surface. The Program's witnesses testified that when they inspected the driveway they saw no oil spots. The Applicant produced no photographs to support his contention nor did he have any person testify in support of this allegation. However, he did concede that a further or second coat has been applied by the builder to the driveway's surface and that oil spots are no longer apparent. He now claims that the resurfacing has resulted in five rust spots, each the size of the tip of a ball point pen, appearing on the asphalt.

The original complaint of oil spots were not observed by the Program's witnesses but in any event they have now been eliminated. The Applicant's original complaint of oil spots was remedied by the second layer of asphalt. That claim must therefore fail.

Insofar as the five rust spots are concerned, such allegation surfaced for the first time when the Applicant testified at the hearing. At no time has a claim relating to rust spots been made to the Program in writing. Accordingly, the Applicant's claim relating to rust spots must fail due to non compliance by the Applicant with Section 13.(4) of the Act as read with section 4.(1) of Regulation 892. Even if the Applicant had proven there are rust spots present (which the Tribunal finds he has failed to prove to the Tribunal's satisfaction) he has not at any time reported such complaint to the Program in writing or within one year of taking occupation of the home.

The Tribunal finds that when the builder applied the second coat or layer to the asphalt driveway that work was not done as repair work but was done in the normal course of the completion of an asphalt driveway.

CLAIM 13

This claim of the Applicant relates to a downspout or eavestrough at the southeast corner of the home that the Applicant claims is leaking badly. This claim was verbally reported to the Program for the first time at the conciliation meeting held on March 18, 2002. The warranty representative, Skyba, did not observe any leak at the time of inspection.

This claim was made after the expiry of the one-year warranty period as required by section 13.(4) of the Act. As such the Tribunal finds the claim to have been made beyond the one-year period calculated from the date of occupation, namely February 21, 2001. This claim accordingly fails due to it having been reported out of time. In addition, in view of the conflicting testimony of the Applicant and Skyba as to whether there is or was a leak, the Applicant's claim must fail as he has failed to prove on the balance of probabilities that there is or was leakage.

In dismissing all the claims of the Applicant, the Tribunal finds that none of the Applicant's complaints or claims resulted from the home not being constructed in a workmanlike manner or having defects in material that were used. Furthermore, the Tribunal find the home is fit for habitation and is constructed in accordance with the Ontario Building Code.

DECISION

Accordingly, pursuant to the authority vested in it under section 16(3) of the *Ontario New Home Warranties Plan Act*, the Tribunal directs the Ontario New Home Warranty Program to disallow the claims of the Applicant.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: March 7, 2003

JASON H. TRUONG

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: JASON H. TRUONG, Applicant, representing himself

MICHAEL ROTHE, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: February 27, 2003

Toronto

ORDER

Following attendances on February 27, 2003 at the hearing before this Tribunal of Jason H. Truong, appearing on his own behalf ("Truong") and Michael Rothe, Counsel appearing on behalf of the Registrar, *Motor Vehicle Dealers Act* (the "Registrar");

And following the testimony of Police Officer Paul Stewart and the testimony of Jennifer Andrew of the Ontario Motor Vehicle Industry Council at the hearing on February 27, 2003;

The Tribunal makes the following order by consent of Truong and Michael Rothe, Counsel for the Registrar.

1. Truong undertakes to inform the Registrar in writing, immediately upon the disposition of the pending charge of fraud over \$5, 000.00 against him which is presently due to be heard on September 4, 2003 under case: D32.CIPS-AR#.575134.
2. In the event of Truong being found guilty of the aforesaid charge, he hereby consents to the immediate revocation by the Registrar of his registration as a motor vehicle salesperson under the *Motor Vehicle Dealers Act*.
3. Truong undertakes that in any future application for registration, whether such application is directed to the Registrar or any other body or organization, and whether such future application relate to a new application for registration or renewal of an existing registration, he shall fully and honestly disclose all and any information that would enable an informed decision to be made by the recipient of such application, including the Registrar.

4. At all times that Truong's driver's licence is or remains under suspension, for any cause whatsoever, he undertakes not to drive and/or be in control of a motor vehicle and this shall include, but not be limited to, driving prospective customers on test drives of motor vehicles.
5. Truong shall be entitled to the immediate reinstatement of his registration as a motor vehicle salesperson and the Registrar shall ensure compliance with this order by withdrawing the Proposal to revoke Truong's registration dated September 12, 2002.
6. Nothing contained in this Order shall preclude the Registrar from at any time in the future bringing a Proposal to Revoke the registration of Truong should Truong fail to comply with this Order or with the *Motor Vehicle Dealers Act* and its Regulations.

LICENCE APPEAL TRIBUNAL

Derek Israel,
Vice-Chair

Released: March 4, 2003

RAJWANT KAUR MULTANI O/A NANCO MOTORS

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: ANTOINE AOUAD, M.D., Presiding Member

APPEARANCES:

AVIVA HARARI, Counsel, representing the Registrar, *Motor Vehicle Dealers Act*

RAJWANT KAUR MULTANI, Applicant
unrepresented

DATE OF
HEARING: February 7, 2003

Toronto

REASONS FOR DECISION AND ORDER

PRELIMINARY MATTERS

Counsel for the Respondent, Ms. Aviva R. Harari, expressed concern regarding Mrs. Multani's daughter acting as both interpreter and witness. Ms. Harari pointed out that part of the Order made by this Tribunal on November 14th, 2002, required that the Applicant obtain the services of an independent and certified interpreter. Ms. Harari argues that the Applicant's daughter is not certified and she definitely cannot be considered impartial.

Mrs. Multani explained that she is not able to afford the services of a certified interpreter, and that her daughter will not be a witness in these proceedings.

Noting, Ms. Harari's objection that the interpreter should only provide translation to questions posed to the Applicant, and not the complete answers given by the Applicant, the Tribunal ruled that in the interests of justice, Mrs. Multani's daughter would be allowed to assist Mrs. Multani.

Ms. Jaspreet Multani was sworn in as interpreter of the Punjabi language.

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the “Tribunal”) from a notice of Proposal issued by the Registrar under the *Motor Vehicle Dealers Act* (the “Registrar”), pursuant to section 7 of the *Motor Vehicle Dealers Act* (the “Act”). The Proposal dated September 12, 2002, seeks to revoke the Registration of Rajwant Kaur Multani o/a Nanco Motors, as a Dealer.

The Proposal sets out the Registrar’s reasons for seeking an order for the revocation of the registration. The reasons are stated as follows:

The intention and objective of the Act is to protect the public interest. The requirements of the Act include that Registrants be financially responsible in the conduct of business and that Registrants carry on business in accordance with the law and with integrity and honesty. The Registrant’s conduct is inconsistent with the intention and objective of the Act, and therefore warrants disentanglement to registration under the Act.

The particulars in the Notice of Proposal dated September 12, 2002, are:

1. Rajwant Kaur Multani o/a Nanco Motors (hereinafter the “Dealer”) is currently registered as a motor vehicle dealer and was originally registered on or about November 30, 1995.
2. Makhan Singh Multani (hereinafter “Mike”) was refused registration as a motor vehicle salesperson in or around November 1997.
3. Mike has a beneficial interest in the Dealer.
4. Mike is an unregistered salesperson for the Dealer.
5. The Dealer has been advised by the Representatives of the Registrar that retaining the services of an unregistered salesperson is in contravention of the *Motor Vehicle Dealers Act*.
6. The Registrar’s office has received consumer complaints concerning the conduct of the Dealer.
7. The Dealer has engaged in conduct, which has resulted in charges being laid for making false statements and falsifying safety certificates under the *Highway Traffic Act*.
8. The Dealer has engaged in conduct, which has resulted in charges being laid under the *Highway Traffic Act* for failing to maintain a garage register.
9. The Dealer has permitted an unregistered salesperson to attend Dealer only

auctions on behalf of the Dealer.

10. The Dealer has shown a disregard for the *Motor Vehicle Dealers Act* and its Registrations.

By Notice of Further and Other Particulars dated January 16th, 2003, the Registrar stated as follows:

1. On January 3rd 2003, the Small Claims Court rendered a Judgment in favour of a consumer plaintiff against Nanco Motors in the amount of \$4,726.00.

By written Notice of Appeal Mrs. Rajwant Kaur Multani informed the Tribunal pursuant to section 7 (2) of the Act that a hearing was requested regarding an appeal to the proposal.

THE EVIDENCE

WITNESSES FOR THE REGISTRAR:

Testimony of Mr. Larry Edgar

Presently, Mr. Edgar is an Investigator for the Registrar of the Ontario Motor Vehicle Industry Council (OMVIC), a position that, he has held since "March 2000". He was previously with the OPP for 33 years.

On Thursday, April 25th, 2002, Mr. Edgar attended at the premises of Nanco Motors, at 610 Danforth Road. Mr. Edgar confirmed that the handwritten notes filed in Exhibit # 5, at Tab 21, were made at time and shortly after his visit to Nanco Motors.

Mr. Edgar posed as the buyer of a 1994 red Pontiac Firebird being offered for sale. The vehicle was further identified by licence plate ALMZ 147, and by the last five digits of VIN number: 14116.

The female present at the dealership, later identified as Mrs. Multani, gave information as to the listed sale price. Further conversation took place with the male, who identified himself with a business card imprinted with the business name Nanco Motors and the words: "Call: Multani". The name "Mike" is hand printed over the words: "Call: Multani". "Mike" was subsequently identified as Mr. Multani.

After obtaining the serial number of the vehicle from Mr. Multani, Mr. Edgar informed Mr. Multani of his employment with OMVIC, and asked him why he was selling cars. According to Mr. Edgar, Mr. Multani explained that Nanco Motors was a family business in existence for twenty years, that business was bad and that he was just helping.

Testimony of Mr. Brian Lia

Mr. Lia is an Inspector with the Ontario Motor Vehicle Industry Council (OMVIC). Prior to becoming an Inspector, three years ago, Mr. Lia worked for OMVIC as a Complaints Officer.

In his capacity as Inspector Mr. Lia visited Nanco Motors on "01/09/02". The document entitled "Short Report" under the letterhead of OMVIC (Ontario Motor Vehicle Industry Council), filed in Exhibit # 5, at Tab 14, reflects Mr. Lia's notes made shortly after the inspection of Nanco Motors.

Mr. Lia confirmed that he met with Mr. and Mrs. Multani. The discussion, with Mr. Multani, focused on the alleged misrepresentation, by Nanco Motors involving the sale of a 1988 Caravan.

During the inspection, Mr. Lia observed Mr. Multani openly provide information to two prospect customers, about a vehicle being offered for sale by the dealership.

Mr. Multani did not hide from Mr. Lia, the fact that he had been refused a salesman's licence, but explained that he was just helping his wife.

Prior to leaving Nanco Motors, Mr. Lia prepared and left a copy with the Dealer of his Inspection Findings. Mrs. Multani signed the sheet and indicated to Mr. Lia, that she understood the comments made therein.

Subsequently, Mr. Lia followed up with the consumer, who confirmed that Mike Multani had sold the vehicle to him. Documentation filed in Exhibit #5, at Tab 15, indicates that R. Multani signed the transaction information sheet.

Testimony of Mr. Kevin Van-Pedro

Mr. Van-Pedro has been a Complaints Mediator with OMVIC since April 2001.

As a Complaints Mediator, Mr. Van-Pedro had occasion to be involved in a dispute between a consumer and Nanco Motors.

Filed at Tabs 17 and 18 of Exhibit # 5, are copies of the records of the complaint received from Mr. Rick Thomson, and of Mr. Van-Pedro's conversation with Mrs. Multani, respectively.

In speaking to Mrs. Multani, Mr. Van-Pedro was informed that Mr. Multani's involvement in the business is in financing.

Mr. Van-Pedro was also involved, but unsuccessful, in mediating the complaint against Nanco

Motors, made by Mr. Douce.

After succeeding in Small Claims Court, Mr. Douce faxed Mr. Van-Pedro a copy of the last page of the court order which has been entered into evidence as part of Exhibit # 5, Tab 33.

Testimony of Mr. Doug Davey

Mr. Davey, who is employed by the Ministry of Transportation as a Provincial Offences Officer under the *Highway Traffic Act*, testified as to his responsibilities regarding compliance with regulations for the issuance of Safety Standards Certificates.

As Nanco Motors, owned by Mrs. R. Multani was licenced under the *Highway Traffic Act* as an Inspection Station, Mr. Davey had occasion to carry out an audit on August 7th, 2002. Mr. Davey's findings are filed at Tab 27 of Exhibit # 5.

As a result of Mr. Davey's audit, the licence under the *Highway Traffic Act* for Nanco Motors has been revoked, and charges have been laid against the garage and the mechanic.

Based on his observations, Mr. Davey agreed with Ms. Harari's statement that Mrs. Multani had not fulfilled her obligations as a licence holder.

Testimony of Ms Laura Gordon

Ms. Gordon has been with Ontario Motor Vehicles Industry Council, OMVIC, since April 1997, and has held the position of Director of Compliance since September 1997.

For the record, Ms. Gordon explained that OMVIC, created in January 19th, 1997, is a non-profit corporation, which has been delegated, the responsibility to administer the *Motor Vehicle Dealers Act*. Enacted as a public protection statute, the *Motor Vehicle Dealers Act*, ensures compliance, by dealers and salespersons, with Section 5 of the Act, requiring that individuals and corporations registered under the Act, meet standards of honesty, integrity, compliance with law, and financial responsibility.

The decision to revoke the registration of Rajwant Kaur Multani o/a Nanco Motors was based on the past conduct of the dealer. As part of her testimony Ms. Gordon reiterated the reasons set out in Notice of Proposal to Revoke Registration and in the Notice of Further and Other Particulars, found in Tabs 1 and 2 of Exhibit #5, respectively. Ms Gordon testified that Mrs. Multani's failure to abide by the terms of her licences under the *Highway Traffic Act* denotes disregard for the law, and therefore contravenes section 5 of the *Motor Vehicle Dealers Act*.

As requested by Ms. Harari, Ms. Gordon continued her testimony by identifying and commenting on particular documents contained in Exhibit #5.

Nanco Motors was registered as a Motor Vehicle Dealership on November 30 1995. In December of 1997, Mike Multani applied to be registered as a salesperson for the Dealer. A copy of the Registrar's Notice of Proposal to Refuse Registration based on Mr. Multani's past conduct forms part of these proceedings, and can be found at Tab 9 of Exhibit #5.

Ms. Gordon also referred to a search carried out by OMVIC which revealed that the premises listed as the business address for Nanco Motors, 610 Danforth Road, is owned by Sonna 2000 Venture, whose officer and shareholder is Mike Multani. Copies of the search effected at the Companies Branch are filed under Tab 8 of Exhibit #5.

Filed under Tab 7 of Exhibit #5 is a copy of the Transfer/Deed of Land and as well as a Charge/Mortgage of Land in the amount of \$275,000.00 showing as Chargor Rajwant Kaur Multani, designated as having "authority to bind the Corp."

Ms. Gordon is aware that since May 1996, the Dealer has been notified on numerous occasions that only licenced salespersons can work at the dealership. In support of her statement Ms. Gordon alluded to Tabs 10, 11, 12, 13 of Exhibit #5.

The Registrar is particularly concerned, as Ms. Gordon affirmed, with the fact that Mrs. Multani has not heeded the warnings of the Registrar. The Registrar also has reason to believe that neither Mr. nor Mrs. Multani act in a professional manner in the discharge of their duties. This conclusion was reached after a telephone conversation where Mr. Multani was heard screaming in the background.

As further proof that Mr. Multani has been carrying on the activities of a salesperson for the dealership, Mr. Gordon referred to Tab 19 of Exhibit #5, which indicates that Mr. Multani attended a dealer's only auction as a visitor. Ms Gordon contends that Mr. Multani should not have attended and that Mrs. Multani should not have signed him as a visitor.

In conclusion, Ms. Gordon confirmed that the Registrar, albeit showing patience in the past, now maintains the position that the Dealer licence for Rajwant Kaur Multani o/a Nanco Motors should be revoked.

APPLICANT'S EVIDENCE

Testimony of Mrs. Rajwant Kaur Multani

Mrs. Multani testified that she understands that there are several problems that have been caused by her husband. However, Mr. Multani is no longer part of the business.

Mrs. Multani related that an incident that occurred with a consumer that resulted in a complaint being made. She confirmed that both herself and her husband were involved in the transaction.

Mrs. Multani stated that she had not seen some of the letters before, and does not know whether the information therein is right or wrong. As an example, Mrs. Multani cited Mr. Lia's report contained at Tab #14, of Exhibit 5.

Mrs. Multani points out that the conversation took place between Mr. Lia and her husband. Nonetheless, Mrs. Multani admits to not reading but signing the Inspection Findings.

Mrs. Multani recognizes that she has made mistakes, and assures that she will not make the same mistakes in future. She reiterated the request in her Notice of Appeal, asking the Tribunal to give her one more chance, as she has a family to support.

In cross-examination Mrs. Multani confirms that her signature appears at the bottom of documents contained in Tabs 11, 13 and 14 of Exhibit #5, but that she never reads any of the documents she signs.

Mrs. Multani confirmed that Mr. Multani returned to India in May of 2002, but left with a Power of Attorney, which in her opinion, enabled her to sign the mortgage.

In response to Ms. Harari's questions, Mrs. Multani stated that she works for the Toronto Star and that one of her children holds a full time job. As for the number of cars sold by Nanco Motors during the 2002, Mrs. Multani stated that only approximately "...four or five maybe six..." vehicles were sold.

Mrs. Multani admitted to not being aware of the dealings in the garage, and not being aware of the whereabouts of the 340 missing safety standard certificates, as she trusted her husband, in spite of his criminal record.

Submissions by Ms Aviva Harari

In support of the Registrar's arguments, Ms. Harari referred to a number of tribunal decisions as well as the Divisional Court decision of Justices Southey, Reid, and Krever, in Brenner referred to as *Brenner 19 CRAT SCO Decisions and Orders (1971-1989) page 95*.

Ms. Harari emphasizes that the Tribunal must consider the reasonableness of the decision of the Registrar, and according to the Brenner decision, in order to reverse the Registrar's decision, the Tribunal must consider that the Registrar erred in law.

She submits that in this case, the Registrar has not erred in law. Regardless of how sincere Mrs. Multani is in her intentions not to allow the situation to be repeated in the future, the fact remains that the Applicant has been given several chances in the past. Mrs. Multani has made a mockery of the system by her continuous disregard for the law. Mrs. Multani has demonstrated that the dealership is ungovernable and has failed to accept responsibility for her actions.

The Respondent's Counsel continued by listing the several occasion where Mrs. Multani has been informed of her responsibility in the dealership. As the evidence of Laura Gordon suggests, and as per documentation in Exhibit #5, as early as 1996, the Registrar's office had concerns about Mike Multani acting as salesperson for the Dealer.

In 1998, as per statement filed at Tab 13, of Exhibit #5, Mrs. Multani acknowledged being told of the seriousness of the matter and the possibility of revocation of the Dealer licence in the

event of non-compliance.

Mr. Lia attended the dealership in January 2002, he finds that Mr. Multani is still representing the Dealership and participating in the sale of vehicles. A notice is again left with the Applicant. Yet, in April 2002, when Mr. Edgar visits the Dealer pretending to be a consumer, he is still assisted by Mr. Multani, who actually offered Mr. Edgar a business card for Nanco Motors with the name "Mike", hand printed on the card.

During this time, there have been several consumer complaints. In fact, there is an outstanding judgment against the Dealer, resulting from a Small Claims Court action brought by a consumer. Mrs. Multani has completely ignored her responsibility towards the regulations, towards the consumers and towards the Courts. According to Ms. Harari, Mrs. Multani has provided no evidence that she has taken any steps to protect the integrity of the Dealership.

Ms. Harari pointed out, Mrs. Multani's defense that she signs documents without reading them, is not acceptable, as the Tribunal heard the evidence of Mr. Lia, that he explained the contents of the Notice given to Mrs. Multani, prior to asking her to sign it.

Another area of concern to the Registrar is the fact that Mrs. Multani, was the principal in the garage registered under her name. Mrs. Multani evades responsibility, by admitting she did not know what her mechanic was doing. The Tribunal has heard evidence that there is a black market for Safety Standards Certificates, Mrs. Multani's lack of involvement in the garage cannot be ignored. The Registrar believes that Mrs. Multani has put the public at risk, by her failure to account for 340 Safety Standards Certificates.

With respect to the books of the business, the Respondent's Counsel, notes that simple tasks of record keeping were not maintained.

In conclusion, Ms. Harari emphasizes that Mrs. Multani's conduct demonstrates total lack of integrity, honesty, and compliance with the law, and requests that the Tribunal uphold the Registrar's decision to revoke the licence of Rajwant Kaur Multani o/a Nanco Motors.

In reply to the Applicant's closing comments, Ms. Harari strongly pointed out that Mrs. Multani no longer deserves another chance as she has already been given many in the past.

Submissions by the Applicant

Mrs. Multani, in closing pleaded for another chance. She stated that the situation arose because she trusted her husband. The cause of all the problems has now been eliminated, as her husband is absent from the business.

FACTS FOUND PROVEN:

The following are the facts found by the Tribunal to have been proven.

1. Rajwant Kaur Multani o/a Nanco Motors is currently registered as a motor vehicle dealer and was originally registered on or about November 30, 1995.

2. Makhan Singh Multani was refused registration as a motor vehicle salesperson in or around November 1997.
3. Mr. Multani participated in the dealership as an unregistered salesperson for the Dealer.
4. The Dealer was advised several times by the Representatives of the Registrar that retaining the services of an unregistered salesperson is in contravention of the *Motor Vehicle Dealers Act*.
5. There have been consumer complaints concerning the Dealer.
6. The Dealer has engaged in conduct, which has resulted in charges being laid for making false statements and falsifying safety certificates under the *Highway Traffic Act*.
7. The Dealer has engaged in conduct, which has resulted in charges being laid under the *Highway Traffic Act* for failing to maintain a garage register.
8. The Dealer has permitted an unregistered salesperson to attend Dealer only auctions.
9. The Dealer has shown a disregard for the *Motor Vehicle Dealers Act* and its Regulations.
10. On January 3rd 2003, the Small Claims Court rendered a Judgment in favour of a consumer plaintiff against Nanco Motors in the amount of \$4,726.00.

THE LAW:

Section 5. (1) of the *Motor Vehicle Dealers Act* states:

5(1) an applicant is entitled to registration or renewal of registration by the Registrar except where,

- (a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
- (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law, and with integrity and honesty; or

APPLICATION OF LAW TO FACTS:

Although all the evidence presented has been carefully considered, the preceding reflects a

summary of the proceedings. Evidence not directly germane to the issue was not transcribed.

The issue for consideration by this Tribunal is, whether the Applicant's past conduct affords reasonable grounds for the belief that the Applicant will not carry on business in accordance with law, and with integrity and honesty.

The Respondent's Counsel submits that the Applicant's past conduct is a clear indication of a total disregard for the law.

The Applicant pleads ignorance of the facts. Mrs. Multani's testimony is that she was unaware of what other people were doing. The Tribunal finds this contention problematic. If she did not know, she ought to have known, as the licences were issued in her name.

By virtue of the licences entrusted to Mrs. Multani, she was given the trust of the people of the Province of Ontario, a trust that she not only thoroughly violated but showed contempt for, by ignoring the verbal and written warnings given to her. As early as 1996, Mrs. Multani's signature appears at the bottom of each notice that has been left at the Dealer. The Tribunal heard, and has no reason to disbelieve evidence, introduced by the Respondent's witnesses, that the documents were verbally explained to Mrs. Multani prior to her signature being sought.

The Tribunal finds as follows:

That the testimony of Mr. Edgar and Mr. Lia establishes that Mrs. Multani was aware that Mr. Multani participated in the sale of vehicles without a salesperson licence. Mr. Lia established that Mr. Multani actually completed the sale of a motor vehicle, without a sales person licence. This would occur with the full knowledge and approval of Mrs. Multani.

The Tribunal finds further that there is ample evidence of past conduct that shows that Rajwant Kaur Multani o/a Nanco Motors is not carrying on business in accordance with law, and with integrity and honesty.

Mrs. Multani would have the Tribunal believe that now that her husband has left, things will be different. Mrs. Multani's uncertainty when asked how many motor vehicles were sold by the dealership in the past year, offers the Tribunal no reassurance that she now has a hands on involvement in the business.

The Tribunal agrees with the Respondent's Counsel, that the Applicant's reluctance to accept responsibility in the past, is disconcerting and definitely demonstrates complete and utter disregard for the law. Furthermore, Mrs. Multani's past conduct does not negate, in fact, it corroborates the Registrar's position, that this Dealer is ungovernable.

DECISION:

Therefore, by virtue of the authority vested in it under section 7(4) of the *Motor Vehicle Dealers Act*, the Licence Appeal Tribunal directs the Registrar to **carry out** the proposal to revoke the registrations of Rajwant Kaur Multani o/a Nanco Motors.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.
Presiding Member

Released: March 6, 2003

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
KANISHKA (DANNY) BARIZ

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: September 23, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

KANISHKA (DANNY) BARIZ

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Kanishka (Danny) Bariz, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: February 5, 2003

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
789 Don Mills Road, Suite 800
Toronto, ON M3C 1T5

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Kanishka (Danny) Bariz
1089 – 1 Greystone Walk Drive South
Scarborough, ON M1K 5J3

Pursuant to subsection 5(2) of the *Motor Vehicle Dealers Act* Kanishka (Danny) Bariz (hereinafter referred to as “the Applicant”) and the Registrar, *Motor Vehicle Dealers Act*, (hereinafter referred to as “the Registrar”), in accordance with section 4.1 of the *Statutory Powers Procedure Act*, do hereby waive the requirements of a hearing and consent to an Order of the Licence Appeal Tribunal based upon the following Terms and Conditions:

1. The Applicant agrees, if he is charged in the future, to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.
2. The Applicant agrees if he is convicted under any law of an industry specific offence or if he is convicted under the Criminal Code, the Registrar is directed to and shall carry out the proposal.
3. The Applicant agrees not to transfer his registration as a salesperson under the *Motor Vehicle Dealers Act* to another dealer without the prior written consent of the Registrar.
4. The Applicant agrees not to be involved in the process of buying, selling or leasing motor vehicles without the benefit of registration.
5. The Applicant will take reasonable steps to review his employer’s books, records & information pertaining to prior use/condition of any motor vehicle that he sells on behalf of his employer and ensure that the information is disclosed to the purchaser in writing on the bill of sale.
6. The Applicant agrees to immediately enrol in the Ontario Motor Vehicle Industry Council Certification Course and to be responsible for all fees in relation to enrolment. The Applicant further acknowledges that enrolment in the course entitles him to a sixty (60) day conditional registration period that allows for his successful completion of the course (including passing the exam).
7. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.

8. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.

Kanishka (Danny) Bariz (initials)

9. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
10. The Applicant will provide a copy of this order to his employer forthwith.
11. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
12. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
13. The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____ this _____ day of _____ 2003.

Kanishka (Danny) Bariz (signature)

These Terms and Conditions are accepted by the Registrar, *Motor Vehicle Dealers Act*.

Date:

Carl Compton
Registrar
Motor Vehicle Dealers Act

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
QUESTOURS INC.
as a travel agent

AND IN THE MATTER of the PROPOSAL by the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: November 12, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

QUESTOURS INC.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by Questours Inc., the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: March 4, 2003

LICENCE APPEAL TRIBUNAL

BETWEEN:

QUESTOURS INC.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

1. Questours Inc. ("the Registrant") was registered as a travel agent and travel wholesaler (Registration Nos. 4671186/R & 50008436/W) on April 13, 1999 and January 9, 2001 respectively.
2. The Registrant signed Terms and Conditions of registration on February 25, 1999.
3. The Registrant filed its financial statements with TICO for the fiscal year ended March 31, 2000, which were due by June 30, 2000, on October 24, 2000. The financial statements reflected a working capital shortfall of \$8,337.
4. By letter dated October 27, 2000, the Registrant was advised of its working capital shortfall of \$8,337, and given a due date of November 15, 2000 to provide TICO with evidence of correction of its working capital shortfall.
5. On November 15, 2000, TICO received evidence of injections totalling \$6,591.76, which were injected on November 15, 2000. TICO telephoned the Registrant for clarification on the source of the injections. TICO was advised by the Registrant that the total of \$6,591.76 deposited on November 15, 2000 were shareholder advances. The Registrant was advised that there remained an outstanding balance of \$1,745.24, still to be addressed.
6. On December 4, 2000, TICO received evidence of shareholder advances from the Registrant totalling \$1,780, deposited on November 23, 2000. It appeared that as at November 23, 2000, the Registrant met working capital requirements.
7. On February 25, 2002, the Registrant was requested by TICO to file its financial statements for the fiscal year ending March 31, 2002 by June 30, 2002.

8. By letter dated July 15, 2002, TICO issued a deficiency notice to the Registrant to file its financial statements for the year ended March 31, 2002, which were due by June 30, 2002, no later than July 31, 2002.
9. By letter dated August 9, 2002, TICO issued a final due date to the Registrant to file its financial statements for the fiscal year ended March 31, 2002, by August 16, 2002.
10. On August 19, 2002, TICO telephoned the Registrant in an attempt to obtain the financial statements. TICO left a message on the answering machine to contact TICO re: the non submission of financial statements.
11. On September 9, 2002, the bookkeeper for the Registrant, Mr Gus Ayala, telephoned TICO to advise that he did not have the books and records up to date, but would make an endeavour to have the books and records to the accountant by September 9, 2002, and subsequently have the accountant contact TICO with an estimated submission date.
12. On September 17, 2002 TICO telephoned the Registrant and left a message on the answering machine to contact TICO with a firm submission date for the company's financial statements.
13. On September 20, 2002, the Registrant's bookkeeper telephoned to advise that the books and records were with the accountant, and provided TICO with the telephone number of the accountant.
14. On September 24, 2002, TICO telephoned the number of the accountant, provided by the Registrant, and left a message to contact TICO with an update on the submission of the financial statements.
15. On September 26, 2002, the Registrant's bookkeeper telephoned TICO to advise that his accountant was involved in an auto accident, and required additional time to file its financial statements. TICO advised that they required an estimated submission date on the accountants letterhead no later than September 27, 2002.
16. On September 27, 2002, the Registrants accountant telephoned to advise that he expected to receive the books and records from the Registrant by October 11, and hoped to submit financial statements by the first week in November 2002.
17. On October 3, 2002, TICO telephoned the Registrant asking for something in writing as to why he was unable to get the books and records to the accountant.
18. On October 4, 2002, the Registrants accountant telephoned to advise that he had been contacted by the bookkeeper for the Registrant, promising to get the books and records to him by October 11, 2002.
19. On October 4, 2002, TICO received a fax from the Registrant advising that Mr Ed DeFreitas, A.P.A. would submit financial statements with a Review Engagement by October 31, 2002.

20. On October 4, 2002 TICO telephoned the Public Accountants Council of Ontario to check if Mr Ed DeFreitas was a LPA, pursuant to section 15 of the "Act" and section 24 of the Regulation. The Public Accountants Council of Ontario advised TICO that Mr DeFreitas was not a LPA. TICO telephoned the Registrant to advise that since Mr DeFreitas was not a LPA, TICO would not be able to accept the financial statements.
21. On October 9, 2002 the Registrant telephoned TICO to advise that it had retained the services of a LPA.
22. On October 24, 2002 TICO telephoned the Registrant and left a message to contact TICO with an update on the filing of its financial statements.
23. On October 25, 2002, the Registrant telephoned TICO to advise that the LPA would be working on the statements over the week-end, and that TICO would be updated on October 28, 2002.
24. To date the Registrant has failed to file its financial statements, for the fiscal year ended March 31, 2002, which were due June 30, 2002.
25. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsections 6 (4) and (5) of the *Travel Industry Act* directing that:

1. the Registrar refrain from carrying out the Proposal to Revoke Registration dated November 15, 2002;
2. the Registrant's registration is to be subject to the following terms and conditions:
 - (a) The Registrant shall file complete financial statements, including a reconciliation of customer funds and customer obligations, as required by section 24 of the Regulation, for its fiscal year ended March 31, 2002, no later than March 31, 2003;
 - (b) If the above-noted statements reflect a working capital deficiency, the Registrant shall correct any and all working capital deficiencies and provide evidence of its current working capital position by April 30, 2003. At all times thereafter, the Registrant shall maintain the minimum working capital as required by section 25 of the Regulation or such subsequent provision as may be in force from time to time;
 - (c) The Registrant shall file complete financial statements, including a reconciliation of customer funds and customer obligations, as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for its fiscal year ending March 31, 2003, no later than June 30, 2003;

(d) The Registrant shall file complete financial statements, including a reconciliation of customer funds and customer obligations, as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time for its fiscal year ending March 31, 2004, no later than June 30, 2004; and

(e) If the above-noted financial statements as filed are incomplete, the Registrant will have 14 days from the date of notice of the deficiency to fully and completely address the deficiency and produce proof of such correction to the Registrar. Notice of the deficiency, if any, shall be sent by registered mail to the Registrant.

3. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) to (e) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.
4. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by its signature below that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED at Mississauga this ____ day of February, 2003

Mr. Gus Ayala
Questours Inc.
I have authority to bind the corporation

Mr. Michael Pepper
Registrar, *Travel Industry Act*

PREHEARING

RENAUD HOMES INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: VICTOR DREVNIG, Vice-Chair

APPEARANCES:

PAUL RENAUD, Agent representing the Applicant
CAROL STREET, Counsel, and KEVIN BRODIE, Agent, representing
the Ontario New Home Warranty Program

DATE OF

PREHEARING: March 6, 2003 *by teleconference*

ORDER

FOLLOWING attendances by teleconference on March 6, 2003 at a prehearing before this Tribunal of Paul Renaud, Agent, appearing on behalf of Renaud Homes Inc. (the "Applicant"), and Carol Street, Counsel and Kevin Brodie, Agent, on behalf of the Ontario New Home Warranty Program (the "Program");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Tuesday, April 15, 2003 at Holiday Inn Select, 1855 Huron Church Road, Kingsville "B" Room, Windsor, Ontario;

1. The Parties to the hearing are the Applicant and the Program.
2. There were no facts or Evidence Agreed upon by the Parties nor was there any settlement of any issue or issues.
3. The Applicant informed the Tribunal that he had not consulted with nor had he retained a legal advisor in connection with the hearing due to commence on April 15, 2003. The Tribunal urged the Applicant to do so immediately.

4. The Parties to the hearing are required to comply with the Rules of Practice of the Tribunal.
5. The hearing is estimated to require one day.

LICENCE APPEAL TRIBUNAL

Victor Drevnig, Vice-Chair

RELEASED: March 10, 2003

PREHEARING

SAVINO AND ANTONIA QUATELA

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE *ONTARIO
NEW HOME WARRANTIES PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL: VICTOR DREVNIG, Vice-Chair

APPEARANCES: SAVINO QUATELA, Applicant, representing himself and Antonia
Quatela ("The Applicants")
FIL CECE AND GAIL RISK, Agents, representing the Ontario New
Home Warranty Program ("The Respondent")
ENZO BERTUCCI, Agent, representing Maple View Building
Corporation ("The Added Party")

DATE OF
PREHEARING: March 6, 2003 Toronto

ORDER

Following the attendance at a pre-hearing before the Licence Appeal Tribunal (the "Tribunal") on March 6, 2003 of Savino Quatela, A pplicant, representing himself and Antonia Quatela (the "Applicants"), with Fil Cece and Gail Risk, Agents, representing the Ontario New Home Warranty Program (the "Respondent") and Enzo Bertucci, Agent, representing Maple View Building Corporation (the "Added Party");

The Tribunal makes the following Order:

1. The parties to the hearing are Savino and Antonia Quatela (the "Applicants"), the Ontario New Home Warranty Program, (the "Respondent") and Maple View Building Corporation, (the "Added Party").
2. It is agreed by the parties that the matter cannot continue at the present time due to the Intervention and Order of the Building Inspector of the City of Vaughan and that a new Conciliation Report will be issued by the Respondent.
3. It was agreed by the parties that the items mandated by the City of Vaughan being

- i) repairs to the inside stairway and ii) the air tight sealing of the garage area from the living quarters are warranted issues and are accepted as such by the Respondent. The Added Party agreed that it will remedy the defects forthwith, and the Applicants agree to allow the Added Party entry to enable the Added Party to complete the work.
4. The matter still in dispute is the exterior front staircase being the pre-cast concrete steps.
 5. The Applicants have agreed to either have their son Giuseppe assist them at the hearing or to retain the services of a lawyer and notify all parties immediately of all details concerning their son or their lawyer. They were strongly advised to retain the services of counsel.
 6. The Applicants witnesses at present will be Mr. Quatela and his son. No experts have been consulted as of this date.
 7. The Respondent and Added Party are awaiting the preparation of a new Conciliation Report before attempting to know the number of witnesses and the time required in order to present their respective cases.
 8. The parties agree to inform each other of any and all witnesses they intend to call including experts prior to the hearing in accordance with the disclosure provisions of the Tribunal's Rules of Practice.
 9. The original Notice of Appeal and any additional Notice of Appeal, if required, are consolidated into one hearing. No further filing of application fees is required.
 10. The hearing dates presently scheduled to take place on April 7 and 8, 2003 at the Tribunal's Chambers, are hereby vacated. The hearing in this matter is re-scheduled to Thursday, May 22, 2003 at 9:30 a.m. at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, and to continue, if necessary, on Friday, May 23, 2003 at the Tribunal's above Chambers.

LICENCE APPEAL TRIBUNAL

Victor Drevnig, Vice-Chair

Released: March 12, 2003

1461-ADLS-NOMC

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding Member

APPEARANCES: LUBA NEUWIRTH,
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF
HEARING: January 20, 2003

DECISION
RELEASED: January 21, 2003 Toronto

REASONS FOR DECISION

A hearing was held on January 20, 2003, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on January 21, 2003, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was undated, and was received by the Tribunal on December 31, 2002, together with the prescribed fee of \$100.00, paid by cheque.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

The Applicant sought to introduce in evidence a note from a physician dated January 16th, 2003. The Respondent's Representative objected on the grounds that the letter being submitted had not been previously disclosed to the Ministry.

The Tribunal noted the objection of the Respondent and reserved its decision.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice to Registrar dated December 16, 2002, issued by the Registrar of Motor Vehicles.
- b) Exhibit # 2 Notice of Appeal Form – received December 31, 2002

By the Respondent:

- a) Exhibit # 3 Ministry of Transportation submissions – received January 13, 2003.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

- 50.1(1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
 - (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
 - (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

- 15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
 - (a) the name, telephone number and address, with the postal code, of the medical practitioner;
 - (b) the name, date of birth and address of the person who is the subject of the report;
 - (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;

- (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner.”

Finally, section 13 of Regulation 574 (amended) provides:

“A person appealing a suspension has the onus of establishing the merit of the appeal”.

FACTS:

Applicant’s Driver’s Licence was suspended “Dec 16, 2002” as per undated Notice of Appeal.

Applicant’s Evidence

In lieu of providing the information required in page two of Notice of Appeal, the Applicant submitted a report from Physician #1, dated March 28, 2002 (prior to the incident) and addressed Physician #2.

Physician #1 notes that “...*the issue for referral was in relation to symptoms of depression and anxiety...*” According to Physician #1 that the Applicant “...*relates a history of feeling depressed, anxious and irritable together with the cessation of his usual activities due to long term hospital-based treatment as well as adjunctive care such as physiotherapy and pain related treatments...*”

After examining the Applicant Physician #1 diagnoses the Applicant with “...*Axis I: Major Depressive Disorder, chronic; Axis II: Deferred; Axis III: Motor vehicle accident in December 2001 – pain related symptoms; Axis IV: Psychosocial stressors – difficult finances, questionable ability to return to work; Axis V: Current GAF – 65 to 70...*”

The Applicant has been prescribed Paxil as an anti-depressant agent, and appears to be deriving “...*a degree of benefit...*”

At the hearing the Applicant testified by reading a prepared statement into the record. In his statement the Applicant described the circumstances leading up to and surrounding the demand for a breath sample, and alluded to his disgust at what he believes was the unacceptable treatment he received at the hands of the police. Given his previous experience with the police, the Applicant believes that he is a victim of "...*brutal police practices...*"

The Applicant stressed that he does not drink and that he had not been drinking that night. He went to pick up his friends, who had been drinking at a Club, in order to "...*protect...*" them, and society, from a possible accident.

Due to a motor vehicle accident over a year ago, the Applicant sustained severe injuries, including two herniated disks, and continues to suffer from chronic pain. The Applicant's life and general health were affected to the degree that changed his life completely. According to the Applicant he is not able to work, tires easily and has "...*new symptoms every day...*" which, require him to see various doctors on a weekly basis.

The Applicant emphasized that he did not refuse to provide a breath sample and believes that another officer would have acted differently and let him go. At the time the Applicant asked to have a blood test, as he knows this is possible. The officer refused. Yet, the Applicant bears no ill will towards the police and continues to support the R.I.D.E. programme.

In cross-examination, the Respondent's Representative, asked the Applicant to tell the Tribunal exactly how he was feeling at the time of the breathalyzer session. The Applicant replied: "...*You know, ...I have these symptoms for over a year ...and I am on a daily basis with all doctors... I am not taking the medication all the time, and the reason why I didn't ...not taking the medication for bronchitis or emphysema is because I have so many medications, I don't want to be addicted ...I was feeling I could drive the car...*"

Asked specifically, by the Respondent's Representative, whether he was experiencing any breathing difficulties, at the time, the Applicant explained: "...*difficulties with my breathing, you never know when they come ...in stressful situations ...difficulty breathing, yes I feel that I am breathing properly, but I am not breathing properly ...sometimes under stress I cannot take a breath...*" The Applicant continued by clarifying that he has not sought medical advice regarding his breathing because he already "...*too many doctors and specialists...*".

When asked directly whether, at the time of the breathalyzer sessions, he was exhibiting any visible signs of breathing difficulties, the Applicant commented that; "... *with the breath problem, you cannot really ...show the signs...*".

The Applicant believes that he could never provide a breath sample, because he is not able to take a deep breath, as he has been diagnosed with "...*asthma...*". Although he does not have documentary evidence to support this belief, the Applicant asserted that he had been diagnosed with "...*bronchitis, asthma, and emphysema...*". The major symptoms of these diseases are coughing and discharge.

The Respondent's Representative attempted to ascertain whether at the time of the breathalyzer session, the Applicant was suffering from any of the symptoms he described. The Applicant's answer was: "...*I am on stress all the time ...sometimes I cannot even walk because I am out of breath...*". After further questions by the Tribunal as a means of clarification, the Applicant admitted that he was not suffering from asthma at the time of the breathalyzer.

At the time, the Applicant did not inform the officer about any of his medical problems, nor offer any reason as to why he could not provide a breath sample.

The Applicant stated that the applicant's doctor is aware of the breathing problems, but has not ordered pulmonary function tests recently, as the Applicant has been seeing too many doctors and it is difficult to make appointments with specialists. Physician #2 has never treated the Applicant for emphysema, just bronchitis. The Applicant is currently on antibiotics and has been since the 16th of January.

From time to time, the Applicant takes an over the counter "...*natural syrup...*" for the asthma and the emphysema.

The Applicant did not ask his family physician for a report because he thought it was better to get a report from the clinic.

In closing the Applicant reiterated the comments made during his viva voce evidence, regarding the events of the evening.

The Applicant feels that he is paying the price for trying to help his friends, and stated that from now on he will never allow anyone who is drunk in his car.

Respondent's Evidence

The Respondent provided the following Documents:

1. Certified Notice to the Registrar, sealed January 8th, 2003
2. Certified Driving Record of The Applicant, sealed January 9th, 2003.

The Respondent's Representative called Police Officer #1 as a witness. Police Officer #1 testified that he has been a member of the Toronto Police Services for "...*fourteen years...*".

Police Officer #1 was on duty with a R.I.D.E. when he had occasion to stop the Applicant. Police Officer #1 continued his testimony by relating the events that led to the demand for a breath sample and the subsequent suspension of the Applicant's licence.

The Applicant was given about ten opportunities to provide a breath sample, but failed to do so. Police Officer #1 described the several attempts, made by the Applicant to blow into the

Alcotester. Each time, the Applicant gave a "...*quick puff*...", and each time the instrument registered an error reading, indicating that not enough air was getting through the mouthpiece.

During his dealings with the Applicant Police Officer #1 noticed "...*nothing strange*..." in the Applicant's behaviour. According to Police Officer #1 the Applicant "...*was fine*..."

Police Officer #1 attested that at no time did he observe the Applicant being afflicted with any physical or breathing difficulty, such as wheezing or coughing. Police Officer #1 further indicated that the Applicant did not inform him that he had any medical problems, or ask for medical assistance.

In her closing remarks, Respondent's Representative contends that there is no medical reason for the Applicant's failure to provide a breath sample, and that in fact the Applicant had no intention to provide a breath sample. To substantiate her argument, the Respondent's Representative relied on Police Officer #1's testimony. The Respondent's Representative noted that the Applicant showed no signs of stress, breathing difficulties, or of being visibly upset.

The Respondent's Representative referred to the medical report submitted by the Applicant and pointed out that Physician #1's report fails to link the diagnosis to the Applicant's ability to provide a breath sample. Further to Physician #1's report is dated March 28, 2002, nine months before the incident.

With respect to the report submitted at the hearing by the Applicant, the Respondent's Representative highlighted that the report confirms that the Applicant was diagnosed with bronchitis "...*today*..." the date being January 16th, 2003. The report does not mention the Applicant's condition on December 15th.

The Respondent's Representative suggested that neither medical report conforms with the criteria of the Regulation 574.

In addition due to the lack of specialists' reports verifying the Applicant's condition, the Respondent's Representative asked that the Tribunal uphold the Registrar's decision.

APPLICATION OF THE LAW TO FACTS:

Although the total evidence presented was considered, the preceding reflects a summary of the proceedings. Evidence introduced not directly germane to the issue was not transcribed.

Prior to setting out the reasons for decision the Tribunal will address the issue of the admissibility of the medical note submitted by the Applicant during Preliminary Matters. The Tribunal must abide by the Licence Appeal Tribunal Rules of Practice. The pertinent section concerning disclosure is Section 6.1 (1) which states:

“the party requesting a hearing before the Tribunal shall at the time of the request or not more than ten (10) days thereafter provide in writing to the Tribunal particulars of the facts on which the party bases the request for the hearing, and the Tribunal shall forward a copy of those particulars to any party to the proceedings.”

After considering the guidelines the Tribunal finds the Applicant's report submitted at the hearing inadmissible. However, for the Applicant's benefit, the Tribunal will comment on the relevancy of the report. As the Respondent's Representative mentioned, the Main Square medical and Dental Centre's attending physician, is quite explicit that the condition diagnosed, applies as of the date of the report which is January 16th, 2003. On the basis alone the Applicant failed to establish a link between the diagnosis in the report dated January 16th, 2003, and failure to provide a breath sample which occurred on December 15th, 2002.

With respect to the Applicant's issue concerning his request for a blood sample, the Tribunal must refer to subsection 48.3 (3) 1 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H-8 as amended. While subsection 48.3 (3) 1 is clear in its provision, that the concentration of alcohol in the blood may be obtained “...by an analysis of the person's breath sample or blood taken...” the decision to request a blood sample remains at the discretion of the officers.

According to established policy, no blood samples are to be demanded unless there are obvious visible physical signs preventing the individual from providing a breath sample. As no such signs were present, the issue of a blood sample is inconsequential.

The Tribunal feels it is imperative to explain to the Applicant that this Tribunal has no jurisdiction to deal with issues concerning the behaviour of police officers. Further the issue, is not whether the Applicant was impaired or had been drinking at all.

The appeal was brought by the Applicant under Section 50.1 (2) (b) of the *Highway Traffic Act*, which provides that:

“...person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason...”

The issue to be determined in this appeal is whether or not the Applicant has a medical condition that could cause, at the time of the breath sample demand, the Applicant to fail or not comply with the breath demand.

The bulk of the Applicant's evidence focused on issues extraneous to that issue. In dealing with the medical grounds for appeal, the Applicant told the Tribunal that he has been diagnosed with “...bronchitis, asthma and emphysema...” No documentary evidence whatsoever was presented by the Applicant to support this claim.

Unfortunately page 2 of the Notice of Appeal has been left blank, therefore denying the Tribunal possibly valuable insight into the Applicant's physical condition. The Applicant opted to submit an outdated report from Physician #1, dealing with the Applicant's general mental status, rather than having a physician complete page 2 of the Notice of Appeal as required.

The Respondent claims that the information contained in Physician #1's report, does not meet the criteria set out in Section 15 of Regulation 574, in that it provides none of the information required. The Tribunal agrees. Section 15 (2) of Regulation 574 is most relevant:

"The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath sample including the results of any related tests"

The physician must therefore establish a link between the condition and the individual's inability to provide a breath sample. Section 15 therefore specifically states the detailed information required to be set out on page 2 of the Notice of Appeal. This serves as a valuable guideline to the Tribunal as it is designed to provide pertinent details of the Applicant's condition, such as:

- Details and diagnosis of the patient's present condition;
- History of condition;
- Type of Measurements or recent test taken with (date indicated): (Reference to any pathology test (e.g.: PFT represent important corroboration of your medication opinion).
- Relevant details of last visit and when ...patient was last seen

It is not clear to the Tribunal why page 2 of the Notice of Appeal is left blank, but the fact is, that Physician #1's report fails to meet the test of establishing the grounds for appeal under section 50.1.

The Applicant was asked several times by the Respondent's Representative to specifically describe the symptoms he experienced during the breathalyzer session. The Applicant's replies were elusive and evasive, at best.

The Applicant was unable to describe to the Tribunal, any actual physical symptoms, that would have precluded the provision of an adequate breath sample.

The Applicant maintains that breathing difficulties are not discernible. The Tribunal disagrees. It is the Tribunal's experience that the signs of breathing distress, manifested by shortness of breath and wheezing are quite noticeable even to an untrained observer. The Tribunal heard and accepted the evidence presented by Police Officer #1, that the Applicant exhibited absolutely no signs of physical distress or discomfort during the breathalyzer session. Nor did the applicant communicate to the officer any difficulties with breathing.

The onus being on the Applicant to establish the merit of the appeal, the Tribunal finds that the Applicant's testimony was insufficient to substantiate the basis for an appeal on medical grounds. Thus, the Tribunal finds that the Applicant does not meet the criteria of Section 50.1 (2) (b), in that he was not able to demonstrate that he suffers from a medical condition, which would prevent him from complying with the demand for a breath sample.

DECISION:

Upon the application by The Applicant to appeal the suspension order dated December 16, 2002 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal **confirms** the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: January 28, 2003

PREHEARING

DR. TAHER SHAATH

APPEAL FROM A DECISION OF THE BOARD OF THE TRAVEL
INDUSTRY COUNCIL OF ONTARIO UNDER THE *TRAVEL
INDUSTRY ACT*

TO DISALLOW A CLAIM

TRIBUNAL: VICTOR DREVNIG, Vice-Chair

APPEARANCES: GLENN KOHUT, Agent, representing Dr. Taher Shaath (the
"Applicant")
TREVOR C.D. BRANION, Counsel, representing the Travel Industry
Council of Ontario

DATE OF
PRE-HEARING: March 4, 2003 Toronto

ORDER

Following the attendances on March 4, 2003 at a pre-hearing by teleconference before the
Licence Appeal Tribunal (the "Tribunal") of Glenn Kohut, Agent, on behalf of Dr. Taher
Shaath (the "Applicant"), and Trevor C. D. Branion, Counsel on behalf of the Travel Industry
Council of Ontario ("TICO");

The Tribunal makes the following Order respecting the hearing scheduled to commence at
9:30 a.m. on Thursday, May 22, 2003 at the Gillespie Reporting Services, 130 Slater
Street, Suite 200, Ottawa, Ontario.

1. The parties to the hearing are the Applicant and TICO.
2. It was agreed by the parties' respective representatives that the issues for
adjudication at the hearing shall be as follows:
 - (i) Did Dr. Taher Shaath ("The Customer") pay Farah Travel for travel
services to be supplied to him by Farah Travel in respect of a trip to
Jordan in compliance with section 51(1) of Regulation 806/93 under the
Travel Industry Act (the "Act")?

- (ii) Did Farah Travel pass all or part of the Customer's money to Royal Jordanian Airlines in compliance with section 51(1) and (1)(b) of Regulation 806/93 under the Act?
 - (iii) Did the customer comply with section 50(3)6 of Regulation 806/93 under the Act and pay for the travel services with cash or by cheque, credit card or other similar cash payment method?
1. The parties shall fully comply with the disclosure requirements set forth in Rule 6 of the Rules of Practice of the Tribunal.
 2. The parties agreed that the Applicant would call two or three witnesses and that TICO would call one witness, and that one day for the hearing would be sufficient to hear the matter in its entirety.

LICENCE APPEAL TRIBUNAL

Victor Drevnig, Vice-Chair

Released: March 10, 2003

1482-ADLS-NOMC

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S
LICENCE SUSPENSION

TRIBUNAL: ELIZABETH L. SPROULE
Presiding Member

APPEARANCES: KYLE M. BIEL
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF
HEARING: February 28, 2003

DECISION
RELEASED: March 4, 2003 Hamilton

REASONS FOR DECISION

A hearing was held on February 28, 2003, at Hamilton, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on March 4, 2003, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated January 14, 2003, and was received by the Tribunal on January 15, 2003, together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Submissions of Written Material

By the Applicant:

- a) Exhibit #1 - Copy of Suspension Reminder Notice dated December 31, 2002
- b) Exhibit #2 - Notice of Appeal Dated January 14, 2003, with attachments

By the Respondent:

- a) Exhibit #3 - Materials and Submissions of the Respondent dated February 24, 2003

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal there by having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

- 50.1(1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
 - (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
 - (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1), (2) and (3) requires that a medical report must contain:

- 15. (1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
 - (a) the name, telephone number and address, with the postal code, of the medical practitioner;
 - (b) the name, date of birth and address of the person who is the subject of the report;
 - (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

The Applicant, aged 41, was stopped at approximately 9:00 p.m. on December 28, 2002. It is the Applicant's evidence that once stopped, his truck door was flung open by the arresting officer and he was grabbed, pulled out, and forcibly put over the hood of his truck. The officer then forced handcuffs on which were too tight. The Applicant refused to get into the police car until the handcuffs were loosened. He was then transported to the Fergus police station where he was searched and the handcuffs removed. The Applicant was then held in a room while effort was made, inadequate effort in the opinion of the Applicant, to contact his lawyer in Toronto. It is the Applicant's evidence that he requested his heart medications while at the police station, repeatedly, but they were not given to him. (The Applicant had heart surgery, angioplasty, in September, 2002).

In his written submission the Applicant states he had not been drinking that evening, in cross-examination he stated that he had consumed one beer.

The applicant's sworn evidence with respect to why he did not provide a breath sample was that he blew into the machine four times and that he began "passing out from blowing out" and that he "was sore" and that it "got to point hurting too much". In his written submissions the Applicant stated: "I proceeded to blow into the machine four separate time with in five minutes. I was fainting from blowing and having the blood flowing through my veins again. I explained I was very dizzy etc."

In cross-examination the Applicant was asked whether he had said anything to the breathalyser technician about his condition and he stated "I was asking for my medications". When asked specifically did he say he was having chest pain the Applicant's evidence was "I did explain that I was passing out". The question was repeated and the Applicant replied "no".

The Applicant also confirmed in cross-examination that "I was more vocal", "I wasn't being polite", "Yah I kicked the door, I was trying to get someone's attention, I was asking for my medication".

Police Officer #1, of the O.P.P. - Fergus Detachment, administered the breathalyser test to the Applicant. His sworn evidence was that for the first two attempts the Applicant just laid the mouthpiece in his mouth and made no attempt to blow. On the third attempt he observed that the Applicant was attempting to blow but did not seal his mouth around the mouthpiece so that the air simply blew into the room. On the fourth attempt the Applicant blew into the machine for one second, which was insufficient to provide a sample. He offered the Applicant one last opportunity to provide a breath sample, but the Applicant refused to try stating "you will hear from my lawyer, I'm fuck.'n done".

Police Officer #1 testified that he questioned the Applicant at the time of the breath test to ascertain whether he had a reason why he could not provide a breath sample and his evidence was that the Applicant responded "Yah, I told you I had a bad heart". Police Officer #1 testified that he did not observe the Applicant having any breathing difficulties, rather that the Applicant was belligerent and talking in a loud voice.

Police Officer #2, of the O.P.P.- Mount Forest Detachment, was the arresting officer. His evidence with respect to the roadside events contradicted that of the Applicant. According to him the Applicant got out of his truck himself. He did confirm that the Applicant requested his medication at the police station. Police Officer #2 testified that he had concerns whether the Applicant should have his medication (having the opinion he had been drinking) and therefore took the Applicant to the Hospital after the Applicant had been charged and released.

At the Hospital a physician in the emergency department assessed the Applicant. A copy of the Emergency/Outpatient Record and Triage Record and Nursing Notes were filed with the Applicant's Notice of Appeal. According to these records the Applicant was given an ECG and had his vital signs checked. No medical intervention took place and the attending physician confirmed that the Applicant could take his medication. Police Officer #2 testified that the Applicant was given back his medications at the hospital but did not in fact take them. In cross-examination the Applicant stated that he waited until he got back to a friend's house.

The Applicant in his evidence on cross-examination pointed out the fact that his blood pressure taken at the hospital, and noted on the Triage Record, was higher than normal, 151/93, and that "this says it all" as to why he could not provide a breath sample.

Finally, in his summation the Applicant argued that if he hadn't been slammed on the hood of his truck he would have been able to provide a breath sample. He agreed he had been belligerent but that he felt he was manhandled and not treated with respect.

APPLICATION OF THE LAW TO FACTS:

In order to succeed in his appeal the Applicant must prove that he had a medical condition that prevented him from providing a breath sample. Through oral evidence and written submissions the Applicant has suggested four different reasons why he failed to provide a breath sample:

- 1) that he has high blood pressure;
- 2) that he has a bad heart;
- 3) that the handcuffs had affected his circulation, and lastly and most significantly;
- 4) that he was in too much pain as a result of being slammed up against the hood of his truck.

The Applicant provided no medical report(s) as described by Reg. 574. The Tribunal accepts that the Applicant has had heart surgery and has above normal blood pressure, however, there was no evidence before the board to suggest that these facts in themselves would preclude the Applicant, or any person, from providing a breath sample.

The suggestion that the tight hand cuffs worn during transportation played a role in the Applicant's inability to provide a breath sample is simply not accepted as there is no evidence of any kind to support this.

Lastly, with respect to the argument that he was in too much pain. It is apparent from the facts that the Applicant was very vocal and let his complaints be known yet he failed to mention he was in pain. Even when asked by Police Officer #1 why he might not be able to provide a breath sample the Applicant did not indicate he was in pain. The tribunal notes that in his written submissions filed with his Notice of Appeal, dated January 14, he does not claim he was in pain at the time of the breath test. Given these facts the Tribunal concludes that the claim to be in too much pain was simply an after thought.

The focus of the Applicant in both his written and oral evidence was on what he perceived to be mistreatment by police. This perceived mistreatment, whether founded or not, was the basis for his admitted belligerent and disruptive behaviour but it is not a basis for appeal under Sec. 50.1 of the *Highway Traffic Act*. In the absence of any medical evidence in support of the Applicant's claims, and in view of the facts set out above, the Tribunal finds that the Applicant has failed to prove the merits of his appeal.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated December 28, 2002, of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Elizabeth L. Sproule
Presiding Member

RELEASED: March 12, 2003

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
McDONELL TRAVEL LTD. O/A THOMAS COOK TRAVEL
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: January 6, 2003

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

McDONELL TRAVEL LTD. O/A THOMAS COOK TRAVEL

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Applicant

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by McDonell Travel Ltd. o/a Thomas Cook Travel, the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule 'A';

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule 'A'.

LICENCE APPEAL TRIBUNAL

Carl Dombek, Chair

Released: March 7, 2003

LICENCE APPEAL TRIBUNAL

BETWEEN:

MCDONELL TRAVEL LTD O/A THOMAS COOK TRAVEL

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

1. McDonnell Travel Ltd. o/a Thomas Cook Travel ("the Registrant") was registered as a travel agent (Registration No. 50008201/R) on July 31, 2000.
2. On June 19, 2001, TICO performed a site inspection of the Registrant. The visit revealed that the Registrant's *Travel Industry Act* trust account was dormant, and due to the absence of trust accounting, posed a risk to the Fund. A follow up visit was scheduled to ensure that trust accounting had been implemented and properly maintained.
3. On December 3, 2001, TICO performed a site inspection as a follow up to the June 19, 2001 inspection, re: trust accounting. It appeared that the Registrant had corrected the trust accounting compliance issues revealed during the June 2001 inspection visit.
4. On October 19, 2001, the Registrant filed its financial statements for the fiscal year ended June 30, 2001, which were due by September 30, 2001. The statements reflected a working capital shortfall of \$56,350, based on sales of \$616,097.
5. By letter dated November 6, 2001 the Registrant was advised by TICO of its working capital shortfall of \$56,350 and given a due date of November 21, 2001 to provide evidence of correction.
6. On November 12, 2001, the Controller for the Registrant, Kevin Deacon, telephoned to discuss how to address the working capital issue. Mr Deacon further stated that he "was meeting with the franchisor for Thomas Cook to see whether the franchise was worth saving or whether they would voluntarily terminate the registration".
7. On November 26, 2001, Ms Karen Romans, franchise regional support manager, telephoned TICO to advise that she had hired a full time accountant for the Registrant, as the Registrant had no administrative background. She advised that the books and records "were a mess" and needed time to provide a new financial statement as at December 31, 2001.
8. By letter dated January 22, 2002, the Registrant was reminded that its working capital shortfall needs to be corrected.
9. On February 28, 2002, the Registrant submitted an interim financial statement to January 31, 2002. The statements reflected a working capital shortfall of \$36,702.

10. On March 6, 2002 the Registrant was issued a final due date of March 25, 2002, to correct its working capital shortfall of \$36,702, failing which a proposal to revoke would be issued.
11. On March 25, 2002, the Registrant submitted a copy of a deposit slip showing a \$37,000 injection on March 21, 2002, as evidence of correction of its working capital shortfall.
12. On August 13, 2002 TICO performed a site inspection to ensure that the cash injection into the company on March 21, 2002, had not been removed. It appeared that the Registrant had not removed the funds as at the date of the visit.
13. By letter dated May 23, 2002, the Registrant was requested by TICO to file its financial statements for the fiscal year ending June 30, 2002, by September 30, 2002.
14. By fax dated September 26, 2002, the Registrant's accountant requested an extension to file the Registrant's financial statements for fiscal June 2002 by November 30, 2002.
15. By fax dated September 26, 2002, TICO notified the Registrant's accountant that TICO was unable to agree to an extension for the filing of financial statements for the Registrant.
16. By letter dated October 3, 2002, the Registrant was requested by TICO to file the June 30, 2002 financial statements no later than October 15, 2002.
17. By letter dated October 23, 2002, the Registrant was issued a final due date of October 31, 2002 to file its financial statements for fiscal June 2002, failing which a proposal to revoke would be issued.
18. On November 14, 2002 TICO telephoned the Registrant to advise that the financial statements for fiscal June 2002 must be submitted by November 18, 2002.
19. On November 15, 2002, the Registrant's accountant telephoned and stated that the financial statements for the registrant should be submitted by November 30, 2002.
20. On November 26, 2002 the Registrant's accountant telephoned and stated that the financial statements for the Registrant for fiscal June 2002 may not be submitted by November 30, 2002, as there "were issues that needed cleaning up". The accountant further stated that she was unable to give a submission date, and asked what steps would be taken by TICO. The accountant was advised by TICO that a proposal to revoke would be issued.
21. To date the Registrant has failed to file its financial statements for the fiscal year ended June 30, 2002, which were due by September 30, 2002.
22. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsections 6 (4) and (5) of the *Travel Industry Act* directing that:

1. the Registrar refrain from carrying out the Proposal to Revoke Registration;
2. the Registrant's registration is to be subject to the following terms and conditions:
 - (a) The Registrant shall file complete financial statements, including a reconciliation of customer funds and customer obligations, as required by section 24 of the Regulation, for its fiscal year ended June 30, 2002, no later than March 15, 2003;

- (b) If the above-noted statements reflect a working capital deficiency, the Registrant shall correct any and all working capital deficiencies and provide evidence of its current working capital position by April 30, 2003. At all times thereafter, the Registrant shall maintain the minimum working capital as required by section 25 of the Regulation or such subsequent provision as may be in force from time to time;
 - (c) The Registrant shall file complete financial statements, including a reconciliation of customer funds and customer obligations, as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for its fiscal year ending June 30, 2003, no later than September 30, 2003;
 - (d) The Registrant shall file complete financial statements, including a reconciliation of customer funds and customer obligations, as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time for its fiscal year ending June 30, 2004, no later than September 30, 2004; and
 - (e) If the above-noted financial statements as filed are incomplete, the Registrant will have 14 days from the date of notice of the deficiency to fully and completely address the deficiency and produce proof of such correction to the Registrar. Notice of the deficiency, if any, shall be sent by registered mail to the Registrant.
- 3. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) to (e) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.
 - 4. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by its signature below that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED at Chatham this ____ day of March, 2003

Mr. Charles McDonnell
McDonnell Travel Ltd. o/a Thomas Cook Travel
I have authority to bind the corporation

Mr. Michael Pepper
Registrar, *Travel Industry Act*

1500-MED-ALCL

Appeal under Section 50(1) of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 47(1) of that Act.

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ROSS C. BENNETT M.D., Presiding Member

APPEARANCES: LUBA NEUWRITH
Representative for the Registrar of Motor Vehicles

Applicant,
Unrepresented

DATE OF
HEARING: February 24, 2003

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to Section 47(1) of the *Highway Traffic Act* (Ontario).

EXHIBITS

- (1) Notice of Suspension of Driver's Licence from the Ministry dated June 20, 2002.
- (2) Notice of Appeal by the Applicant received at the Tribunal January 27, 2003.
- (3) File Summary introduced by the Respondent.
- (4) Applicant's Driving Record introduced by the Respondent.

FACTS:

The Applicant, a 49 year old steel worker, had his licence suspended on June 6 2002 by the Deputy Registrar of Motor Vehicles. A Medical Report was received from Physician #1 advising that the Applicant had suffered a full body seizure, while at work on March 13, 2002, however, there was no biting of the tongue or incontinence. There was a history of a similar experience in July 2001, while at his cottage. At that time he was hospitalized for 4 days. Physician #1 also noted that the Applicant has a drinking problem and drinks on a daily basis.

This notice arrived in the Ministry Offices at the time of the Public Service strike, so it was June before the Ministry could react. The response was a request for a complete neurological assessment with results of an EEG, MRI and CT Scan as well as a report on the Applicant's alcohol status and an Alcohol Assessment Form completed, with interpretation of bio-chemical markers.

An internist, Physician #2, saw the Applicant on October 28, 2002 and in his report gave the details of the two reported incidents, which he diagnosed as withdrawal seizures related to alcohol use. He enclosed a follow-up EEG report which did not reveal any evidence of epileptiform activity. Also enclosed were a Holter Monitor report which disclosed isolated ventricular premature beats and couplets and an Echo/Doppler report, which showed mild concentric LVH function, degenerative changes of the aortic valve and mild aortic insufficiency.

A laboratory report, dated December 2, disclosed a normal AST- 29 (6-42) and an elevated Gamma GT -83 (5-50). An Alcohol Assessment Form indicated the Applicant had started drinking again after his March episode, but has been abstinent since October 5, 2002. On December 20, 2002 the Ministry informed the Applicant that his driver's licence would remain under suspension until a Medical Report confirmed he had been seizure free and abstinent from alcohol for a period of one year.

The Applicant was upset that because of the strike he had not been notified earlier and now the starting date is October rather than March. He claims that if he had known, he would not have started drinking again. The Applicant's driving record indicates he had been convicted of drinking and driving in 1992 and refusing a breathalyzer test in 1996. His habit was to drink 6-7 bottles of beer daily and always at home or with friends.

ISSUES

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffer from any mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

The Deputy Registrar of Motor Vehicles was obligated to suspend the Applicant's driver's licence under Section 47(1) of the *Highway Traffic Act*, when informed in March, 2002 that the Applicant had suffered two full body seizures in the past year and had a drinking problem.

The Applicant has a long history of alcoholism with two previous alcohol convictions and two alcohol related withdrawal seizures leading up to his suspension. He was informed by several physicians why the seizures had occurred, but started drinking again, for several months. He admits to many attempts in the past to stop completely, without success.

The Guide for Physicians "Determining Medical Fitness to Drive" states in Section 5.5 "Seizures Induced by Alcohol Withdrawal" – "Patients who have had alcohol seizures should not drive any type of motor vehicle. Before they can recommence driving these patients must complete a recognized rehabilitation program for substance dependence and remain alcohol free and seizure free for 12 months".

The evidence establishes that in March, 2002, the Applicant suffered a full body seizure, which has been diagnosed as withdrawal seizure related to alcohol use. He continued to drink until October, 2002. The Tribunal finds that the Applicant suffers from a disability likely to significantly interfere with his ability to drive a motor vehicle. Due to the two full body seizures diagnosed as withdrawal seizures, the Tribunal finds that the Applicant is addicted to the use of alcohol to an extent likely to significantly interfere with his ability to drive a motor vehicle safely.

The Tribunal finds the evidence presented supports the above noted recommendation and is sufficient to warrant a continued suspension of the Applicant's driver's licence under Section 47(1) of the *Highway Traffic Act*.

DECISION:

Upon the application by the Applicant to appeal the decision dated June 20, 2002 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

Ross C. Bennett M.D.,
Presiding Member

RELEASED: March 5, 2003

1501-ADLS-ASTHMA

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF
HEARING: February 17, 2003

DECISION
RELEASED: February 18, 2003

REASONS FOR DECISION

A hearing was held on February 17, 2003 to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on February 18, 2003, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated January 20, 2003, and was received by the Tribunal on January 27, 2003, together with the prescribed fee of \$100.00, paid by cheque.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

There were no preliminary matters and the hearing proceeded.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Suspension Reminder Notice dated January 9, 2003 – issued by the Registrar of Motor Vehicles.
- b) Exhibit # 2 Notice of Appeal Form – received January 27, 2003.

By the Respondent:

- a) Exhibit # 3 Ministry of Transportation submissions – received February 11, 2003.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the

Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

- 50.1(1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
 - (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
 - (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

- 15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
 - (a) the name, telephone number and address, with the postal code, of the medical practitioner;
 - (b) the name, date of birth and address of the person who is the subject of the report;
 - (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.

- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

Applicant's Driver's Licence was suspended "January 8, 2003" as per Notice of Appeal (Exhibit # 2)

Applicant's Evidence

The Applicant submitted as his documentary evidence, page 2 of the Notice of Appeal, which, was prepared by the Applicant's physician of "20 years, 7 months", Physician #1, on "Jan 14/03".

Under the headings set out hereinafter, Physician #1 writes:

"Details and Diagnosis of patient's present condition: Asthma. This patient has a long history of asthma, since childhood, mainly aggravated by exercise, cold air & second hand cigarette smoke."

History of Condition: "He chronically uses inhalers for control. He was unable to cooperate with recent breathalyzer test (symbol) of exposure to cigarette smoke & was unable to access his inhaler – this is consistent with the diagnosis..."

Type of Measurements or recent tests taken...

Relevant details of visit and when your patient was last seen?"

At the hearing, the Applicant, read from a prepared statement, which reiterated his position, that he is appealing the suspension of his driver's licence on medical grounds.

The Applicant confirmed that he has suffered from asthma since childhood, and that the breathalyzer procedure was hampered by the officer's denial to allow him the use of his inhaler.

The Applicant described the occurrence for the Tribunal, emphasizing that he had not consumed any alcohol, prior to being stopped. Although the Applicant cooperated with the officers, and attempted to provide the best possible sample of breath, he was unable to do so. The Applicant believes that the reason he was unable to provide an adequate breath sample is that he had spent the night in a smoky room, and was feeling the effect on his breathing.

After not being able to blow into the device, the Applicant informed the officers that he was asthmatic and asked to be allowed to use the inhaler, which, was in his vehicle. According to the Applicant, the officers “*restricted*” the Applicant’s use of the inhaler.

The Applicant concluded his chief testimony by informing the Tribunal, of the hardship that he has endured since the night of the incident, and requesting that the Tribunal reverse the suspension.

In cross-examination, the Applicant confirmed that he has a history of asthma, which, is aggravated by cold air, exercise and smoke filled rooms. The Applicant was not feeling well as he had spent the night in a smoky environment.

The fact that the Applicant felt intimidated by three officers standing over him, made him nervous, and the tension aggravated the condition.

Asked specifically, by the Respondent’s Representative, to describe his symptoms on the night in question, the Applicant replied that he was gasping for air and was not able to get a full breath of air. As he was unable to inhale fully, the Applicant was also not able to exhale the same amount of air as “...a normal person...”. The Applicant believes that it would be easily discernible to the officers that he was wheezing and having difficulty taking a deep breath.

The Applicant did not refute the statement that, during the brief period of incarceration, he was singing in the cells. However, the Applicant denied singing “...*at the top of his lungs*...”, as suggested by the Respondent’s Representative.

The Applicant confirmed that he was still experiencing breathing difficulties after being released, and that he continued to feel uncomfortable for a few days after the incident. In response to the Respondent Representative’s question as to how soon after leaving the station he used his puffer, the Applicant stated: “*I never took it after that*”.

As far as visiting his physician, the Applicant confirmed that he needed no immediate medical attention. The Applicant called his physician’s office and accepted an appointment a week hence.

The Respondent’s Representative, asked the Applicant if he had seen a respiratologist recently and had any pulmonary function tests performed. The Applicant is not sure whether he has had pulmonary function tests done in the past. The Applicant recalls being hospitalised when younger and assumes that some tests might have been performed then. Lately, the

Applicant has learned to live with his condition, in fact, in the “...*last six years...*” the Applicant verified that he has been able to “...*grow out of it ...past the stage ...of asthma attacks...*”.

In closing the Applicant, repeated his assertion, that he had asked for his inhaler at the time, and that even though the officers did not notice, he was having breathing difficulties.

Further the Applicant is confident that had he been allowed to use the inhaler he would have been able to provide a breath sample, passed, and not need to appear before the Tribunal.

Respondent's Evidence

The Respondent provided the following Documents:

1. Certified Copy of Notice to Registrar, sealed January 29, 2003.
2. Certified Copy of driving record of the Applicant sealed January 29, 2003.
3. Certified Copy of Vehicle Search sealed, sealed January 29, 2003.

The Respondent's Representative called Police Officer #1 as the Respondent's first witness. Police Officer #1 testified that he is currently a member of the Hamilton Police Services and has been a police officer since “...*September 2000...*”.

Police Officer #1 related the events that led to the demand for a breath sample and the subsequent suspension of the Applicant's licence.

Police Officer #1 noted that each time the Applicant attempted to provide a breath sample, he would “...*blow on the machine for approximately one second, take his mouth away from the machine, and claim that he had asthma and could not perform the duties...*”. The Applicant was given eleven opportunities to provide a breath sample.

At no time, did the Applicant request permission to use an inhaler or request medical assistance. During his dealings with the Applicant, Police Officer #1 did not observe the Applicant exhibiting any signs of respiratory distress. In fact Police Officer #1 could hear, through the heavy steel door of the cell, the Applicant singing loudly.

The second witness to testify on behalf of the Respondent was Police Officer #2, also with the Hamilton Police Services. Police Officer #2 has been a police officer “*Just a little over one year, January 2002*”.

Police Officer #2 was asked by the Respondent's Representative to take the Tribunal through the events of the night in question.

He stated that on the first try, the Applicant “...*would put the machine up to his mouth and he would blow for a second, then stop, exhale, wait for a couple of seconds that [sic] start talking about how he has asthma and could not provide a sample...*”. After the fourth attempt by the

Applicant, Police Officer #2, who suffers from asthma as well, demonstrated that he could blow into the device.

Police Officer #2 attested that at no time did he observe the Applicant being afflicted with any physical or breathing difficulty, such as wheezing or coughing. Police Officer #2 is quite certain that the Applicant never asked to use the inhaler. Had the Applicant asked, Police Officer #2 would have definitely retrieved the inhaler from the Applicant's car, and allow him to use it.

Police Officer #2 confirmed that he heard the Applicant singing. Police Officer #2's personal experience with asthma, is that there is a tight feeling in the chest, that he would not "...*want to sing*...".

In his cross-examination of Police Officer #2, the Applicant asked the Constable to clarify his testimony, particularly as to whether the Applicant has asked for the inhaler or not.

In his closing remarks, the Respondent's Representative emphasized that it is the Registrar's position that the Applicant does not suffer from a medical condition, which would have prevented him from providing an adequate breath sample. Mr. Biel argued that the Applicant simply had no intention of providing a breath sample. This argument is substantiated by the observations of both Constables, as well as the behaviour of the Applicant.

Neither officer noticed the Applicant exhibiting any signs of breathing difficulties. The Applicant was able to sing quite loudly. It is unlikely that anyone having difficulty breathing could sing at the top of his lungs. Further, the Applicant did not require the use of an inhaler after leaving the station, nor seek medical intervention.

According to the Respondent's Representative, there is absolutely no medical evidence by way of current medical reports to support the Applicant's argument. The Applicant has introduced no specialist reports, nor any pulmonary function test results.

The Respondent's Representative concluded by asking the Tribunal to uphold the decision of the Registrar.

APPLICATION OF THE LAW TO FACTS:

Although the total evidence presented was considered, the preceding reflects a summary of the proceedings. Evidence introduced not directly germane to the issue was not transcribed.

The subject of this appeal is whether the Applicant has a medical condition that could cause, at the time of the breath sample demand, the Applicant to fail or not comply with the breath demand. The applicable section under the Act is, as stated hereinbefore is Section 50.1 (2) (b) of the *Highway Traffic Act*, which prescribes:

“... person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason...”

In dealing with the medical grounds for appeal, the Applicant takes the position that he was unable to provide a breath sample, because he has suffered from asthma since childhood.

The Respondent's Representative insists the Applicant's failure to comply with the breath demand was not due to a medical condition, but that the Applicant simply had no intention to provide a breath sample.

The Tribunal found the Applicant's evidence credible, and has no doubt that the Applicant, as corroborated by Physician #1's report, has suffered from asthma most of his life. The issue to be determined by this Tribunal, is whether the Applicant's condition at the time of the breathalyzer could have precluded him from providing an adequate sample.

The Tribunal agrees with Physician #1's conclusion that cigarette smoke is an irritant that aggravates any respiratory dysfunction. Nonetheless, it is apparent that Physician #1's opinion that the Applicant: *“...was unable to cooperate with recent breathalyzer test ...exposure to cigarette smoke ...was unable to access his inhaler...”*, is based on information provided by the Applicant. With all due respect to the Applicant's physician, Physician #1, was not present during the incident, and is, therefore, not privy as to what transpired.

The Tribunal must depend on the viva voce evidence of the Applicant and the eyewitness evidence of the officers involved.

The Applicant claims that he was unable to provide a breath sample because he was denied the use of the inhaler. Constables #1 and #2 attest that the Applicant did not ask to use the inhaler. In fact Police Officer #2 suggested that had the Applicant asked, he would have retrieve it from the Applicant's vehicle. The Tribunal will not attempt to make a finding as to this issue. Rather, the Tribunal will focus on the Applicant's behaviour, and any visible physical symptoms the Applicant may have been exhibiting at the time.

There are certain unmistakable indicators of respiratory impairment that are discernable even to an untrained person. Police Officers #1 and #2 were in direct contact with the Applicant. Neither officer detected, at any time, the Applicant suffering from any type of respiratory distress.

As for the Applicant's own testimony, the Tribunal finds it to be problematic and implausible. The Applicant did not deny that he sang for a period of time after being placed in a cell. The Tribunal agrees with the testimony of Police Officer #2, who, is asthmatic himself. It is, inconceivable as well as inconsistent with the condition, that the Applicant would feel like, or be able to sing, while experiencing shortness of breath due to asthma.

The Tribunal considered the testimony regarding the use of the inhaler after the Applicant was released. By his own admission the Applicant declared: "*I never took it after that*". Given, that the Applicant maintains that he was gasping for air, while trying to inhale, the Tribunal finds it improbable that the Applicant's shortness of breath, would have subsided without the aid of an inhaler.

Further, since the Applicant's condition did warrant seeking medical assistance immediately or shortly after the incident, the Tribunal must infer that the condition was not severe enough to preclude the Applicant from providing an adequate breath sample.

The Tribunal finds that there is insufficient evidence, medical and viva voce from the Applicant, to satisfy the Tribunal that the Applicant has a medical condition, which would have prevented the Applicant from providing a breath sample.

The onus being on the Applicant to establish the merit of the appeal, the Tribunal finds that the Applicant has failed to do so. Thus, the Tribunal finds that the Applicant does not meet the criteria of Section 50.1 (2) (b), in that he was not able to demonstrate that he suffers from a medical condition, which would prevent him from providing a breath sample.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated January 9, 2003 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal **confirms** the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D
Presiding Member

RELEASED: March 5, 2003

1502-MED-DOWN

Appeal under section 50(1) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Minister pursuant to section 32(12)(b)(i) of that Act.

TO CHANGE THE CLASS OR CLASSES OF
MOTOR VEHICLE IN RESPECT OF WHICH THE
LICENCE WAS ISSUED

TRIBUNAL: ROSS BENNETT, M.D., Presiding Member

APPEARANCES: LUBA NEUWIRTH
Representative for the Minister

Solicitor for the Applicant

DATE OF
HEARING: FEBRUARY 26, 2003

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Minister (the "Respondent") pursuant to section 32(12)(b)(i) of the *Highway Traffic Act* (Ontario).

EXHIBITS

- (1) Notice of Downgrading of the Applicant's Driver's Licence from the Ministry dated September 3, 2002.
- (2) Notice of Appeal from the Applicant Received at the Tribunal January 28, 2003.
- (3) File Summary Introduced by the Respondent.
- (4) Photostat of Ontario Reg. 340/94 Section 20(1).

(5) Photostat of article – "Ask Dr. Dan—what is stress testing?" –Introduced by the Applicant's Counsel.

(6) Photostats of several Medical Reports, Introduced by the Applicant's Counsel.

FACTS:

The Applicant, a 62 year old school bus driver had his Class BM driver's licence downgraded to a GM by the Deputy Registrar of Motor Vehicles on September 3, 2002.

The Ministry had received a Cyclical Driver's Medical Report from Physician #1, the Applicant's family physician, reporting that the Applicant had a history of Cardiovascular Disease and had suffered a Myocardial Infarction in November 1998. The Ministry's first response was to request a waiver of the medical standards from his physician, if he wished to maintain his classified licence.

Physician #2, an internist, forwarded a waiver and a medical report on December 18, 2002. The report stated that the Applicant underwent coronary angiography following his myocardial infarction and was found to have coronary artery disease and circumflex disease, but could be managed medically. He had exercise testing in April 2001, which demonstrated some ST-T changes in various leads, indicating ischemia, but he never experienced any chest pain.

Physician #2 recommended that the Applicant should have his Class B licence renewed.

The Applicant gave evidence that he had been driving a 72 passenger school bus for the past 4 years. He had previously worked for General Motors for over 30 years. His bus driving involved 3 hours of driving 5 days a week in the city.

The Medical Advisory Committee (MAC) recommended downgrading his licence to a Class GM, but the Ministry first demanded an up-to-date detailed internist's assessment in a February 11, 2002 letter.

Physician #2 responded on May 15, 2002 with the results of another series of exercise stress tests, which demonstrated the same ST depressions as the other tests. He made arrangements for a cardiolute exercise test, but again recommended that the Applicant's BM licence be renewed.

On April 4, 2002 a Nuclear ECG stress test disclosed changes significant with myocardial ischemia without any chest pain. The radiologist remarked that the positive interpretations are silent ischemia versus a falsely positive stress ECG. Another part of this study reported there was an appropriate rise in the left ventricular ejection fraction with exercise.

The MAC recommended downgrading of the Applicant's licence on July 31, 2002. The reason being the Applicant does not meet the requirements for a commercial licence or waiver

consideration due to demonstrated reversible ischemia on stress testing (N.S.C.3.1) (Exhibit # 3).

Physician #2 sent a letter to the Ministry on September 9, 2002 questioning why the licence had been downgraded. He followed this up with another letter on September 27, 2002 reiterating his findings and stating the Applicant's physical status is unchanged and thus the reported changes in the Nuclear stress tests are false positive. He once again recommended that the Applicant's licence be reinstated.

The MAC responded on November 29, 2002, repeating that the tests show ischemic changes and in spite of being asymptomatic he does meet the C.C.S. functional requirements.

The Applicant was then seen by Physician #3 a cardiologist at the General Hospital and more tests were done by another cardiologist, Physician #4. The summary, in Exhibit # 6, states:

1. Preserved left ventricular function with inferior hypokinesis.
2. Moderate coronary artery disease in the LAD (left descending artery).
3. Focal severe stenosis in the circumflex distal segment.
4. Recannulized occlusion of the RCA with collaterals.

Physician #3, in a letter dated January 23, 2003, states there is little change in the new tests from the March 1999 tests. The exercise will show ischemia inferiorly despite good collaterals. The collateral flow is sufficient to maintain a non ischemic myocardium under mild to moderate conditions, but under high conditions of stress (exercise) the defect will be noted. He added, in the absence of change and having continued as a driver in the interval, until he was recently stopped because of a positive exercise tests, it would, in his opinion be reasonable to his returning to the bus.

Physician #2's last letter on February 17, 2003 (Exhibit # 6) discusses the Applicant's coronary angiography on January 8, 2003. It showed improvement in blood flow in the occluded right coronary artery and collaterals. The left main was normal and the left anterior descending had moderate disease in the range of 50% in the proximal segment.

Physician #4 stated at the time the Applicant was asymptomatic with a positive exercise test showing infralateral ischemia and no significant new wall motion abnormalities on exercise RNA scanning.

Physician #2 repeated that he could see no reason at this time why the Applicant should not be allowed to continue his employment.

ISSUES:

Should the decision of the Minister to change the class or class of motor vehicles in respect of which the licence is issued in accordance with the result of the examination be varied, modified or set aside?

Does the Applicant no longer suffer from a mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffer from any mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Regulation 340/94, Section 17 and 18 states:

- 17. (1) Qualifications required by an applicant for a holder of a Class A, B, C, D, E or F driver's licence are that the applicant or holder,
 - (a) has no history or clinical diagnosis of diabetes that requires insulin for control;
 - (b) is not taking any drug that could, in the dosage prescribed or in the dosage recommended by the manufacturer, impair his or her ability to drive a motor vehicle of the applicable class safely;
 - (c) has no established medical history of myocardial infarction, angina pectoris, coronary insufficiency or thrombosis;
 - (d) has no established medical history of heart disease including arrhythmia or of respiratory dysfunction likely to interfere with the safe driving of a motor vehicle of the applicable class;
 - (e) is not suffering from an aortic aneurysm, whether resected or not;
 - (f) is not suffering from hypertension accompanied by postural hypotension resulting in giddiness when under treatment;
 - (g) has no established medical history of loss of consciousness or awareness due to a chronic or recurring condition;

- (h) has no established medical history of a disorder of the musculoskeletal or nervous system that may interfere with the safe driving of a motor vehicle of the applicable class;
 - (i) has no established medical history of an intractable psychotic or psychoneurotic disorder, having particular regard for sustained hostile, aggressive, paranoid, suicidal or other destructive tendencies or depression unless it is medically determined that the condition from which the person has suffered is corrected or controlled;
 - (j) has a visual acuity by Snellen Rating, with or without the aid of corrective lenses, no poorer than 20/30 in the better eye and 20/50 in the weaker eye; and
 - (k) has a horizontal visual field of at least 120 degrees in each eye as measured by confrontation tests.
- (2) An applicant for or a holder of a Class A, B, C, D, E or F driver's licence who fails to meet the qualifications referred to in clauses (1)(a) to (i) may, despite the failure, qualify for the class of licence applied for or held if he or she demonstrated the ability to drive a motor vehicle in the applicable class as safely as any person who meets those qualifications.
- (3) An applicant for or a holder of a Class D driver's licence who fails to meet the qualification referred to in clause (1)(c) may, despite the failure, qualify for that class of licence if it is medically determined that he or she has made a full recovery and there is no established history of a second occurrence of myocardial infraction, thrombosis or recurring angina pectoris.
- (4) An applicant for or a holder of a Class B, C, E or F driver's licence whose hearing in one ear is better than in the other must be able to perceive in the better ear, with or without a hearing aid, a forced whisper at a distance of 1.5 metres or, if an audiometer is used to test the person's hearing, must not have a loss in the better ear of more than 40 decibels at 500, 1,000 and 2,000 hertz.
- 18. An applicant for or a holder of a G, G1, G2, L, M, M1, M2, or R driver's licence must have,
 - (a) in the case of a person whose vision in one eye is better than in the other, visual acuity in the better eye that is no poorer than 20/40 as measured by Snellen Rating; and
 - (b) a horizontal visual field of at least 120 degrees as measured by confrontation tests.

Section 32(12)(b)(i) states:

- 32 No person shall drive a motor vehicle on a highway unless the motor vehicle is within a class of motor vehicles in respect of which the person holds a driver's licence issued to him or her under this Act.

- (12) An applicant for a driver's licence or a person who holds a driver's licence shall submit to the examinations that are authorized by the regulations relating to this section and required by the Minister at the time and places that the Minister may require and the Minister may,
 - (b) in the case of a person who holds a driver's licence,
 - (i) impose or remove the conditions or endorsements authorized by the regulations or change the class or classes of motor vehicles in respect of which the licence is issued in accordance with the result of the examinations, or

Section 50 states:

- 50(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or Registrar.

APPLICATION OF THE LAW TO FACTS:

When the Deputy Registrar of Motor Vehicles became aware of the Applicant's coronary artery disease it was necessary to investigate how serious the condition was and determine whether the disease would create a danger to the public. The Medical Advisory Committee reviewed all of the medical reports and recommended downgrading the Applicant's driver's licence.

A cardiologist and an internist examined the Applicant and ordered a multitude of ECG's, x-rays, nuclear tests and various stress exercise tests. At least 2 medical waivers and multiple medical reports were sent to the Ministry from the specialists recommending the Applicant's Class BM licence be reinstated. They acknowledge the Applicant's ECG's demonstrate some "ST" depressions during stress testing, which are indications of ischemia, but state he has never experienced any chest pain.

The issue of no chest pain during the stress tests is of little significance, since the Applicant did not experience any chest pain when he suffered the myocardial infarction in 1998. He claims he has greater tolerance when he exercises at home then when he is doing the stress test and is stopped because of ST depression. This is no doubt because he is unaware of the ST depression and does not experience angina to warn him to stop. The Applicant stated that he also wears a "nitro" patch at all times, which would reduce the possibility of angina even more.

After examining all of the available evidence the Tribunal determined that the persistent finding of ST depression in all of the stress tests cannot be ignored. This is objective evidence of heart disease, since the ECG changes are exercise-induced. This puts the Applicant in the

Canadian Cardiovascular Society Class II, which would make him only eligible to drive a taxicab.

The Tribunal finds that the Applicant holder of a BM licence suffers from a physical disability which is likely to significantly interfere with his ability to drive a motor vehicle, contrary to Section 14 Regulation 340/94 of the Act.

The Applicant suffers from coronary artery disease with myocardial ischemia. His medical history raises a significant concern about his ability to drive. Due to the absence of symptoms, the Applicant could suffer a serious cardiac event without warning, placing the lives of school children in great jeopardy.

The Tribunal has carefully considered the specialist's recommendations, but finds the evidence of ischemia too significant to ignore, because the Applicant is driving a large 72 passenger school bus. Therefore the Tribunal finds there is enough evidence under Section 32(12)(b)(i) to warrant the downgrading the Applicant's driver's licence from Class BM to Class GM.

DECISION:

Upon the application by the Applicant to appeal the decision dated September 3, 2002 of the Minister ("Respondent") to change the class or classes of motor vehicle in respect of which the licence was issued pursuant to Section 32(12)(b)(i) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Respondent and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

Ross Bennett, M.D.
Presiding Member

RELEASED: March 4, 2003

1517-ADLS-NOMC

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD M.D.
Presiding Member

APPEARANCES: KYLE M. BIEL
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF
HEARING: March 04, 2003

DECISION
RELEASED: March 10, 2003

REASONS FOR DECISION

A hearing was held on March 04, 2003 to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on March 06, 2003, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated February 12, 2003, and was received by the Tribunal on February 14, 2003, together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

The Respondent's Representative informed the Tribunal that the Registrar was agreeable to proceeding without the viewing of the videotape of the Applicant's breathalyzer session, as the hearing room is not equipped with a video system.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice to Registrar dated January 9, 2003, issued by the Registrar of Motor Vehicles.
- b) Exhibit # 2 Notice of Appeal Form – received February 14, 2003.

By the Respondent:

- a) Exhibit # 3 Ministry of Transportation submissions – received February 26, 2003.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is:

Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

- 50.1(1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
 - (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
 - (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

- 15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
 - (a) the name, telephone number and address, with the postal code, of the medical practitioner;
 - (b) the name, date of birth and address of the person who is the subject of the report;
 - (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who

is the subject of the report from providing a breath or blood sample including the results of any related tests.

- (3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

The Applicant's Driver's Licence was suspended on "Jan 9/03" as per Notice of Appeal.

Applicant's Evidence

The Applicant submitted Page 2 of the Notice of Appeal, prepared by his physician of "*1 years and 7 months*", together with several laboratory blood analysis results, as well as report of findings of an Abdominal and pelvic ultrasound.

Physician #1 describes the Applicant's medical condition as follows: "*Diabetes Mellitus for years with complications ...peripheral vascular disease & cirrhosis of liver and splenomegally ...gout ...cervical spondylitis.*"

At the hearing, the Applicant proceeded to tell the Tribunal about his financial and general life situation.

The Applicant testified that the officer "*...talked very loud ...yelled and yelled and yelled*". The officer's loud voice was very disturbing and aggravating, "*...like a slap in the face...*" because of the fact that the Applicant wears a hearing aid.

As far as the night in question, the Applicant repeatedly stated that he was not drunk, and that he did not have an accident. At the time of the breathalyzer, the Applicant was feeling well, except for a ringing in his ears, which happened after several attempts of trying to provide a breath sample.

Under cross-examination the Applicant confirmed that he does not believe that the diabetes could have prevented him from providing a proper breath sample.

In response to the Tribunal's question, posed as a matter of clarification, the Applicant verified that he has not been diagnosed with any respiratory illnesses, and does not suffer from any breathing difficulties.

By way of closing remarks the Applicant commented that he does not understand how the police can say that he was drinking "*...grape juice...*". The Applicant emphasized that he does not drink, was not drinking at the time, did not have an accident, nor hurt anybody.

The Applicant complained about being a prisoner in his own home, as without a car, he is not able to go out.

Respondent's Evidence

The Respondent provided the following Documents:

1. Certified Copy Notice to the Registrar, sealed February 17, 2003.
2. Certified Copy Driving Record of the Applicant, sealed February 17, 2003.
3. Certified Copy of Vehicle Record, sealed February 17, 2003.

The Respondent called as a witness, Police Officer #1, from the Regional Police Service. Police Officer #1 has been a police officer for “...*twenty-two and half years*...”

Police Officer #1 detailed the events that led to the Applicant's arrest and his being turned over to the breathalyser technician. During the time that Police Officer #1 spent with the Applicant, before and after the breath test, Police Officer #1 did not observe the Applicant exhibiting any signs of respiratory distress. Further, at no time, did the Applicant request medical assistance.

Police Officer #2 was also called as witness by the Respondent's Representative. Police Officer #2, who is with the Police Service, has been a police officer for “*almost ten years*...” and qualified “...*as breathalyser technician as of June 16, 1997, and designated and qualified as an Intoxilyzer technician on February 11, 1999*...”

Police Officer #2 described for the Tribunal the Applicant's numerous attempts to provide a breath a sample. According to Police Officer #2, the Applicant alternated between not meeting either the pressure or the time requirement. At times the Applicant provided sufficient pressure but not long enough to allow the machine to register. There were times when both the pressure and the time requirements were met, but the Applicant was not able to maintain the slope needed to register the amount of alcohol in the blood. Police Officer #2 also noticed that there were times when the Applicant was just not exhaling into the device.

The Applicant's appearance was dishevelled. He was incoherent, rambled and behaved in a rude, boisterous manner. The Applicant told Police Officer #2 he was diabetic, and had several other illnesses, but was not able to name any of the medication that he has been prescribed. The Applicant did show Police Officer #2 a prescription bottle with his name, and advised Police Officer #2 that “...*he had a penis infection at that time*...”

When asked by Police Officer #2 why he was not providing a breath sample, the Applicant told Police Officer #2 that she “...*had enough information*...”

During the breathalyzer test session, Police Officer #2 did not notice the Applicant showing any signs of physical discomfort. Further, the Applicant never asked for any medication.

In his closing remarks, the Respondent's Representative emphasized that it is the Registrar's position that the Applicant does not suffer from a medical condition, which would have prevented him from providing an adequate breath sample. Mr. Biel argued that the Applicant simply had no intention of providing a breath sample. This argument is substantiated by the

observations of both Constables, who at no time noticed any signs of breathing difficulties, such as shortness of breath. In fact, the Applicant confirmed that he has no respiratory disorders.

Mr. Biel, the Respondent's Representative pointed out that Physician #1's medical report does not link the diabetes with the Applicant's ability to provide a breath sample.

The Respondent's Representative concluded by asking the Tribunal to uphold the decision of the Registrar.

APPLICATION OF THE LAW TO FACTS:

Although the total evidence presented was considered, the preceding notes reflect a summary of the proceedings. Evidence introduced not directly germane to the issue was not transcribed.

Prior to setting out the reasons for the decision, the Tribunal feels it is imperative that the Applicant understand that at issue, is not whether the Applicant was impaired at the time, or has a need to drive.

An appeal was brought by the Applicant under Section 50.1 (2) (b) of the *Highway Traffic Act*, which prescribes:

"...person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason..."

The Applicant takes the position that he was unable to provide a breath sample, because of a medical condition and supports his claim with a medical report from his physician. Physician #1's report establishes the Applicant has been diagnosed with: *'Diabetes Mellitus ...peripheral vascular disease & cirrhosis of liver and splenomegally ...gout ...cervical spondylitis.'*

The Respondent's Representative mentioned the fact that Physician #1 fails to connect the Applicant's condition to his ability or inability to provide a breath sample.

The Tribunal must agree. Physician #1 does not offer any rationalization or justification of how the Applicant's condition may affect the Applicant's breathing pattern. In his somewhat incoherent viva voce testimony, the Applicant, by his own admission, stated that he has no respiratory illnesses, was not experiencing breathing difficulties at the time, and was feeling fine, except for a slight ringing in his ears after several attempts.

As there are certain unmistakable indicators of respiratory impairment that are visible even to an untrained person, the Tribunal also relies on the testimony of the eyewitnesses who were involved in the incident. Both, Police Officer #1 and Police Officer #2 were in direct contact with the Applicant. Neither officer noticed, at any time, the Applicant suffering from any type of respiratory distress.

The Tribunal finds there is absolutely no evidence that the Applicant's medical condition precluded the Applicant, at the time of the breath sample demand, to fail to provide an adequate breath sample.

The onus being on the Applicant to establish the merit of the appeal, the Tribunal finds that the Applicant has failed to do so. Thus, the Tribunal finds that the Applicant does not meet the criteria of Section 50.1 (2) (b), in that he was not able to demonstrate that he suffers from a medical condition, which would prevent him from providing a breath sample.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated January 9, 2003 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal **confirms** the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: March 10, 2003

SUZANNE NAULT

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: NIVES MONTANO
Presiding member

APPEARANCES: LYNDA DUNBAR
Representative for the Registrar of Motor Vehicles

SUZANNE NAULT, Applicant

DATE OF
HEARING: February 27, 2003

DECISION
RELEASED: March 5, 2003 by teleconference

REASONS FOR DECISION

A hearing was held on February 27, 2003, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Suzanne Nault (the "Applicant")
Motor Vehicle:	1996 Suzuki X90 (the "vehicle")
Date of Appeal:	February 7, 2003

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence (i.e. all reasonable efforts) to determine that the driver's licence was not suspended and the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(c) and (d) of the Act.

This matter came before this Tribunal on February 27, 2003 and proceeded as a teleconference.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

I lended my car to my son Nicholas Raymond to go to work because his was in the garage. On Sunday night at approx 11 pm Darren asked Nicholas to borrow the car because he had to go to work and if he was late one more time he was going to get fire. Nicholas ask him if he had a valid driver licence and Darren said yes and show him his driver licence. Attach is a statement from Darren verifying this statement.

The loss of the vehicle will result in exceptional hardship already that to miss two days of work and also all the cost associated with it – impoundment cost, the repair cost, loss of wages also no having the vehicle to go to work.

The Applicant is a single mother with one of two adult sons still residing at home. She is employed full-time at Ontario Power Generation in Pickering, 27 kilometers from home as a mechanical maintainer. She starts each business day at 6:30 a.m.

The circumstances surrounding the impoundment resulted due to a car accident. The following is a brief synopsis.

The Applicant's son, Nicholas, who does not reside with the Applicant, borrowed her vehicle so that he could play hockey. Darren Rankine, the driver at the time the vehicle was impounded, and a friend of Nicholas's for about the past 3 years, asked Nicholas at the arena, if he could borrow the vehicle to go to work at Arcon, located in Richmond Hill. Mr. Rankine advised Nicholas that it would be returned to him in the morning, after his midnight shift. Mr. Rankine is currently under probation at work and a threat of losing his job is possible if he continued to be tardy. Nicholas was satisfied that Darren had a valid driver's licence because Darren had shown it to him upon inquiry.

Mr. Rankine, while having care and control of the Applicant's vehicle allegedly stopped at a red traffic light wherein he was rear-ended. Mr. Rankine called Nicholas from the hospital to advise him of the impoundment.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows (Exhibits 3 and 4):

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;

2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Darren Rankine;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of driving with more than 80 mgs of alcohol in blood under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until October 25, 2003.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(c) and (d).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. *Law.* The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in

exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
- (b) financial or economic loss to any person;
- (c) loss of employment or employment opportunity to any person; or
- (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,

- (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

Appeal – Due Diligence

The first issue to be considered in this appeal is whether the Applicant exercised due diligence in attempting to determine that Darren Rankine's driver's licence at the time in respect of which the order was made was not then under suspension.

The Applicant is the owner of the vehicle that has been impounded as set out in the vehicle and plate portion of her driver's licence, a copy of which is attached to Exhibit 2. She also owns a 1999 Pontiac Grand Am.

Subsection 50.2(3)(c) of the Act is quite specific in that the owner of the vehicle must exercise due diligence and the onus of proof is on the Applicant to establish that due diligence was performed which is required under this section of the Act.

The Applicant lent her vehicle to her son. The Tribunal is assuming that she was unaware that her son was going to lend her vehicle to a friend. In a document provided by the Applicant's son, Nicholas, he confirmed that he exercised due diligence and a driver's licence was viewed (Exhibit 2). Unfortunately, the Applicant's son is not the owner of the vehicle.

The Tribunal therefore has no evidence that the Applicant exercised due diligence as required by section 50.2(3)(c) of the Act.

Appeal – Exceptional Hardship

The Tribunal must determine whether it should set aside the Registrar's order to impound the vehicle on the basis that the owner of the impounded vehicle will suffer exceptional hardship.

The Applicant has appealed on the grounds of "exceptional hardship" under section 55.2(3)(d).

Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the criteria the Applicant must meet to determine if in fact "exceptional hardship" will result from the impoundment. The Applicant in this case has argued that the impoundment will result in hardship as described in section 22(2). In order for her appeal to be considered under section 22(2), she must have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulations provides the criteria for demonstrating that every reasonable option has been considered respecting an alternative vehicle.

The Tribunal's consideration of subsections 22(3)(a), (b) and (c) follows:

- (a) **"no alternative to the impounded motor vehicle is available"**. The Applicant has conceded that she is also the owner a 1999 Pontiac Grand Am which she is currently using as an alternate vehicle (Exhibit 3).
- (b) **"the loss will be immediate, significant and lasting"**. The Applicant testified that (i); she has taken 2 vacation days due to her vehicle's impoundment; (ii) she has not had nor has missed any doctor's appointments; (iii) although there is no need to use public transit, the Applicant lives in a community where public transit, GO trains and taxis are available; and (iv) in the event of an emergency, the hospital is approximately 6 kilometres from her home.
- (c) **"the impact of loss will be upon a person ordinarily transported by the motor vehicle"**. The Applicant's 25 year old son who currently resides with her, uses the vehicle to attend a trade school. Since the impoundment, he has walked to school.

These criteria are cumulative. That is, all of these criteria must be met before the Tribunal may consider the ground of "exceptional hardship" under section 50.2(3)(d). On the evidence, none of the criteria have been met.

Evidence was heard that the Applicant has incurred financial hardship as a result of the loss of the vehicle. The Applicant may pursue compensation from the suspended driver, Darren Rankine, as is stated in section 55.1(21) of the *Highway Traffic Act*:

"The owner of a motor vehicle that is subject to an order to impound under this section may bring an action against the driver of the motor vehicle at the time the order was made to recover any costs or other losses incurred by the owner in connection with the order".

After considering the above requirement, the Tribunal finds that the Applicant has alternatives to the impounded vehicle and the impact of the loss will not be immediate, significant and

lasting as required by section 22(3) of Regulation 574 as amended by Regulation 632/98.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Nives Montano
Presiding Member

RELEASED: March 6, 2003

CHRISTIAN BRAUNOEHLER

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: CHARLES SANDIFORD
Presiding Member

APPEARANCES: LUBA NEUWIRTH, Representative for the Registrar of Motor Vehicle

RHONDA A. METELSKY, Representative for the Applicant

DATE OF HEARING: February 28, 2003 Oshawa

REASONS FOR DECISION

A hearing was held on February 28, 2003, at Oshawa, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Christian Braunoehler (the "Applicant")
Motor Vehicle: Chev GM 4, plate 887OEE (the "vehicle")
Date of Appeal: February 13, 2003

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on February 28, 2003 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

1. the Ministry's impoundment Order will result in exceptional hardship;
2. there is no alternative to the impounded vehicle available;
3. the impact of the loss of the vehicle will be immediate, significant and lasting;
4. the loss will be upon persons other than the person whose driving while his driver's licence was under suspension resulted in the order to impound the motor vehicle;
5. every reasonable option has been considered and inquired into.

AFFIDAVIT
OF CHRISTIAN BRAUNOEHLER

I, CHRISTIAN BRAUNOEHLER, of the city of Pickering, in the Regional Municipality of Durham, Manager of Andy & Frank Excavating, MAKE OATH AND SAY:

1. I am the legal owner of the impounded vehicle that is the subject of this appeal.
2. Mr. Andrew Happe was the driver of the vehicle at the time it was impounded. Mr. Happe did not have my permission to drive my(sic) as I was aware that he was a prohibited driver.
3. Mr. Happe currently owns and operates an excavating business jointly with his father, Frank Happe. The name of the business is Andy & Frank Excavating and its head office is located in Pickering. The business has been operating for about 20 years and currently employs seven people. I have been employed by Andy & Frank Excavating for over 11 years.
4. The sole purpose of the business is excavation. The company owns four excavators, two Bob Cats, two Blades as well as other hydraulic machineries and equipments that service the business. All of these machineries require fuel regularly.
5. The vehicle that was impounded by the Ministry is a fuelling truck that is used to fuel all of the heavy machineries and equipments that are used in the day-to-day operations of the business. The fuel truck holds approximately 550 liters of fuel. Attached to my fuel truck is a trailer that is used to haul the smaller machineries(sic) to various job sites. This trailer was impounded along with the truck.
6. The successful operation of the business depends on these machineries. The winter season is ordinarily a busy season for the company who currently has several contracts for snow removal, breaking and dumping ice, etc. These contracts must be fulfilled. However, since the impoundment of the fuel truck, all business operations have ceased.
7. I have inquired into the rental of a fuel truck but the cost is excessive. In addition, I don't have access to company funds to undertake this immediate financial obligation. On February 6, 2003, the police arrested Mr. Happe for Driving While Prohibited. Mr. Happe remains in custody in Penetanguishene and the expected date of his release is sometime in July 2003. Mr. Happe's father is co-owner of the business but is presently out of the country on an extended leave. Since I do not have signing authority of the company's funds, I am not in a position to rent another fuel truck for the duration of the Ministry's impoundment.

8. I do not know whether Mr. Happe considered the possible drastic consequences to his actions before de(sic) decided to act. For the [past seven months I have been responsible for driving Mr. Happe back and forth on business and personal errands. I have been diligent in assisting Mr. Happe with following the Order of the court by ensuring that all aspects of the business that required driving a vehicle was carried out either by myself or by another employee. On occasions that I was not available to drive Mr. Happe on some errand, another employee would fulfil this role. On the day Mr. Happe was caught driving. I was out on a job site and had left my fuel truck at the business location so that it can be available for fuelling the machines. I did not give Mr. Happe permission to move the truck, however, I later learnt that he had moved the truck about 1000 feet in order to dump some sand. Mr. Happe acted entirely on his own when he chose to violate this Court Order, and his action will cause a lasting impact on the business and its employees.

9. Most of these employees have been with the company for several years and depends on the business for their livelihood. Thus the loss of business revenue would have an immediate and significant economic impact on them. Further, a loss of employment would result in undue hardship for the seven employees and their families.'

10. The survival of the business depends upon the immediate release of my fuel truck and I therefore, request an Order that the Ministry's impoundment order be set aside and that the Ministry pay all costs related to the impoundment.

Sworn before at the City of Pickering
In the Regional Municipality of Durham,
on the 13th day of February, 2003.

"Signatures"

Commissioner for Taking Affidavits

" Signatures "

CHRISTIAN BRAUNOEHLER

The applicant's lawyer R. Metelsky called her client C. Braunoehler as her witness and proceeded to develop their position through his testimony. The Applicant has worked for an excavating company for the past eleven years. His prime function is to supply fuel etc. to the equipment used at different sites and transport this equipment to new projects as needed. The trailer he uses in this operation is still impounded but could be released by contact with the ministry for the required papers. To date the Applicant has not pursued this path.

There are seven employees affected by the impoundment of the Applicant's vehicle who might lose their jobs and indeed the whole company may fail in the absence of some solution to the loss of the refuelling truck.

A replacement fuel truck was considered but thought to be too costly. No evidence of cost was submitted or names of rental companies that were contacted. The fact that the principal owner was at the time out of the country seemed to be a factor as he would have to supply the money to rent the unit.

The driver of the vehicle at the time of impoundment was Andrew Happe who is under suspension until March 2007 before the resolution of this charge. He is currently incarcerated and in no position to help financially even though he is co-owner of the business with his father.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner.
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Andrew Happe.
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until March, 2007

During the Respondent's examination of the Applicant it was determined that the business was still operating even though with some difficulty and diminished productivity. The employment of 20-liter cans is currently servicing the fuel requirements of the equipment but not as efficiently as the fuel truck.

It was also determined that the owner of the business, Frank Happe is back in the country and in spite of a sudden illness would now be able to lend his financial support to the rental of a suitable replacement vehicle during the impoundment period. It had been the intention of the Applicant's lawyer to have Frank Happe testify at the hearing but regrettably he was too ill to appear. No written statement was available from Frank Happe either.

In general testimony it was established that there was some additional inconvenience servicing the equipment with fuel through the use of the use of fuel cans.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

- (3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:
1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
 2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
 3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d), exceptional hardship.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
- (b) financial or economic loss to any person;
- (c) loss of employment or employment opportunity to any person; or

- (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant has appealed under Section 50.2 (3)(d) of the Act on the basis that the impoundment of his vehicle will and has resulted in exceptional hardship. The Applicant's lawyer refers specifically to Regulation 574 Section 22 (a)(b)(d) and (i).

Section 22 of Regulation 632/98 is very specific. The Applicant must meet these clearly defined criteria to establish exceptional hardship as a result of impoundment.

The Tribunal cannot consider any other factors arising from or directly related to the impoundment itself.

Under Section 22(2) of Regulation 632/98 the Tribunal cannot consider financial or economic loss or loss of employment or loss of employment opportunity unless the Applicant demonstrates that all criteria set out in Section 22(3) apply. One of those criteria is that no alternative to the impounded vehicle is available. Furthermore Section 22(4) of the Regulation requires the Applicant to demonstrate that every reasonable option has been explored including an alternative vehicle. The Tribunal finds that the Applicant has failed to establish that no alternative to the impounded vehicle is available.

In this case the Applicant demonstrated a less than aggressive effort to replace the impounded vehicle in spite of what he considered severe consequences because of the loss of his vehicle to himself and others. No evidence was presented to the Tribunal by way of rental estimates for small truck equipped with a trailer hitch. This would have provided transport for the 20-liter fuel cans and brought back the stored trailer into service. The cost barrier to a rental unit stated in the Applicant's submission was removed by the return to home of the owner of the business in which the impounded vehicle was employed.

The Applicant has failed to show that every reasonable option was considered to replace the impounded vehicle with a rental unit. This is the first test and the evidence submitted by the Applicant did not support his basis for Appeal of the Impoundment Order under Section 22(4) of the Regulation.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Charles Sandiford
Presiding Member

RELEASED: March 6, 2003

1208242 ONTARIO INC. O/A CHEAP WHEELS 4 RENT

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: TERRENCE LORETTE
Presiding member

APPEARANCES: LYNDA DUNBAR
Representative for the Registrar of Motor Vehicles

JAIRAM CHIEKRIE, Agent for the Applicant

DATE OF HEARING: March 4, 2003

DECISION RELEASED: March 10, 2003 *by teleconference*

REASONS FOR DECISION

A hearing was held on March 4, 2003, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: 1208242 Ontario Inc. (the "Applicant")
Motor Vehicle: 1994 Pontiac GFS, plate ANKY 251 (the "vehicle")
Date of Appeal: February 14, 2003

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on March 4, 2003 and proceeded as an electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

To: Licence Suspension Appeal Board
From: Jairam Chiekrie
1208242 Ontario Inc. o/a Cheap Wheels 4 Rent.
Date: February 11, 2003

Re: Owner's Position

On, February 6 , I rented a car, licence plate ANKY 251, to one Michael D. Savory. On that day I filled out the contract based on information from his driver's licence, which he presented to me. He never indicated to me that his licence was suspended neither did I had any reason to doubt the validity of his licence. He called me on February 7th, 2003 and told me that the car in question was seized and impounded by the MTO and would not be released until after 45 days because "they said his licence was suspended for unpaid overdue parking tickets."

I would like to make this appeal based on the grounds that it will cause exceptional hardship on the company. The company will have to pay \$ 800.00 storage fee plus loss of projected revenue of about \$ 600.00. Our company is single location company with only two employees and does not make any great profit, very recently we experienced a 50% increase in our insurance premiums and had to lay off one of our employees. I am working seven days a week to make ends meet especially in these slow winter months.

The renter does not have any balance on his credit card remaining, so my alternative is to take him to court. This exercise will on prove fruitless because even if judgment is made in my favor it will be impossible to collect since he does have any money, not to mention the cost of filing a claim against him.

I would ask the board to give me a chance since this my first case of this kind. I am very careful with customers who make cash deposits and tend to be more trusting to credit card customers. I suppose I will have to check the validity of every customer's licence rather than just accepting it on sight.

I thank you for your kind consideration.

(sic)

The Applicant testified that he rented a car to Mr. Savory for a month, for a rental fee of \$599 plus taxes. On the day of the rental Mr. Savory presented his Driver's License and a credit card. The Applicant stated that he then processed a charge of \$300 against the credit card by calling the credit card issuer and agreed with Mr. Savory that the balance would be due upon the return of the car in early March. The Applicant further stated that he assumed that the presented driver's license was valid and did not do anything to verify it. When asked about his car rental business the Applicant stated that this particular car was one of 30 and that the business also had about a dozen other vans and small trucks for rent. The Applicant further stated that the business generated approximately \$30,000 per month in gross business and that in its 8 years of operation it had never had a car impounded and that he was unaware that he could, or should, check the validity of a driver's license with the Ministry of Transportation.

In response to questions about how the business was suffering "exceptional hardship" due to the impoundment, the Applicant restated his written position relative to lost revenues and the impound storage expense. When questioned, the Applicant did admit that the original \$300 credit card charge did mitigate the claimed \$600 revenue loss.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Michael Savory;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Fail to Remain at Accident under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until December 17, 2003.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate

or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The evidence presented by the Respondent points out that several conditions have to be met to meet the criteria for exceptional hardship set out in the Act, and that these criteria are cumulative. The Applicant has appealed on the grounds of exceptional hardship, in accordance with section 50.2(3)(d) of the Act. Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the specific criteria the Applicant must meet to determine if exceptional hardship under the Act will result from the impoundment.

Though inconvenienced, the Applicant has not presented the Tribunal with evidence that would prove the loss of the vehicle would be immediate, significant and lasting, as required per section 22(3)(b) of the Regulation. The Tribunal does not consider a financial loss claim of approx. \$1100 to be significant or lasting to an enterprise that generates \$30,000 per month in sales.

The Tribunal finds that the Applicant has failed to meet the onus under the sections 22(3) and 22(4) of the Regulation, and that the Tribunal is therefore precluded from further considering the Applicant's claim of exceptional hardship under section 22(2).

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Terrence Lorette, Presiding Member

RELEASED: March 10, 2003

SHERRY SHUBA

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: ELIZABETH L. SPROULE
Presiding member

APPEARANCES: LYNDA DUNBAR
Representative for the Registrar of Motor Vehicles

SHERRY SHUBA, Applicant
unrepresented

DATE OF HEARING: March 6, 2003

DECISION RELEASED: March 11, 2003 KITCHENER

REASONS FOR DECISION

A hearing was held on March 6, 2003, at Kitchener, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Sherry Shuba (the “Applicant”)
Motor Vehicle: 1993 Buick LLF, plate AMXF 231 (the “vehicle”)
Date of Appeal: February 19, 2003

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on March 6, 2003, and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing. The representative for the Registrar provided original certified copies of the materials filed with the Tribunal.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant’s request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant’s appeal.

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant’s evidence follows:

Applicant’s written submission filed with the Tribunal in support of appeal states:

On the weekend of Feb. 14th, 2003, I was helping a friend move to Sault Ste. Marie. I left Friday night driving a moving van there. Upon my return home on Monday I found out that my vehicle had been impounded.

I would like to appeal this decision (sic) under the loss will result in exceptional hardship. We moved here 2 years ago and have no family here except my two daughters (age 17, 23). My youngest daughter lives with me. She has changed schools 3 times, she has a learning disability and has had a difficult time. She is attending Lutherwood in Kitchener. I drive her 3 times a week. My oldest daughter has 2 small children. Her husband works for a vending company, he leaves their home at 4 am and is not back until 2 pm or later. I supply rideies (sic) to her and my grandchildren for the doctors or if an emergency situation (sic) happens.

I only have this vehicle and am not in the position to buy another. Albert was dismissed from his job 6 weeks ago, he worked days (7am, 3pm) I worked afternoons (4pm, 1am) in Cambridge. I was dismissed two weeks ago. Our savings are very low. I have a new job opportunity in Ayr at the Schnieders plant, which is about 40 miles away. There are no buses that travel there on a daily basis (sic). I have looked into renting a car but don't have a credit card, all car rental companies require one.

If this results in a 45-day impoundment I would not be able to get my car back until April 1st. I would possibly lose my home leaving my daughter and myself in a very difficult situation.

The Applicant, in her oral testimony reiterated her above submissions as to why the loss of her car will cause exceptional hardship:

- (1) she has a teenage daughter who has a learning disability and who she drives to school 3 times a week;
- (2) she assists her adult married daughter, who does not drive, transport her infant children to the doctor's or in emergency situations, and
- (3) she is currently unemployed but she has a job opportunity in Ayr which she needs her car to get to.

In cross examination the Applicant confirmed that her teenage daughter can get to school using public transit, that her married daughter's husband has a car, and that she had not formally applied for the job in Ayr but that a friend, a supervisor of maintenance, has put in a word for her with the supervisor of production. When asked what alternative modes of transportation she has investigated, the Applicant stated she had got a quote from a cab company as to the cost of a ride to Ayr based on a distance of 40 miles, although she hadn't checked on what the actual mileage would be, and that it would cost too much to make it worth it. When asked if she had looked into buses between Kitchener and Ayr she replied she had not. She had only considered the local city buses, which she did not believe, would be an alternative mode of getting to Ayr.

The Applicant also testified that she has a part-time job in Kitchener working weekends, 2 shifts, earning \$12.50 an hour and that she has made application for unemployment insurance although she suggested because she was fired from her last job she may not get it. She could not explain why her application might be denied. She also testified that her mother is currently helping her with her rent.

Lastly, in cross-examination, the Applicant confirmed that this is in fact the second vehicle she has had impounded as a result of her spouse driving while suspended. The other car had been a 1985 Chevy and had been impounded in Sault Ste. Marie about 4 years ago.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Alber J. Shuba;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of impaired driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension for life.

The Registrar submitted no oral evidence.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

- (4) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:
 1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
 - (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).

- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

In her oral testimony the Applicant stated that this is the second vehicle of her's, which has been impounded due to her husband driving while suspended. Although not argued by the Registrar, subsection 50.2(4), as set out above provides that subsection 50.2(3)(d), exceptional hardship, does not apply when there has been a previous order to impound with respect to any vehicle then owned by the same owner. Although the Applicant testified to this fact, the Registrar submitted no evidence of the previous order to impound. If that had been the case this Appeal would fail on that basis. However, the Tribunal does not want to rely solely on the testimony of Applicant in the event the facts are not as she stated.

To succeed in an appeal based on exceptional hardship under subsection 50.2(3)(d), the Applicant must meet the very specific criteria set out in section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, set out above.

There is no evidence before the Tribunal to suggest the loss of the vehicle will result in a threat to the health or safety of any person or any thing as set out in section 22(1).

Under section 22(2) the Tribunal may consider whether there will be a loss of education, [section 22(2)(d)], or loss of employment opportunity, [section 22(2)(c)], however, the Applicant must demonstrate that there is no alternative to the impounded vehicle and the loss will be immediate, significant and lasting, [section 22(3)].

It was clear from the Applicant's testimony that her teenage daughter can reach her school using public transit. This is an alternative to the impounded vehicle. This alternative should eliminate any threat of loss of education.

With respect to the Applicant's claim that the impoundment will result in the loss of an employment opportunity in Ayr, the Tribunal was not satisfied by the Applicant's evidence that every reasonable option had been considered and inquired into to show there is no alternative to the impounded vehicle. The only inquiry made was to a cab company, without verifying the distance she needed to travel. The Tribunal was also not satisfied that an employment opportunity would in fact be lost. The Applicant has not actually made any application for employment with the company in Ayr or spoken with the individual(s) who would be hiring her to confirm the availability of the position and her suitability for it. She merely spoke to a friend who spoke to friend who put in "a word" for her.

Given the criteria set out in section 22(1) of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 6322/98, the Tribunal finds the Applicant has not established exceptional hardship as set out in section 50.2(3)(d) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Elizabeth Sproule, Presiding Member

RELEASED: March 11, 2003

HIGHWAY TRAFFIC ACT
R.S.O. 1990, Chap. H.8 as amended

IN THE MATTER of the ORDER to IMPOUND a MOTOR VEHICLE Order #3500862 OWNED BY: Canada Cartage System Ltd. of: 1561 The Queensway, Toronto, Ontario, M8Z 1T8 made pursuant to section 55.1 of the *Highway Traffic Act*, effective on: February 27, 2003.

AND IN THE MATTER of a requirement for a hearing respecting an appeal of the said Order to Impound, pursuant to section 50.2 of the *Highway Traffic Act*.

CANADA CARTAGE SYSTEM LTD.

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

CONSENT ORDER

Upon the application to the Tribunal by the Applicant, Canada Cartage System Ltd., and by the representative for the Registrar of Motor Vehicles, for the issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22, and having reviewed the written settlement signed by the Applicant and the Registrar of Motor Vehicles as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the facts and on the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: March 4, 2003

Schedule "A"

LICENCE APPEAL TRIBUNAL

Between:

Canada Cartage System Ltd.

Applicant

-and-

THE REGISTRAR OF MOTOR VEHICLES

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

1. On February 27th, 2003, the motor vehicle described in **Order to Impound #3500862** was impounded in accordance with subsection 55.1(3) of the *Highway Traffic Act*, RSO 1990, c. H. 8 as amended.
2. The Applicant, Canada Cartage System Ltd., whose name is shown on the plate portion and vehicle portion of the permit for the impounded motor vehicle, is the owner of the said vehicle.
3. No other order to impound under section 55.1 of the Act has ever previously been made with respect to any motor vehicle then owned by the Applicant.
4. The Applicant filed an appeal to the impoundment order, in accordance with the grounds permitted under clause 50.2(3)(c) of the *Highway Traffic Act*, stating **that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension.**
5. Materials provided to the Registrar and investigations conducted indicate that the Applicant did exercise due diligence in attempting to determine that the driver's licence was not suspended.
6. The Applicant has had the opportunity to obtain independent legal advice with respect to consent to this Order.

7. The parties agree that this agreement does not bind the Ministry of Transportation or the Registrar of Motor Vehicles in any way, with respect to future hearings or consent orders.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsection 50.2(5) of the *Highway Traffic Act* that the Tribunal set aside the order to impound.

**Dave Carr,
Representative
for Canada Cartage System Ltd.**

The Registrar of Motor Vehicles

(signature of Applicant)

(signature of Registrar)

(date)

(date)

VALUE VACATIONS LTD.

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *TRAVEL INDUSTRY ACT*

TO REVOKE REGISTRATION

TRIBUNAL: BRIAN MAROTTA, Vice-Chair

APPEARANCES: ADAM ALTMID, Counsel for the Applicant, Value Vacations Ltd.

TREVOR BRANION, Counsel, representing the Registrar,
Travel Industry Act

DATES OF HEARING September 24, 2001, December 6, 2001, December 14, 2001, February 7, 2002, February 26, 2002, March 21, 2002, May 1, 2002, June 20, 2002, July 16, 2002, July 31, 2002, August 16, 2002, September 12, 2002, November 13, 2002 and November 14, 2002

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

Pursuant to Sections 6(1) and 7 of the *Travel Industry Act*, Revised Statutes of Ontario, 1990, Chapter T.19, (the "Act"), a Notice of Proposal dated June 21, 2001, (the "Proposal") was issued by the Registrar under the Act (the "Registrar") to revoke the registration of Value Vacations Ltd. (the "Applicant") as a travel agent and by order temporarily suspended the said registration effective the date upon which the Proposal was issued (the "Suspension Order").

The Applicant by a Notice of Appeal dated June 22, 2001 (the "Appeal") and filed at the offices of the Licence Appeal Tribunal (the "Tribunal") on June 28, 2001, required a hearing by the Tribunal in respect of the Proposal and the Suspension Order pursuant to Section 6(2) of the Act.

The Proposal and the appeal was set down for a hearing before the Tribunal on July 12, 2001, and at that time and at the request of the Applicant, the hearing was adjourned by the Tribunal for the purpose of affording the Applicant an opportunity to engage and instruct counsel to represent the Applicant. On July 12, 2001 the Tribunal heard evidence from three witnesses and continued the Suspension Order pending a prehearing conference (the "Prehearing Conference") before the Tribunal for the purpose of identifying and/or simplifying the issues contained within the Proposal and the appeal.

The Tribunal issued an Interim Order released July 27, 2001 (the "Interim Order"), respecting the adjournment, the continuation of the Suspension Order, the evidence presented at the said hearing of July 12, 2001 and the need for a Prehearing Conference in order to refine the issues raised in the Proposal and the Appeal.

Participation in the Prehearing Conference was set down for a conference on August 8, 2001, in accordance with the Rules of Practice of the Tribunal. At the Prehearing conference, both the Registrar and the Applicant, Charles A. Pinnock, were present and participated.

At the Prehearing Conference it was noted that the particulars alleged in the Proposal resulted from numerous alleged breaches by the Applicant on several separate occasions respecting the same issue or issues. The Registrar has set out sixty-two items in the Proposal in which specific particulars of non-compliance by the Applicant of statutory or regulatory requirements were alleged. It was also clear at the Pre-hearing Conference that "the categories or issues were subordinate to the main issue of the Applicant's ability or fitness to comply with the regulatory requirements of the Act as determined by the Registrar and to do business with other Registrants and wholesalers".

The enumerated items of non-compliance fell into the following categories:

- late filing of financial statements,
- failing to maintain working capital,
- misuse of credit cards,
- issuing NSF cheques,
- failing to meet its financial responsibilities to wholesalers,
- misrepresentation,
- failing to notify the Travel Industry Council of Ontario ("TICO") of changes in its financial institutions,
- deficient advertising,
- failure to maintain proper records, and
- failure to deal with customers' complaints.

On September 7, 2001, the Registrar issued a Notice of Further or Other Particulars, which added other specific allegations to the above-mentioned list of headings. The Registrar also added new allegations relating to the Applicants ability to carry on business in accordance with the law and with integrity and honesty, by alleging that the Applicant continued to carry on business as a travel agent despite the Interim Suspension Order.

On December 11, 2001, the Registrar issued a Notice of Further or Other Particulars, which added other specific allegations concerning the Applicant continuing to carry on business as a travel agent despite the Interim Suspension Order.

The Registrar takes the position that the Applicant is not entitled to registration under section 4 of the Act on the grounds that; it cannot reasonably be expected to be financially responsible in the conduct of its business, that the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty, that it is in breach of the terms and conditions of registration and that the Applicant is in contravention of the Act and the Regulations.

The Applicant takes the position that in collecting this information the Registrar's staff grossly failed in the following respects:

1. it did not critically analyze any of the information regardless of its source;
2. it completely failed to fully or at all to investigate the various allegations;
3. it did not fully understand the information gathered and misconstrued its significance and/or effect;
4. it purposely and negligently ignored material evidence.

Furthermore, the Applicant argues that the Registrar strayed far from its mandate and its statutory jurisdiction into an area of trade disputes which have no bearing whatsoever on consumers and the criteria set out in the Act, which are to be considered in granting or refusing someone's license. The Registrar's staff had taken the approach that every issue including ones previously reviewed and accepted and however minimal or non-consequential ought to be part of the proposal, in the apparent effort to attempt to persuade the Tribunal with mere volume of materials rather than on basis of clear evidence and proper legal principals.

The Applicant contends that the result was a Proposal which is unnecessarily lengthy and complicated and which in the end contained no credible allegations necessary to support the upholding of the Registrar's proposal and the resulting deprivation of license.

THE EVIDENCE:

The evidence in this matter was both oral and documentary. The following persons appeared before the Tribunal and testified:

Jack Foster

Jack Foster was the first witness called by the Registrar. He gave oral testimony on December 6 and 14, 2001. Mr. Foster testified that he is a Certified Management Accountant and has been employed as an Inspector, designated by the Registrar since May, 1993. In his capacity as an Inspector, Mr. Foster routinely reviews financial statements and performs on-site inspections of travel Registrants to determine their financial viability and their compliance with the Act. Mr. Foster indicated that he has performed thousands of Abench reviews of Registrant financial statements. He estimated that he performed over 500 on-site inspections. He has first-hand knowledge of the Applicant and has since 1997, conducted eleven on-site inspections of the Applicant's business premises.

Rachel Palozzi

Rachel Palozzi was the second witness called by the Respondent. Ms. Palozzi is employed as a Compliance Officer by the Travel Industry Council of Ontario (hereinafter referred to as TICO) and is an Inspector, designated by the Registrar. As TICO's Compliance Officer, Ms Palozzi has corresponded with the Applicant concerning issues of non-compliance including advertising deficiencies, NSF cheques, and credit card problems. Ms Palozzi has also dealt with several tour operators, who have notified TICO that they have ceased to trade with the Applicant by reason of the Applicant's apparent lack of financial responsibility, as they are obligated to do under subsection 18(1) of the Regulation. Ms Palozzi gave oral testimony on December 14, 2001 and February 7, 2002.

Antonette Ermellini

Ms Antonette Ermellini was the third witness called by the Respondent. She gave oral testimony on February 7, 2002 and February 27, 2002. Ms Ermellini is the manager of accounts receivable for North American Leisure Group o/a Sunquest and Alba Tours (NALG). She has held that position since 1994. In her testimony, Ms Ermellini referred to several documents, which were collectively bound in a brief marked as Exhibit 12.

Ms Ermellini also produced evidence of charge backs to NALG in relation to the Applicant, which were marked as Exhibits 13 B 17.

Ms Ermellini gave evidence that the Applicant owed an outstanding account of \$57,512.50 in respect of *Toronto Star* newspaper advertising.

Ms Ermellini testified that in the fall of 1998, NALG stopped selling its travel services to the Applicant and advised the Applicant of this in or around October 7, 1998. She testified that the Applicant managed to book through Nalg's computer system until the end of that year, although it did not have permission to do so.

Tammy Crane

Ms. Tammy Crane gave evidence on February 27, 2002 and March 21, 2002. In her testimony, Ms Crane referred to several documents, which were collectively bound in a brief marked as Exhibit 20. Ms. Crane testified that she has been employed by Signature Vacations, a tour operator registered under the *Travel Industry Act*, since March, 1987 and is currently their Manager of Customer Accounts.

Ms. Crane also testified that or about July 25, 1997, Signature Vacations contracted with Charles Pinnock to allow the Applicant to sell and advertise Signature vacation packages.

Ms. Crane indicated that in 1998, Signature received several credit card charge backs in relation to the Applicant. The Applicant also issued an NSF cheque during this time. Ms Crane stated that on September 14, 1998, Signature refused to accept any more bookings from the Applicant.

She further indicated that by January 5, 1999, the Applicant owed Signature \$11,907.77 for travel services relating to eight customers. On January 6, 1999 the Applicant was placed on third party collection for the outstanding amount owed. Its account with Signature remained closed and it was not permitted to sell Signature Vacation packages. Its account has not since been re-opened. On June 4, 1999, Signature obtained a default judgment against the Applicant and Mr. Charles Pinnock for the sum of \$12,002.86 plus \$399.00 costs, plus interest.

Immelda Accosta

Ms. Immelda Accosta was the first witness called by the Applicant. She gave oral testimony on March 21, 2002. Ms Accosta testified about past bookings made by the Applicant through Amazonas Travel. Ms Accosta did not have any first-hand knowledge of the Amazonas booking transaction, which was formed part of the Proposal.

Charles Pinnock

Mr. Charles Pinnock was the second witness called by the Applicant. Mr. Pinnock is the Applicant's principal. He is the Applicant's sole shareholder and officer and director. Mr. Pinnock gave extensive testimony on March 21, 2002, May 1, 2002, June 20, 2002, July 16, 2002, September 15, 2002, November 14, 2002 and November 15, 2002. His testimony is described in more detail throughout this Decision.

Yvonne Harris

Ms. Yvonne Harris was the third witness called by the Applicant. Ms Harris gave oral testimony on November 15, 2002. Ms. Harris is an Accounts Receivable Supervisor with Signature Vacations and reports directly to Ms. Tammy Crane. Ms. Harris gave evidence regarding her experience in the travel industry, particularly her knowledge of the charge back process and charge backs in the travel industry. Ms. Harris also gave testimony in respect of her dealings with the Applicant.

Ownership of Applicant

The Applicant was initially registered as a travel agent (registration number 2301830) on December 14, 1984. The Registrant's registration was suspended on August 14, 1990 and lapsed on December 14, 1990. Mr. Pinnock was the principal of the Applicant during this period. On April 17, 1997, the Applicant was reinstated as a travel agent.

There was an issue between the parties as to who was actually in control of the Applicant and for what period of time. Mr. Pinnock indicated that from April, 1997 to the fall of 1998, he was employed as a reservation agent and did some marketing. Mr. Pinnock indicated that Ms. Inna Zelener, the identified 60% shareholder and Mr. Patrick Daley managed the company during that period. Mr. Pinnock testified that in or about June 3, 1998, he and Inna Zelener reached an agreement for the transfer of the travel agency to him. He further testified that the transfer was a gradual process and that the effective ownership and control did not change until about April, 1999. About that time, a solicitor completed the transfer, filed the requisite Notice of Change with the Ministry and advised TICO. Until that time, Ms. Zelener was identified as the president and majority shareholder. She was operating another travel agency, named IPT at that time. Ms. Zelener was not called as a witness.

It is noted that Ms. Zelener's release to Charles Pinnock and Value Vacations (Exhibit 115) was signed on June 3, 1998. According to a letter from Patrick Daly, the Comptroller for the Applicant and IPT, Ms Zelener maintained signing authority of the Applicant's CIBC accounts until November, 1998 (Exhibit 28). It is also stated by Mr. Daly that Zelener and her backers agreed to loan Pinnock \$70,000 to start the company (Value Vacations Ltd.). On October 22, 1998, Mr. Pinnock had executed a Schedule A Form (Exhibit 5, Tab 38) to become the manager of the Applicant. In November, 1998, the office of the Applicant was moved by Mr. Pinnock to a different location.

The Tribunal notes that the Applicant's Form 1, filed with the Ministry of Consumer and Commercial Relations (Exhibit 115), shows Lloyd Pinnock to be director and general manager of the Applicant between March 25, 1997 and April 27, 1999. Charles Pinnock (aka Lloyd Pinnock) certified that the information set out in the Form 1 was true and correct.

On the oral and documentary evidence produced, the Tribunal finds that Charles Pinnock was in daily control and the true manager and controlling mind of the Applicant since March, 1997. This was subject only to Zelener protecting her investment by retaining authority over cheque writing. Despite her Release of Pinnock and the Applicant June 3, 1998, she retained cheque writing authority until the fall of 1998.

Late Filing of Financial Statements

Subsection 24(1) of Ontario Regulation 806/93 (the "Regulation"), made under the Act, states that every Registrant shall file with the Registrar financial statements for each fiscal year.

Subsection 24(2) of the Regulation states that if the Registrant had sales of less than \$10 million during the previous fiscal year, the Registrant shall file, within three months of the end of the fiscal year,

- i) annual financial statements with a review engagement report by a public accountant licensed under the Public Accountancy Act; or
- ii) annual financial statements with an audit opinion from a public accountant, if the Registrant is required to obtain annual financial statements with an audit opinion under the Business Corporations Act.

Subsection 24(5) of the Regulation states that the financial statements shall include a statement of sales made during the period, a balance sheet, an income statement and a reconciliation of customer funds and customer obligations.

1998

The Registrar alleges that despite three contacts by TICO the Applicant did not file financial statements due July 31, 1998 until September 29, 1998.

Charles Pinnock testified that letters regarding financial statements were all addressed to Inna Zelner and were in regard to the period of time that she had exclusive control of Value Vacations. Pinnock further testified that when he became aware that the statements were not filed, he immediately contacted the accountant and wrote to TICO on August 10, 1998 (Tab 24 of Document Brief Volume 1 Exhibit 5). He advised TICO that, due to system failure at the accountants the financial statements were going to be two to three weeks late. Furthermore, on September 18, 1998, Inna Zelner wrote to Michael Pepper and again confirmed that the statements were being delayed due to computer problems but that they would be delivered within several days (Tab 4 of the Applicant's Document Brief – Exhibit 7). The financial statements were filed on September 29, 1998.

1999

The Registrar again alleges that it took several contacts with the Applicant before the financial statements due July 31, 1999 were filed on September 30, 1999.

The Tribunal notes that the first two contacts were only form letter reminders, as the statements had not yet become due. Pinnock testified that when he changed the location of offices in November of 1998, he also changed accountants. Pinnock further testified that the lateness of filing resulted, in part, from the new accountant not being familiar with the accounts. He had not obtained the necessary documents from the old accountant until a short period of time prior to the filing deadline as a result of an outstanding account incurred by previous owners of Value Vacations. Pinnock was in contact with TICO regarding the financial statements and testified that he had instructed his accountant to contact TICO directly and advise them when the statements would be ready. Charles Pinnock confirmed this by letter to TICO on or about August, 1999 (Tab 29 - Registrant's Document Brief Volume 2 – Exhibit 6).

The Tribunal finds Pinnock failed in his duty to provide financial statements on time. He was in total control of the Applicant. All matters with Ms. Zelener had been settled by that time. Not paying the accountants of the Applicant showed financial irresponsibility.

2000

Financial statements for its fiscal year ended April 30, 2000, were due by July 31, 2000. The accountant had communicated and written to TICO on July 31, 2000 (Tab 23 of the Applicant's Document Brief - Exhibit 7) regarding the late filing of the statements prior to receiving any inquiry or reminder from TICO.

The Applicant filed its financial statements for its fiscal year ended April 30, 2000, which were due by July 31, 2000, on August 21, 2000.

The Applicant was late again, however the Registrar did not complain until this proposal.

2001

By letter dated March 27, 2001, Ms Pamela Stout, Financial Inspection Co-ordinator with TICO, reminded the Applicant that its financial statements for its fiscal year ended April 30, 2001 were due by July 31, 2001.

By letter dated August 21, 2001, the Applicant informed TICO that it did not believe it was required to submit its financial statements for its fiscal year ended April 30, 2001 due to the present Licence Appeal Tribunal proceedings. The Applicant indicated that it would attempt to submit its financial statements by September 10, 2001.

The financial statements for the Applicants fiscal year ended April 30, 2001, which were due by July 31, 2001, were received on or about November 18, 2001.

Application of law to facts relating to late filing

The following cases establish the law in this area:

Karin Travel v Registrar Travel Industry Act (May 3, 1996) Commercial Registration Appeal Tribunal

In this matter the travel agency had failed to file its financial statements as required. It was argued that allowing the Registrant to remain open for business would not pose the danger to the public. There was no issue that the filing of the required financial material was not made. The Tribunal directed that the Registrar should revoke the registration of the travel agent and found that the requirement by the regulations to the Act to submit financial statements does not confer discretion upon the Tribunal. The legislation, which was passed after extensive consultation with the industry, made the prompt filing of financial statements to be a necessary prerequisite for the continued registration of a travel agent.

Crystal Travel Ltd v Registrar, Travel Industry Act (March 15, 1996) Commercial Registration Appeal Tribunal

In this matter the travel agency had failed to file its financial statements as required and asked that the Tribunal not revoke its registration and promised on behalf of the travel agent to file the required documentation within the next three month period. The Tribunal held that the registrar was correct in finding that the failure to file the required financial statements contravened the Act and the regulations, and that the travel agent was thereby not entitled to registration under the Act. It was found at page 3 of the decision that:

"it is the nature of a regulated industry that certain requirements for continued registration must be met for the mutual advantage of the industry and consumer. In this fashion the consumer is guaranteed a measure of protection against business failures with negative consequences for consumers and those regulated companies reap the benefit of working in an industry with enhanced public credibility as a result of effective regulation."

Luna Travel Agency Inc. v Registrar, Travel Industry Act (May 3, 1996) Commercial Registration Appeal Tribunal

In this matter the travel agency had failed to file its financial statements as required, even as of the date of the hearing. The agent on behalf of the travel agency apologized for this and promised to file the documentation as soon as possible. The Tribunal found that the requirement to submit financial statements does not confer any discretion upon the Tribunal and that the registrar was correct in finding that the failure to file financial statements disentitled the Registrant from being registration under the Act. It was found that the purpose of the Act was to monitor the financial health of travel agents and thereby avoid insolvencies and bankruptcies which had occurred earlier in the industry

Applying these principals to the present case, in the *Karin* case the Registrant had not filed its financial statements for over a year after they were due and had not done so by the time of the hearing. At paragraph 13 of the decision, the Tribunal determined that as the statements were not filed, it had no discretion to allow the registration to continue. The Tribunal also pointed out that once the statements were filed, this would constitute a material change in circumstances, which could entitle the Registrant to reinstatement of its license. As such, it was argued that the Tribunal implied that even a one year delay in filing financial statements may not mean that the Registrant is precluded from registration but that the Registrant is not entitled to be registered so long as it is in default of its obligation to file financial statements.

Both *Crystal Travel* and *Luna Travel Agency* decisions, express the same point of law as set out above in the *Karin Travel* decision. In both of these cases the Registrants failed to file financial statements as requested and had not done so by the time their respective hearings were held. Since at the time of the hearing each of the Registrants was in default, the Tribunal felt that it had no discretion to permit the registrations to continue.

In the present case the Applicant had always been late in filing financial statements, although they had all been filed by the start of this hearing. That is not to say that by filing statements before a hearing that an Applicant can escape all liability. At some point excuses wear thin, even for minor delays. A continual late filer can be held accountable by reason that it demonstrates that it cannot be reasonably expected to act in accordance with the law or be financially responsible in the conduct of its business. The Applicant has reached that point.

\$10,000.00 Security

In order to properly address the issue of a shortfall of working capital, one must first review the issues of the \$10,000 security deposit and the Zelener loan.

Subsection 26(1) of the Regulation provides that a person who has not been registered during the previous 12 months shall provide \$10,000 in security to the Council when applying for registration on or after June 24, 1998.

Subsection 26(2) of the Regulation provides that the Corporation shall transfer to the Council all security that it held immediately before June 24, 1998.

Subsection 26(3) of the Regulation provides that the Registrar shall return the security to the Registrant 24 months after the date of registration, less an amount for any claims paid or anticipated to be paid to customers of the Registrant by the Corporation or the Council for the costs of the Corporation or the Council, as the case may be.

It was submitted that the Registrar has residual discretion under subsection 26(3) to hold the security provided under section 26, if he anticipates that there would be claims and costs to TICO in respect of a Registrant. It was admitted that the decision of the Registrar must be reasonable and there must be a legitimate basis for his belief that claims and costs are anticipated.

In accordance with the requirements of the Act, Value Vacations paid a \$10,000.00 deposit in or about March, 1997 and Value Vacations was registered on April 17, 1997. The evidence does not show that the Registrar had any serious belief in April, 1999 that there would be any claims to be paid to customers of the Registrant or that retaining the deposit had even been considered by the Registrar. After one of the final inspections on March 3, 2000, Jack Foster concluded in his report (Tab 42 of Document Brief Volume 2– Exhibit 6, at page 2) that Value Vacations was not a threat to the compensation fund. During cross-examination, Mr. Foster also testified that at that time there were not anticipated claims against the fund.

As such, in accordance with the Act, the amount of the deposit of \$10,000.00 ought to have been released in full to Value Vacations in April, 1999. As it was not released, it could not be considered as part of the Applicants working capital. The Applicant had not asked for the security deposit to be released.

Zelener Loan

Pinnock testified that initially Inna Zelener lent him the sum of \$34,000.00 to be used in the business. Pinnock testified that this was a personal loan to him, however the loan from the very first statement was improperly recorded as a company liability. Over the next few years, Charles Pinnock, paid down the loan to about \$23,566.00. In or about May, 1998, Inna Zelener agreed to transfer her shares in Value Vacations to Charles Pinnock providing he continued to repay her his loan to her. When it was discovered that this loan was recorded in the financial statements as a liability of the company, Pinnock gave Zelener a promissory note for \$23,566.00, which had the effect of injecting the money into the company.

By fax dated September 14, 2000 (Exhibit 122) Mr. Pinnock advised Pamela Stout, TICO's financial inspections co-ordinator, "Regarding your letter dated August 29, 2000 please be advised that prior to April 30, 2000 Charles Pinnock had advanced the company funds to repay the outstanding loan of \$23,566.00". The letter from Pamela Stout dated August 29, 2000 stated that the financial statements showed a working capital deficiency of \$12,350.00, and continued to state "To comply with the Regulation, an improvement of \$17,350.00 in working capital is required to attain the minimum required. This can be achieved by means of a shareholder advance."

By giving a promissory note to Zelener for the \$23,566.00, which was recorded as a debt of the Applicant, this was no longer a debt of the company but became a personal debt of Pinnock and a shareholders loan to the Applicant. The Tribunal also notes that there was an undated handwritten letter from Pinnock to Zelener (Exhibit 26), wherein he had made a proposal to Zelener regarding the startup of Value Vacations, which proposal contemplated a loan to Charles Pinnock personally.

Mr. Foster in his testimony and affidavit, gave evidence that during his October, 2000 inspection of the Applicant, Mr. Pinnock explained to him that the \$23,566.00 loan, which had appeared on its financial statements, was from Ms Zelener, and that Ms Zelener had agreed to charge the loan to Mr. Pinnock personally. TICO requested proof that the loan was personal. In October, 2000, Charles Pinnock provided to TICO a personal promissory note in the amount of \$23,566.00. TICO then requested a letter from an accountant confirming the effect of the promissory note. A letter was provided to TICO by the company's accountant on or about November 20, 2000, which confirmed that the loan was at all times personal to Charles Pinnock and thus wrongly recorded as company liability. TICO did not ask for anything else.

Failure to Maintain Working Capital

The requirement to maintain minimum working capital is another term and condition of a travel agent's registration. The working capital requirements are laid out in section 25 of the Regulation.

Subsection 25(1) of the Regulation states that a Registrant shall maintain a minimum working capital of \$5,000.00 if the Registrant had sales in Ontario of less than \$1.5 million during the previous fiscal year.

Subsection 25(2) of the Regulation states that a Registrant who had sales in Ontario of \$1.5 million or more but less than \$10 million during the previous fiscal year shall maintain a minimum working capital of \$25,000.00.

Subsection 25(5) of the Regulation states that the working capital of a Registrant shall be calculated in accordance with generally accepted accounting principles and shall not include the value of any security provided under subsection 26(1) or the account of any person with whom the Registrant has a non-arm's length relationship.

Mr. Foster testified that the Applicant's financial statements (Exhibit 5, Tab 27) for its fiscal year ended April 30, 1998, revealed a working capital shortfall as of that date of \$9,039.00, based on the Registrant's reported sales of \$2,439,713.00.

Mr. Pinnock, in his evidence, conceded that there was a working capital shortfall, as of April 30, 1998. He attributed the shortfall to the failure of his predecessor Inna Zelener to inject sufficient capital.

Mr. Foster testified that he conducted an inspection of the Applicant on October 8 and 9, 1998. During the course of his testimony, Mr. Foster referred to his Inspection Findings and Inspection Report (Exhibit 5, Tab 34), which were made at or around the time of the inspection.

Mr. Foster indicated that Mr. Pinnock advised him that he had injected \$3,500.00 on September 7, 1998 and \$15,000.00 on September 17, 1998, to correct the working capital shortfall reflected on the Registrant's April 30, 1998 financial statements.

Mr. Foster did not have the Applicant's September, 1998 bank statements available during his October 8 and 9, 1998 inspection and relied on the information provided to him by Mr. Pinnock. The Applicant also did not have copies of its bank statements and cheques for September and October 1998 available for Mr. Foster's November 27, 1998 follow-up inspection.

The September and October 1998 bank statements (Exhibit 5, Tab 49) were provided to TICO on or about December 4, 1998 for Mr. Foster's follow-up inspection. The statement shows a \$3,937.00 credit on September 9, 1998 and a credit of \$15,080.70 on September 17, 1998. The account was, however, overdrawn and not replenished indicating that the apparent working capital injection was not maintained by the time of Mr. Foster's October inspection.

Further inspections in December, 1998 and February, 1999 indicated negative balances in the Applicant's bank accounts. On April 19, 1999, the Applicant submitted interim financial statements (Exhibit 6, Tab 21) for the period ended February 28, 1999. The statements revealed that as of that date, the Applicant had a working capital deficit of \$4,578.00 or total shortfall of \$29,578.00 based on the Applicant's required minimum working capital.

It was submitted by the Applicant that the financial statements filed for the period ending April 31, 1998, and the interim statements in April, 1999 included a loan from Inna Zelener, which in 1997 totaled \$34,000.00 and by 1999 was paid down to \$23,566.00. They also did not take into account the \$10,000.00 deposit, which was then due to be released by TICO. If the financial statements are corrected by deducting either of these amount from the company liabilities, the working capital increases by the corresponding amount and the Value Vacations does not have a working capital shortfall but, in fact, has a surplus of capital.

The Tribunal cannot entirely agree with the Applicant's submissions in this regard. It is the responsibility of the Registrant to see that its records are accurate. The Registrar looks at the information provided by the Registrant. The Tribunal examines the decision of the Registrar to see if he was in error in making his decision based on the information before him (*Brenner*). If the Registrant has provided incorrect information, it cannot complain that the Registrar was in error in basing his decision on information provided by the Registrant. As was stated, the deposit is not to be included in the working capital, as is set out in section 25 (5) of the Regulation.

In the present case the Registrant did not correct the issue of the Zelener loan until April, 2000 and did not advise TICO until September, 2000. Before that it appeared to the Registrar that there was a shortage of working capital.

The Applicant's financial statements for its fiscal year ended April 30, 1999 (Exhibit 6, Tab 30) revealed that the Applicant had a working capital deficiency of \$41,918.00 or total shortfall of \$46,918.00 based on the Applicant's reported sales of \$1,139,865.00. This substantial shortfall existed despite Mr. Pinnock's purported capital injection of \$54,000.00 including the \$20,000.00, which was injected only nine days prior to the Applicant's fiscal year end. Pinnock testified that he was advised of the above shortfall on October 19, 1999, by letter from TICO. A potential buyer deposited \$47,000.00 on or about November 7, 1999 but changed his mind and was refund the sum of \$37,000.00 very shortly thereafter. A prior cheque for \$47, 000.00 was not honoured. The \$10,000.00 difference was a penalty to the potential buyer. Pinnock, injected a further sum of \$14,000.00 on December 2, 1999, which sum was still in place by March 3, 2000, as confirmed by Mr. Foster in paragraph 43 of the Proposal.

TICO's review of the Applicant's financial statements for its fiscal year ended April 30, 2000 (Exhibit 6, Tab 45) identified a working capital deficiency of \$12,350.00 or total shortfall of \$17,350.00. In his testimony, Mr. Foster indicated that the actual shortfall was, in his opinion, \$27,350.00. He attributed the discrepancy to the inclusion of the Applicant's \$10,000.00 security in the Applicant's current assets. The Applicant maintains that there was no shortfall if the Zelener loan is taken into account. Pinnock testified that he provided a copy of the Promissory Note on or about October 11, 2000. Value Vacation's accountant provided that confirmation in writing on November 27, 2000 (Tab 26 of the Applicant's

Document Brief – Exhibit 7). Removing the Promissory Note from the company's liabilities appears to result in a working capital of \$11,216.00 as of April 30, 2000. There is some dispute as to whether the Applicant reported to it's accountant the outstanding Signature judgment of \$12,002.86 plus costs and interest. It is clear that the financial statements did not reflect the judgment as a liability, or even make reference to it.

Misuse of credit cards

Phyllis James

On or about September 24, 1998, a credit card belonging to James Phyllis was used to purchase a trip for a party with a different name. This transaction was done with approval of James Phyllis.

Mr. Pinnock gave evidence that James Phyllis was Phyllis James, a corporate client and close friend of Mr. Pinnock. The Applicant introduced two letters from Ms. James (Exhibits 29 and 30) in support of its position that the transaction was authorized. Despite the allegations of three charge backs, which were received in relation to bookings made by the Applicant using Ms. James' credit card, the letters from Phyllis James clearly state that the Applicant had authority to use her credit card. She admits to some issues with charge backs, but the Registrar had not proved evidence of wrongdoing on the part of the Applicant.

Nadia Ciaravino

Regent made an error and billed the client twice, once in the amount of \$3,600.00 and once in the amount of \$699.00. The booking form authorized Regent to bill only the amount of \$3649.00 to a certain master card number (Booking form at page 6 of Tab 32 of Registrar's Document Brief Volume 1 – Exhibit 5). From the documentary evidence and the testimony of Pinnock this transaction appears to be the error of Regent with no basis for any allegation that Value Vacations did anything improper.

Sheryl Davis

Sheryl Davis, purchased a trip from the Applicant, to Greece, departing on September 5, 1998 and returning on September 21, 1998. Ms Davis authorized the Applicant to debit her credit card \$4,922.00. Ms Davis' credit card was later debited again, without her authorization, for the same amount, which resulted in a charge back to Regent Holidays. The Applicant reimbursed Regent Holidays for the charge back.

Ms Ermellini indicated that the Applicant booked trips for passengers Bourneas and Martino departing for Acapulco and Aruba. Ms Ermellini further indicated that the Applicant had booked the trips on June 15, 1998. Despite attempts to obtain payment on the file, no payment was made until the Applicant provided Ms. Davis' credit card on August 13, 1998.

Pinnock explained that several agents worked on this file and in the end, inadvertently the client was charged twice. The client charged back one of the billings and she was not out any money. Pinnock testified Value Vacations in return reimbursed Regent Holidays.

The fact that one credit card was charged for two trips by different people traveling to two different locations, with the amount of the two trips equaling the cost of the one trip that the cardholder actually did take, appears to be too much of a coincidence. This charge back would give reason for concern to the Registrar.

Dufour transaction

Ms Ermellini testified that NALG received a charge back in respect of this booking for \$6,116.00 on September 14, 1998 (Exhibit 12, Tab 1 and Exhibit 13). She stated that the Applicant faxed documentation in response to the charge back (Exhibit 12, Tab 10). Ms Ermellini indicated that the documentation received was unsatisfactory. There was no explanation as to why it was not acceptable.

Mr. Pinnock testified that Mr. Dufour later authorized the Applicant to use his credit card, because he, in effect, received a free trip. It appears that the Applicant applied Mr. Dufour's credit card to other bookings.

The Applicant contended that NALG double-billed it in relation to the charge back and took it out of commissions due to the Applicant. The Respondent acknowledged that the NALG brief (Exhibit 12, Tab 20) showed the Dufour amount twice. Ms Ermellini candidly admitted this in her testimony. The Respondent could not locate the alleged double billing to the Applicant. Visa had closed the file.

It was not explained why Dufour had received a free trip or why his credit card was not debited properly, or at all, on the first trip. It appears that the first trip was paid for by commissions owing to the Applicant, but it was not explained why it appeared twice in the NALG documents. The Tribunal would have thought that this would raise enough concern that TICO would have investigated this with both the Applicant and NALG.

Kiwanuka Transaction

Ms Ermellini testified that a \$96.00 charge back occurred in respect of a credit card the Applicant applied to a booking for a passenger, Kiwanuka, (Exhibit 14). This amount was disputed and charged back to NALG. The Applicant could not explain the charge back but neither could the Respondent.

Mitchell Transactions

Ms Ermellini testified that a credit cardholder, Mr. Guiseppe, had his credit card debited three times for travel services, without his authorization. The Applicant accepted responsibility for the first booking and denied responsibility for the other two.

Pinnock testified that when the first transaction (Exhibit 15) came to his attention he spoke with the agent (Monica) who did the booking. Monica advised him that she did not know anything about the transaction, except that she was asked by another agent "Donna" to do the booking for her. This booking was done in the office by Monica and as such Value Vacations agreed to assume responsibility for paying for this transaction.

The other two transactions appeared to have been telephone bookings by someone who purported to be an employee of Value Vacations. At the time of the second two bookings "Donna's" employment at Value Vacations had been terminated by Value Vacations. Upon learning of the last two transactions, Charles Pinnock contacted the Police and filed a report (Exhibit 35). Pinnock also produced two lists of all agents who ever worked for Value Vacations (Exhibits 32 and 33) to show that no agents with the names "Richa" or "Diane" ever worked for Value Vacations. Those were the names of the agents who did the other two bookings.

During the course of its hearing, Sunquest was also contacted and asked to search its records if it ever accepted a booking from Value Vacation's agents with those names. Sunquest advised that its records did not indicate so (Exhibit 34). There was no evidence given as to the result or who was found at fault. The Registrar failed to prove fault on the Applicant.

Hola Sun Holidays

Pinnock testified that in a conversation with TICO he advised Jack Foster that he was having problems collecting money from some agencies and that one of those agencies was Hola Sun. Mr. Foster contacted Hola Sun and the result was the subject letter from Hola Sun (Tab 46 of Document Brief Volume 1). Paragraph 19 of the Proposal states that in the letter, Hola Sun advises that they were holding back commissions "due to credit card irregularities".

The Tribunal finds that the Hola Sun letter does not allege any "credit card irregularities". The Respondent conceded in the Agreed Statement of Facts that on November 27, 1998, Hola Sun Holidays received an inquiry regarding a particular trip. Upon request, the Applicant faxed credit card authorization. The name on the credit card was not the same as the name of the people who traveled.

Pinnock testified that this transaction never resulted in a charge back. There was no evidence of wrongdoing proved against the Applicant.

Signature Charge Backs

Bolers Transaction

Signature advised TICO that it had received a charge back in September, 1998 for \$1930.00 with an affidavit from the cardholder (White), stating the charge was not authorized (Exhibit 20, Tab 7, Signature Document Brief).

Pinnock testified that this was a booking, which was done over the phone. The agent on the file filled out the first three lines of the credit card authorization (page 2 of Tab 15 of the Applicants Book of Documents Exhibit 7) being the destination, date and price of the trip. The agent then faxed the authorization and asked that the client fill in her credit card information and sign and faxes back the form (Tab 2 of Applicant's Affidavit Record Exhibit 36). After the passengers (Bolers and Caines) traveled, the person to whom the credit card belonged (White) objected to the charge.

Signature was back charged by Visa for \$1930.00.

Pinnock testified that he first learned of it after Signature wrote to TICO on January 6, 1999 complaining about this charge back (page 1 of Tab 7 of Document Brief for Signature). Pinnock stated that he then received a phone call from TICO requesting information. On the same day that he was contacted by TICO he faxed to TICO a short letter, credit card authorization and booking form. (Value Vacations letter to TICO Tab 15 of the Applicant's Book of Documents, Exhibit 7).

Yvonne Harris, from Signature Vacations, stated that this information was not provided to her by TICO and if she had received it she would have tried to appeal to VISA to reverse the charge back.

Upon examining the signatures, it is clear that they are not the same. The Registrar submits that if the Applicant accepts such a booking without an imprint, it must bear responsibility for the charge back. It was not denied that accepting a faxed credit card authorization is common in the travel industry.

It appears that neither TICO nor Signature nor the Applicant made any effort to follow up on this matter. The Tribunal finds that there was poor investigation and follow up on the part of all parties involved.

John Curtis Transaction

Mr. Curtis booked a trip with the Applicant and paid in full with his credit card on November 26, 1997. His credit card number was later given to Signature by an agent of the Applicant and he was charged for another person's trip. As a result the client ended up paying for two trips. Pinnock testified that this was caused by a mixed-up between several agents working on the file with the wrong credit card information being forwarded to Signature.

To correct the charge back, the Applicant issued a NSF cheque, before it subsequently reimbursed Signature in September, 1998. The Applicant attributed the problem to a mix-up and indicated that Signature was responsible for the delay. The Tribunal finds that the fault lies with the Applicant.

Redpath Transaction

Pinnock testified that on November 14, 1997, this transaction was booked directly on the computer and the credit card information was put into the system at the time of booking. He testified that at this point Value Vacations involvement ended with the computer booking. Signature applied payment on November 17, 1997 and again on the November 18, 1997. Pinnock stated that the error had to have been made by Signature in double billing the client.

During cross-examination Tammy Crane admitted that she could not be sure that the error was not made by Signature. Furthermore, Signature confirmed that it had made an error when it wrote to the client on December 12, 1997, "We apologize for the system error that may have occurred when your travel agent made the booking." (page 3 of Tab 12 of Document Brief of Signature)

The Registrar produced no evidence that Value Vacations did anything improper.

Air Transat Transactions

Pinnock testified that at the time Value Vacations was promoting a Caribana cruise. Some people wanted to pay by credit card, even though they were advised that Value Vacations did not then have a merchant number to process the cards and that the cruise company was not accepting credit card payments. As such Value Vacations processed the credit card payments by paying for other peoples trips with agencies, which did accept credit card payments. Pinnock testified that the consumers were advised that their credit cards will be used in this manner and that there was not one consumer complaint or charge back related to this matter. There was no evidence presented to the contrary.

George Pinnock Transaction

Pinnock used the card of his relative George Pinnock, to pay for the trip of a consumer, Mr. Hadida. Mr. Hadida previously paid cash for his trip. Mr. George Pinnock authorized the transaction and signed the credit card authorization form.

It was submitted by the Applicant that the Act does not prohibit these type of transactions as was admitted by TICO. The *Travel Industry Act Proposal for Reform document September, 2000* edition, states as follows at page 13:

“Currently, a Registrant can use a personal credit card to buy travel services for customers, while using the cash from customers, which was to pay for the same services...”

It was not proved to the satisfaction of the Tribunal that there was any complaint or impropriety on the part of the Applicant.

Charlotte Gibson

Ms. Charlotte Gibson, purchased a trip for a party of four to Amsterdam, through the Applicant. Ms. Gibson's credit card was debited twice for the same trip. "Value Marketing and Promotion" debited the card on July 19, 2000 and Martinair debited the card on October 31, 2000. As a result of the double billing, there was a charge back to Martinair. The Applicant reimbursed Martinair for the charge back.

Pinnock testified that there were three agents involved in the transaction. The client paid by credit card, which was processed and the money was deposited into the Value Vacations merchant account. Subsequently when in October, 2000 Martinair called for payment, it spoke to another agent who was not aware that the credit card was processed and passed on the credit card number. Martinair again charged the credit card and was charged back when the client complained.

TICO wrote to Pinnock on December 28, 2000 (Document brief volume 3, tab 9), and Pinnock responded January 23, 2001. The client was reimbursed by Martinair and payment was forwarded to Martinair by way of cheque from the Applicant, as it ought to have been done in the first place.

The proper method for paying for the trip by the Applicant should have been by a cheque paid out of the merchant account. The Applicant did not follow proper procedure.

Rita Silvestri

Pinnock testified that Ms Silvestri and her sister-in-law called and each had agreed to purchase a trip for themselves and their respective partners. Each sister agreed to pay for two tickets. Ms. Silvestri came in to Value Vacations and signed a regular credit card imprint. Her sister-in-law lived further away and faxed her authorization to Value Vacations. The trip was with Conquest Tours, which does not accept fax credit card authorizations. Value Vacations used its funds to obtain a certified cheque on behalf of the sister in law and gave Conquest Ms. Silvestri's credit card imprint and a certified cheque on behalf of the sister-in-law.

The problem occurred when the Value Vacations agent went to process the sister's-in-law credit card to reimburse Value Vacations for the money it used cover the certified cheque. The agent processed the wrong card. As a consequence, Ms. Silvestri's card was charged with all four transactions and the sister-in-law was not charged for any transactions.

Ms. Silvestri attended at the Applicant's office three times to obtain a refund. On one occasion, the Applicant issued a refund cheque, which was not honoured. The Applicant later credited Ms Silvestri's credit card for the full amount plus an additional amount of \$188.50 for interest. Pinnock testified that there was no valid reason for the bank not honoring the cheque as there was money in the account. Pinnock introduced into evidence a copy of the relevant bank statement to show there were sufficient funds in the account.

Issuing NSF Cheques

Travel Media Cheque

Pinnock testified that the cheque (Tab 40 of the Document Brief Volume 1 – Exhibit 5) was written during the move to the Finch Avenue location. At that time Value Vacation was still using the CIBC accounts set up by Inna Zelener. In regard to those accounts both the general and trust cheques were the same color and the cheque was written in error on the general account, when it was supposed to be written on the trust account. At the time of writing the cheque there were sufficient funds to cover the cheque in the trust account (Exhibit 7 Tab 8 page 2). Charles Pinnock testified that, as per the note on the NSF cheque, Travel Media received cash immediately upon Value Vacations learning of the NSF cheque.

It was noted that the amount of the cheque was \$758.00 and that the Applicant had \$804.89 in the trust account. It was also noted however that Pinnock had told Ms. Palozzi on her inspection on November 5, 1998, that the cheque was post-dated and that Travel Media had tried to cash it prematurely.

September and October, 1998, NSF Cheques

In September, 1998 there were four NSF cheques drawn on the Applicant's general account. In October, 1998, there were ten NSF cheques drawn on the Applicant's general account. To explain the reason for the Applicant's NSF activity during September and October, 1998, Pinnock referred to "bank transfer memos" (Exhibits 44 and 45), which were purportedly made to transfer necessary funds from IPT, operated by Ina Zelener, to the Applicant. Pinnock stated that the NSF cheques were the result of the bank's failure to transfer funds.

The problem that the Tribunal finds with this explanation is that the transfer memos, to which Mr. Pinnock referred, were not signed by Ms. Zelener, whom Mr. Pinnock had testified was the sole signatory of IPT and the Applicant. The September 6, 1998 transfer memo was not signed at all. The September 9, 1998 transfer memo was allegedly signed by Patrick Daly, a non-signatory. The dates on both memos have been crossed out and replaced. By the time of the alleged transfer, Ms. Zelener had released her shares in the Applicant. According to Pinnock, he did not have signing authority until November 1998. It was not explained how Pinnock expected the bank to act on these memos. The Tribunal feels that the fault in relation to these items clearly lies with the Applicant.

South American Tours Cheque

The cheque was written on June 1, 2000 (Exhibit 47). The customer traveling paid by credit card, which ought to have been processed through the bank of Montreal visa clearing account.

Pinnock testified that the Applicant erroneously did not process the credit card in time and there was no money to cover the cheque. Pinnock testified that this NSF cheque was replaced on June 10, 2000, which cheque cleared (Exhibit 49).

Cheques Written on a Frozen Trust Account

Thomas Jacob

The Applicant admitted in the Agreed Statement of Facts that on June 22, 2001, the Applicant was served with a Director's Direction issued under section 22 of the *Travel Industry Act* and dated June 21, 2001, which froze the Applicant's bank accounts.

The Applicant also admitted that on August 2, 2001, Thomas Jacob, a consumer, wrote to TICO to complain about the Applicant. Mr. Jacob had purchased a Niagara Falls vacation package, which he did not receive. When Mr. Jacob demanded a refund from the Applicant on June 30, 2001, he was provided with a cheque for \$380.00. The cheque was written on the Applicant's "Value Vacations Limited In Trust Account", an account that had been frozen by the Director, *Travel Industry Act* on June 22, 2001. The cheque was not honoured. Mr. Pinnock indicated in his testimony that Mr. Jacob has yet to be refunded.

Elizabeth Pellegrino

The Applicant further admitted that on August 30, 2001, Elizabeth Pellegrino, a consumer wrote to TICO to complain about the Applicant. Ms. Pellegrino had purchased a Niagara Falls vacation package, which she did not receive. On August 17, 2001, Ms. Pellegrino demanded a refund from the Applicant and was provided with a cheque for \$240.00, which was written on the Applicant's "Value Vacations Limited In Trust Account". This account had been frozen by the Director, *Travel Industry Act* on June 22, 2001. The cheque was not honoured. The Applicant subsequently reimbursed Ms. Pellegrino.

In examination in chief, Mr. Pinnock claimed that he wrote the cheques because he was not getting anywhere with TICO regarding the Signature garnishment of the Applicant's trust account. The Applicant introduced several letters (Exhibit 107) written by Mr. Pinnock to TICO between July 10, 2001 and November 1, 2001, demanding a return of the garnished funds. He included a hand-written list identifying 40 consumers with deposits of approximately \$13,000.00, whom Mr. Pinnock indicated required reimbursement because their money was garnished from the trust account (Exhibit 108). In chief, Mr. Pinnock testified that the monies for those consumers were held in trust.

During cross-examination of Mr. Pinnock, it was demonstrated that the Applicant's bank statement (Exhibit 7, Tab 49) identified only \$5,456.87 in the trust account at the time of the Signature garnishment. That amount included a \$2,500 deposit, which related to a consumer who was not on the Applicant's list (Exhibit 108). It was not shown that the Applicant had sufficient funds on deposit in its designated trust account to cover its customer obligations.

The Respondent introduced videotaped testimony given under oath by Mr. Pinnock to the Toronto police in August, 2001, to impeach Mr. Pinnock's evidence regarding the customer deposits, which were said to be held in trust. In the videotaped statement, Mr. Pinnock indicated that much of the money, which was paid for Niagara Falls vacation packages, was not deposited into the Applicant's trust account. A large amount was apparently misappropriated by a Jasen Plunkett.

Pinnock stated that the monies were secured by a supposed refund Mr. Plunkett had owing on a cruise that did not take place, because of Mr. Plunkett's earlier incarceration. When questioned about the cruise refund by the Tribunal, Mr. Pinnock indicated that the Applicant never received that money. Mr. Pinnock also said that he only subsequently learned that some of the money received by Mr. Plunkett was not turned over to him.

The Tribunal finds that the Applicant did not take sufficient precautions to safeguard consumers' funds, which were impressed with a specific trust.

There were other allegations put forth by the Respondent, regarding an improper payment out of the Applicants trust account, but these arose out of the videotape and were not part of the proposal. As the Respondent had possession of the video tape and rejected an opportunity to include these allegations in the Proposal or either of the further Notices, the Tribunal will not consider these additional allegations in making its finding.

South American Tours Cheque

The cheque was written on the account of the Applicant on June 1, 2000 (Exhibit 47). The customer traveling paid by credit card, which ought to have been processed through the Bank of Montreal visa clearing account. Pinnock testified that Value Vacations erroneously did not process the credit card in time and there was no money to cover the cheque. Pinnock testified that this NSF cheque was replaced on June 10, 2000 which cheque cleared (Exhibit 49).

The Applicant's bank statement for the period did not identify a customer deposit to correspond with the Applicant's submission. There were three identified customer deposits to the account for \$2,600, \$1806.82, and \$400 during June 2000. This was left unexplained and the Tribunal was satisfied that this would be cause for concern to the Registrar.

Southwinds Cheque

The cheque was written on August 15, 2000 and processed on August 18, 2000. (Exhibit 50). Pinnock testified that he does not know why the cheque was returned NSF. A review of the applicable bank statement (Exhibit 51) shows that there were sufficient funds to clear the cheque and that the cheque does not in fact even appear to have gone through the account. The NSF cheque refers to a customer "Grantham", and the cheque amount was \$454.00. The Respondent failed to prove that the Applicant was at fault.

Distinguished Travel Cheque

The cheque was written on May 12, 2001 (Exhibit 53) and was processed on May 18, 2001 (Exhibit 54). Analysis of bank statement for the applicable period of time (Exhibit 55) shows that there was sufficient money in the bank account to clear the cheque. Pinnock testified that he does not know why the cheque was returned NSF other than it being an error on the part of the bank. The Respondent concedes that there is nothing in the documents, which explains why this item was returned NSF.

Sylvestri Refund Cheque

As noted above, Ms Sylvestri attended the Applicant's premises to obtain a refund for a double billing on her credit card and received an NSF cheque. The reason for the NSF cheque was not explained.

Abdy Electriciteh

Pinnock gave testimony regarding cheque problems in respect of the refund owing to Mr. Electriciteh for a booking made during the Applicant's suspension. It took approximately three weeks for the Applicant to reimburse Mr. Electriciteh for his travel services. Three cheques were drawn to reimburse Mr. Electriciteh. A NSF cheque was issued by Value Marketing and Promotion. Mr. Pinnock's testimony was contradictory regarding the refund. He indicated that he would have to review the cheques. The cheques were never provided to the Tribunal.

Failing to Meet its Financial Responsibilities to Wholesalers

There is considerable contention and a complete divergence of opinion and evidence given on this matter between the wholesalers and the Applicant.

The Respondent submitted that the Applicant's failure to meet its financial responsibility to wholesalers goes directly to its ability to be financially responsible in the conduct of its business for the purpose of subsection 4(c) of the Act and affects the Applicant's working capital. Trade debts are proper matters upon which the Registrar may base a proposal to revoke a Registrant's registration when they affect the financial viability of the Registrant.

The Applicant disputed any amounts owing to the wholesalers and produced two charts (Exhibits 68 and 127) summarizing its position. The Applicant's position was that the wholesaler's claims were unfounded and unsupportable from the evidence and resulted from the wholesaler's not honouring their commitments to the Applicant.

Sunquest Debt

In attempt to support its position, the Applicant had broken down its claim into several subheadings:

December 27 and 28 Incentives

Exhibit 56 is a letter purporting to summarize the terms of the promotion, and in particular entitlement to Value Vacations and its agents to receive \$15 per passenger. The letter was written by Pinnock in response to an offer by Sunquest to pay an incentive of \$10.00 per passenger. On basis of 50 passengers tallied by Value Vacations at the material time, Value Vacations calculated the outstanding amount owed to the Applicant to be \$750.00.

It is noted by the Tribunal that this is a self-serving letter written by the Applicant with no verification from the wholesaler, no documentation of the number of bookings and no documentary evidence regarding requests made by the Applicant for payment in respect of this promotion.

November 1998 Promotion

Pinnock testified that Sunquest held another promotion for which they promised to pay another \$15.00 per person. He calculated the money owing to the Applicant to be in the amount of \$1,000.00 although he had no documents in support of this claim.

Cruise Incentive Summer 1997 to Winter 1998.

The Applicant produced exhibit 57, a promotion form and Exhibit 58, a sample completed cruise form. Attached to Exhibit 57 is a Sunquest computer summary of the passengers booked for the subject cruises by Value Vacations. The said form shows 107 passengers in total (therefore 53 cabins). Value Vacations calculated the amount of owing to it being \$8,300.00.

The Tribunal notes that the Sunquest productivity report includes “bookings on option”, and that the Applicant has not produced satisfactory evidence of its own to demonstrate how many bookings were actually made as a result of the Dream Cruise Incentive.

Fax Broadcasting

Exhibit 59 is an accepted proposal from Value Vacations to Sunquest pursuant to which Sunquest agreed to pay \$450.00 per week for 11 weeks of advertising for a total of \$4,950.00. Value Vacations was required to submit tear sheets in order to receive payment. Exhibits 60 are sample tear sheets, showing Sunquest products being advertised during the material time.

There is no documentary evidence regarding requests made by the Applicant for payment in respect of these broadcasts. The evidence of the Applicant was that it was not paid.

The Tribunal is also aware of the findings made during the Applicant's July 12, 2001 interim suspension hearing. At paragraph 10 of its decision, the Tribunal found:

He (Charles Pinnock) admitted there may be some \$57,000 owing to the North American Leisure Group Inc. operating as Sunquest and Alba Tours, but he is not sure of the exact amount. The debt apparently arose from the Company's share of advertisements put in newspapers.

Signature Debt

As with Sunquest and Alba, there were also disputes between the Applicant and Signature Vacations. These disputes relate to incentives alleged to be outstanding, shared advertising and fax broadcasting charges between the parties.

These are matters of trade debts between retailer and supplier and do not affect consumers.

Tribunal's Position Regarding Trade Disputes

What the Applicant and Respondent are asking the Tribunal to do is to adjudicate disputes between various tour operators and the Applicant, and to make determinations regarding interpretations of contracts and accounting matters between them.

That is not the function of this Tribunal and this is not the proper forum in which those determinations should be made.

Concerning monetary trade disputes between tour operators and agents, it is only after a finding has been made in the appropriate legal forum that the results become relevant to the decision to be made by this Tribunal.

That is not to say that the Tribunal will not consider such matters of charge backs, dishonesty or NSF cheques, as these are matters which affect the Applicants ability to carry on business with honesty and integrity and in accordance with law. It means that the Tribunal will not make decisions on the interpretation of contracts and accounting between the agent and tour operator, as that is not its mandate.

In that regard, what is relevant is the Signature Judgment against the Appellant, on June 4, 1999, in the amount of \$12,002.86. The Tribunal notes that the Applicant did not defend the claim nor did it move to set aside the judgment after it became aware of it. As such, the Applicant is deemed to admit the truth of the allegations and the validity of the debt. The Tribunal will not look behind the judgment, absent very extreme and compelling evidence, as to the reason the defendant in the action would not have defended, appealed or moved to have the decision set aside. The Tribunal finds no such reason in the present case.

Misrepresentation

Under the heading of misrepresentation there are several sub headings listed as follows:

Fax Broadcasting Advertisements

The Applicant does not dispute the fact that it has been unable to make bookings directly with the following tour operators since the end of 1998 or beginning of 1999: North American Leisure Group o/a Sunquest and Alba Tours; Signature Vacations; and Regent Holidays.

The Applicant does not dispute that it has advertised the travel services of one or more of the above-noted tour operators in the period since it was "blacklisted" by those companies.

In August, 1999, North American Leisure Group's counsel sent a cease & desist letter (Exhibit 85) advising the Applicant to cease using the SUNQUEST trademark. The word SUNQUEST is a registered trademark to identify travel services, which was owned by North American Leisure Group (Exhibit 125).

Pinnock testified that he was never asked not to advertise Sunquest products. Ms. Ermellini confirmed that she did not give such advice to Value Vacations and she did not have any documents proving that such advice was given to Value Vacations. Pinnock testified that notwithstanding any reservations that the Sunquest accounting department might have had, the Sunquest marketing department was very much intent on soliciting Value Vacations' business. Throughout the material time it continued to send Value Vacations stacks of brochures and fax broadcasts.

Pinnock testified that the only communications on this subject which he ever received (written or oral) was a letter dated August 17, 1999, from Sunquest's solicitors requesting that he does not use the "Sunquest" logo.

Pinnock testified that when Sunquest denied him access to their direct booking system because of the dispute over payment, he simply purchased the packages from other wholesalers. It was confirmed by Rachel Palozzi during her cross-examination that there is nothing in the Act prohibiting such practice. Any agency is entitled to purchase a package from a licensed wholesaler. Consequently, the Applicant argued that Value Vacations could legally purchase any Sunquest product and therefore had every right to advertise same for sale.

The Tribunal does not entirely agree with the Applicant's submission. The Applicant is quite correct that it was allowed to purchase the packages from wholesalers. The matter of reselling the packages under the tour operators name is a different situation, in this case. Here the letter from the lawyers for Sunquest said more than the Appellant must not use the "Sunquest" logo. It stated that "...you must immediately cease and desist from any and all further use of the SUNQUEST trade mark, its associated logos or any mark confusingly similar therewith in conjunction with the operation of your business". In addition, the Applicant was very much aware that Sunquest had denied him access to their direct booking system. It should have been very apparent to the Applicant that Sunquest did not want it involved with their name or products.

The confusion comes about because the marketing department of Sunquest kept sending the Applicant faxes and brochures of their trips. It appears that the marketing branch of Sunquest had no communication with the accounting department. Although that was a great shortcoming on the part of Sunquest, the Applicant was well aware of the intention of Sunquest and took advantage of the lack of communication within Sunquest.

Several provisions of the Regulation are germane to this issue, as follows:

Subsection 21(1) of the Regulation states that a Registrant shall not make any representations with respect to travel services that are false, misleading or deceptive.

Subsection 21(2) of the Regulation states that before reserving travel services for a customer, "the travel agent shall bring to the attention of the customer any conditions related to the purchase of travel services that the travel agent has reason to believe may affect the customer's purchase...".

Section 38 of the Regulation provides that every Registrant shall ensure that any advertising or representation in Ontario with respect to travel services sold by the Registrant is not false, misleading or deceptive.

It is noted that the word “representation” and the phrase “false, misleading or deceptive” are not defined in the Regulation. They are, however, defined in the *Business Practices Act*, a companion consumer protection legislation.

Section 1 of the *Business Practices Act* defines “consumer representation” as: “a representation, statement, offer, request or proposal, (a) made respecting or with a view to the supplying of goods or services, or both, to a consumer, or (b) made for the purpose of or with a view to receiving consideration for goods or services, or both, supplied or purporting to have been supplied to a consumer.”

Section 2 of the *Business Practices Act* states that for the purposes of this Act, the following shall be deemed to be unfair practices:

- i. A false, misleading or deceptive consumer representation including, but not limiting the generality of the foregoing,
- ii. a representation that the person who is to supply the goods or services has sponsorship, approval, status, affiliation or connection the person does not have

It was submitted by the Registrar that the Applicant, by continuing to advertise the travel services of the noted tour operators, for the purpose of receiving consideration in respect of those services, is indicating approval or affiliation it does not have. The representations go to the Applicant’s honesty and integrity and are also, false, misleading or deceptive, and in contravention of the Regulation.

The Tribunal agrees that the Applicant’s representations could place consumers at risk. If consumers are not told that the Applicant is barred from making bookings directly with the tour operator, they are unwittingly dealing with a travel agent, which is unable to make its bookings through normal open channels. This would affect the ability of the agent to represent the consumer with the tour operator should any difficulties arise with the trip.

Amazonas Transaction

Ms. Palozzi gave evidence that Cecilia Ycaza, Manager of Amazonas Travel, contacted TICO in response to a complaint from Signature Vacations, holding Amazonas responsible for a booking made on January 31, 2001. Ms. Ycaza denied responsibility for the booking and indicated that no one in her agency made the booking.

Pinnock testified that he often purchased packages from Amazonas, that Value Vacations could not buy directly from any particular tour operator. Exhibit 87 was a partial four-page list of packages purchased from Amazonas Travel. Charles Pinnock and Imalda Acosta testified that the normal process was, that if Value Vacations had a client who wished to purchase a particular package, it would advise Amazonas Travel which would purchase the subject package and resell it to Value Vacations for a certain fee. Pinnock further testified that Value Vacations' relationship with Amazonas was so good that when the time to book a particular trip was of the essence (i.e. limited seat availability) and when Amazona's sales representative could not be reached, Amazonas permitted Value Vacations to call in the booking directly on its behalf. It then required that Value Vacations immediately advise Amazonas of the booking.

Charles Pinnock testified that on this particular occasion, he tried reaching Amazonas by telephone to request that it buy a particular Signature package for Value Vacations customer, but he was unable to reach anyone at Amazonas Travel. As there was urgency to the booking because of limited availability of seats, Pinnock testified that he called Signature, identified himself by his name and requested a booking on behalf of Amazonas Travel.

The Tribunal notes that Pinnock did not identify himself as "Charles Pinnock from Value Vacations", but simply as "Charles on behalf of Amazonas Travel". The problem was discovered when Signature became suspicious because it did not recognize any agent named Charles, working at Amazonas.

Section 13(1), states that a Registrant shall not carry on business under a name other than the name appearing on the registration and a name registered under the *Business Names Act*. By making bookings in another agent's name, the Applicant contravened subsection 13(1), even if it did have "implied permission" to do so.

Alleged Failure to Disclose Judgment on Application Form

In its Application for Business or Branch Registration or Reinstatement dated April 27, 2001 (Respondent Brief vol. 3, Tab 25), the Applicant was asked: "Are there any unpaid judgments outstanding against the Applicant? If yes, submit a copy of each judgment. State the amount outstanding and repayment arrangements." In the Application, the Applicant indicated that there was \$2,600.00 owed to Canadian Tire and the Applicant was negotiating terms of repayment. The Applicant did not disclose the outstanding Signature judgment against the Applicant and Mr. Pinnock (Exhibit 6, Tab 24).

Pinnock testified that he believed that the "Applicant" was himself and not Value Vacations. In support of that he pointed out that the signature line of the Application (Exhibit 88) states "Signature of Applicant" seemingly asking for personal signature.

At page 6 of Jack Foster's report regarding the October 6 and 10 inspection (Tab 17 of the Signature Document Brief – Exhibit 20) is a hand written note from Charles Pinnock to Jack Foster specifically informing him of the judgment and the first garnishment.

It is noted by the Tribunal that this disclosure by the Applicant was in October, 2000, while the Application signed by the Applicant to TICO was in April, 2001.

Failure to Notify of Changes in Financial Institutions

A Registrant's obligations in respect of advising TICO of its financial institutions are laid out in the Act and the Regulation.

Subsection 16(3) of the Act states that upon an inspection under this section, the person inspecting is entitled to free access to all books of account, cash, documents, bank accounts, vouchers, correspondence and records of the person being inspected that are relevant for the purposes of the inspections

Clause 16(1)(4) of the Regulation states that a Registrant shall notify the Registrar within fifteen days of a change in the name or number of an account or in the choice of financial institution in which the account is required to be maintained.

Clause 37(1) 2 of the Regulation states that a Registrant shall keep and maintain at the Registrant's principal place of business or such other place as the Registrar may approve in writing, banking records that identify readily and may be used to verify all transactions that were made in connection with the operation of the business of the Registrant.

In his testimony, Pinnock indicated that he opened bank accounts with the TD Bank on or about October 26, 1998. Mr. Foster testified that on February 5, 1999, he conducted an inspection of the Applicant. Mr. Foster indicated that TICO was not notified of the opening of the Applicant's Toronto Dominion bank accounts. The Applicant presented a copy of a fax purportedly sent to TICO on November 29, 1998, as notification that it had opened the TD bank accounts. The exhibit contains no transmission confirmation.

The Applicant's trust account was not available on the premises, however by fax (Exhibit 6, Tab 7), the Applicant provided TICO with copies of its CIBC trust account statements for September, October and December, 1998.

It could not explained by the Applicant, why TICO would not have asked for the TD bank records if it knew of the TD account at that time. In the past, TICO had always asked for all bank records and that was the normal procedure.

Bank of Montreal

Pinnock testified that TICO and in particular Jack Foster, urged him to open a credit card clearing account in order that Value Vacations could process each credit card payment directly in order to avoid any credit card problems. He opened a Bank of Montreal account strictly for the purpose of processing master card payments, sometime in June, 1999 or after. He did not remember exactly when. Pinnock confirmed that he did not advise the Registrar in writing of the Bank of Montreal account, as required by the Regulation, but said he verbally advised Mr. Foster. He could not remember when.

Mr. Foster testified that, at no time, did the Applicant advise him of the Bank of Montreal account.

The account was closed around June, 2000, and Pinnock admitted that NSF activity might have had some influence on the account being closed. Pinnock also admitted that he did not advise TICO that the account was closed.

The Tribunal prefers the evidence of Foster in that regard, that neither he nor TICO was aware of the opening or closing of this account at the relevant times.

Royal Bank Account

As previously mentioned, on June 22, 2001, the Applicant was served with a Director's Direction issued under section 22 of the *Travel Industry Act* and dated June 21, 2001 to freeze the Applicant's bank accounts to protect consumer deposits. The Director's Direction (Exhibit 119) states, among other things, that:

... pursuant to and under the authority of Section 22 of the Travel Industry Act, R.S.O. 1990, Chapter T.19 ("the Act"), as amended, the Director directs Value Vacations Ltd. to refrain from withdrawing any assets or trust funds from any person having any of them on deposit or under control or for safekeeping and to hold any such assets or any trust funds of clients, customers or others in their possession or control or that come into their possession or control in trust...

This Direction shall apply with immediate effect from the date of service of this Direction and it shall remain and continue to remain in effect until the Director revokes or the Licence Appeal Tribunal cancels the Direction or consents to the release of any particular assets or trust funds from the direction...

In his testimony, Mr. Pinnock admitted that the Applicant opened and operated a new general account and trust account with the Royal Bank. This was clearly contrary to the Director's Direction and a contravention of the Act. The Royal Bank, according to Mr. Pinnock, subsequently closed the accounts.

Deficient Advertising

The prescribed advertising requirements are laid out in sections 38 through 40 of the Regulation.

Section 38 of the Regulation states that every Registrant shall ensure that any advertising or representation in Ontario with respect to travel services sold by the Registrant is not false, misleading or deceptive.

Subsection 39(1) of the Regulation states that a Registrant who advertises or places an advertisement for travel services shall ensure that the advertisement complies with the Act and the regulations.

Subsection 40(1) of the Regulation states that if an advertisement for the sale of travel services refers to the price of the travel services, the price shall include all fees, levies, charges, services charges, surcharges or other charges and taxes. The advertisement shall either state that the price includes GST, transportation taxes and related transportation fees or it shall state that the price does not include those items.

Subsection 40(2) of the Regulation states that any advertisement for the sale of travel services that refers to the price of the travel services shall include the following information and shall set it out in a prominent and understandable manner:

1. A statement indicating whether the price includes GST, transportation taxes and related transportation fees.
2. The terms and conditions, if any, that affect or limit the availability of the price of the travel services.
3. A brief description of the advertised travel services including the name of the air carrier, hotel and travel wholesaler where applicable.
4. A statement that a brochure containing further information is available from a travel agent.

In her testimony, Ms Palozzi indicated that by letter dated November 19, 1997 (Exhibit 5, Tab 6), she advised the Applicant that its advertisement, which was placed in the November 16, 1997 edition of the *Toronto Sun* (Exhibit 89), was deficient, because it did not clearly state whether the price included GST, transportation taxes, and other fees. The advertisement also did not mention the applicable air carrier, hotel, and travel wholesaler.

Ms Palozzi also testified that the Applicant's October 24, 2000 advertisement was deficient, because it did not include applicable taxes and service charges.

The following facts were admitted:

- a) On December 2, 1997, TICO sent a letter to the Applicant regarding advertising deficiencies, including failure to identify the applicable air carrier, hotel, and travel wholesaler.
- b) On December 12, 1997, TICO sent a letter to the Applicant to clarify the advertising provisions of the Regulation and to ensure advertising compliance in the future.
- c) On January 15, 1998, in response to a complaint from a consumer alleging misleading advertising by the Applicant, TICO cautioned the Applicant about its advertising practices.
- d) On April 13, 1998, Ms. Rachel Palozzi, Compliance Officer with TICO, met with Mr. Charles Pinnock to discuss advertising issues.

- e) On October 24, 2000, TICO received a copy of the Applicant's advertisement, which was issued on October 18, 2000.
- f) On October 25, 2000, TICO notified the Registrant that its October 18, 2000 advertisement was deficient.

Pinnock testified that at the time that TICO came into existence the advertising rules were very unclear, so much so that one of the first things that TICO did after coming into existence was to publish advertising guidelines for the industry. These guidelines were provided to Value Vacations on December 2, 1997 (Exhibit 90). He argued that the advertisements were in compliance with the information required, but were not set out in the manner that TICO wanted.

The Tribunal notes that the letter from TICO dated November 19, 1997, clearly sets out what was deficient in the Applicants November advertising and how to correct the deficiency.

The December 2, 1997 letter from TICO again mentioned some of the same items and that they must be set out "in a prominent and understandable manner". The letter included a copy of the advertising guidelines for the industry.

The December 12, 1997 letter from TICO commended the Applicant on its efforts to comply and clarified a point in its previous letter. It also stated that there were several advertisements in the same edition that were also deficient and that in the past month TICO had made over 40 contacts with various travel agencies.

In response from a complaint from a consumer, TICO again wrote to the Applicant on January 15, 1998, advising of deficient advertising, but not specifying the reason.

In the Applicants advertisement of October 18, 2000, The Tribunal notes that it states in the middle of the advertisement that GST, transportation taxes and services charges are not included, that Christmas and New Year were not included and Pinnock testified that the dates advertised were available.

Failure to Maintain Proper Records

Subsection 37(1) of the Regulation states that a Registrant shall keep and maintain at the Registrant's principal place of business or such other place as the Registrar may approve in writing the following records:

1. Accounting records setting out in detail the income and expenses of the Registrant and supporting documentary evidence which includes copies of statements, invoices or receipts that have unique identifiers or serial numbers provided to customers.
2. Banking records that identify readily and may be used to verify all transactions that were made in connection with the operation of the business of the Registrant.

3. A written record of all payments made by or to a Registrant respecting the purchase or sale of travel services which record shall be in a form that enables the Registrar to identify readily the transaction to which the payment relates based on the unique identifiers or serial numbers.

With respect to the findings of Jack Foster during his Inspection on October 8 and 9, 1998, (Exhibit 95), the inspection report alleges three deficiencies:

- i. Monthly customer deposit reconciliation were not being completed:

As admitted by Mr. Foster during his cross-examination, the Act does not require that monthly reconciliation's are prepared. The Tribunal cannot see how Mr. Foster can note this as a deficiency when it is not something that is required under the Act.

- ii. Inspectors were unable to determine if sales were being recorded.

At paragraph 2 of Exhibit 2 to the subject Report, Mr. Foster wrote, "automated invoicing is not operational & therefore unable to determine if all sales recorded."

During cross-examination Mr. Foster confirmed that the Act does not require an automated invoicing system. This should not have been noted as a deficiency.

- iii. Incomplete bank records

Pinnock explained that Jack Foster pointed out that when cash was being deposited, the bankbooks did not indicate to which customer the cash belonged. Pinnock explained that bank deposit book has a place to write information about individual cheques being deposited but with respect to cash, there is only space to write the amount, as such he was not recording any information. He further went on to say, that Mr. Foster suggested that he just write notes on the back of previous deposit page setting out details of who was paying in cash.

Mr. Foster explained that the Applicant never provided him with "a record of all payments made by or to a Registrant respecting the purchase or sale of travel services which record shall be in a form that enables the Registrar to identify readily the transaction to which the payment relates based on the unique identifiers or serial numbers". That record is required.

Further, the Applicant's failure to maintain or furnish sufficient records is evidenced by the non-disclosure of bank accounts discussed above. If the Applicant never advised the Respondent of its bank accounts, it follows that it did not maintain or furnish banking records in respect of those accounts as required by 37(1)2 of the Regulation.

November 27, 1998 Inspection

This inspection report alleges two deficiencies:

- i. No trust reconciliation's prepared: It has already been noted that none were required under the Act.
- ii. Bank Statements for the previous two months were not available:

Pinnock testified that all the other financial statements were there but not the September and October statements. He was unsure why the statements were not there. He further testified that he undertook to contact the bank and fax the statements to TICO.

December 4, 1998 Inspection

Since the previous inspection a week earlier, Pinnock had faxed bank statement with respect to the general bank account.

The Proposal further alleges that no trust reconciliation's were available. As stated above, in regard to the October 8/9 inspection and the November 27 inspection, trust reconciliation's were not required.

June 29, 2000 Inspection

The deficiency raised was the absence of financial statements at the business premises. Pinnock testified and as is confirmed in first paragraph of the subject inspection report, the financial statements were not there because they were with the accountant. The accountant was preparing the year-end financial statements for Value Vacations for the fiscal period ended April 30, 2000 and due July 31, 2000. The attending inspector requested statements from the previous two months (May and June) and was provided with it. The statements were attached to the subject inspection report. As such the only statements not in possession of Value Vacations were the statements required by the accountant for preparation of financial statements for the previous fiscal year. Pinnock advised the inspector (as is also confirmed in the first paragraph of the subject report) that the accountant was in the same building. The inspector did not ask to be shown the statements or to speak to the accountant.

Foster testified that it was not the duty of TICO inspectors to go searching for records; it was the responsibility of the Registrant to have the records on the premises, as required by the Act.

Notice of Further and Other Particulars, dated September 7, 2001

Failure to File Financial Statements on Time

By letter dated March 27, 2001, Pamela Stout, Financial Inspection Co-ordinator with TICO, reminded the Applicant that its financial statements were due by July 30, 2001.

It was admitted by the Applicant that it did not file its financial statements on time. Pinnock gave evidence that the statements were not filed because he did not think that the Applicant had to file financial statements while under suspension.

The Registrar made representations to this Tribunal that there were several cases that had held that the Travel Industry Act regulation, section 24, does not confer any jurisdiction on the Tribunal to allow a Registrant to keep their registration when they have not filed their financial statements. These cases have been dealt with elsewhere in this decision. The Applicant did file its financial statements, but again they were filed late.

Carry on Business while under Suspension

On June 21, 2001, the Respondent issued an Interim Suspension of the Applicant's Registration. On June 22, 2001, the Applicant was served with the Registrar's Interim Suspension Order and advised that it may not, while under suspension, act or hold itself out to be available to act as a travel agent. Specifically, it may not accept any consumer monies or make new bookings for travel services.

After the Applicant was served the Registrar's Interim Suspension Order, the Applicant made queries regarding the scope of the Order. TICO, by letter June 22, 2001, responded to the Applicant's queries. The Tribunal thinks that it is of such significance that the correspondence be set out in its entirety. The letter read:

Dear Mr. Pinnock:

Re: Interim Suspension

I am writing in response to your queries about what Value Vacations is and is not permitted to do during the period of its interim suspension.

Briefly, section 7 of the Travel Industry Act gives the Registrar authority to impose the order to temporarily suspend Value Vacation's registration. Under that section, "the order shall take effect immediately and where a hearing is required, the order expires fifteen days from the date of the notice requiring the hearing unless the hearing is commenced in which case the Tribunal holding the hearing may extend the time of expiration until the hearing is concluded."

Section 3 of the Act provides that no person shall act or hold himself, herself or itself out as being available to act as a travel agent unless the person is registered as such by the Registrar. Any person doing so is guilty of an offence and on conviction, is liable to a fine and/or imprisonment.

During the period of the interim suspension, Value Vacations may not act or hold itself out as being available to act as a travel agent. It may not, therefore, accept any bookings or take any consumer monies. While Value Vacations is not permitted to take new bookings, it will be able to complete any outstanding bookings that had been paid in full prior to the date of the suspension. Bookings that had not been paid in full prior to the suspension should be transferred to another registered Ontario travel agency and those customers advised accordingly. TICO will work with you to ensure that arrangements have been made to protect any consumers who have not received the travel services for which they have paid.

If Value Vacations receives calls from customers during its suspension, it may not imply that it is operating as a travel agent. It should answer telephone calls with a simple "hello". If a customer calls or enters Value Vacations' offices and requests travel services, Value Vacations should direct that person to an Ontario registered travel agency, which is able to make the necessary booking and provide the travel service.

Please guide yourself accordingly. If you have any questions, please do not hesitate to contact me at (905) 624-6241.

Yours truly,

THE TRAVEL INDUSTRY COUNCIL OF ONTARIO

Immediately after receiving TICO's letter, the Applicant telephoned TICO for further clarification. In response to the Applicant's request for clarification, TICO, by another letter dated June 22, 2001, advised:

Dear Mr. Pinnock:

Re: Interim Suspension

To follow up on my previous letter and telephone conversation, Value Vacations may assist customers and provide information with respect to travel services. It may not sell or hold itself out as being available to sell those travel services and should direct the customer to a registered Ontario travel agent to make any bookings.

I hope that clarifies things. If you have any questions, please do not hesitate to contact me at (905) 624-6241.

Yours truly,

THE TRAVEL INDUSTRY COUNCIL OF ONTARIO

In the Notice of Further and Other Particulars dated September 7, 2001, and in its evidence given at this hearing, the Registrar alleged further specific transactions of the Applicant, which were done in contravention of the Order.

Duane Squires Transaction

The Applicant admitted that, on or about July 20, 2001, TICO received a complaint from a consumer, Mr. Duane Squires. Mr. Squires had paid the Applicant for travel services for his girlfriend Cilla Namsua, on July 6, 2001. While Ms. Namsua made the original reservation for the travel services on June 19, 2001, Mr. Squires paid for the travel services by VISA on July 6. When the tickets for the travel services arrived, the dates were allegedly incorrect. This resulted in the complaint from Mr. Squires. TICO advised Mr. Squires that the Applicant had been under suspension since June 22, 2001.

In his evidence, Pinnock had added that the original credit card was given on June 19, 2001, and was processed on July 6, 2001, when the seats became available. This information was not in the original agreed facts, however it was supported by letter from Elaine Welsh, former employee of Value Vacations (Tab 3 of the Applicant's Affidavit Record – Exhibit 36).

It was submitted by the Applicant, that the letter from TICO setting out Value Vacations obligations after suspension (Exhibit 105), Value Vacations was expressly permitted to complete all bookings. As such, in regard to this transaction Value Vacations did not accept payment after the date of suspension and merely completed processing the transaction.

The Tribunal sets out the relevant portion of that letter as follows:

“While Value Vacations is not permitted to take new bookings, it will be able to complete any outstanding bookings that had been paid in full prior to the date of the suspension. Bookings that had not been paid in full prior to the suspension should be transferred to another registered Ontario travel agency and those customers advised accordingly.”

The Tribunal finds that the trip was not ‘*paid in full prior to the date of the suspension*’, nor was the transaction “*transferred to another registered Ontario travel agency*” nor was the customer advised that the Applicant was under suspension.

Abdy Electriciteh Transaction

Mr. Pinnock testified that the subject customer inquired about a trip for twelve people in the month of June, 2001, prior to the suspension. On July 17, 2001, the customer then attended at the Value Vacations place of business in order to book the subject trip. Pinnock testified that in order that it would not be taking the booking directly, Value Vacations intended to transfer the booking to Travel Media. For that purpose it prepared the Booking

Request Form, (Exhibit 106) which it faxed to Travel Media. Travel Media could not complete the transaction because all twelve seats were not available at that time. Value Vacations then proceeded to monitor the availability of seats.

The client attended again on August 3, and was very impatient and irritated that the seats were not yet booked and demanded that the seats be booked then and there or he wanted his money back. In order to placate the customer, Value Vacations directly reserved whatever number of seats were then available (10). Pinnock testified that Value Vacations never intended to be making the reservation directly and only did so in order to appease the customer and provide it with a written confirmation. Pinnock testified that it was his intention to still transfer the booking transaction to Travel Media, however, the customer called TICO from the premises and learned that the Value Vacations was suspended. TICO then got involved and the entire transaction was canceled on the spot before any transfer could have been affected. Neither the Applicant nor respondent could establish the exact date, however, both parties agree that the customer received a full refund.

The Tribunal finds that, no matter what the intention of the Applicant may have been, it made a direct booking in contravention of its suspension. It also failed to advise the customer that it was under suspension at the time of the booking and it accepted money from a consumer while under suspension.

Notice of Further and Other Particulars dated December 11, 2001

The Registrar alleges that the Applicant has continued to carry on business directly with Air Canada Vacations Ltd. By making bookings and payments for travel services for consumers, despite the Interim Suspension Order under section 7 of the Act.

Air Canada Vacations

By affidavit evidence (Exhibit 10), Ms. Grundie indicated that since the date of its suspension, the Applicant has continued to carry on business directly with Air Canada Vacations Ltd. by making bookings and payments for travel services for consumers. The Applicant made twelve bookings with Air Canada Vacations totaling \$15,809.38 more or less, since its suspension. The last booking was made on October 29, 2001. Air Canada Vacations has used the commissions payable to the Applicant to reduce the amounts owing from the Applicant for credit card charge backs and NSF cheques.

Pinnock testified that he completed only nine transactions with Air Canada after the suspension. He further testified that he only accepted money on a couple of occasions and that in all other cases he either passed on the credit card number directly to Air Canada or after making the arrangements, instructed the customers to pick up their tickets directly from Air Canada and to pay directly to Air Canada. Pinnock testified that he advised the various parties of the suspension and as proof, submitted to the Tribunal three letters (Exhibits 111 to 113) from some of the Air Canada customers. He further testified that he did not personally benefit from the transactions but that he participated in the subject transactions out of obligation to his old clients and also in order to payoff outstanding commissions to Air Canada.

The Tribunal accepts the evidence of Ms. Grundie in that regard. Three letters produced by the Applicant do not speak for the other consumers that booked and paid for trips through the Applicant, while it was under suspension. The Tribunal also disagrees that the Applicant did not personally benefit from the transactions. The commissions earned on the transactions were used to pay down the Applicants debt, which is in itself, a benefit to the Applicant.

Ms. Grundie stated that Charles Pinnock personally attended the offices of Air Canada on several occasions after the suspension of the Applicant, to make payment for customers travel services. She testified that the Applicant still owed Air Canada Vacations \$1,229.43.

Direct and Indirect Bookings

Mr. Pinnock gave evidence that the Applicant continued "indirect" bookings as well as "direct" bookings. The indirect bookings were arranged with tour operators that the Applicant was not able to book directly. Pinnock would provide particulars of the trip to the consumer and then fax a credit card authorization to the consumer who would then fax it back to the Applicant. Pinnock would then obtain the travel services from another travel agent and fax that agent the customer's credit card authorization. The other agent would book the trip with the tour operator and give the customer's credit card number, but not the faxed sheet unless there was any problem. The tour operator would then charge the customer's credit card and the second travel agency would obtain the commission. The second travel agency would charge the Applicant \$10.00 or \$20.00 per booking and remit the rest to the Applicant. Pinnock would then deposit the commissions into the Applicants Royal Bank account. In some cases, the agency would be told to hold onto the commissions and set them off against other trips that the Applicant has sent, where the consumers had paid the Applicant in cash. Pinnock indicated that the Applicant had done approximately 60 indirect bookings while under suspension, which number he considered to be trivial compared to the Applicant's usual volume.

In the "direct bookings" the consumers paid Value Vacations directly and the Applicant then dealt directly with the tour operator, such as Air Canada Vacations. The Applicant has also dealt through retailers who are also wholesalers, although the consumers paid the Applicant directly by cash, credit card or a combination of both. Pinnock stated that his best estimate was that the Applicant had done approximately 30 direct bookings while under suspension. The bookings were of a value of between \$25,000.00 to \$30,000.00 with the last booking done in late June or early July of 2002.

Acting as Outside Sales Agent

The Applicant submitted that the Act does permit unlicensed individuals (such as outside sales representatives) to provide certain travel services providing that they meet certain obligations set out in section 14 of the Act. One of such requirements is that the outside sales agents have a written agreement with the company(s) for whom they sell travel services.

Pinnock testified that he approached several agencies and requested that they enter into a written contract in order that he could act as a freelance travel agent. However, as Charles Pinnock testified during his rebuttal evidence, after TICO made it public knowledge (by publishing the suspension in the trade newspaper) that Value Vacations license was suspended; he was only able to obtain one written contract (between the third party agency and another agent employed by Value Vacations). Other agencies were willing to accept referral clients but none of these agencies were willing to enter into written contracts.

It was further submitted by the Applicant, that other than the Air Canada bookings set out in the Notice of Further and Other Particulars, no other bookings were part of the overall Proposal or either Notice of Further and Other Particulars and ought not to have been properly considered by the Tribunal.

The Tribunal notes that there are several sections of the Act and Regulation that outline the requirements for an outside sales agent.

There must be a written contract. Section 14 of the Regulation states that a travel agent shall not sell travel services unless sold directly by the Registrant, *through an employee or through a person with whom the Registrant has a written contract* and who operates from the registered premises.

The outside sales agent must operate from the registered premises. Subsection 3 (3) of the Act states that *no travel agent shall conduct business from a place at which the public is invited to deal unless it is named as an office in the registration*. Subsection (4) clarifies *when there is more than one office, one is the main office, and the remaining are branch offices*. The Applicant did not operate from a registered head office or branch office.

There are a number of specific advertising sections found in the Regulations. Section 39 (2) and (3) specify *all advertisements for the sale of travel services shall include the registered name, address and registration number of the Registrant*. The advertisements made by the Applicant did not identify the registered name, address and registration number of any agency with whom it dealt.

The Tribunal notes that Pinnock gave evidence that there was one employee of the Applicant that had a contract with one travel agency until May 2002. He also stated that the Applicant made bookings through five other travel agencies, none of which the Applicant had contracts with.

The Applicant has taken the position that the Applicant was denied natural justice, because, among other things, it was denied the opportunity to explain or clarify any accusations before its licence was suspended. The Applicant has also suggested that... "The Tribunal should treat all allegations arising from breach of the suspension as nullity (The Tribunal ought not to consider any allegations of breach of suspension). Furthermore, it is submitted that to consider any evidence regarding any matter arising after the unlawful suspension would have the effect of justifying TICO's unlawful actions and be a gross miscarriage of justice."

Regarding the Applicants argument that the Tribunal cannot take into account the improper bookings, other than those with Air Canada Vacations, because they were not included in the Proposal, the Tribunal disagrees. The purpose of the Act is to safeguard consumers. It is a public protection Statute. This is not a criminal matter where each allegation must be proven beyond a reasonable doubt. Nor is the Tribunal as restricted in the evidence that it may consider, as may be the case in a criminal court. The burden of proof is on the Registrar, and it is not a light burden. Where the issue involves taking away a persons right to make a living in that persons chosen field, the evidence must be "clear and convincing and based on cogent evidence which is accepted by the Tribunal" (*Bernstein*). It is up to the Tribunal as to what evidence it will consider and accept. If clear and convincing evidence is brought forth in the hearing, and that evidence has a bearing on the allegations and the protection of the public, the Tribunal may consider that evidence in making its decision.

Addressing the argument that the Applicant was denied the opportunity to explain or clarify any accusations before suspension, the Proposal contained the following:

*TAKE NOTICE that subsection 6(2) of the Act provides that a Registrant is entitled to a hearing by the Licence Appeal Tribunal in respect of a proposal by the Registrar to revoke a registration if **WITHIN 15 DAYS** after receipt of notice that the Registrar intends to revoke a registration, the Registrant mails or delivers notice in writing that a hearing is required (Notice to Reader) to the Registrar and the Tribunal...*

AND TAKE FURTHER NOTICE that if you require a hearing regarding this proposal, a hearing date may be set by the Licence Appeal Tribunal on short notice to you. If you wish to be represented by a lawyer at the hearing, it is advisable that you make these arrangements as soon as possible. The Registrar reserves the right to oppose any request by you for an adjournment in order for you to make such arrangements.

Mr. Pinnock appeared at the hearing on behalf of the Applicant and had an opportunity to submit evidence and to cross-examine the Registrar on his opinion why the Applicant's licence should be suspended. The Applicant was afforded due process with full participatory rights. The fact that the Applicant chose not to be represented by counsel at the hearing was a matter of the Applicants choice. It did not diminish the fact that there was notice given that counsel could have represented it.

Unnecessary Delay

The Applicant has contended that the Respondent has delayed and unnecessarily complicated the hearing and that its unjust actions have resulted in the hearing that stretched over one and a half years. The Applicant has further contended it was the Respondent's counsel that was often not available on the dates that were convenient to the Tribunal, usually as a result of an apparently busy hearing schedule, or for an extended absence due to the birth of his child.

The Tribunal, at the outset of the hearing, had requested that both counsel give an estimate of the anticipated length of the hearing. Either counsel thought that perhaps three or four days would be sufficient. There was more evidence to be covered than either counsel anticipated and at the conclusion of each hearing day, another date was set to resume. There were more occasions when the Respondent was not available for hearing dates, however there were also dates when the Applicant or the Tribunal was not available. There were also several occasions where the sheer volume of the material to be covered necessitated longer time between hearing dates in order to allow counsel adequate time to prepare. This was the case for both counsels as they had tried to accommodate each other's schedules without any significant objection.

Bad Faith or Bias

The Applicant argued that TICO and the Registrar has shown bias against the Applicant by including complaints from third parties in the Proposal, as if they were proven facts. It used this information without investigating the allegations. Further, the Applicant alleged that TICO misconstrued facts, contradicted facts it had already accepted (promissory note and accountants opinion), ignored letters from the Applicant in its possession (TD bank accounts), ignored the garnishment of the trust account by Signature, made allegations regarding deficient advertising when the rules were not yet settled and generally pursued trivial matters. These incidents, the Applicant alleged, showed TICO was bias and unfair in its prosecution of this matter.

The Registrar submitted that the Applicant, acknowledged several breaches of the Act and Regulations. Those breaches were sufficient to justify the Registrar's conclusions. It was submitted that the Applicant did little to demonstrate that the Registrar was in error. It merely attempted to explain away the enumerated items and many of the explanations were insufficient or contradictory.

It further submitted that the Applicant had demonstrated bad faith in these proceedings by breaching The Tribunal's Interim Suspension Order. The breach placed consumers at risk and caused harm, as evidenced by the Electriciteh transaction. The Respondent submitted that the Applicant's bad faith was compounded by its submissions to the Tribunal that all consumers were being referred to other travel agencies, when they were not.

The Issue:

The Tribunal must decide whether the Registrar ("the Respondent") had sufficient grounds to support his belief that the Applicant's registration as a travel agent under the Act, should be revoked.

The Law:

Section 4 of the *Travel Industry Act* (the "Act"), states as follows;

4(1) an Applicant is entitled to registration or renewal of registration as a travel agent or travel wholesaler by the Registrar except where,

(a) having regard to his, her or its financial position, the Applicant cannot reasonably be expected to be financially responsible in the conduct of his, her or its business; or

(b) the past conduct of the Applicant affords reasonable grounds for belief that he, she or it will not carry on business in accordance with law and with integrity and honesty; or

(c) the Applicant is a corporation and,

(i) is incorporated without share capital, or

(ii) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, or

(iii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carry on in accordance with law and with integrity and honesty; or

(d) the Applicant is carrying on activities that are or will be, if the Applicant is registered, in contravention of this Act or the regulations.

Section 5 of the Act states as follows;

(1) Subject to section 6, the Registrar may refuse to register an Applicant where in the Registrar's opinion, the Applicant is disentitled to registration under section 4.

(2) Subject to section 6, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the Registrant to registration under section 4 if he, she or it were an Applicant, or where the Registrant is in breach of a term or condition of the registration.

Section 6 of the Act states as follows;

(4) Where an Applicant or Registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out his or her proposal or refrain from carrying out his or her proposal and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

(5) the Tribunal may attach such terms and conditions to its order or to the registration as it considers proper to give effect to the purposes of this Act.

The onus of proof rests upon the Registrar to satisfy the Tribunal that he has reasonable grounds to believe that the registration of Applicant ought to be revoked based upon the particulars set out in the Notice of Proposal dated June 21, 2001 and the Notices of Further and Other Particulars dated September 11, 2001 and December 11, 2001.

Case Law

The leading authority, which has been followed in numerous cases, is the Divisional Court Decision of *Brenner*, reported in 19 CRAT 58. This decision held that the Tribunal should only refuse to direct the Registrar to carry out his proposal if it is of the opinion that the Registrar was in error. The authority of the Tribunal under Section 7(4) of the Motor Vehicle Dealers Act (paralleling the Act) respecting the proposal of the Registrar was reviewed by Southey J. where he stated :

“The Tribunal should only have refused to direct the Registrar to carry out his Proposal if it thought the Registrar was in error in concluding that the past conduct of the Applicant afforded reasonable grounds for belief that he would not carry on business in accordance with the law and with integrity and honesty... The Proper question at the rehearing remains, however, whether the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law, and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal.”

Brenner v. Ontario (Registrar of Motor Vehicle Dealers and Salesman) [1983 O.J. No. 1017 Ontario Supreme Court

The above has often been quoted, but also of importance is the burden of proof required as well as the quality of that proof. The following have provided some assistance in that regard:

“Nothing short of clear and convincing proof based upon cogent evidence will justify an administrative tribunal in revoking a license to practice medicine or to gain a livelihood in business.”

Coates v. Ontario (Registrar of Motor Vehicle Dealers and Salesmen) 1998 65 O.R.(2d) 526 at p526 ([1988] O.J. No. 1351 at page 9)

“In my view discipline committees whose powers are such that their decisions can destroy a man’s or woman’s professional life are entitled to more guidance from the Courts ... I hold that the degree of proof required in disciplinary matters of this kind is that the proof must be clear and convincing and based on cogent evidence which is accepted the tribunal.”

Bernstein and College of Physicians and Surgeons of Ontario (1977), 15 O.R.(2nd) 447

“I wish, however, to emphasize that in every civil action before the tribunal can safely find the affirmative of an issue of fact required to be proved it must be reasonably satisfied, and that whether or not it will be so satisfied must depend on the totality of the circumstances on which its judgment is formed including the gravity of the consequences...”

Smith v. Smith [1952] 2 S.C.R. 312 at pp. 331-2

“The concept that the standard of proof rises with the gravity of the allegations and the seriousness of the consequences has been reaffirmed in the recent decision of the Supreme Court of Canada in *R v. Oakes* [1986], 1 S.C.R. 103.”

Regarding denial of due process:

“...the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made in its statutory, institutional and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision maker.”

Baker v. Canada (Minister of Citizenship and Immigration) [1999] 2 S.C.R. 817 at paragraph 22

Regarding Failure to Disclose on Application

“Failure to make proper disclosure on the application form is considered by this Tribunal as a serious error of judgment and requires reasonable explanations as to why the application was not completed properly. In this case the Tribunal did not receive such reasonable explanations. The Registrar must rely on these applications to be accurate and honest due to the tremendous volume of applications received each year. To deceive the Registrar, particularly on a reinstatement application, show a lack of honesty and integrity on the part of the Applicant. This Applicant had worked for many years in the motor vehicle industry and had been registered previously. She should have ensured her answers were accurate to the best of her ability.”

Re Hunt [2002] O.L.A.T.D. No. 273. At paragraph 20

Regarding Failure to Maintain Working Capital

In this matter the travel agency had failed to maintain the minimum working capital requirement due to a downturn in economy. There was evidence that some financial relief would be available and the business might improve; however, the Tribunal found that the decision by the Registrar was reasonable when it was made.

591578 Ontario Inc. o/a Hansa Travel v Registrar Travel Industry Act (September 17, 1997)
Commercial Registration Appeal Tribunal

In this matter the travel agency had a history of filing necessary forms late, filing forms, which were insufficient, and of not maintaining a sufficient amount of working capital. The Tribunal found that in the circumstances the Registrar had not made an error in deciding that the past conduct of the Registrant and its officers provided reasonable grounds to believe that it would not carry on business in accordance with law.

CIAO Travel & Tour Inc. o/a CIAO Travel & Tour v Registrar, Travel Industry Act
(August 25, 1998) Commercial Registration Appeal Tribunal

Contravention of Terms of Registration and Miscellaneous

In this matter the travel agency had contravened the Act, the terms and conditions of registration, and an order of the Tribunal. Sufficient working capital was not maintained, there were problems with the trust accounting, and the financial statements were not provided within the proper time limits. Even though the company had the assistance of direct intervention by the Registrar and prior appearances at the Tribunal, they did not appear to understand the importance of compliance with the Act and Regulations to ensure the protection of the public. The deficit in the trust account and the failure to maintain the required working capital were found to pose a substantial risk to the public.

London South Transportation Center Inc. o/a Diamond Tours Canada v Registrar, Travel Industry Act (February 11, 1999) Commercial Registration Appeal Tribunal

Past Conduct and Current Circumstances

As stated in Derek Scanlan, a decision of this Tribunal released November 26, 2002, *In Ontario (Registrar of Real Estate and Business Brokers) v. Faccenda* (Ont. Div. Ct.) [1994] O.J. No. 9541 Adams J. in considering s. 6 of the *Real Estate and Business Brokers Act* R.S.O. 1990, c.R.4. Which is essentially the same as s. 4 of the Act before this Tribunal stated:

Given the test set out in s. 6(1) of the *Real Estate and Business Brokers Act*, R.S.O. 1990, c.R.4, all past conduct is potentially relevant, notwithstanding that it was the subject of a previous proposal. It is the totality of that past conduct, considered in the light of more current circumstances, which form the basis for the relief.

He further added:

Clearly, s. 6(1)(b) requires a more qualitative assessment of the entire conduct of an Applicant to determine whether past conduct affords reasonable grounds for belief that he or she will not carry on business in accordance with law and with integrity and honesty.

Facts Found Proven:

1. From 1984 to 1990, the Applicant was registered as a travel agency with Charles Pinnock as part owner.
2. In April 1997, the Applicant was reinstated with a surety of \$10,000.00. Inna Zelener financed the company and was president.
3. Charles Pinnock was the manager and the controlling mind of the Applicant since 1997, subject to Zelener protecting her investment by retaining cheque-signing authority until October, 1998. Zelener had released any interest in the Applicant by a full release in June, 1998.
4. In November, 1998, Charles Pinnock moved the office of the Applicant.
5. The Applicant was late in filing its Financial Statements every year since 1997.
6. The Applicant paid a \$10,000.00 security deposit into the compensation fund in March, 1997, which should have been returned, in accordance with Section 26 of the Act by April, 1999.
7. The security deposit was not to be considered as part of the Applicants working capital, according to section 25(5) of the Regulation.

8. The loan from Zelener was meant to be personal to Pinnock and it was improperly recorded as a debt of the Applicant. This was resolved by April, 2000.
9. According to the Applicants records at the time, the Applicant had a working capital shortfall for the year ending April 30, 1998.
10. In 1999, even if there were adjustments for the deposit and the promissory note, as the Applicant contends there should be, the Applicant still had a working capital shortfall.

The Applicant had to be continually monitored by TICO and advised of its working capital shortfalls.

11. The Applicant usually made up any shortfalls in working capital within a brief time after being advised of them by TICO.
12. In the Phyllis James matter, the Tribunal finds no fault on the part of the Applicant. This was merely an inquiry from a tour operator and Ms. James agreed that her card was used with her permission.
13. In the Nadia Ciaravino matter, the Tribunal finds no conclusive proof of any fault on the part of the Applicant.
14. In the Cheryl Davis matter, the Applicant was at fault for double billing the client by using her charge card to pay for another customer's trip. There was a charge back to Regent, which was then reimbursed by the Applicant. This complaint gave reason for the Registrar to be concerned.
15. In the Dufour transaction, there was no proof by the Registrar of fault on the part of the Applicant.
16. In the Kiwanuka transaction, there was a \$96.00 charge back to NALG, but neither party could explain the reason. The Tribunal finds no fault on the part of the Applicant was proved.
17. In the Mitchel transactions, the customer was debited three times for travel services. The Applicant accepted the first charge, but denied responsibility for the other two charges and filed a Police Report. It appeared that two other persons, who were not employed by the Applicant, used the Applicants name and the consumers' credit card to book trips. There was no evidence of wrong doing proved against the Applicant.
18. In the Hola Sun Holidays matter, there was no proof of any charge back. Hola Sun was withholding the Applicants commission as a precaution against a credit card inquiry from Visa. The name on the credit card was different from the name of the travelers, however there was no impropriety proved on the part of the Applicant.

19. In the Bolers transaction, Signature was back charged \$1,930.00 as a result of the Applicant booking a trip on a credit card, which was rejected by the owner. Although the Applicant provided a signed authorization, it was not the name or signature of the owner of the card. The Tribunal finds it very strange that neither the Applicant or the witness from Signature followed up and produced further evidence on this matter when both had the fax and phone number of the person who signed the authorization. This transaction would be enough to raise the suspicion of the Registrar of some improper behavior, but it was not proven that the Applicant was at fault.
20. In the John Curtis matter, the Applicant charged his credit card for the trip of Mr. Curtis and then again for another customer's trip. Curtis wrote a letter to TICO alleging dishonesty on the part of the Applicant. This also would have been reason to raise the Registrar's concern. There was fault proven on the part of the Applicant in allowing the consumer's credit card to be debited twice, as well as issuing a NSF cheque.
21. In the Redpath transaction, there was no evidence of wrongdoing proved against the Applicant.
22. There were several Air Transat transactions. Even though there were no complaints from consumers, the fact that the Applicant was using consumer's credit cards to pay for totally unrelated travel by other persons with different travel agencies, would give cause for concern to the Registrar.
23. In the George Pinnock matter, although the nature of the transaction may have raised a suspicion, there was not any proof of impropriety on the part of the Applicant.
24. In the Charles Gibson matter, the Applicant made a mistake by not paying for the Client's trip out of the merchant account after debiting the Client's credit card. Martinair was reimbursed shortly after the mistake was brought to the attention of the Applicant. The Tribunal is not impressed that it took the Applicant five months to discover that it had debited the Client's credit card, but never remitted the funds to Martinair. Although it did so shortly after notification by TICO, the nature of the transaction infers that there were some shortcomings in the Applicant's bookkeeping.
25. In the Rita Silvestri transaction, it was not proved that there was any intentional dishonesty on the part of the Applicant, but again the transaction indicated that the Applicant's bookkeeping lacked careful attention. A complaint from the consumer, as well as issuance of NSF cheques to Visa to reimburse the client, certainly would give cause for concern to the Registrar.
26. Regarding the Travel Media cheque of November 5, 1998, the explanation given by the Charles Pinnock appears credible and without dishonest intent. Again, however, it shows that the Applicant was not paying attention to detail in its financial matters.

27. The matter of the transfer memos and NSF cheques in September and October, 1998 was not explained to the satisfaction of the Tribunal. In its best light, it is yet another example of the Applicant not comprehending or not following proper financial procedures. Fourteen NSF cheques over a two-month period, would give rise for concern to the Registrar regarding the Applicant's financial dealings and responsibility.
28. In the Thomas Jacob matter, the Applicant wrote a cheque on the Value Vacations Ltd. in trust account, after it had received Notice that account had been frozen. The cheque was not honoured and no reimbursement was made to the customer. The Applicant was at fault when it wrote the cheque, knowing that the account had been frozen and again when it did not reimburse the consumer.
29. Concerning the Elizabeth Pellegrino and Niagara Falls transactions, the Respondent has proved that the Applicant had written cheques on a bank account that it knew was frozen at the time. The reason given, that the Applicant wrote the cheques out of frustration because of TICO taking so long to deal with the Signature garnishment of the Applicant's trust account, is no excuse. The evidence accepted by the Tribunal shows a clear breach of the Regulation by the Applicant. The fact that there were not enough funds in the Applicants trust account to pay for all the trips that were booked, also reinforced the need for inspections of the Applicants accounts. These transactions would clearly give the Registrar reasonable concern that the Applicant may not be carrying on business with honesty, integrity and according to law.
30. Regarding the South American Tours cheque, again this shows the Applicant's lack of detail to accounting and protection of consumer funds. The fact that the Applicant's account did not show a corresponding deposit that was paid by the consumer, was not explained. The Tribunal was satisfied that the Registrar would have had cause for concern in this transaction.
31. Concerning the Southwinds cheque of August, 2000, there was no fault proved attributable to the Applicant. However, the fact that this matter still remained unexplained over two years later, again demonstrated a lack of attention to financial matters.
32. Regarding the Distinguished Travel NSF cheque, the Tribunal finds that there was no wrongdoing proved on the part of the Applicant.
33. Regarding the Abdy Electricitch matter, the cheques in issue were not produced to the Tribunal. The evidence was that one NSF cheque was from Value Marketing and Promotion. The Tribunal was not satisfied with the contradictory evidence given by the Applicant concerning this matter. The circumstances and lack of explanation by Pinnock, would give the Registrar a reason for concern regarding the financial responsibility of the Applicant.

34. Signature obtained a Default Judgment against the Applicant on June 4, 1999, in the amount of \$12,002.86, which Judgment remains outstanding. The Applicant did not dispute the Judgment or move to set it aside. This again demonstrated a lack of financial responsibility.
35. Signature acted inappropriately in its garnishee of a Travel Industry Trust Account. Signature further acted inappropriately in not turning over the funds garnished from a Travel Industry Trust Account to either the Applicant or to TICO to administer on behalf of the consumers.
36. The Registrar acted inappropriately in not taking any action to deal with the garnishee of a Travel Industry Trust Account. The main purpose of TICO is to regulate the industry and protect consumers. TICO should have demanded the return of the money garnished from a Travel Industry Trust Account to ensure the protection of the consumers to whom the funds belong.
37. The Applicant continued to advertise and sell Sunquest products when it knew that Sunquest had the intention of prohibiting the Applicant from doing so. This action on behalf of the Applicant could have placed consumers at risk if any difficulty had arisen between the consumer and the tour operator, as the Applicant would not have had any status to represent the consumer. The actions of the Applicant were also false and misleading, as the advertising did not inform the consumer of the Applicants status with those tour operators. This is considered in the Applicants ability to carry on business with honesty and integrity.
38. The Applicant contravened the Act by making a reservation for a Value Vacations customer under the name of Amazonas Travel, while not registered as an agent of Amazonas Travel.
39. The Applicant failed to disclose the Signature Judgment of June 4, 1999 in its Application of April 27, 2001, when it knew or ought to have known that it was required to do so. The Tribunal is satisfied that the non-disclosure arose from a lack of understanding of the form by the Applicant since the Applicant had advised Jack Foster of the Judgment during an inspection in October, 2000.
40. The Applicant had opened, operated and closed a Bank of Montreal account without informing TICO contrary to clause 16 (1) (4) of the Regulation.
41. The Applicant had opened and operated accounts at the Royal Bank contrary to the Director's Direction. The Tribunal notes that the issue of non-disclosure of the Royal Bank accounts was not in the Registrars Proposal. The Applicant argues this non-disclosure cannot be considered by the Tribunal since the Registrar did not know about the accounts at the time of the Proposal. The Tribunal is of the opinion that it can consider matters that are proved, although not in the Proposal, in its overall assessment of the Applicants honesty and integrity.

42. The Applicant was in breach of the Regulations relating to advertising in its 1997 advertisements. The Tribunal notes that TICO came into existence on June 25, 1997. The advertising regulation enforcement began near the end of 1997. There were many agencies that were not in compliance as the method of following the regulation was being formulated. It would be unfair to single out the Applicant for its breaches at that time. The Applicant has been in substantial compliance with its advertising format since then. The Tribunal is commenting simply on the advertising format under the Regulations and not the propriety of the advertising by the Applicant subsequent to its suspension.
43. The Applicant failed to maintain and produce proper records by not providing the information regarding the undisclosed bank accounts.
44. The Applicant failed to file statements by the time that they were due in 2001 despite being advised by TICO in March 2001, that the statements were due by July 30, 2001.
45. On June 22, 2001, the Applicant was served with the Registrar's Interim Suspension Order and advised that it may not, while under suspension, act or hold itself out to be available to act as a travel agent. Specifically, it may not accept any consumer monies or make new bookings for travel services.
46. The Applicant made inquiries regarding the scope of the order and TICO responded in two letters also dated June 22, 2001.
47. The Applicant took payment for travel services in the Squires transaction after it had received notice that it was under suspension and the Applicant failed to advise the consumer that it was under suspension contrary to the terms of the Interim Suspension Order.
48. In the Electricitch transaction, the Applicant made a direct booking, took consumer funds and failed to advise the consumer that it was under suspension at the time. The Applicant was again in breach of the Interim Suspension Order.
49. The Applicant continued to act as a travel agency by making direct bookings with Air Canada Vacations and taking consumer monies while under suspension.
50. The Applicant continued to hold itself out as, and to act as a travel agent by making indirect bookings through five different travel agencies without having a contract with those agencies, contrary to the Regulation.

Analysis:

The onus of proof in this matter falls on the Registrar.

In the Registrar's Proposal to Revoke the Applicant's registration and the Notice of Further and Other Particulars dated September 7, 2001 and December 11, 2001, he laid out four grounds, upon which Value Vacation Ltd.'s registration should be revoked. They included the following:

1. The Applicant is and has been carrying on activities that are in contravention of the Act and Regulations;
2. The Applicant is in breach of the Terms and Conditions of its registration;
3. The past conduct of the Applicant's officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law, and with integrity and honesty; and
4. Having regard to the Applicant's financial position, the Applicant cannot reasonably be expected to be financially responsible in the conduct of its business.

The Registrar alleged that the Registrant has shown a pattern of non-compliance, which goes to its ability to be registered as a travel agent. This non-compliance includes: late filing of its financial statements; failing to maintain working capital; credit card misuse; issuing NSF cheques; failing to meet its financial responsibilities to wholesalers; misrepresentation; failing to notify the TICO of changes in its financial institutions; and deficient advertising. In the two Notices of Further or other Particulars, the Registrar also alleged that the Applicant continued its non-compliance by carrying-on business while under suspension and knowingly issuing cheques on a frozen bank account to refund its customers.

The Tribunal finds that, taking into account the totality of the past conduct of the Applicant, considered in the light of more current circumstances, the Registrar has satisfied the burden of proof and was not in error in his belief.

The Tribunal is not unmindful of the Applicants argument that the Registrar has included numerous unfounded allegations in the Proposal and subsequent Notices of Further and Other Particulars. That the sheer number of the allegations would have influenced the Registrar to make the decision that he did, even though most of the allegations were unproven and groundless. There were many allegations made which were of little substance, and unnecessarily made this hearing longer, and more complicated and cumbersome than necessary.

In order to address that concern of the Applicant, the Tribunal has re-examined the evidence and allegations that were proven by the Registrar, without regard to the allegations that were unproven. In other words, if only the allegations which have been found to have been proven were before the Registrar at the time that he made his decision, would they have been enough to justify the Registrars decision at that time?

The Tribunal finds that the failure to disclose bank accounts, shortage of working capital, poor or inadequate supervision of customer's monies which should have been scrupulously safeguarded in a properly managed trust account and issuing NSF cheques, were sufficient in themselves to allow the Registrar to reach the conclusion that he did. The Registrar had a justifiable concern as to the financial viability of the Applicant, as is required by section 4 (1) (c) (ii) of the Act. In addition, the Applicant was carrying on business in breach of the terms and conditions of its registration, in contravention of section 4 (1) (d) of the Act.

Furthermore, the actions of the sole officer and director of the Applicant, while the Applicant was under suspension, supported the Registrar in his concern regarding the Applicants ability to carry on business in accordance with law, and with honesty and integrity, as set out in section 4 (1) (c) (iii) of the Act.

DECISION

Pursuant to the authority vested in it by subsection 6(4) of the *Travel Industry Act*, the Tribunal directs the Registrar to carry out his proposal to revoke the registration of Value Vacations Ltd.

LICENCE APPEAL TRIBUNAL

Brian Marotta, Vice-Chair

Released: March 18, 2003

RADU AND LILIANA SIRBU

IN THE MATTER OF THE DECISION OF THE
ONTARIO NEW HOME WARRANTY PROGRAM

DECISION DATED MAY 3, 2002

TRIBUNAL: MARJORIE HILEY, Vice Chair
ALBERT LONGO, Member

APPEARANCES: RADU SIRBU, representing the Applicants
MARCUS KNAPP, Counsel, representing the Ontario New Home
Warranty Program
ENZO BERTUCCI, Agent, representing the Added Party, Maple
View Building Corporation

DATES OF HEARING: September 4 and 5, 2002

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

The Program by its decision letter of May 3, 2002 refused a number of claims made by the Applicants for warranty coverage. The Applicants requested a hearing before the Tribunal by their Notice of Appeal dated May 12, 2002. The hearing was held on September 4, 2002 with all parties present. In the course of the hearing Mr. Sirbu filed a consent from Liliana Sirbu which stated that she wished Radu Sirbu to act on her behalf.

EVIDENCE:

Mr. Sirbu stated in his opening statement that there was an eight month delay in closing of the house. This resulted in poor workmanship and incomplete work. Even at the date of closing the house was not in livable condition. The Applicants did receive some compensation for the delay in closing. The Applicants were in possession on December 15, 2000. Mr. Sirbu stated that after that date there were continual problems with delays in getting repairs completed. The Applicants had to make their requests by fax due to problems with staffing of the office. Mr. Sirbu stated that they were dissatisfied with the

Program, particularly the conciliation process. They did receive some compensation and were able to hire trades to complete repairs.

They are concerned about future repairs.

The Program stated in their opening statement that there was no delay claim before the Tribunal. There were fifteen items found not to be warranted. Many of these items were minor in nature and not noticeable. In some instances the Applicants were not in compliance with the contract and therefore not under protection by the Program.

The Added Party stated that it states in writing that all service requests are to be in writing or by fax. It is their policy only to take telephone service requests if it is an emergency situation.

Evidence of Radu Sirbu:

Mr. Sirbu testified that they took possession of the house on December 15, 2000 as is stated in the Certificate of Completion and Possession.

Mr. Sirbu had a series of computer generated colour photos to demonstrate the defects in the house. The issues are numbered as per the decision letter.

Issue #1

Regarding the issue of the main wood staircase Mr. Sirbu stated that from December 4-15, 2000 there were trades in the house completing the interior work. These tradesmen were using this staircase. Though the stairs were varnished there were severe gouges in the wood to a depth of 3 mm. When varnished these marks were evident. (photo 9A) They need to be sanded. This is particularly evident in the first set of stairs going to the landing.

Mr. Sirbu had no invoices for the cost of repair of the staircase. Mr. Sirbu stated that a tradesman named John told him that the repairs could not be accomplished without removing the hand rails to sand and stain the stairs.

Issue #2

Mr. Sirbu stated that regarding the kitchen cabinets they were described in Tab I Schedule B of the Agreement of Purchase and Sale as tall or upper cabinets. What was installed in their kitchen were cabinets that stopped one foot from the kitchen ceiling. (photo 9 N) The model home had cabinets installed in the kitchen which went all the way to the ceiling. Their home is based on a model called Rosemount which is the subject of a brochure. The picture in that brochure shows the kitchen cabinets going right to the ceiling.

Issue #3

It was the testimony of Mr. Sirbu that there was no trim on the kitchen counter at the time of its installation. When the trim was not installed despite his request Mr. Sirbu purchased trim and installed it using glue. (photo 9B) Unfortunately by that time the edges of the counter were worn out as shown by that photo.

Issue #4

Mr. Sirbu stated that the interior walls in the family room were crooked. Some of the walls were repaired. The photo 9 C shows the SW corner wall which was not repaired.

Issue # 5

Mr. Sirbu stated that the door to the master bathroom is not straight due to the difference in inclination of $\frac{1}{2}$ cm at the bottom to $2 \frac{1}{2}$ cm at the top.

Issue # 6

It is the claim of Mr. Sirbu that the fireplace in the family room is not in accordance with the contract. Photo 9E shows that it is built out into the family room. The brochure for the Rosemount model shows the fireplace flush to the wall. When he complained due to this design taking too much space in the family room the builder told him that because of a sidelot problem the fireplace had to be built inside the room rather than outside of the home. Mr. Sirbu stated that when he went to City Hall and bought the plans for the house it showed an encroachment for the fireplace outside of the home.

Mr. Sirbu testified that he wanted a fireplace but it needed to be flush to the wall. He was prepared to take a smaller fireplace. Otherwise he wanted to be compensated for the loss of space. Mr. Sirbu did not know what should be the amount of compensation.

Issue #7

Mr. Sirbu stated that if you were in the living room you could hear every step of someone in the bedroom above. The Schedule B to the Agreement of Purchase and Sale stated that all sub floors were to be screwed down and joints sanded. This problem was mentioned in the pre delivery report and despite numerous service requests it had not been fixed.

Issue # 8

Mr. Sirbu complained about the excessive noise and springing of the sub floors under the living room. He stated that this problem had been brought to the attention of the builder and the Program. Mr. Sirbu felt to do the repairs properly the flooring needs to be removed and the subfloor has to be screwed down.

Issue # 9

Mr. Sirbu stated that the east wall of the family room is not square. Photos 9F and 9G. He measured a two inch difference for approximately three feet. It is evident on the parquet floor. Mr. Sirbu did not have any solution on how to fix this problem.

Issue # 10

Mr. Sirbu stated that the front patio door is not aligned properly. Photo 9H At first they could not use the door and then it was fixed but not to his satisfaction. Mr. Sirbu stated that the builder said they had to fix the door in this manner or else they would have to take out the door and fix the wall.

Issue # 11 is no longer an issue.

Issue #12

Mr. Sirbu stated that the stone accent on the exterior finish above the garage door had a number of chips in it. Photos 9I and 9J.

Issue # 13

There is an issue with the alignment of the wall in the master bathroom. The variation is 1/8". As it runs parallel to the bathroom floor tiles it can be readily seen. Mr. Sirbu wants the wall to be aligned properly.

Issue #14

Mr. Sirbu stated that the front porch was not constructed in accordance with the plans. The front porch columns are not installed correctly. Mr. Sirbu had obtained plans from the municipal authorities which showed the columns installed on the porch, not on the stairs. In his conciliation request it was stated that there had been service requests on this issue on June 23/01 and Sept.23/01.

Issue #15 not an issue.

Issue #16

Mr. Sirbu stated that the patio slabs were not installed properly as they are not in the correct location and not properly aligned to the stairs. As well the slabs are cracked. This is a poor workmanship issue and is a safety hazard as you can trip on them. Photos 9L and 9M

Issue #17 not an issue.

Issue #18

The columns on the front balcony are not finished properly. They were not sealed or painted in a proper fashion and the edges are not sealed. He had mentioned it in his letter of June 23/01 to the Program when he stated that the poles were not painted.

Mr. Sirbu testified that he tried to negotiate with the builder to get the work done but he find it a frustrating experience. He would send a lot of faxes to the builder. Then the Program got involved and he did get some compensation. There were a large number of items in the conciliation report. He wants to be compensated for some of these problems so he can hire someone else to do such work as moving the paving slabs and getting the walls aligned.

In his cross examination Mr. Sirbu stated that there are clauses in his Agreement of Purchase and Sale dealing with such matters as grading, substitution and alterations. He has nothing in writing from the municipality regarding the deficiencies though he thought the municipality was currently doing work at the property.

Mr. Sirbu agreed that the brochure and the plans he obtained from the municipality do not form part of the Agreement of Purchase and Sale. He agreed that the matter of a delayed closing is not an issue before the Tribunal.

Mr. Sirbu disagreed with the comments on the decision regarding the condition of his stairs. He thinks the photos he took of the stairs was after either the decision letter or the conciliation report. He believes he was about one foot away from the stair tread when he took the photograph.

He stated that the Agreement of Purchase and Sale stated he was to have "taller upper cabinets". Though the model home has an eight foot ceiling his home has a nine foot ceiling and the cabinets stop about a foot from the ceiling.

Mr. Sirbu agreed with the comment of the Program regarding Issue #4 that the bulkhead in the southwest corner of the room is skewed. But regarding issue #5 he feels that the non alignment is more than the 1/16" mentioned by the Program. He agrees that the non alignment does not affect the operation of the bathroom door.

Regarding issue #6 Mr. Sirbu agreed that he did get a gas fireplace and it works normally. His photo 9E shows that the fireplace protrudes into the room and impedes his ability to watch TV.

Regarding issues #7 and #8 Mr. Sirbu stated that the subfloors have creaked from day one. It was not mentioned on the predelivery inspection as the floors were not complete then.

Regarding issue #9 Mr. Sirbu agreed that the east wall of the family room is skewed about two inches. This occurs for its length of nine feet.

Mr. Sirbu agrees concerning issue #10 that the patio door opens freely now.

He agrees that there is 1/8" variation in the wall alignment in the master bathroom.

Mr. Sirbu stated that in a number of the items he was disputing esthetics not operation. There was poor workmanship on the items. There was poor quality assurance and poor completion work.

Testimony of Fernando Silva:

Mr. Silva works for the Added party, the builder Maplevue Building corp. He has been the contract manager and the project coordinator for the past two years. Prior to that he worked for seven years in the building industry as a drywall installer. He has an architectural technologist diploma. He attended at the conciliation meeting on December 17, 2001.

Mr. Silva stated that he disagrees with Mr. Sirbu's assessment of the condition of the wood stairs. There is no problem with the staining of them.

There are variances in the walls. A nine foot wall could have a variance up to 3/4". To correct such a variance would make matters worse. There is a minor misalignment on the shower wall.

Mr. Silva stated that the fireplace is approximately 4 1/2 feet wide.

He stated that the floors are structurally sound and that when wood dries you will get squeaking. There are no screws popping out or parquet popping. The Agreement of Purchase and Sale does not state that insulation is required between the floors.

Regarding the patio stones you have to match them to the elevation. They were laid on gravel and can move by use or by the freezing of the ground.

Under cross examination Mr. Silva stated that the plans entered as an exhibit by Mr. Sirbu are not the final approved plans. The builder's final plans as provided in Exhibit 8 show the revisions. There was a setback problem and the fireplace had to be changed.

In the living room the builder did do repairs to the three joists in the subfloor. There is no visible deficiency in the subfloor in the bedroom nor any excessive squeaking.

Mr. Silva stated that the patio slabs were installed correctly to ensure proper water drainage. The cracked slab was due to it shifting.

Testimony of Enzo Bertucci:

Mr. Bertucci is the developing coordinator for Mapleview Building Corp. He deals with municipal approvals, committee of adjustment, building permits and consultants. Then the project is turned over to construction.

Exhibit 8 is the site plan and grading plan. It deals with elevation, grading, slopes and drainage and has all the stamps of the building department on it. Originally the site plan had the fireplace protruding by 1.2 m. But there would be two houses encroaching into the side lot. The first one to purchase gets to keep that fireplace. Lot 39 kept it but lot 40, being Mr. Sirbu's house, has to have the fireplace inside the house. As the City said the changes have to be made on the site plans addendum drawings were provided.

Regarding the columns on the front porch the new site plans showed nine risers. The steps had to be pushed in for the two more risers. The porch overhang did not change so it was necessary to have the columns on the stairs to support it.

Regarding the kitchen cabinets there is no industry standard as to the term "taller upper cabinets". Usually their manufacturer uses 24" cabinets but the cabinets in Sirbu's home are 30" tall. There was no contract to put in 42" cabinets.

Under cross examination Mr. Bertucci stated that he had spoken to Mr. Sirbu about the fireplace and had given him the option of having the fireplace in the corner. No such option was provided for the columns. Mr. Sirbu had not paid for a customized staircase such as porch surrounding columns.

Testimony of Warren Northcott:

Mr. Northcott has been a warranty representative for the Program for three years. He has inspected over 150 homes. Prior to that he was a building inspector for Barrie and Brantford for approximately eleven years. He is a certified building code official for Ontario. The Tribunal found him to be an expert as to requirements of the Ontario Building Code.

Mr. Northcott took a number of photographs of issues in the Sirbu home during the conciliation inspection. He sent Mr. Sirbu the conciliation report. Mr. Sirbu responded to it in writing. Then Mr. Northcott did the decision letter.

Mr. Northcott had the following comments concerning the issues:

Issue #1: These are oak stairs with a natural finish with varnish. There were some marks prior to the varnish being applied. Others were wear and tear marks. Mr. Northcott stated that minor blemishes are to be expected when stairs are finished on site. There are no written standards and the assessment is based on his own visual observation.

Issue #2: The height of the kitchen cabinets is not referenced in the Agreement of Purchase and Sale so this is not a substitute matter.

Issue #3: Mr. Northcott stated the problem was at the floor level. There could have been damage due to using water to clean the floor. But Mr. Sirbu installed the trim so it is excluded from warranty coverage as it is work by the owner.

Issue #4: The bulkhead in the family room conceals a duct. Though the corner is not perfectly square it is not readily visible.

Issue #5: There is a space between the door casing and the wall. He measured it and found it to be 1/16" for one foot in length. It is behind the door in the bathroom. It does not affect the operation of the door.

Issue #6: There is no defects in workmanship or materials as regards the fireplace. There is no reference in the Agreement of Purchase and Sale as to whether or not it was to protrude out of the wall. Under the Ontario Building Code the City of Vaughan has jurisdiction. Section 10.13 states that the drawings are to be approved by the municipality. There needs to be accordance with the approved drawings.

Issue #7: Mr. Northcott stated that he had heard a squeak from the quarter round trim in the northeast bedroom and some crackling noises when in the living room. There was no visible movement of the subfloor.

Issue #8: There was no creaking noises but there was a small amount of deflection in the floor of the living room. The dishes did rattle in the hutch there. Mr. Northcott found the vibration to be normal. There are joists over the steel beams and the only solution would be to add more beams.

Issue #9: In the family room the interior wall is not parallel to the parquet flooring. The parquet flooring is aligned with the load bearing wall. The two inch variation by the east wall is not in a location which is readily visible. Mr. Northcott found the installation to be done in a good workmanlike manner.

Issue #10: There was a repair to the non moveable door. Though the two doors are not perfectly square in the frame the doors operate.

Issue #12: Mr. Northcott found the stone chips to be minor in nature. He found the stones were installed in a good workmanlike manner.

Issue #13: In the master bathroom there is a variation of approximately 1/8" for approximately three feet. It is not readily visible and is minor in nature.

Issue #14: The columns are on the steps of the front porch. This is an issue of design and not one of workmanship or substitution.

Issue #16: Mr. Northcott stated that the cracked patio slab was not reported within the first year warranty time frame. The slabs have moved due to settlement of the soil which is an exclusion under the Act. The slabs extend into the driveway but that is not an issue of workmanship or materials.

Issue # 18: There are no structural problems with the balcony columns.

Under cross examination Mr. Northcott stated that there is no requirement in the Ontario Building Code that the walls need be perfectly plumb or square. He stated that there was no defects with the installation of the subfloors. Otherwise there would have been sections of the parquet coming apart. Regarding the placement of the porch columns he stated that this is not a contractual issue and the builder can change the design.

CLOSING STATEMENTS:

Mr. Sirbu stated that there were a substantial number of problems with both the completion of work and the quality of the work that was completed. A number of items were covered by the Program. Others that are in question are decisions based on subjective factors. The process has taken a whole toll on the owners. In reply Mr. Sirbu stated that there are no standards on how one interprets the concept of aesthetics as part of workmanship.

Counsel for the Program stated that the Applicants are asking for too high a standard from the builder. The Act does not require a standard of perfection.

Counsel stated that in Re Goulet (2000) O.C.R.A.T.D. No. 51 the Tribunal discusses the concept of workmanlike manner which can include such concepts as functionality, expertise, practice skill, proficiency, craftsmanship, competency, the ability to do something well and aesthetics.

Counsel referred to Re Kirk (2001) O.L.A.T.D. No. 193 wherein the Tribunal had mentioned a number of cases that deal with the concept of aesthetics. These cases found that the standard is acceptability not perfection.

Counsel discussed each disputed item and reiterated the testimony of the witnesses for the Program. None of the matters fell within the warranties as stated in the Act. The loss of floor space by the location of the fireplace was within the criteria as set out in Builder Bulletin #22.

LEGISLATION:

The relevant sections within the *Ontario New Home Warranties Plan Act* are as follows:

- 13 (1) Every vendor of a home warrants to the owner,
- (a) that the home,
 - (i) is constructed in a workmanlike manner and is free from defects in materials,
 - (ii) is fit for habitation, and
 - (iii) is constructed in accordance with the Ontario Building Code...
 - (2) A warranty under subsection (1) does not apply in respect of,
 - (a) defects in materials, design and work supplied by the owner,
 - (c) normal wear and tear
 - (d) normal shrinkage of materials caused by drying after construction...
 - (g) alterations, deletions or additions made by the owner,
 - (h) subsidence of the land around the building or along utility lines, other than subsidence beneath the footings of the building
 - (4) A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed
- 14 (3) Subject to the regulations, an owner of a home is entitled to receive payment out of the guarantee fund for the cost of the remedial work required to correct a breach of warranty if,
- (b) the person has a cause of action against the vendor or the builder, as the case may be, for damages resulting from the breach of warranty
- (7) The Corporation may perform or arrange for the performance of any work in lieu of or in mitigation of damages claimed under this section.
- 16 (3) Where a person or owner gives notice in accordance with subsection (2) the Tribunal shall appoint a time for and hold the hearing and may by order direct the Corporation to take such action as the Tribunal considers the Corporation ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Corporation.

Regulation 892

18. (1) Every vendor of a new home warrants to the owner that the vendor shall make no substitutions in those items of construction or finishing for which the purchaser is entitled to make selection pursuant to the purchase agreement without the written consent of the purchaser.
- (2) Subsection (1) does not apply where,
- (a) the purchaser, having been notified, does not make a selection within thirty days after executing the purchase agreement or within such other time period as may be agreed; or
 - (b) an item selected under clause (a) is not available and the purchaser does not make a selection within seven days of receiving written notice from the vendor or within such other time period as may be agreed that the item is unavailable.
- (3) Every vendor of a new home warrants to the owner that where the purchaser fails to make a selection under clause (2)(a) or (b) that the vendor will make a selection on the

purchaser's behalf that is of equal or better quality than the original selection as set out in the purchase agreement.

19 Every vendor of a new home warrants to the purchaser that, where the vendor makes a substitution with respect to an item that is referred to in the purchase agreement that is not an item that is to be selected by the purchaser, the item will be of equal or better quality than the item referred to in the purchase agreement.

ANALYSIS:

The Tribunal reviewed the case law in the Program's Book of Authorities. Re Goulet supra and Re Kirk supra were cited by Counsel for the Program in his closing statement. Re Tharmathurai (2001) O.L.A.T.D. no. 466 at page 15 cites from Breen (1999) O.C.R.A.T.D. no.86, Mark Teitelman (1987) 16 CRAT 179 and Saporita (1999) O.C.R.A.T.D. no.166 dealing with the standard to be expected in a standard housing, which is less than perfection. In Re Whitham (2000) O.L.A.T.D. no.20 the Tribunal cited considerable case law dealing with the value of property when changes are made to plans and it is not considered a substitution under the Regulations. The Tribunal found that the change in plans was not specifically mentioned in the Agreement of Purchase and Sale and even if the height of ceilings had been mentioned there was no proof of a loss in the market value of the unit. In Re Van Sterijevski (1998) O.C.R.A.T.D. no.73 the Tribunal held that "an item of construction is not the same as a plan of construction" and therefore the building of the home on a reverse mirror image did not constitute a substitution under Regulation 892. The case also dealt with the 2% guideline for difference in overall area that is set out in Builder Bulletin # 22.

The onus of proof is upon the Applicants for they must show that their claims fall into section 14 (3)(b), and 14 (7) of the Act. In this case the Applicants did not provide the Tribunal with any estimates to permit a calculation of damages under 14 (3) (b) and therefore if the Applicants are successful on any of the items the Tribunal under section 16(3) can ask the Program to perform any required repairs.

The items in contention will be reviewed by the Tribunal using the item # as stated in the decision letter of the Program.

1. wood stairs – It is agreed by the Program that there are some marks on the wooden stairs. The Tribunal agrees with the position of the Program that these are minor in nature and do not constitute a defect in either materials or workmanship. This claim is denied.
2. Kitchen cabinets – The Agreement of Purchase and Sale does not specify the height of the kitchen cabinets. This is not an item of substitution. The brochure does not form part of the contract between the builder and the Applicants. If the Applicants were desirous of cabinets going right to the ceiling they should have so stated in the APS rather than using the vague phrase "taller upper cabinets". This claim is denied.

3. Kitchen counter – The Applicants have not proved that the defect of the trim at the floor level was due to any action by the builder. By installing trim without allowing for the Program to act on this omission the Applicants have excluded themselves from any warranty coverage under section 13(2)(a) of the Act. This claim is denied.
4. Family room wall – The bulkhead in the southwest corner is slightly skewed. This is a minor defect and the Tribunal agrees with the Program that it is not readily visible nor constitutes a defect in materials or workmanship. This claim is denied.
5. Master bathroom – The wall adjacent to the shower is slightly skewed. The Tribunal agrees with the Program that this is a minor defect, not readily visible and does not constitute a defect in materials or workmanship. This claim is denied.
6. Fireplace not per contract The Tribunal holds that this is not part of the contract. The final plans for the City of Vaughan were revised due to the issue of the setback. The Tribunal accepts the evidence of Mr. Bertucci that the builder gave the Applicants the option of having the fireplace in the corner. The amount of space taken by this fireplace does not fit the criteria as stated in Builders Bulletin #22 and therefore compensation for lack of space is not required. The builder has provided an explanation for why the plans needed to be revised (sidelot issues) and the Applicants knew of this problem prior to occupancy. This claim is denied.
7. Squeaking floor in bedroom – There are some noises and squeaks when the bedroom floor is walked upon. There is no evidence of screws popping out and the parquet flooring being loose. Though this is of some concern to the Tribunal the Applicants have not given sufficient evidence to show that the defect is not within the exception under section 13(2) (d) of the Act and due to normal shrinkage. This claim is denied.
8. Living room subfloor – There is some deflection and vibration of the wood floors when walking across the living room floor. The Tribunal is concerned about this issue but the Applicants have not provided sufficient evidence to show that this is not due to normal shrinkage. The builder has done some repairs on three joists. There is no evidence that can attribute this existing problem to improper screwing. It falls under the exception of section 13 (2) (d). This claim is denied.
9. Family room east wall There is some skewing along this wall. It is not readily visible even from the photographs submitted by the Applicants. The parquet floor aligns with the load bearing wall. Though it is not perfect it does not affect the operation of the family room and is not a defect in materials or workmanship. This claim is denied.
10. Patio door – This door did not work until repairs were made to it. It does operate now. While not perfect the Tribunal examined the photographs of the Applicant and the Program and does not see this as a glaring aesthetics problem. Indeed in the normal course of settling of a new home there can be problems with alignments of

doors. The Tribunal does not find this to be a defect of materials or workmanship. This claim is denied.

11. Not an issue

12. Exterior finish There are some minor chips to the stone accents. The Tribunal examined the photographs of the Applicants. The defect is very minor in nature. The Tribunal does not find this to be a defect of materials or workmanship. This claim is denied.

13. Walls crooked by shower, master bathroom - Again the Tribunal carefully examined the photograph done by the Program and the evidence presented at the hearing. There is a minor variation of the wall near the shower door. The Tribunal finds that this is not a defect of materials or workmanship. This claim is denied.

14. Front porch not as plans – The front posts are situated on the stairs rather than on the porch. The Tribunal accepts the evidence of Mr. Bertucci that due to grading issues the number of risers required at the front of the house were increased. This then led to a change in the design. The builder felt that the columns had to be on the steps in order to support the overhang of the porch. This was not a custom designed home and the Applicants were not paying for a customized staircase. This is not a substitution issue. This claim is denied.

15. Not an issue

16. Patio slabs. The cracked slab was not reported within the one year warranty period. It is not warranted. The shifting of the patio slabs is due to soil settlement and is excluded from warranty under section 13(2) (h) of the Act. The Tribunal accepts the evidence of Mr. Silva that the patio slabs were positioned in accordance with the slope of the grass and water drainage considerations. There is no defect of materials or workmanship. This claim is denied.

17. Not an issue

18. Front balcony columns – The Applicants complained of the joints not aligning properly on the columns and they were not sealed properly. The Program states that this problem was not reported to it within the one year warranty period. The Applicant held that it was by the phrase “poles not painted”. Whether or not it was reported in time the Tribunal has examined the photographs taken by the Program and does not see a major defect. There is no defect of materials or workmanship. This claim is denied.

This case should have had a pre hearing conference. Such conferences can be of great help to all parties prior to the entrenchment of positions. It might have assisted the Applicants to realize that their standard based on perfection is not the standard espoused under the legislation. Warranty protection is not based on such a high

standard. The Tribunal agrees with the concept of workmanship as stated in Re Goulet. Workmanship includes many concepts including that of aesthetics. In determining whether or not there has been a defect of workmanship in the construction of a new home one must consider a multitude of issues of which aesthetics certainly is part of the consideration but not the prominent consideration. In this case the Applicants examined each repair issue with microscopic scrutiny. The Tribunal understands that these homeowners were involved in a lengthy process of repairs and it is evident that mutual respect and understanding is lacking in the relationship between these homeowners and their builder. But the warranties stated in the legislation are founded on the concept of what is reasonable, not on what is perfect. The defects complained of by these owners are there and are recognized by both the Program and the builder. After consideration of all the evidence the Tribunal does not find that these defects are warrantable under the *Ontario New Home Warranties Plan Act* or its regulations.

ORDER:

Therefore, pursuant to the authority vested in it by section 16(3) of the *Ontario New Home Warranties Plan Act*, the Tribunal directs the Ontario New Home Warranty Program to disallow these claims.

LICENCE APPEAL TRIBUNAL

Marjorie Hiley, Vice Chair,
Presiding

Albert Longo, Member

Released: March 14, 2003

YOUNIS SABHAH YOUNIS O/A EAGLE CAR SALES

APPEAL FROM A PROPOSAL OF THE REGISTRAR
OF THE *MOTOR VEHICLE DEALERS ACT*
TO REFUSE REGISTRATION

TRIBUNAL: E. ALAN GARBE, Vice-Chair
DONALD BENNINGER, Member

APPEARANCES: YOUNIS SABHAH YOUNIS, the Applicant
AVIVA R. HARARI, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: January 27 and 28, 2003 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

The Applicant appeals a notice of proposal dated May 9, 2002, issued by the Registrar under the *Motor Vehicle Dealers Act* (the "Act") to refuse to grant the registration of Younis Sabhah Younis o/a Eagle Car Sales (the "Applicant") as a motor vehicle dealer under the provisions of the Act.

Registrar's Position

It is the position of the Registrar, *Motor Vehicle Dealers Act* (the "Registrar") that the past conduct of the Applicant is inconsistent with the intention and objectives of the Act for the following reasons:

1. The Applicant acted as a motor vehicle dealer without being registered as a motor vehicle dealer under the Act.
2. The Applicant purchased vehicles using the registration identification number of another party.
3. The Applicant was found to be in possession of vehicles which he knew or ought to have known were stolen or re-vined vehicles.

Item number 6 contained in the proposal of the Registrar was withdrawn.

By notice of further and other particulars, the Registrar replaced allegation number 4 contained in its notice of proposal with the following:

"The spouse of the Applicant reported a motor vehicle stolen and an insurance claim was made for the vehicle. The licence plate of the stolen vehicle was subsequently found in the possession of the Applicant at 26 St. Albans Road."

Applicant's Position

It is the Applicant's position that an agent of the Ontario Motor Vehicle Industry Council ("OMVIC") was aware of and had agreed to the sale of vehicles by the Applicant. The Applicant stated that he was not the individual who was involved with any stolen or re-vined vehicles but that a person named Leszek Florkowski, the person who shared space at the same location, was responsible. The reason that the Applicant did not apply for registration earlier was that he was waiting until criminal charges arising from the presence of stolen vehicles on the premises leased by the Applicant were dropped.

THE EVIDENCE:

The evidence introduced by the Registrar consisted of the testimony of Tamar Vartanian, Sharon Slade, Dmytro Nikolaenko, Darrell Ware, Mary Jane South and Tim Thomas. Vladislav Zoric was called as the only witness for the Applicant and the Applicant himself did not give evidence.

The above parties introduced documentary evidence with the Applicant's Book of Disclosure being admitted as Exhibit 4 and the respondent's Books of Disclosure were made Exhibits 5 and 6 in these proceedings.

TESTIMONY OF TAMAR VARTANIAN AND SHARON SLADE

Both Ms. Vartanian and Ms. Slade testified that they had purchased vehicles from the Applicant believing him to be a dealer but neither witness was told that the vehicles that they were about to purchase were salvaged or rebuilt vehicles. Both witnesses stated that they would not have purchased the vehicles had they been advised as to the history of the respective vehicles.

TESTIMONY OF DMYTRO NIKOLAENKO

Dmytro Nikolaenko testified that he operated Hi-Tech Car Care, which carries on business as a car detailing business, and used car dealer. The witness confirmed that he knew the Applicant and that he had transferred vehicles, which were not his vehicles at the Applicant's request. Mr. Nikolaenko testified that there were approximately four cars, which he had transferred for the Applicant. When asked about the vehicles identified at Tabs 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21 of Exhibit 5 as having been transferred by him to third parties, the witness stated that he only sold

two of the vehicles (Tabs 12 and 13). The witness stated that he had no knowledge of the other vehicles and had never seen the vehicles. The witness testified that he did not sell the vehicles referred to at Tab 10 and Tab 20 which were the vehicles sold to Ms. Slade and Ms. Vartanian respectively.

TESTIMONY OF DARRELL WARE

Darrel Ware is a member of the Metropolitan Toronto Police Service holding the rank of Detective Constable and until recently was assigned the Auto Section of Special Investigative Service. Detective Constable Ware testified that he had attended at 26 St. Albans Road, Etobicoke on August 31, 1999 as a result of information that there was a stolen vehicle at this location. The witness stated that he met the Applicant at the shop and determined that there were other stolen vehicles inside the premises, which were in the process of being or had been "re-vined". The witness testified that in inspecting the premises various parts from the vehicle reported stolen in the occurrence report at Tab 41, Exhibit 6 were recovered together with the rear portion of the vehicle reported stolen in the occurrence report at Tab 38, Exhibit 6. A search warrant was issued and a search conducted on September 1, 1999. When asked by the Applicant, the witness acknowledged that he had been invited into the premises by the Applicant at the time of his attendance at the premises.

TESTIMONY OF MARY JANE SOUTH

Ms. South, the Deputy Registrar, confirmed the reasons why the Registrar was refusing registration as set forth in the notice of proposal and the notice of further particulars. Ms. South identified a variety of transactions in which the Applicant owned vehicles, which were never plated and subsequently transferred up to five to six weeks after being registered in the Applicant's name. The witness confirmed that at the time of the transactions, including the sales to Ms. Slade and Ms. Vartanian, the Applicant was not registered under the Act.

The witness stated that the Registrar had concerns about the Applicant being involved in transactions where the transfers were done using Dmytro Nikolaenko's registration identification number ("RIN"). The witness stated that the consumers were not told the history of the vehicle and did not know if they were dealing with a dealer or not and the Applicant's use of Mr. Nikolaenko's RIN was to circumvent the registration requirements of the Act.

The witness testified that amongst the material seized at 26 St. Albans Road (Exhibit 6 Tab 51,) were documents that showed that the Applicant, an individual identified as "Les" and a person identified as "Vlad" had business dealings and that the conclusion is that "Les" refers to Leszek Florkowski.

Ms. South stated that the police report at Exhibit 6, Tab 6 refers to the theft of a 1994 Chrysler with licence plate ADWR 908 and in the record of the insurance adjustor's call to the Applicant (Exhibit 6, Tab 8) he confirms the licence number and that the vehicle

was registered in the Applicant's wife's name, Fagima Younis. In the course of the telephone call with the adjustor, the Applicant stated that he parked the car at about seven o'clock on the day before the theft and discovered it stolen the following morning yet the above referenced licence plates for the vehicle were found at 26 St. Albans Road two and a half months later.

The witness identified the offer to lease (Exhibit 6, Tab 52) wherein the Applicant together with Leszek Florkowski leased the premises at 26 St. Albans Road, Etobicoke and the actual lease for the premises (Tab 53) together with receipts for payment of the rent in the name of the Applicant (Tab 54).

TESTIMONY OF TIM THOMAS

Tim Thomas testified that he had been with the Metropolitan Toronto Police for 28 years and was a vehicle identifier. The witness stated that on August 31, 1999, he received information, which suggested that there was a stolen vehicle at the premises municipally known as 26 St. Albans Road, Etobicoke and that he attended there with Detective Constable Ware. Upon their attendance, they found a Honda, which matched a theft occurrence report made on July 31, 1999 (Exhibit 6 Tab 21). The witness testified that there was two Jeep Grand Cherokees in the premises together with tools, which were general, used for grinding out vehicle identification numbers and that it was clear one of the Jeeps had been re-vined.

The witness testified that he was told by the Applicant that a customer had brought the Honda to the premises but no documentation was produced to substantiate this statement. The warranty card and owner's manual for the vehicle were found in a trash can at the premises.

The witness testified that personal items were found at 26 St. Albans Road, which were reported as being in a stolen vehicle at the time of its disappearance (Tabs 32 and 65, Exhibit 6).

The witness traced the history of numerous vehicles, including a 1995 BMW 325 V.I.N. WBACB3328SFE23754 purchased by Star Kar Sales on June 2, 1998 for \$10,700.00 U.S. and registered in the Applicant's name August 18, 1998.

The Applicant signed a proof of loss for this vehicle on February 2, 1999, claiming a loss of \$32,555.75 which amount was paid by Allstate Insurance less the \$500.00 deductible. This vehicle was seized from Vilhelm Kocs and it was determined that the front half of the vehicle had V.I.N. WBACB3328SFE23754 and the rear half had V.I.N. WBACB4309PFL00294. The front half of this latter vehicle was found at 26 St. Albans Road.

TESTIMONY OF VLADISLAV ZORIC

The witness called by the Applicant, Vladislav Zoric, knew Dmytro Nikolaenko and had had dealings with him but his evidence was not helpful in addressing the issues raised by the Registrar in the notice of proposal.

FACTS FOUND PROVEN:

The following facts are found by this Tribunal to have been proven:

1. The Applicant was a tenant at 26 St. Albans Road, Etobicoke.
2. That numerous stolen vehicles and car parts were found at 26 St. Albans Road, Etobicoke.
3. Vehicles found at 26 St. Albans Road, Etobicoke had been re-vined.
4. The Applicant has sold vehicles at a time when he was not registered under the Act.
5. The Applicant has been involved in transactions involving vehicles, which have been rebuilt using parts from stolen vehicles.

ISSUE:

The issue before this Tribunal is whether or not the Registrar has erred in proposing to refuse the registration of the Applicant under the Act.

LAW:

The authority granted to the Registrar is provided in subsections 5(1)(b) of the Act, which states:

5. (1) An applicant is entitled to registration or renewal of registration by the Registrar except where,
 - (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty;

The Registrar has the onus of proof to satisfy the Tribunal that there are reasonable grounds to believe that the registration of the Applicant, Younis Sabhah Younis, should be refused.

For the Tribunal to carry out its responsibilities pursuant to the Act, the Tribunal must review the decision of the Registrar by examining the allegations of the Registrar with respect to the activities of the Applicant and consider such allegations in light of the evidence given by the Registrar and the Applicant.

In the leading case of *Brenner* 19 CRAT SCO Decisions and Orders (1971-1989), page 59, is a decision issued on April 7, 1983 where the Divisional Court overruled a decision of this Tribunal. Southey J. states that the Registrar proposed to refuse registration because of the existence of the specific circumstances set out in Section 5(1)(b) of the *Motor Vehicle Dealers Act*:

“The effect of Sec. 7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the Applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view; the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself.”

Due to the particular facts in that case, Southey J. sent it back for a rehearing, however, he added in the third last paragraph:

“The proper question at the rehearing remains, however, whether the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal.”

Therefore, it is not sufficient for the Tribunal to reach a conclusion that it would have exercised the discretion differently from the way in which the Registrar did. Clearly, in order to overrule the Registrar the Tribunal must conclude that the Registrar was wrong in his decision and that the conduct of the Applicant does not afford reasonable grounds for his belief based upon it.

The above principle was affirmed by the Divisional Court in *Faccenda* [1994] 26 CRAT Part II 1050. In *Faccenda*, the Divisional Court, again on appeal from this Tribunal quashed a decision to direct a Registrar not to carry out his Proposal. At page 1051, the Court held:

“It follows that the Tribunal should have refused to direct the Registrar to carry out his proposal only if it thought that the Registrar was in error in his belief.”

APPLICATION OF LAW TO FACTS:

The evidence presented to the Tribunal by the Registrar, which was virtually unrefuted by the Applicant, provides ample evidence that the Applicant has not conducted his business affairs in an honest and forthright manner. The number of occurrences and extent of the Applicant's activities provide ample and sufficient grounds for the Registrar to refuse to grant registration to the Applicant.

The Tribunal finds that the Registrar has satisfied the onus of proof that there are reasonable grounds to believe that the Applicant's registration should be denied.

DECISION:

Accordingly, pursuant to the authority vested in it by section 7(4) of the *Motor Vehicle Dealer Act*, the Tribunal directs the Registrar to carry out the notice of proposal dated May 9, 2002, to refuse the registration of the Applicant as a motor vehicle dealer under the Act.

LICENCE APPEAL TRIBUNAL

E. Alan Garbe
Vice-Chair

Donald Benninger
Member

Released: March 20, 2003

1441660 ONTARIO INC. o/a SUNRISE HOMES DURHAM

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*

TO REVOKE REGISTRATION

TRIBUNAL: Simon Dann, Member

APPEARANCES:

Jayne Hughes, Counsel, representing 1441660 Ontario Inc. (Sunrise Homes Durham)

Carol Street, Counsel, representing the Registrar, Ontario New Home Warranty Program

DATE OF
HEARING: February 28, 2003 Toronto

ORDER

1441660 Ontario Inc. (Sunrise Homes Durham) (the "Applicant") appealed a Notice of Proposal dated August 30, 2002 of the Registrar of the Ontario New Home Warranty Program (the "Program") to revoke the registration of the Applicant;

WHEREAS the Applicant appealed the proposal to the Licence Appeal Tribunal requesting a hearing;

AND WHEREAS the hearing was scheduled to be held on January 6, 2003, to be continued on January 7, 2003;

AND WHEREAS the hearing commenced on January 6, 2003 and Counsel for both parties requested an adjournment as the parties had arrived at a settlement of all issues as described in a duly executed 'Minutes of Settlement' document;

AND WHEREAS the terms and conditions described in the 'Minutes of Settlement', attached as Schedule "A" to the Adjournment Order of January 14, 2003, required the Applicant to provide the Program with specified information, documentation, and additional security or, failing the Applicant's timely delivery of the specified documentation and security to the Program, both parties agreed the result would lead to "revocation with no further hearing rights";

AND WHEREAS upon commencement of the hearing on February 28, 2003 Counsel for both parties advised the Tribunal of their request for an additional adjournment to allow the Applicant to complete and submit further material as arranged between the parties;

AND WHEREAS the Program agreed that the original material information and security had been delivered but also advised the Tribunal that additional documentation, which would now include financial statements for the Applicant's most recent year-end, being December 31, 2002, was now required, and that as a result more time was required for the Applicant to complete and deliver this documentation;

AND WHEREAS the Applicant confirmed that the complete documentation would be provided to the Program on or before March 31, 2003;

AND WHEREAS both parties agreed on and requested an adjournment to allow for the Applicant to complete the additional documentation and to then provide the Program with the time to complete their review as being "an appropriate resolution";

NOW THEREFORE this Tribunal orders that the proceedings in this matter are hereby adjourned until 9:30 a.m. April 16, 2003.

LICENCE APPEAL TRIBUNAL

Simon Dann, Member,

Released: March 14, 2003

PREDRAG AND IRMA PASIC

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE *ONTARIO
NEW HOME WARRANTIES PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL: MICHAEL H. TURK, Vice Chair

APPEARANCES:

PREDRAG PASIC, the Applicant, in person,
MARCUS KNAPP, Counsel, representing the Ontario New
Home Warranty Program,
BLAGOJE SAVIC, representing Savic Homes Ltd., added
party.

DATE OF
HEARING: February 11, 12 and 13, 2003 Toronto

REASONS FOR DECISION AND ORDER

The Applicants, Predrag and Irma Pasic appeal to the Licence Appeal Tribunal from a decision of the Ontario New Home Warranty Program (the Program) set out in a decision letter dated September 25, 2002. The decision letter confirmed the position of the Program contained in the Conciliation Inspection Report dated March 26, 2002.

BACKGROUND:

On September 17, 2000, the Applicants entered into a contract with the added party, Savic Homes Ltd. (hereinafter "Savic Homes") for the construction of a home on 756 Chesapeake Drive, Waterloo, Ontario. The contract is contained at Tab 1 of the Respondent's Book of Documents which was marked as Exhibit Number 6.

The Certificate of Completion and Possession contained at Tab 2 of Exhibit Number 3 was signed by the Applicants and Savic Homes on January 19, 2001 and lists grading and sodding as unfinished work.

The Applicants first written complaint was delivered to Savic Homes on September 29, 2001 and identifies 12 items of complaint. The Applicants corresponded to the Program on October 25, 2001 and by this correspondence identifies 15 items of complaint. These letters are contained at Tabs 3 and 4 of Exhibit Number 6.

The conciliation took place on March 18, 2002 at which time 18 items of complaint were addressed. In the Conciliation and Inspection Report the Program found 2 items to be warranted.

THE FACTS

Predrag Pasic testified on behalf of the Applicants and relied upon the report of Abode Inspection Services dated January 15, 2003.

The Program called one witness, Doug Irvine, a warranty representative.

Blagoje Savic testified on behalf of Savic Homes, the added party.

The Applicants withdrew conciliation item number 12 and therefore 17 items remained to be determined. These items can be categorized in the following manner:

1) Location of the Shut Off Valve for Exterior Faucet

The Applicants allege that the installation of the shut off valve in the basement ceiling is improper and should be relocated for easier access. The Program and Savic Homes deny any defect.

2) Missing Exterior Faucet

The Applicants claim that while Savic Homes installed two faucets on the exterior of the home, the building contract required and Savic Homes failed to install one of these two exterior faucets in the garage. The Program and Savic Homes deny any defect.

3) Misplaced Electrical Panel

The Applicants claim that the electrical panel should have been installed in the garage rather than in the basement. The Program and Savic Homes deny any defect.

4) Misplaced Light Switch

The Applicants claim that the light switch in the main floor bathroom should be located on the opposite wall. The Program and Savic Homes deny any defect.

5) Unfinished Laundry Room

The Applicants claim that the laundry room has not been finished properly. The Program and Savic Homes deny any defect.

6) Missing Basement Windows

The Applicants claim that the plans require the placement of windows on each side of the home on the basement level and that these two windows have not been installed. The Program and Savic Homes deny any defect.

7) Improper Installation of Brick

The Applicants claim that the method of installation of brick at the rear of the home is improper. The Program warranted this item to the extent that it required confirmation from Savic Homes that the brick installation had been approved on the construction permit and that all code requirements had been met.

8) Installation of Siding

The Applicants claim that the siding on the home has not been installed properly. The Program and Savic Homes deny any defect.

9) Installation of Fascia & Downspouts

The Applicants claim that the fascia and a downspout have been installed improperly. The Program and Savic Homes deny any defect.

10) Squeaky Floors

The Applicants claim that the floors throughout the home squeak. The Program and Savic Homes deny any defect.

11) Cold Bedroom above Porch

The Applicants claim that the bedroom located above the porch is cold. The Program noted limited airflow and warranted this item to the extent that Savic Homes was required to investigate and determine whether the pipes were installed properly or if there was a blockage in the line.

12) Bulkhead in Den

The Applicants claim that the construction of a bulkhead in the den is improper. The Program and Savic Homes deny any defect in materials or workmanship.

13) Placement of Exterior Dryer, Furnace & Water Heater Vents

The Applicants claim that the placement of the exterior vents for the dryer, furnace and water heater are improper. The Program and Savic Homes deny any defects.

14) Installation of Gas Line

The Applicants claim that the location of the gas line on the side of the home is improper. The Program and Savic Homes deny any defects.

15) Cracks and Nail Pops

Although described in the conciliation report as nail pops & cracks, the Applicants ask that Savic Homes return and repaint areas of the home that have been touched up. The Program and Savic Homes state that repainting is not a warranted item.

16) Wood Post on Porch

The Applicants claim that a wooden post installed on the front porch is defective. The Program and Savic Homes deny any defect in material.

17) Height of Home

There is a dispute as to the nature of this complaint. The Applicants contend that the exterior height and length of the home do not correspond to the building plans. The Program contends that this complaint relates to the level of the front entry door and sill area.

THE EVIDENCE

Predrag Pasic

Predrag Pasic gave evidence on behalf of the Applicants. In addition to his own testimony, Predrag Pasic relies upon the report of Abode Inspection Services dated January 15, 2003, authored by Roy Chan, P.Eng., CET, RHI. This report was entered and marked as Exhibit Number 5.

Mr. Pasic testified that in September 2000 he viewed some model homes in this development by another builder, Mr. Stencek, who advised that he was soldout and referred him to Savic Homes who could build him a similar home.

Following negotiations, the parties signed a building contract for the construction of the subject home. This contract was entered and marked as Exhibit Number 3 and the plans for the construction of the home were entered and marked as Exhibit Number 4.

Mr. Pasic testified that he felt that he was protected by the building contract, that he wanted the home to be constructed strictly in accordance with the building plans and he felt that paragraph 9 of the building contract provided him with this protection. Paragraph 9 states inter-alia that "the contractor agrees to build the said dwelling house in strict accordance with the detailed plans and specifications referred to herein in a proper and workmanlike manner".

Mr. Pasic's testimony continued by going through each individual item of complaint, providing photographs of the complaints and his comments thereto. The photographs were entered and marked collectively as Exhibit Number 7.

Complaint item number 1, Mr. Pasic testified that the placement of the shut off valve for the exterior faucet was improperly placed in the basement ceiling and that if he finishes this area he will lose access to the shut off valve. In addition to this item, Mr. Pasic testified that he was also complaining that Savic Homes substituted plastic pipe lines when the contract provided for copper. In Mr. Pasic's view, this substituton was not proper.

Complaint item number 2, Mr. Pasic testified that the building contract provided for the placement of two exterior faucets one of which was to be in the garage and that whereas Savic Homes installed two exterior faucets, it failed to install a faucet in the garage. Mr. Pasic also stated that he could not hook up a hose to the exterior faucets.

Complaint item number 3, Mr. Pasic testified that Savic Homes improperly installed the electrical panel in an area of the basement where he was planning to construct a bathroom and that in all other model homes the electrical panel was installed in the garage.

Complaint item number 4, Mr. Pasic testified that the light switch in the main floor bathroom was improperly installed behind the door and that he has to close the door before being able to turn the light switch on.

Complaint item number 5, Mr. Pasic testified that Savic Homes did not finish the basement laundry room.

Complaint item number 6, Mr. Pasic testified that while the building plans initially required two windows at the rear of the home, during negotiations with Savic Homes it was agreed that the two rear windows would be relocated to each side of the home. Mr. Pasic stated that the two windows were not installed on the sides of the home and that for the purpose of this hearing, he wanted a window on the left side of the home.

Complaint item number 7, Mr. Pasic testified that the use of angle irons as a method of brick installation at the rear of the home was improper. In support of this contention, Mr. Pasic refers to page 3 of the Abode Inspection report which states "this add-on brick siding violates OBC 9.20.12.3(1) which states that the Masonry veneer resting on a bearing support shall not project more than 25mm (1") beyond the supporting base. The report continues by stating that there is the possibility that the entire wall may collapse in the event that the angle irons rust or the top of the foundation wall spalls, that this may run with the possibility that the entire wall may collapse and recommends that the brick siding be examined and approved by a structural engineer.

The Abode report also notes that there are no weepholes at the bottom of the brick and that there is insufficient air space behind the veneer.

Complaint item number 8, Mr. Pasic testified that when the siding at the side of the home was reinstalled it was not attached properly and is loose.

Complaint item number 9, Mr. Pasic testified that the installation of the downpipe at the side of the home is improper as it is not parallel to the home.

Complaint item number 10, Mr. Pasic testified that the floor is squeaky and unstable throughout the home and referred to page 5 and 6 of the Abode Inspection Services report which states that the floors squeak and shake, there were no joist hangers and screws intended to attach to the sub floor missed their targets.

Complaint item number 11, Mr. Pasic testified that although additional insulation was installed, the bedroom above the porch remains cold.

Complaint item number 12, was withdrawn.

Complaint item number 13, Mr. Pasic testified that the installation of a bulkhead in the den was not in the plans and that Savic Homes relocated a closet within the den without his approval.

Complaint item number 14, Mr. Pasic is critical of the placement of the exterior vents for the dryer, furnace and water heater and relies on page 7 of the Abode Inspection Services report which found that these vents are clustered and therefore

not in the perfect location. The report also noted the possibility of excessive condensation which may in the future result in mold and a health and safety issue.

Complaint item number 15, Mr. Pasic testified that the installation of the gas line, running parallel to the home was unsightly.

Complaint item number 16, Mr. Pasic testified that Savic Homes returned to the home to repair nail pops and cracks and that during this time patched 93 different areas of the home. Mr. Pasic stated that in view of the numerous patches, the home now needs to be repainted and that Savic Homes refuses to repaint it.

Complaint item number 17, Mr. Pasic testified that there is a blemish in a wooden post on his porch and asks that it be replaced.

Complaint item number 18, Mr. Pasic testified that his home was not constructed in accordance with the building plans and specifically, that the home is shorter than his neighbors in height as well as in length. Mr. Pasic relies upon page 4 and 5 of the Abode Inspection Services report which found that the home was not built in accordance with the plans and states "we found that on the exterior the right side and over the garage of the house to be short 1'3" while the overall height was short by 2 feet".

Abode Inspection Services found further that "the rear foundation walls were erected to a height of 8' rather than 5'2" as designed in the house plans".

At the conclusion of this section, the report states "apparently, these construction changes are major breaches to the building contract of both Articles 9 and 10. Moreover, this is a violation of Ontario Building Code (OBC) Table 9.5.3.1 & 9.15.1.2(3).

On cross-examination by Mr. Knapp, Mr. Pasic essentially repeated the evidence that he gave in chief. Mr. Pasic did acknowledge that he was unaware of any work orders, or orders to comply with respect to the construction of the home, that the plumbing and electrical systems and drainage pipes were operating properly and that the complaint items for installation of the bulkhead in the den, location of vents and location of the gas line related to issues of aesthetics.

Mr. Knapp's, cross-examination concluded with Mr. Pasic stating that he was relying on the report of Abode Inspection Services for the issues contained therein.

On cross-examination by Mr. Savic, Mr. Pasic acknowledged that the building contract was conditional upon Savic Homes being able to purchase the required building lot.

Mr. Pasic testified that although Mr. Savic offered to cancel the contract and return his money, he wanted interest on his deposit, did not take the offer seriously and expected Mr. Savic to fulfill his obligations.

Mr. Savic's cross-examination concluded with Mr. Pasic acknowledging Mr. Savic's attempt to send in his plumbers and drywall contractors to perform remedial work. Mr. Pasic acknowledged that drywall repairs were done, but to the wrong area and that he did not advise Mr. Savic of this.

When questioned by the Tribunal as to what remedy he is requesting, Mr. Pasic testified that he wished for Savic Homes to fix what can be fixed and payment of the sum of 25% of the original cost of the home.

On re-examination by Mr. Knapp arising from the question by the Tribunal, Mr. Pasic testified that if he wanted to sell his home back to Savic Homes it would be for more than he paid and stated that the current assessed value of the home was \$242,000.00.

Blagoje Savic

Mr. Savic's testimony followed each item of complaint:

Complaint item number 1, Mr. Savic testified that it is his practice to install the shut off valve in the ceiling and that the substitution of plastic for copper was more expensive and is used in approximately 95% of new home construction today and that the plumbing passed all inspections.

Complaint item number 2, Mr. Savic testified that the contract called for two exterior faucets and that he did not care where they were placed. He acknowledged that the issue of one faucet in the garage was raised by Mr. Pasic, however this was raised after Mr. Pasic moved into the house and had it been raised during construction, he would have been able to change the location of one faucet. Mr. Savic testified that the faucets work, that he sent a plumber to check the system and that no problems were found.

Complaint item number 3, Mr. Savic testified that placement of the electrical panel in the garage was not discussed, that it is not uncommon for it to be placed in the basement and that the installation of the panel was inspected and approved.

Complaint item number 4, Mr. Savic testified that the placement of the light switch in the main floor bathroom was the only wall that it could be placed and that it was inspected and approved.

Complaint item number 5, Mr. Savic testified that according to the plans this was to be an unfinished area and that his installation of drywall in the basement was done as a courtesy to Mr. Pasic.

Complaint item number 6, Mr. Savic testified that he and Mr. Pasic agreed that due to the installation of a rear deck, the two windows in the rear would be deleted from the building plans.

Complaint item number 7, Mr. Savic acknowledged that the Program warranted this item and in accordance with the requirement of the Program he obtained an engineer's report from Courtland Engineering Consultants Inc. This report was entered and marked as Exhibit Number 8.

Complaint item number 8, Mr. Savic denies that the flashing is loose.

Complaint item number 10, Mr. Savic testified that there will be some squeaks in the floor and that when he attended at the home, Mr. Pasic would jump on the floor in order for it to squeak. He testified that he uses the best lumber and that the floor was inspected and approved.

Complaint item number 11, Mr. Savic testified that during construction he explained to Mr. Pasic that the very nature of this room, above a non-heated area, would result in it being cooler. He stated that he sent his trades back and they increased the insulation to R-31.

Complaint item number 12, Mr. Savic testified that it is standard practice to install a bulkhead and that any complaint is cosmetic. As it relates to the issue of the closet location, Mr. Savic testified that the first he heard of this complaint was during the hearing.

Complaint item number 13, Mr. Savic testified that the building contract does not specify placement of the exterior vents and that all inspections were completed and approved.

Complaint item number 14, Mr. Savic denied any defect with the placement and installation of the gas line and stated that its regulated by the City.

Complaint item number 15, Mr. Savic testified that there is no warranty for paint.

Complaint item number 16, Mr. Savic testified that the wood post may have a blemish but that it is acceptable and not defective.

Complaint item number 17, Mr. Savic denied that there was any discrepancy with the height or dimensions of the home. Mr. Savic testified that the exterior

dimensions will depend upon grading and how the lot was set out by the surveyor. Mr. Savic denied that this issue was previously raised by Mr. Pasic.

On cross-examination by Mr. Pasic, Mr. Savic testified that he was approached by Mr. Pasic and told by Mr. Pasic that he wanted to save money and that he advised Mr. Pasic that he did not own the lot. Mr. Savic stated that he constructed the home next door after he completed the construction of Mr. Pasic's home and that the electrical panel was located in the garage as a special order. Mr. Savic testified that he had no recollection that he was to install two additional windows.

Mr. Savic further testified that the work contemplated by the report of Courtland Engineering Consultants Inc. was performed by his trades but that he did not personally inspect and that he does not have a letter confirming that the work was done. Mr. Savic stated that the work was inspected in September or October, 2002 by Tom Hushka.

As it relates to the method of brick installation, Mr. Savic testified that this is an acceptable method of installation and that the original plans for the home do not provide for the installation of brick at the rear of the home.

Mr. Savic stated that the exterior dimensions of the home when compared to the home next door are basically the same and that he did not use cheaper materials in Mr. Pasic's home.

As it relates to the downspout in complaint item number 9, Mr. Savic testified that although there is no defect, it is possible to repair the elbow and make it more parallel to the home.

Mr. Savic testified that he sent his heating contractor into Mr. Pasic's home to investigate the complaint of a cold room over the porch, that the trades checked the heating line and found no problems. Mr. Savic relied upon his correspondence to the Program located at Tab 24 of Exhibit Number 6 in support of the work done. Mr. Savic stated that if the problem persists, an extra fan could be installed to increase the air flow into this room.

Mr. Savic denied any defect in the installation and placement of the exterior vents and gas line, denied that it was his responsibility to repaint the home after his painters repaired cracks and nail pops and maintained that the wooden post used on Mr. Pasic's home was the same quality and from the same supplier that he uses for more expensive homes.

On re-examination by Mr. Knapp, Mr. Savic testified that the foundation was constructed in accordance with the building plans, that joist hangers were not required, that the framing was inspected and approved and that any squeaking would be as a result of normal shrinkage of material.

Doug Irvine

The Program's only witness was Doug Irvine, an employee of the Program since 1979 and a warranty representative for 10 years.

Mr. Irvine testified that he has inspected over one thousand homes and generally conducts between 180-300 home inspections per year. Mr. Irvine testified that on March 18, 2002 he conducted a conciliation inspection and issued his report on March 26, 2002. Mr. Pasic was not satisfied with the report and requested that another inspector attend at his property. The Program decided that it would not send a second inspector due to the cost and issued its decision letter based upon the conciliation report.

Mr. Irvine then proceeded to go through each item of complaint.

Complaint item number 1, Mr. Irvine testified that while Mr. Pasic wanted a finished area in the basement this was not in the contract, was an issue of design and therefore not covered. Mr. Irvine disputed Mr. Pasic's allegation that the installation of the shut off valve for the exterior faucet in the ceiling was improper and testified that it is the standard practice to install the valve in the ceiling.

As it relates to the substitution of plastic for copper feeding lines, Mr. Irvine testified that he did not recall this issue being raised and that the use of plastic is superior.

Complaint item number 2, Mr. Irvine testified that the contract requires two exterior faucets, was not specific as to location and that there are two working exterior faucets in the home.

Complaint item number 3, Mr. Irvine testified that unless the plans are specific, the location of the electrical panel is at the discretion of the builder. Mr. Irvine continued by testifying that it is not the norm to install the electrical panel in the garage and that the installation of the electrical panel in the basement is not a violation of the Ontario Building Code and that all inspections were completed and approved.

Complaint item number 4, Mr. Irvine testified that there was not a defect in the location of the light switch in the main floor bathroom and that if it was an issue it would have been caught during the electrical inspection.

Complaint item number 5, Mr. Irvine testified that this was an unfinished basement area according to the plans and therefore no defect existed.

Complaint item number 6, Mr. Irvine testified that although the two exterior windows were crossed out on the contract, the contract itself does not specify that the

windows from the rear would be placed on the side. On that basis, no defect existed and Mr. Pasic received what was contracted for.

Complaint item number 7, Mr. Irvine testified that the main issue was the use of angle irons as the method of installation of the brick at the rear of the home. Mr. Irvine stated that he warranted this item to the extent that he wanted to ensure that the method of installation was approved. Mr. Irvine stated that he accepted the findings contained in the Courtland Engineering report but has not followed up the findings and recommendations in the report.

Complaint item number 8, Mr. Irvine denied that there was any defect in the installation of flashing over the brick, however some openings may require caulking.

Complaint item number 9, Mr. Irvine testified that the fact that the exterior downpipe is not parallel to the home is a design issue, is functional and therefore not covered.

Complaint item number 10, Mr. Irvine testified that a degree of squeaking is normal due to the shrinkage of materials and stated that the use of joist hangers were not required. Mr. Irvine testified that the Program offered to pay for the cost of lifting the carpets in order to determine whether there was any defect in the installation of the floor but that if no defects were found Mr. Pasic would be responsible for the costs of re-installing the carpet.

Complaint item number 11, Mr. Irvine testified that all unheated areas over a garage or porch will be subject to temperature variations. Mr. Irvine observed a variation in heat temperature and a reduced area of air flow. He warranted this item of complaint to ensure proper air flow and insulation and asked Savic Homes to remedy the problem. Mr. Irvine then referred to Tab 24 of Exhibit Number 6, which is a letter received from Savic Homes dated July 2, 2002 which states that Corestar Mechanical balanced the heating system, found sufficient insulation and that nothing was wrong.

Mr. Irvine testified further that he has not spoken to nor seen the report of Corestar Mechanical and that in general, these items are design only, not warranted and that an owner could install baseboard heaters.

Complaint item number 12, Mr. Irvine testified that he found no defect in the installation of the bulkhead and that the re-location of the closet was not raised at the conciliation.

Complaint item number 13, Mr. Irvine testified that the placement of the exterior vents, other than for gas, is up to the builder and that there are no defects in this regard.

Complaint item number 14, Mr. Irvine testified that there is no defect in the installation of the gas line.

Complaint item number 15, Mr. Irvine testified that he does not recall noticing excessive nail pops and that these are excluded from coverage as normal shrinkage of materials.

Complaint item number 16, Mr. Irvine testified that the porch post has a slight blemish in the wood but that it is cosmetic, not defective and therefore not warranted.

Complaint item number 17, Mr. Irvine testified that the only item discussed at the conciliation was that the front door to the home should have had a sill. Mr. Irvine testified that the door installation was fine and that any problems experienced by Mr. Pasic were as a result of him having installed ceramic tiles on the porch thereby raising the height.

Mr. Irvine specifically denied that the issue of the height of the foundation, height of brick and site dimensions were raised during the conciliation and that he heard of these issues for the first time at this hearing.

On cross examination by Mr. Pasic, Mr. Irvine maintained his previous testimony.

Submissions

The Applicants submit that Savic Homes has failed to construct the home strictly in accordance with the building contract and the building plans. They ask that Savic Homes fix what can be fixed and provide them with an amount equal to 25% of the cost of the home as compensation arising from variations from the building plans.

The Applicants also ask that they be reimbursed with the sum of \$1,230.00 on account of expenses that they have incurred for this hearing. These expenses consist of \$100.00 filing fee, \$500.00 for the Abode Inspection Services report, \$450.00 for 3 days of lost wages, \$60.00 for gas, \$60.00 for photocopies and \$60.00 for parking.

As it relates to the Applicants claim for costs, it was the submission of the Program that the Tribunal should only award costs in the limited circumstances referred to in Rule 14 of the Rules of the Tribunal and that these factors have not been met.

ISSUES:

There are two issues to be determined.

- 1) Are the items of complaint warranted and if so, what is the appropriate remedy.
- 2) Are the Applicants entitled to costs.

THE LAW:

The relevant sections of the Act are as follows:

13. (1) Every vendor of a home warrants to the owner,:
 - (a) that the home,
 - (i) is constructed in a workmanlike manner and is free from defects in material
 - (ii) is fit for habitation, and
 - (iii) is constructed in accordance with the Ontario Building Code
 - (c) such other warranties as are prescribed by the regulations.
- (2) A warranty under subsection (1) does not apply in respect of;
 - (c) normal wear and tear;
 - (d) normal shrinkage of materials caused by drying after construction;
 - (g) alterations, deletions or additions made by the owner.

Rule 14 of the Rules of the Tribunal,

14.1 Where a party believes that another party in proceedings before the Tribunal has acted unreasonably, frivolously, vexatiously, or in bad faith, that party may make a request to the Tribunal for costs, which request shall be made with notice to all other parties to the proceeding and prior to the release by the Tribunal of its final order in the proceedings.

THE APPLICATION OF THE LAW TO THE FACTS & DECISION:

With respect to the 17 issues of complaint the onus is on the Applicants to demonstrate that the defects complained of are warranted as a result of defects in material and/or workmanship and in this regard the following applies:

(1) Location of Shut Off Valve for Exterior Faucet

The Applicants allege that the shut off valve for the exterior faucet is improperly installed in the basement ceiling. Mr. Irvine and Mr. Savic testified that this is standard practice and that the installation was inspected and approved.

The Tribunal finds that the shut off valve functions as it should, the installation of this valve in the basement ceiling is proper and therefore dismisses the Applicants claim with regard to this item of complaint.

(2) Missing Exterior Faucet

The Applicants state that the building contract required the installation of two exterior faucets one of which was to be installed in the garage. Mr. Irvine and Mr. Savic state that the contract requires the installation of two exterior faucets and that is what was provided. Mr. Savic testified that Mr. Pasic raised this issue after the garage had been completed and that as Mr. Pasic had complete access to the home during its construction, had he raised this issue prior to the installation of the drywall in the garage he would have gladly accommodated Mr. Pasic's request.

The Tribunal notes that Schedule "A" of the building contract states "two exterior faucets; one in the garage one at outside of the house; at back of house". Whereas it was submitted that this paragraph is ambiguous and refers to three exterior faucets, it is the finding of this Tribunal that Schedule "A" to the contract is clear and provides for the installation of two exterior faucets one of which is to be located in the garage.

The Tribunal therefore finds that the failure to install a faucet in the garage is a defect and is warranted. The Tribunal hereby Orders Savic Homes to install a faucet in the garage within 60 days hereof or in the alternative, pay the sum of \$350.00 to the Applicants within the same time frame.

(3) Misplaced Electrical Panel

The Applicants alledge that the electrical panel should have been installed in the garage rather than in the basement and rely upon the location of the electrical panel in the garage in the house next door, also built by Savic Homes.

Mr. Irvine and Mr. Savic stated that it is standard practice for the electrical panel to be installed in the basement and the contract did not specify where it was to be installed. The Tribunal accepts the evidence of Mr. Irvine and Mr. Savic with respect to this complaint, finds that there is no defect in materials or workmanship and dismisses the Applicants' claim with regard to this item of complaint.

(4) Misplaced Light Switch

The Applicants allege a defect in the installation of the light switch for the main floor bathroom as they have to close the door before being able to turn the light on.

Mr. Irvine and Mr. Savic state that the light switch is operable, passed the electrical inspection and deny any defect. The Tribunal accepts the evidence of Mr. Irvine and Mr. Savic on this item of complaint, finds no defect in workmanship or material and dismisses the Applicants' claim with regard to this item of complaint.

(5) Unfinished Laundry Room

The Applicants claim that Savic Homes failed to properly finish the basement laundry room area.

Mr. Savic and Mr. Irvine testified that according to the contract this was an unfinished area and therefore no defect exists.

The Tribunal notes that the building contract does not provide for a finished area in the basement laundry room and therefore dismisses the Applicants' claim with regard to this item of complaint.

(6) Missing Basement Windows

The Applicants claim that when they deleted two windows from the rear of the home these were to be relocated to both sides of the home. In support of this claim they refer to the building plans which were entered and marked as Exhibit Number 4. Mr. Pasic stated however, that for the purpose of this hearing he was content that only one window be installed.

Mr. Savic testified that the rear windows were deleted to accommodate a deck and that these windows were not to be added to the left and right sides of the home. In Mr. Irvine's view, the plans did not require additional windows on each side of the home.

The Tribunal notes that the face of the building plans reflect the deletion of two windows at the rear of the property and the insertion of windows on each side of the home. These side windows were drawn by hand on the building plans and initialed by the parties. The Tribunal finds that the failure to install the two windows on each side of the home is a defect.

The Tribunal notes that the Applicants' list of Homeowner Complaints in the Conciliation Request Form refers to one basement window and this is consistent with Mr. Pasic's testimony that he is only asking for one basement window.

On that basis, the Tribunal Orders Savic Homes to install one basement window on the left side of the home within 60 days hereof, or in the alternative, pay to the Applicants the sum of \$350.00 within the same time frame.

(7) Improper Installation of Brick

The Applicants claim that the use of angle irons as a method of brick installation is improper. Mr. Pasic relies upon the report of Abode Inspection Services which is critical of the installation and at page 4 recommends that the "rear brick siding be examined and approved by a structural engineer for the integrity of the construction".

The Program warranted this item and required evidence from Savic Homes that the method of installation has been approved by an engineer. Mr Savic states that this item has been rectified and provided the Tribunal with a report from Courtland Engineering Consultants Inc., entered and marked as Exhibit Number 8, in support of this position.

The Tribunal notes that on page two of the report under the heading Comments & Recommendation, Larry MacArthur, P.Eng. writes that the "steel angles are considered to be heavy enough to support the brick ledge" and continues by recommending that "proper attention must be made to address rain screen effects as there are no weep holes and no air space behind the brick. All seams on the cap flashings must be sealed with caulking to prevent water penetration and poorly fitted cap flashings replaced to eliminate gaps at seam locations. A penetrating silane sealer should be capable of forming a water repelling (hydrophobic) layer on the surface of the masonry".

The Tribunal notes that whereas the report of Courtland Engineering Consultants Inc. was delivered to the Program in response to a warranted item, the Program did not follow up with respect to this report. Specifically, the Program has not conducted a further inspection nor confirmed that the remedial measures contained in the report and referred to in the above paragraph have been done.

The Tribunal accepts the findings of Courtland Engineering Consultants Inc. and Orders the Program to confirm within 60 days hereof that the remedial measures referred to in the report and as hereinbefore set out have been completed in a good and workmanlike manner. In the event that the remedial measures have not been undertaken, the Program shall ensure that the same are completed within a further 60 days.

(8) Installation of Siding

The Applicants claim that the installation of siding is loose and is in need of repair.

Mr. Savic denies any defect and Mr. Irvine stated that some openings may require caulking.

The Tribunal hereby Orders the Program to reinspect this item of complaint and that Savic Homes effect any necessary repairs to the siding that the Program finds warranted within 60 days hereof.

(9) Installation of Fascia & Downspouts

The Applicants claim that the installation of the downspout on the side of home is improper as it is not parallel to the home. Mr. Irvine and Mr. Savic state that the downspout is functional and deny any defect.

The Tribunal finds that the downspout is functional, that this complaint is cosmetic in nature and therefore not warranted. The Tribunal dismisses the Applicants' claim in regard to this item of complaint.

(10) Squeaky Floors

The Applicants claim that the floors in the home squeak excessively. Whereas Mr. Irvine and Mr. Savic denied any excess squeaking, Mr. Irvine offered to pay the costs of lifting the carpet in the home in order to determine whether there are any defects in the installation of the floor. Mr. Irvine qualified this offer to the extent that in the event that no defects in the floor were found, it would be the responsibility of Mr. Pasic to pay the costs of reinstalling the carpet.

The Tribunal heard conflicting testimony about the extent of the floor squeaking however, without lifting the carpet, the Program is unable to fully investigate and determine whether there were any defects in the installation of the floor.

The Tribunal is of the view that the offer of the Program with regard to this item of complaint should have been unconditional and therefore Orders the Program to reinspect this item of complaint and pay for all costs necessary to conduct the reinspection of this item of complaint within 60 days hereof.

(11) Cold Room Above Porch

The Applicants claim that the bedroom above the porch is cold. Mr. Irvine noted limited amounts of air flow and that the flow was not overly warm. He warranted this item and directed Savic Homes to investigate and determine if the pipes were properly installed or if there is a blockage in the line. Mr. Irvine noted that the owner may be required to balance the system.

Mr. Irvine testified that Mr. Savic advised him that he sent Corestar Mechanical to the home which company balanced the system and advised him that all was fine.

Mr. Irvine did not receive anything in writing from Corestar Mechanical, nor did he speak with Corestar mechanical or follow up to determine whether or not the work remedied the problem.

On the basis of the foregoing the Tribunal hereby Orders Savic Homes to provide the Program with correspondence from Corestar Mechanical outlining what work was performed and its findings. Following receipt of the report, the Program shall reinspect the home with respect to this item of complaint. Delivery of the necessary correspondence and the follow up inspection shall be completed within 60 days hereof.

(12) Bulkhead in Den

The Applicants claim that the installation of a bulkhead in the den is a defect. The Applicants also claim that the closet in the den was relocated without their approval. Mr. Irvine and Mr. Savic testified that the installation of the bulkhead is a design issue and not warranted and that the issue of relocating the closet was not raised previously.

The Tribunal finds that the installation of a bulkhead in the den is an issue of design, is not warranted and therefore dismisses the Applicants' claim in regard to this item complaint.

As it relates to relocation of the closet in the den, this issue was not contained in the Applicants' correspondence nor addressed at the conciliation and is therefore not properly before this Tribunal.

(13) Placement of Exterior Dryer, Furnace & Water Heater Vents

The Applicants claim that the placement of these exterior vents in one cluster is improper. Mr. Irvine and Mr. Savic testified that the vents are functional and that no defect exists in their installation.

The Tribunal finds that the vents are functioning as required, that there are no defects in workmanship and therefore upholds the decision of the Program with regard to this item of complaint.

(14) Installation of Gas Line

The Applicants claim that the location of the gas line running along the side of the home is improper. Mr. Irvine and Mr. Savic testified that Mr. Pasic's complaint is cosmetic in nature and deny any defect.

The Tribunal finds that there is no defect in the installation of the gas line and upholds the decision of the Program with regard to this item of complaint.

(15) Cracks, Nail Pops & Paint

The Applicants state that Savic Homes attended at the home and repaired 93 nail pops and cracks and that the patched areas are so extensive that the entire home needs to be repainted.

Mr. Irvine and Mr. Savic testified that the Act does not provide a warranty for paint and that the repair of nail pops and cracks are excluded by virtue of the normal shrinkage of materials exclusion contained in the Act.

The Tribunal was not provided with a report from a painting contractor nor with sufficient evidence that would enable it to rule that the cracks and nail pops were beyond those arising through the normal shrinkage and drying of material. The Tribunal therefore dismisses the Applicants claim with regard to this item of complaint.

(16) Wood Post on Porch

The Applicants claim that a wood post on the porch is defective. Mr. Irvine and Mr. Savic acknowledge that the wooden post has a slight blemish in the wood but is not defective.

The Tribunal was not provided with sufficient evidence in order to determine whether the wooden post is in fact defective. The post functions as required and the Tribunal dismisses the Applicants claim with regard to this item of complaint.

(17) Height of Home

This is a highly contentious item of complaint between the parties. The Applicants claim that the exterior dimensions of the home are shorter than what were stated in the building plans. In support of this complaint, the Applicants rely upon the report of Abode Inspection Services which details external measurements of the home and compares these measurements to what is stated on the building plans.

Mr. Irvine was adamant that this was not the nature of the complaint and that at the conciliation the only issue raised by Mr. Pasic was with respect to the height of the front door sill. Mr. Savic concurs with Mr. Irvine.

Mr. Pasic wrote to the Program on October 21, 2001 and January 17, 2002 respectively and on February 20, 2002 provided the Program with a Conciliation Request Form. These documents are contained at Tabs 5, 9 and 13 of Exhibit Number 6.

The Tribunal notes that the letters of October 21, 2001 and January 17, 2002 make no reference to the height or dimensions of the home. The Tribunal notes that the only written reference to height is found at item 18 of the Homeowner Complaints attached to the Conciliation Request Form. This item states "height position out home, Nov 29, 01 short obo two F. front of building". The Tribunal is unable to determine what is meant in the previous sentence.

The Tribunal finds that regardless of whether it accepts the Applicants evidence of the nature of this complaint or that of the Program, the Applicants complaint with respect to this item will be dismissed for the following reasons.

If Mr. Irvine's view of the nature of this complaint is accepted, there is no defect as it relates to the installation of the front door sill as any problems experienced by the Applicants are as a result of their installation of ceramic tiles on the porch. The work done by the Applicants falls within the exclusion contained in Section 13 (2) (g) of the Act and therefore this item of complaint will be dismissed.

If the Tribunal accepts Mr. Pasic's evidence that the nature of this complaint relates to the dimensions of the home, this item of complaint will fail for the following reasons:

- a) The Applicants did not conduct any interior measurements or provide the Tribunal with any evidence that the interior dimensions or square footage of the home are incorrect;
- b) The Applicants did not provide the Tribunal with any evidence that the value of their home has been reduced. To the contrary, according to the evidence of Mr. Pasic, the value of the home has increased by \$62,000.00;
- c) The Applicants ask that they receive an abatement of 25% of the value of the home but have not provided the Tribunal with any acceptable and recognized method, formula or legal precedent by which the Tribunal could consider and quantify monetary compensation for this item of complaint; and
- d) The Applicants have not established any damages for this item of complaint.

On the basis of the foregoing, the Tribunal dismisses the Applicants' claim with regard to this item of complaint.

As it relates to the items of complaint for which the Tribunal has ordered reinspection, the Tribunal does hereby Order that the Program deliver to the Applicants a supplementary decision letter within 30 days of completion of all reinspections.

As it relates to the Applicants' claim for costs, the Tribunal heard no evidence that the Program or Savic Homes acted unreasonably, frivolously, vexatiously or in bad faith and therefore dismisses the Applicants claim for costs.

LICENCE APPEAL TRIBUNAL

Michael H. Turk, Vice Chair

RELEASED: March 18, 2003

ROSELLA MORELLI

APPEAL FROM A DECISION OF THE CORPORATION DESIGNATED FOR
THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

ROSARIO DEL RICCIO, Agent, representing the Applicant
MARCUS KNAPP, Counsel, representing the Ontario New Home Warranty
Program
PAUL STARKMAN, Counsel, representing the Added Party, Parastar
Developments Inc.

DATES OF
HEARING: March 13 and 14, 2003 Toronto

ORDER

WHEREAS the Applicant appealed to the Licence Appeal Tribunal from a written Decision of the Respondent dated November 4, 2002;

AND WHEREAS the hearing before this Tribunal of the Applicant's appeal of the Decision commenced before the Tribunal on March 13, 2003 and continued on March 14, 2003, but was not completed;

AND WHEREAS the Parties agreed that the hearing be adjourned to 9:30 a.m. on May 5, 2003;

NOW THEREFORE, this Tribunal orders that:

1. The hearing of this matter shall, by consent of the Parties, be adjourned to 9:30 a.m. on Monday, May 5, 2003 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: March 17, 2003

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
ANDREA KIELTY

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: December 20, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

ANDREA KIELTY

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Andrea Kielty, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: March 19, 2003

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
789 Don Mills Road, Suite 800
Toronto, Ontario M3C 1T5

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West
12th Floor
Toronto, ON M4V 1K6

FROM: Andrea Kielty
983 Bonnieview Avenue
Burlington, ON L7T 1T6

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereinafter the "Act") the parties to the proceeding, Andrea Kielty (hereinafter referred to as "the Applicant"), and the Registrar, *Motor Vehicle Dealers Act* (hereinafter the "Registrar") waive the requirement of a hearing and hereby consent to an Order of the Licence Appeal Tribunal based on the following terms and conditions:

1. The Applicant warrants that all documents submitted to the Receiver and Trustee in Bankruptcy are complete and accurate in all material respects. The Applicant further acknowledges that the Registrar is relying upon the accuracy of the disclosure provided by the Applicant to the Registrar in entering into these terms and conditions.
2. The Applicant agrees not to be a partner, shareholder, officer, director or sales manager of a motor vehicle dealership.
3. The Applicant agrees that after her registration as a motor vehicle salesperson, she will not reapply for registration as a Motor Vehicle Dealer.
4. The Applicant agrees not to transfer her registration as a motor vehicle salesperson to another dealer without having first obtained the prior written consent of the Registrar.
5. The Applicant agrees that she will not be the final signatory on any sales, lease or purchase contracts on behalf the dealer.
6. The Applicant agrees that she will not be involved with the buying and selling of motor vehicles without the benefit of registration.
7. The Applicant agrees to provide full and accurate disclosure on any applications, documents, statements or other form of communication/information provided to the Registrar or her authorized representatives regardless of previous disclosure.
8. The Applicant acknowledges and understands that her registration will not be used to buy or sell motor vehicles where the Applicant knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
9. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke her registration as a motor vehicle salesperson arising from any matters that have occurred in the past or that may occur in the future related to her financial circumstances and her honesty and integrity.
10. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from her actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.
11. The Applicant agrees and acknowledges that should she breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
12. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.

13. The Applicant hereby withdraws her appeal to the Licence Appeal Tribunal.

14. The Applicant hereby acknowledges that she has obtained or has had the opportunity to obtain independent legal advice with respect to her consent to the terms and conditions set out in this document.

Signed in the City of Toronto this day of March, 2003.

Andrea Kielty (signature)

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Date:

Carl Compton
Registrar

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
MAGDALENA LUQUEZ o/a INTI TOURS TRAVEL AGENCY
as a travel agent

AND IN THE MATTER of the PROPOSAL by the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: January 7, 2003

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

MAGDALENA LUQUEZ o/a INTI TOURS TRAVEL AGENCY

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by Magdalena Luquez o/a Inti Tours Travel Agency, the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: March 19, 2003

LICENCE APPEAL TRIBUNAL

BETWEEN:

LUQUEZ MAGDALENA O/A INTI TOURS TRAVEL AGENCY

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

1. The Registrant was registered as a travel agent (Registration No. 4121166/R) on November 25, 1992.
2. On September 30, 1994, the registrant filed its financial statements for the fiscal year ended June 30, 1994, which were due by September 30, 1994. It appeared that working capital requirements were met as at June 30, 1994.
3. On September 29, 1995, the registrant filed its financial statements for the fiscal year ended June 30, 1995, which were due by September 30, 1995. It appeared that working capital requirements were met as at June 30, 1995.
4. On March 5, 1996, TICO performed a site inspection. The visit concluded that trust accounting was being maintained, and that the registrant did not appear to pose any risk.
5. On October 21, 1996, the registrant filed its financial statements for the fiscal year ended June 30, 1996, which were due by September 30, 1996. It appeared that working capital requirements were met as at June 30, 1996.
6. On November 3, 1997, the registrant filed its financial statements for the fiscal year ended June 30, 1997, which were due by September 30, 1997. It appeared that working capital requirements were met as at June 30, 1997.
7. On October 23, 1998, the registrant filed its financial statements for the year ended June 30, 1998, which were due by September 30, 1998. The financial statements reflected a working capital shortfall of \$1,662.
8. On November 24, 1999, the registrant filed its financial statements for the fiscal year ended June 30, 1999. It appeared that working capital requirements were met as at June 30, 1999.
9. On January 31, 2000, TICO performed a site inspection. The visit concluded that the registrant did not appear to pose any risk.
10. By letter dated May 31, 2000, the registrant was requested by TICO to file its financial statements for June 30, 2000, by September 30, 2000.
11. By letter dated October 16, 2000 the registrant was requested to file its financial statements for June 30, 2000, by October 31, 2000.

12. By letter dated November 2, 2000, the registrant was issued a final due date of November 16, 2000, to file its financial statements for June 30, 2000, failing which a proposal to revoke registration would be issued.
13. On November 16, 2000, TICO received a fax from the registrant's accounting firm asking for an extension to November 30, 2000 to file financial statements to June 30, 2000, for the registrant.
14. By fax dated December 13, 2000, TICO notified the registrant's accounting firm that TICO was unable to guarantee non issuance of further administrative letters to the registrant regarding non receipt of the June 30, 2002 financial statements, and to provide an update on the filing of the financial statements before the end of the day.
15. On December 22, 2000, the registrant filed its financial statements for the fiscal year ended June 30, 2000, which were due by September 30, 2000. It appeared that working capital requirements were met as at June 30, 2000.
16. By letter dated May 22, 2001, the registrant was requested to file its financial statements for the fiscal year ended June 30, 2001 by September 30, 2001.
17. By letter dated October 15, 2001 the registrant was requested to file its June 30, 2001 which were due by September 30, 2001.
18. By fax dated October 31, 2001, the registrant requested an extension of one month to file its financial statements for the fiscal year ended June 30, 2001.
19. By letter dated November 2, 2001, the registrant was advised of its history of late filings, and that TICO was unable to guarantee non issuance of further administrative letters including a proposal to revoke registration.
20. By letter dated November 20, 2001, the registrant was issued a final due date of November 30, 2001 to file its financial statements for June 30, 2001 which were due by September 30, 2001, failing which a proposal to revoke registration would be issued.
21. By e-mail of November 29, 2001, Ms Christina Cucci, the registrant's accounting manager, advised TICO that the owner required additional time to file its financial statements for June 2001.
22. By e-mail reply to Ms Cucci, TICO asked that she have the accountant contact TICO with a submission date for its financial statements for June 30, 2001.
23. On November 30, 2001, the accountant, Mr Chander Sudan telephoned TICO to advise that financial statements for June 30, 2001 would be submitted in two weeks.
24. On November 30, 2001, TICO received a fax from the accounting firm, advising that they required an additional two weeks to December 15, 2001 to file the financial statements for June 30, 2001.
25. On February 7, 2002 the registrant filed its financial statements for the fiscal year ended June 30, 2001, which were due by September 30, 2001. The statements reflected a working capital shortfall of \$4,829.
26. By letter dated February 8, 2002 the registrant was advised of its working capital shortfall of \$4,658, and was given a due date of February 22, 2002 to provide evidence of correction.
27. By e-mail received from Christina Cucci on February 25, 2002, TICO was notified that the owner of the agency was out of the country.
28. By letter dated March 8, 2002 the registrant was issued a reminder to correct its working capital shortfall.
29. By letter dated March 15, 2002, the registrant was given a final due date of April 2, 2002 by TICO to provide evidence of correction of its working capital shortfall, failing which a proposal to revoke registration would be issued.

30. By fax dated March 26, 2002 the registrant's accountant provided additional information which appeared to address the working capital shortfall reflected in its June 2001 financial statements.
31. By letter dated May 23, 2002 the registrant was requested by TICO to file its financial statements for the fiscal year ending June 30, 2002, by September 30, 2002.
32. By letter dated October 3, 2002 the registrant was issued a reminder to file its financial statements for the fiscal year ended June 30, 2002.
33. By letter dated October 23, 2002, the registrant was issued a final due date of October 31, 2002 to file its financial statements for fiscal June 30, 2002, failing which a proposal to revoke registration would be issued.
34. By fax dated November 15, 2002, the registrant requested an additional month to file its financial statements.
35. By letter dated November 15, 2002, the registrant was notified by TICO that its financial statements for June 2002 were six weeks late, and that previous filings of financial statements were consistently late each year. The letter further advised that TICO was unable to guarantee non-issuance of further administrative letters including a proposal to revoke registration.
36. To date there has been no further response and the registrant has failed to file its financial statements for the fiscal year ended June 30, 2002, which were due by September 30, 2002.
37. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsections 6 (4) and (5) of the *Travel Industry Act* directing that:

1. the Registrar refrain from carrying out the Proposal to Revoke Registration dated January 7, 2003;
2. the Registrant's registration is to be subject to the following terms and conditions:
 - (a) The Registrant shall file complete financial statements, including a reconciliation of customer funds and customer obligations, as required by section 24 of the Regulation, for its fiscal year ended June 30, 2002, no later than March 31, 2003;
 - (b) If the above-noted statements reflect a working capital deficiency, the Registrant shall correct any and all working capital deficiencies and provide evidence of its current working capital position by April 30, 2003. At all times thereafter, the Registrant shall maintain the minimum working capital as required by section 25 of the Regulation or such subsequent provision as may be in force from time to time;
 - (c) The Registrant shall file complete financial statements, including a reconciliation of customer funds and customer obligations, as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for its fiscal year ending June 30, 2003, no later than September 30, 2003;
 - (d) The Registrant shall file complete financial statements, including a reconciliation of customer funds and customer obligations, as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time for its fiscal year ending June 30, 2004, no later than September 30, 2004; and
 - (e) If the above-noted financial statements as filed are incomplete, the Registrant will have 14 days from the date of notice of the deficiency to fully and completely address the deficiency and produce proof of such correction to the Registrar. Notice of the deficiency, if any, shall be sent by registered mail to the Registrant.

3. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) to (e) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.
4. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by its signature below that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED at Mississauga this ____ day of March, 2003

Ms Magdalena Luquez
Inti Tours Travel Agency
I have authority to bind the company

Mr. Michael Pepper
Registrar, *Travel Industry Act*

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
COTEY C. LEUNG

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: December 20, 2002

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

COTEY C. LEUNG

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Cotey C. Leung, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: March 18, 2003

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
789 Don Mills Road, Suite 800
Toronto, ON M3C 1T5

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Cotey Leung
902 – 10 Kenneth Avenue
North York, On M2N 6K6

In accordance with section 4.1 of the *Statutory Powers Procedure Act* and pursuant to subsection 5(2) of the *Motor Vehicle Dealers Act*, Cotey Lung (hereinafter referred to as "the Applicant") and the Registrar, *Motor Vehicle Dealers Act*, (hereinafter referred to as "the Registrar"), do hereby waive the requirements of a hearing and consent to an Order of the Licence Appeal Tribunal based upon the following Terms and Conditions:

1. The Applicant agrees not to transfer his registration as a salesperson under the *Motor Vehicle Dealers Act* to another dealer without the prior written consent of the Registrar.
2. The Applicant shall not have any beneficial interest in, or be an officer, director, owner or partner in a dealership.
3. The Applicant agrees to provide full and complete disclosure on all future applications and discussions with the Registrar, regardless of whether disclosure has been previously provided to the Registrar.
4. The Applicant confirms that the circumstances surrounding his conviction(s) are substantially as disclosed to the Registrar.
5. The Applicant agrees if he is convicted under any law of an industry specific offence or if he is convicted under the Criminal Code, the Registrar is directed to and shall carry out the proposal.
6. The Applicant agrees to honour any outstanding judgements and/or restitution orders and/or compensation orders against the Applicant.
7. The Applicant will take reasonable steps to review his employer's books, records & information pertaining to prior use/condition of any motor vehicle that he sells on behalf of his employer and ensure that the information is disclosed to the purchaser in writing on the bill of sale.
8. The Applicant agrees not to be involved in the process of buying, selling or leasing motor vehicles without the benefit of registration.
9. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.

10. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.
11. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
12. The Applicant will provide a copy of this order to his employer forthwith.
13. The Applicant hereby consents to an Order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
14. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
15. The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____ this _____ day of _____ 2003.

Cotey Leung (signature)

These Terms and Conditions are accepted by the Registrar, *Motor Vehicle Dealers Act*.

Date:

Carl Compton
Registrar
Motor Vehicle Dealers Act

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
1091873 ONTARIO INC. o/a ONE STEP TRAVEL,
STUDENT ESCAPE TOURS
as a travel agent

AND IN THE MATTER of the PROPOSAL by the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: January 6, 2003

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

1091873 ONTARIO INC. o/a ONE STEP TRAVEL,
STUDENT ESCAPE TOURS

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by 1091873 Ontario Inc. o/a One Step Travel, Student Escape Tours, the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: March 24, 2003

SCHEDULE "A"

BETWEEN:

1091873 ONTARIO INC. O/A ONE STEP TRAVEL, STUDENT ESCAPE TOURS

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

1. The Registrant was registered as a travel agent (Registration No. 4373353/R) on July 31, 1995.
2. On December 9, 1996, the registrant submitted its financial statements for the fiscal year ended July 31, 1996, which were due by October 31, 1996. The financial statements reflected a working capital shortfall of \$39,500, based on sales of \$1,915,837.
3. By letter dated December 16, 1996, the registrant was advised by the Ontario Travel Industry Inspections Office of its working capital shortfall of \$39,500, and given a due date of January 9, 1997 to provide evidence of correction.
4. On January 31, 1997, the registrant provided evidence of correction of its working capital shortfall reflected in its July 1996 financial statements.
5. On December 9, 1997, the registrant submitted its financial statements for the fiscal year ended June 30, 1997, (the registrant had changed its fiscal year-end from July 31 to June 30). It appeared that working capital requirements were met as at June 30, 1997.
6. By letter dated June 15, 1998, the registrant was requested by TICO to file its financial statements for the fiscal year ended June 30, 1998, by September 30, 1998.
7. By letter dated October 28, 1998, the registrant was issued a final due date of November 9, 1998 to file its financial statements for June 1998, failing which a proposal to revoke would be issued.
8. On December 9, 1998, the registrant submitted its financial statements for the fiscal year ended June 30, 1998, which were due by September 30, 1998. The financial statements revealed a working capital shortfall of \$64,084, based on sales of \$2,406,976.
9. By letter dated January 19, 1999, the registrant was advised of its working capital shortfall of \$64,084, reflected in its June 1998 financial statements, and given a due date of February 2, 1999 to provide evidence of correction.
10. By letter dated March 10, 1999, the registrant was issued a reminder to correct its working capital shortfall of \$64,084.

11. On March 23, 1999, TICO performed a site inspection of registrant, due to the unaddressed working capital shortfall of \$64,084 reflected in the financial statements for the fiscal year ended June 30, 1998. It was revealed during the visit that the shareholder had injected \$40,000 on February 18, 1999, and that evidence of correction of the balance of \$24,084 would be forwarded to TICO. It was further revealed that the *Travel Industry Act* trust account was not properly designated, and customer deposits were not being deposited within two business days.
12. By fax dated April 8, 1999, the registrant provided TICO with evidence of a shareholder advance totalling \$49,990, which was deposited on March 30, 1999.
13. On November 17, 1999, the registrant filed its financial statements for the fiscal year ended June 30, 1999, which were due by September 30, 1999. The financial statements reflected sufficient working capital as at June 30, 1999.
14. On November 15, 2000, the registrant filed its financial statements for the fiscal year ended June 30, 2000, which were due by September 30, 2000. The statements reflected a shortfall of \$24,419, based on sales of \$3,333,000.
15. By letter dated November 28, 2000, the registrant was notified by TICO of its working capital shortfall of \$24,419, and given a due date of December 12, 2000 to provide evidence of correction.
16. On December 18, 2000, the registrant's accountant telephoned TICO and directed TICO to the notes to the June 30, 2000 financial statements which indicated that the shareholder advances had been repaid subsequent to year-end. This subsequent event corrected the working capital shortfall as at June 30, 2000.
17. By letter dated December 18, 2000, TICO advised the registrant of the additional information received from its accountant, which consequently corrected the registrants working capital shortfall, and that the letter of November 28, 2000 was withdrawn.
18. On November 2, 2001, the registrant filed its financial statements for the fiscal year ended June 30, 2001, which were due by September 30, 2001. The statements reflected a working capital shortfall of \$37,995, based on sales of \$3,231,000. The notes to the financial statements indicated the repayment of the shareholder loan to the company in August 2001, in the amount of \$36,200, which partially corrected the working capital shortfall. After the repayment of the shareholder loan the working capital shortfall was \$1,795.
19. By letter dated November 7, 2001 the registrant was advised by TICO of its working capital shortfall of \$1,795, and given a due date of November 23, 2001 to provide evidence of correction.
20. On November 16, 2001, the registrants accountant telephoned TICO to advise that the information requested in TICO's letter of November 7, 2001 would be submitted by November 30, 2001.
21. On December 21, 2001 the registrant provided TICO with evidence that it had corrected the balance of its working capital shortfall.
22. By letter dated January 23, 2002, TICO requested confirmation from the registrant's bank on proper trust account designation.
23. On February 12, 2002, TICO received a letter from the registrant's bank confirming the proper designation of the *Travel industry Act* trust account.
24. By letter dated May 23, 2002 the registrant was requested by TICO to file its financial statements for the fiscal year ending June 30, 2002, by September 30, 2002.
25. On September 19, 2002, the registrants accountant telephoned TICO to advise that they were installing a new computer system, and estimated a submission date of October 31, 2002, for the June 2002 financial statements.
26. By letter dated October 3, 2002, the registrant was requested to file its financial statements for June 30, 2002 by October 15, 2002.

27. On October 23, 2002, the registrant was issued a final due date of October 31, 2002, to file its financial statements for June 2002, failing which a proposal to revoke registration would be issued.
28. On October 25, 2002, the registrant's accountant telephoned TICO to advise that they had successfully completed the installation of a new computer system, and that financial statements for fiscal June 2002 would now be submitted by November 30, 2002.
29. On October 30 and November 1, 2002, TICO performed site inspections of the registrant. Copies of bank statements for September 2002 were reviewed, and it appeared that the trust account was not being maintained properly, i.e. overdrafts in the trust account, and not depositing customer monies within two business days of receipt. The visit concluded that until trust accounting was functioning properly, the registrant was a risk to the Fund.
30. By January 6, 2003 there had been no further response and the registrant had failed to file its financial statements for the fiscal year ended June 30, 2002, which were due by September 30, 2002. On that date, the Registrar issued a Proposal to Revoke the Registrant's registration.
31. On January 8, 2003, the Registrant filed its June 30, 2002 financial statements, which were due by September 30, 2002. The statements revealed a working capital deficit of \$28,041.00. The working capital shortfall was subsequently addressed by a shareholder injection.
32. On March 11 and 14, 2003, TICO conducted an inspection of the Registrant. From the information provided, it appeared that the capital injection was in place and that the Registrant was complying with the trust accounting requirements of the Regulation.
33. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsections 6 (4) and (5) of the *Travel Industry Act* directing that:

1. the Registrar refrain from carrying out the Proposal to Revoke Registration dated January 6, 2003;
2. the Registrant's registration is to be subject to the following terms and conditions:
 - (a) The Registrant shall maintain the minimum working capital as required by section 25 of the Regulation or such subsequent provision as may be in force from time to time;
 - (b) The Registrant shall at all times maintain sufficient funds to cover its customer obligations. Such funds shall be maintained in a properly designated "Travel Industry Act Trust Account" and in accordance with the trust accounting requirements as stipulated in section 36 of the Regulation or such subsequent provision as may be in force from time to time;
 - (c) The Registrant shall submit a monthly trust account reconciliation with corresponding bank statements to the Registrar beginning with the month of March, 2003, no later than 30 days after the end of each calendar month, for so long as the Registrar shall so require;
 - (d) The Registrant shall file complete financial statements, including a reconciliation of customer funds and customer obligations, as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for its fiscal year ending June 30, 2003, no later than September 30, 2003;
 - (e) The Registrant shall file complete financial statements, including a reconciliation of customer funds and customer obligations, as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time for its fiscal year ending June 30, 2004, no later than September 30, 2004; and

- (f) If the above-noted financial statements as filed are incomplete, the Registrant will have 14 days from the date of notice of the deficiency to fully and completely address the deficiency and produce proof of such correction to the Registrar. Notice of the deficiency, if any, shall be sent by registered mail to the Registrant.
3. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) to (f) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.
4. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by its signature below that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED this ____ day of March, 2003

Mr. Mazdak Avari
1091873 Ontario Inc.
I have authority to bind the company

Mr. Michael Pepper
Registrar, *Travel Industry Act*

1505-MED-ALCL

Appeal under Section 50(1) of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 47(1) of that Act.

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ROSS C. BENNETT M.D., Presiding Member

APPEARANCES: LUBA NEUWRITH
Representative for the Registrar of Motor Vehicles

Applicant,
Unrepresented

DATE OF
HEARING: MARCH 4, 2003

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

EXHIBITS:

1. Photostat of Notice from the Ministry of Transportation dated February 6, 2003 advising that the Applicant's Driver's Licence Suspension Date was June 10, 2002.
2. Notice of Appeal from the Applicant Received at the Tribunal on January 28, 2003.
3. File Summary Introduced by the Respondent.
4. Applicant's Driving Record Introduced by the Respondent.
5. Medical Records from the Memorial Emergency dated September 20, 2002.

FACTS:

The Applicant, a 40 year old former truck driver, had his Class GM driver's licence suspended by the Deputy Minister of Transportation on June 10, 2002, pursuant to Section 47(1) of the *Highway Traffic Act*.

The Applicant previously had his Class AM and Class GM driver's licences suspended on November 5, 2000 after suffering two grand mal seizures as a result of alcohol withdrawal. The Applicant appealed the suspension in June 2001 and had a hearing in July 2001, but the appeal was rejected. The Ministry returned his Class GM licence on February 27, 2002 after he had been seizure-free and abstinent from alcohol for over 12 months.

The Applicant believed he was going to have his Class A licence restored and when he received only the GM licence on March 7, 2002 he was furious. He was so upset; he started to drink again and forgot to take 2 doses of his medication. The following morning he suffered a seizure and was treated at Sunnybrook Hospital. The attending physician and his neurologist, Physician #1, both informed the Ministry and the result was this suspension.

On April 17, 2002, Physician #2, the Applicant's family doctor, completed a Medical Waiver Certificate and a letter to the Ministry stating the Applicant was not drinking alcohol. Both he and Physician #1 informed the Ministry that the Applicant had an elevated GGT of 169 (N<60), which was due to the drug Carbamazepine (Tegretol), that he was taking for his seizures. This was a result of liver damage from ethanol cirrhosis.

Physician #1 notified the Ministry on October 16, 2002 that the Applicant had suffered another seizure. Medical records from the Memorial ER (Exhibit #6) indicate the Applicant was seen in the emergency with a fever and vomiting followed by a seizure. The Applicant explained that he had vomited several times during the day and had likely brought up his medication, which resulted in the seizure.

Physician #1 sent a Reassessment Summary to the Ministry dated February 13, 2003 stating the Applicant has not had a recurrent seizure since October 16th. He is being maintained on 1200 mg of Tegretol daily.

In his evidence the Applicant denied being epileptic and that he had a problem with alcohol. An EEG in October 2000 showed theta paroxysms, which may indicate to an epileptic diathesis. An EEG in December 2000 was definitely abnormal, demonstrating epileptiform right temporal sharp wave activity. There is no mention of any other EEG tests in the evidence presented. Since 3 of the 4 seizures occurred after drinking alcohol and he has liver damage from alcoholic cirrhosis, it would indicate that alcohol has been a problem.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffer from any mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate, on the grounds of,
- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.

- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

The Deputy Registrar of Motor Vehicles was obligated to suspend the Applicant's driver's licence under Section 47(1) of the *Highway Traffic Act*, after receiving Medical Reports that the Applicant was experiencing epileptic type seizures.

Evidence indicates the Applicant was finely controlled on high doses of Tegretol, but the slightest deviation in the overall treatment resulted in loss of control and a seizure. The first seizure occurred after a weekend of heavy drinking. The second seizure occurred after he stopped his medication, because he did not accept he was epileptic. He had a few drinks with some friends and seized the following morning. The next seizure followed a bout of drinking and failing to take two doses of Tegretol, after learning his Class A licence was not going to be reinstated. His last seizure resulted after a day of vomiting when he likely vomited up his medication.

The Tribunal is concerned about the Applicant's denial that he is neither an epileptic nor has a problem with alcohol. It has been proven several times that he cannot drink alcohol or misses a dose of his medication and he must accept this. The Tribunal recognizes that the last two seizures were provoked inadvertently by the Applicant and need not have happened if he had understood his problems. The "Determining Fitness to Drive" standards (5.4.2) under Private Drivers, written by the Canadian Medical Association states:

Patients with epilepsy and taking anti-epileptic medication should not be recommended for class 5 or 6 licensing until the following conditions are met: the patient has been seizure free on medication for not less than 12 months.

With certain types of epilepsy, this period may be reduced to 6 months on the recommendations of a neurologist. The seizure free period is necessary to establish a drug level that prevents seizures without side effects that could affect the patient's ability to drive safely. The attending physician should feel confident that the patient is conscientious and reliable and will continue to take the anti-seizure medication as directed.

After reviewing all of the evidence the Tribunal is uncertain that the Applicant is not still in denial and could easily get upset over something and return to alcohol, as he did in March 2002. As a result the Tribunal finds that there is not enough evidence at this time to justify reinstatement of the Applicant's licence under Section 47(1) of the *Highway Traffic Act*, as it is only 5 months since the Applicant had his last seizure. A longer period of suspension is required for the Applicant to demonstrate he is capable of remaining seizure-free.

DECISION:

Upon the application by the Applicant to appeal the decision dated June 10, 2002 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

Ross C. Bennett M.D., Presiding Member

RELEASED: March 12, 2003

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990, Chapter 0.31

IN THE MATTER OF a REGISTRATION by
ALLISON HOMES INC.

AND IN THE MATTER OF the PROPOSAL by
the Registrar under the
Ontario New Home Warranties Plan Act
made pursuant to section 9 of the *Ontario New Home Warranties Plan Act*

AND IN THE MATTER OF a requirement for a hearing respecting
the said Proposal

ALLISON HOMES INC.

Applicant

-and-

REGISTRAR, *ONTARIO NEW HOME WARRANTIES PLAN ACT*

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, Chapter 0.31 as amended (the "Act"), Allison Homes Inc. (the "Applicant") initiated an appeal under section 9(4) of the proposal of the Registrar under the Act, dated December 4, 2002 in terms of which the Registrar proposed to revoke registration of the Applicant as a builder;

AND WHEREAS, the Applicant has failed to pay the filing fee for this proceeding before the Tribunal, required pursuant to section 7 of the *Licence Appeal Tribunal Act*, 1999;

AND WHEREAS, the Applicant has not responded to the Tribunal's Notice of Intent to Dismiss Proceedings sent to the Applicant pursuant to section 4.6 of the *Statutory Powers Procedure Act*, R.S.O. 1990, Chapter S. 22 as amended, and Rule 2.10 of the Rules of Practice of the Licence Appeal Tribunal, whereby a proceeding before this Tribunal may be dismissed without a hearing for failure to pay the required filing fee;

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers Procedure Act*, as amended, this proceeding, initiated by the Applicant's request for a hearing before this Tribunal, is dismissed;
2. Pursuant to the authority vested in it under section 9 of the *Ontario New Home Warranties Plan Act*, this Tribunal directs the Registrar, *Ontario New Home Warranties Plan Act* to carry out his proposal dated December 4, 2002 to revoke the registration of Allison Homes Inc.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek, Chair

Released: March 13, 2003

JOHN E. ABEL

IN THE MATTER of the *Highway Traffic Act*,
R.S.O. 1990, c.H.8 as amended, Section 50.2;

AND IN THE MATTER of a motion by
John E Abel seeking an extension of the time
requirements for this Applicant to commence this
appeal from an impoundment order of the
Registrar under Section 55.1 of the *Highway
Traffic Act*;

AND IN THE MATTER
-of-

JOHN E. ABEL

APPLICANT

-and-

THE REGISTRAR OF MOTOR VEHICLES

RESPONDENT

TRIBUNAL: MALCOLM FEALING, Presiding Member

APPEARANCES: ADELAIDE PINDER
Representative for the Registrar of Motor Vehicles

JOHN E. ABEL, Applicant (not in attendance)

DATE OF
MOTION: March 14, 2003

ORDER

A motion was heard on March 14, 2003, at Toronto, Ontario, to consider the Applicant's request for an extension of time to appeal the impoundment order of the Registrar affecting the Applicant's motor vehicle. The motion is brought pursuant to Section 20(7) of Ontario Regulation 632/98 amending Regulation 574 of the Revised Regulations of Ontario, 1990 made under the *Highway Traffic Act*, R.S.O. 1990. c.H.8 amended ("HTA").

The Tribunal refused to grant the extension of time requested by the Applicant to commence an appeal for the reasons set out below.

SUBMISSIONS OF WRITTEN MATERIAL:

The Applicant submitted the following documents:

1. Original Notice of Appeal, including Applicant's position on Appeal, dated January 27, 2003 received by the Tribunal on January 30, 2003. (Exhibit # 1);
2. Letter dated October 3rd 2002, addressed to the Tribunal to the attention of John Ripley/Stacey (sic) Murphy. (Exhibit # 2)

THE FACTS:

Mr. John Abel loaned his vehicle, a 1987 Chev Rio, to his friend Les Joswoki because he would not be using it during the month of December.

The truck was impounded on Saturday Dec. 21st 2002.

The Applicant's Notice of Appeal was dated January 27-03, and was received by the Tribunal on January 30th 2003, which was 41 days from the date of the impoundment. The Motion presently before the Tribunal is for an order, in terms of section 20 (7) of Regulation 632/98, for an extension of the time for the filing of the Notice of Appeal.

The text of Mr. Abel's letter of Appeal was as follows:

Monday, Dec 9-02	wife goes to hospital
Friday, Dec. 13-02	wife released
Sunday, Dec 15-02	wife readmitted (infection)
Saturday, Dec. 21-02	truck impounded
Sunday, Dec 22-02	Informed of impounding by my driver
	"order to impound" letter written
Friday, Dec. 27-02	order to impound letter mailed.
Friday, Jan.03-03	Order of impound letter received
Monday January 06-03	I phoned (416-325-0209) on back of form, then MTO number and got nowhere. I give up, figuring it will cost a couple hundred plus one hundred anyway to fight it.
Tuesday January 07-03	wife gets second infection, this time treated at home by V.O.N.
	Truck least of my worries
Thursday January 16-03	Abrahms towing letter written and mailed
Monday, January 20-03	Abrahms towing letter received.
	I see \$904.69 and I try the phone numbers again, this time I leave messages on the 1800- number, and the French number.
Tuesday January 21-03	my call returned; I'm not home
Wednesday January 22-03	I connect with someone, they confirm phone number outdated and fax me Appeal Forms.

Thursday January 23-03

I read over 22 pages of fax;-----Set up show, speedarama

Friday, Saturday, Sunday:

January, 24,25, 26-03

I work 10-12 hours daily

Monday January 27-03

I write this letter

Tuesday January 28-03

Send.

THE LAW:

Section 20(1) of Regulation 632/98 under the *Highway Traffic Act* states:

20. (1) An appeal to the Tribunal under section 50.2 of the Act shall be commenced by filing a notice of appeal with the Tribunal within 15 days of the issuance of the order to impound, together with a fee of \$100 payable to the Minister of Finance.

Section 20(7) of Regulation 632/98 under the *Highway Traffic Act* states:

20. (7) Despite subsection (1), the Tribunal may extend the time for commencing an appeal if the owner establishes that the owner, acting in good faith, was unable through accident, illness, or other cause beyond the owner's control to bring the appeal within the prescribed 15 days.

Section 7 of the *Licence Appeal Tribunal Act*, 1999 states:

7. Despite any limitation of time fixed by or under any Act for the giving of any notice requiring a hearing by the Tribunal or an appeal from a decision or order of the Tribunal under section 11 or any other Act, if the Tribunal is satisfied that there are reasonable grounds for applying for the extension and for granting relief, it may,

- (a) extend the time for giving the notice either before or after the expiration of the limitation of time so limited; and
- (b) give the directions that it considers proper as a result of extending the time.

APPLICATION OF LAW TO FACTS:

Section 20(7) of Regulation 632/98, provides the Tribunal with the specific criteria that the Applicant must meet to satisfy the Tribunal that an extension of the time for commencing an appeal ought to be granted. The Applicant must establish that he, acting in good faith, was unable through accident, illness or other cause beyond his control to bring the appeal within the prescribed 15 days in circumstances where the Registrar does not give his or her consent in writing for an appeal to be commenced after the expiry of the prescribed time.

The criteria listed in Section 20(7), which the Tribunal should consider in granting an extension, are matters outside the Applicant's control.

This Motion was to have been conducted by Teleconference. The Tribunal was however unable to contact Mr. Abel by telephone. The matter proceeded using Mr. Abel's detailed written Appeal as evidence.

Mr. Abel makes it quite clear in his letter of Appeal and subsequent letter of January 27th 2003 that he was in a lot of stress as a result of his wife's illness and the need to care for his three children. He stated that the truck was the least of his worries. He had, "a sick wife, three worried children, and a household of concerned in-laws." He was not about to call Government offices, which were closed during the Holidays. When he did call he got a "wrong number".

He also stated that he took no further action because he believed it would only cost \$200.00 to get his vehicle back. He only proceeded with the appeal when he realised that the storage charges would be \$904.69.

This time he called all of the numbers (i.e. the 1-800 number, as well as the French Service number) on the Notice of Appeal Form, and made certain to leave messages. Even then, he did not write his letter until January 27th, which was seven days after he received the letter informing him of the cost of the storage charges.

Although initially the Applicant was misled with the wrong Government phone number, the evidence presented does not establish that the Applicant's delay in appealing the order impounding the vehicle under Section 55.1 of the *Highway Traffic Act* was the result of a situation beyond the Applicant's control. The additional delay was the result of the Applicant's inaction. Clearly it was his own inaction that resulted in him missing the time period in which to appeal.

REASONS FOR ORDER:

Section 20 (7) of Regulation 632/98, provides the Tribunal with the specific criteria that the Applicant must meet to satisfy the Tribunal that an extension at the time of commencing an appeal ought to be granted. The Applicant must establish that acting in good faith, he was unable through accident, illness or other cause beyond his control to bring the appeal within the prescribed 15 days.

The evidence presented does not establish that the Applicant's delay in appealing the Order impounding the vehicle under Section 55.1 of the *Highway Traffic Act*, was the result of accident, illness, or other cause beyond the Applicant's control as required by Section 20 (1) as read with section 20 (7) Of regulation 632/98. Further, the Applicant has not satisfied the Tribunal that there are reasonable grounds for applying the extension and for granting the relief. Accordingly, the requirements under section 7 Of the *License Appeal Tribunal Act* have not been met.

While the Tribunal commiserates with Mr. Abel in the stressful situation of caring for a sick wife, and three concerned children during the Christmas Holidays, it notes that Mr. Abel made

a conscious decision to do nothing about the vehicle because he thought it would only cost \$200.00 to get it out of the pound.

The Tribunal also notes that although he read the faxed Appeal Forms on Jan 23rd, he did not mail his Appeal letter until January 28th. which was five days later.

It is the Tribunal's opinion, that Mr. Abel did not act in a manner which supports his request for an extension of time.

ORDER:

For the reasons set out above, the motion herein of the Applicant requesting an extension of time to appeal, pursuant to section 20(7) of Ontario Regulation 632/98 amending Regulation 574, R.R.O. 1990, is dismissed.

LICENCE APPEAL TRIBUNAL

Malcolm Fealing,
Presiding Member

RELEASED: March 18, 2003

HIGHWAY TRAFFIC ACT

Section 50.2 and Regulation 574, R.S.O. 1990, Chap. H8 as amended

SANDRA FISHER

IN THE MATTER of an APPEAL of AN ORDER TO IMPOUND A
MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR
VEHICLES

AND IN THE MATTER OF an ORDER of the Registrar of Motor
Vehicles made pursuant to section 55.1 of the *Highway Traffic Act*
of an Order to Impound a motor vehicle for a period of 45 days
effective January 8, 2003

AND IN THE MATTER of a requirement for a hearing respecting
the said ORDER

SANDRA FISHER

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended (the "Act"), Sandra Fisher (the "Applicant") initiated an appeal under section 50.2 of the Order of the Registrar of Motor Vehicles pursuant to section 55.1 of the Act, effective January 8, 2003 to impound the Applicant's motor vehicle for a period of 45 days;

AND WHEREAS, the Applicant has failed to commence an appeal within the 15 day period prescribed by section 20(1) of the Ontario Regulation 632/98 under the *Highway Traffic Act*;

AND WHEREAS, the Applicant has not responded to the Tribunal's Notice of Intent to Dismiss Proceedings sent to the Applicant pursuant to section 4.6 of the *Statutory Powers Procedure Act*, R.S.O. 1990, Chapter S. 22 as amended, and Rule 2.10 of the Rules of Practice of the Licence Appeal Tribunal, whereby a proceeding before this Tribunal may be dismissed without a hearing for failure to commence an appeal within the 15 day period;

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers Procedure Act*, as amended, this proceeding, initiated by the Applicant's request for a hearing before this Tribunal, is dismissed;
2. Pursuant to the authority vested in it under section 50.2(5) of the *Highway Traffic Act*, this Tribunal confirms the Order of the Registrar of Motor Vehicles effective January 8, 2003, to impound Sandra Fisher's motor vehicle for a period of 45 days.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek, Chair

Released: March 13, 2003

ANGELA KEENAN

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: KENNETH W. KOPROWSKI
Presiding member

APPEARANCES: ADELAIDE PINDER
Representative for the Registrar of Motor Vehicles

ANGELA KEENAN, Applicant
unrepresented

DATE OF HEARING: March 12, 2003

DECISION RELEASED: March 19, 2003 Toronto

REASONS FOR DECISION

A hearing was held on March 12, 2003, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Angela Keenan (the "Applicant")
Motor Vehicle: 1990 Nissan Sentra Coupe plate AHSP 110 (the "vehicle")
Date of Appeal: February 9, 2003

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on March 12, 2003, and proceeded as a written hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

The hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows:

Applicant's written submission filed with the Tribunal in support of appeal states:

My position for this appeal is due to the fact that having my vehicle impounded for 45 days will affect my health. I currently suffer from an eating disorder and I have lots of Doctors (sic) appointments to go to! Taking public transportation will not help, due to the fact that most of my appointments are in Toronto and Peterborough, which means I need to drive there, because there is (sic) no buses to Peterborough and not at the right time for Toronto, keeping in mind that I live in Lindsay, Ontario.

My evidence for this is the Doctor (sic) note I have sent along from my Family Physician stating what I just have.

I also have a disability parking sticker and I am also at this time on a disability pension due to my illness. I would assume that my note from my Doctor would be enough to satisfy any need

of how much having my car for doctor's appts (sic) is necessary for me. Once a week I have to go too (sic) Toronto for a doctor's appt. (sic) and twice a week I go to Peterborough for appts (sic). I would hope this is enough evidence for my case because it is my health.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Shane Newman;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Dangerous Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until July 11, 2003.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
 - (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and

- (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

In order for the Applicant to succeed on the ground that the impoundment order will result in exceptional hardship, she must prove, first, that there was no alternative available to the impounded vehicle, as required by section 22(1) of Regulation 574 R.R.O. 1990, as amended by Ontario regulation 632/98 (the "Regulation").

Then, if the Applicant did, in fact, prove that there was no alternative available, that same section requires that she prove that the impoundment will result in a threat to the health or safety of any person ordinarily transported by the motor vehicle.

This Tribunal cannot consider that the impoundment will result in inconvenience to the Applicant.

It also cannot consider the following three matters; that is:

1. financial or economic loss to any person;
2. whether the impoundment will result in loss of employment or employment opportunity to any person; or
3. whether the impoundment will result in a loss of education or training or of an opportunity for same.

However, the Tribunal may consider the above three last-mentioned matters if the Applicant can prove all four of the following circumstances; namely:

1. if there is no available alternative to the impounded vehicle;
2. if the loss will be immediate, significant and lasting;
3. if the loss will be suffered by the person ordinarily transported by the vehicle; and
4. if the result of the loss does not have an impact on the driver whose licence had been suspended and whose driving of the motor vehicle in question had resulted in the impoundment.

Section 22(4) provides that, to prove there was no alternative to the impounded vehicle, the Applicant would still have to prove that every reasonable option had been considered and inquired into to eliminate or mitigate any threat or loss to her, including using another vehicle or making arrangements to do without the impounded vehicle during the impound period.

The onus is on the Applicant to prove, on a balance of probabilities, that she falls within the above relevant circumstances when claiming exceptional hardship.

To say the least, the Applicant must proffer much evidence to support her appeal.

The Respondent Registrar of Motor Vehicles makes various submissions, in Exhibit 3, and comes to several conclusions to which this Tribunal should give its full consideration.

On the issue of whether the impoundment will result in a threat to the health of the Applicant, pursuant to section 22(1)(a), the Applicant, in her Notice of Appeal, writes that having her vehicle impounded will affect her health. She states that she suffers from an eating disorder and has "lots of doctors appointments to go to."

A letter dated February 4, 2003, from one Doctor Keith Evans, does confirm that the Applicant is under medical supervision which requires her to drive approximately 85 kilometers to Peterborough and back each week for a medical appointment.

Further, the Applicant states that most of her appointments are in Toronto and Peterborough.

It must be remembered that the Applicant lives in Lindsay, and must travel to both Peterborough and to Toronto.

Unfortunately, this Tribunal cannot conclude, on the evidence before it, just how the Applicant's health is affected. Presumably, the Applicant may be saying that failure to attend on those appointments will cause her health to fail; however, the Applicant provides no such details. This Tribunal cannot, therefore, come to any firm conclusion, on such evidence, on the issue of whether there is any threat to the health of the Applicant.

The Registrar has, based on the same evidence, submitted that, therefore, the impoundment does not pose a risk to the health of the Applicant. With this conclusion, this Tribunal cannot agree. The fact that the evidence does not show whether there is a health risk to the Applicant is not the same as saying that there is no health risk to her.

All that can be said is that the evidence is inconclusive, one way or the other, as to whether or not there is a health risk to her.

Dealing with another matter, the Applicant lives in Lindsay. Her car was stopped in Sudbury on a Monday night, January 27, 2003. The Registrar therefore submits that, if the Applicant had to attend on medical appointments, the fact that she had allowed her car to be taken so far away from Lindsay on a weeknight shows that doubt can be cast on the truthfulness of the Applicant's story.

Again, this Tribunal cannot so conclude. There could very well be other explanations for that circumstance. The Applicant's appointments could have been for a time which was later in the

week, for example. Perhaps there are other valid explanations. The end result, however, is that this Tribunal cannot, as the Registrar has, come to any conclusion about the truth of the Applicant's story from that small amount of evidence. Attacking the credibility of an Applicant should be done only in the face of compelling evidence.

In dealing with alternative transportation, the Registrar submitted a bus schedule for travel between Peterborough and Toronto. In so doing, the Registrar submits that the Applicant has failed to provide evidence as to why the bus schedules are not at the right times for her, and why she cannot make use of that reasonable alternative.

However, it must be remembered that the Applicant lives in Lindsay, not Peterborough. What schedules has the Registrar provided for travel between Lindsay and Peterborough? And, without knowing how the Applicant can travel from Lindsay to Peterborough, how can bus travel from Peterborough to Toronto even be considered to be a reasonable alternative to the Applicant? The most that can be said, again, is that this Tribunal has insufficient evidence to even conclude that bus travel is a reasonable alternative for the Applicant.

Further, the Registrar submits that there are three vehicles registered to one Frank Keenan who lives at the same address as the Applicant. The Registrar, correctly, in the view of this Tribunal, submits that there is no evidence that these alternatives cannot be used to transport the Applicant to the bus station or to a doctor's appointment. However, the mere fact, alone, that three vehicles are registered to a Frank Keenan is not evidence that would allow this Tribunal to conclude that these vehicles are, in fact, available to the Applicant. The mere existence of these three vehicles, without more, is not really conclusive of anything, so that this Tribunal cannot come to any conclusion, one way or the other, about whether the availability of any or all of these vehicles is a reasonable alternative to the impounded vehicle for the Applicant.

The Registrar also submits that the Applicant has failed to inquire into obtaining, from the Ontario Disability Support Plan (ODSP), compensation for her transportation costs to her medical appointments. What the Registrar does not provide is any confirmation that the Applicant is even entitled to make those claims under the ODSP.

Decisions about such claims are within the jurisdiction of another agency entirely, and are not within the jurisdiction of this Tribunal. It would be unwise to assume, without more, that the Applicant is entitled to such compensation. Nor would it be proper for this Tribunal to engage in any such inquiry.

The Registrar, correctly, submits that the Applicant has failed to provide evidence of other options such as renting a vehicle, or obtaining assistance from family, friends or neighbours. Such evidence would have been of much value to this Tribunal.

On the question of whether there has been any financial loss to the Applicant as a result of the impoundment, there is no evidence from the Applicant. However, whereas the Registrar concludes that, therefore, there is no financial or economic loss, this Tribunal can only

conclude that there is no such evidence. To reach the conclusion that the Registrar has reached, based only on the lack of evidence of financial loss, is merely speculation and assumption. However, what is significant to this Tribunal is that there is no such evidence on which such a conclusion can be reached. This Tribunal will not engage in making assumptions or in speculating.

There is also no evidence from the Applicant about loss of employment or employment opportunity, nor is there evidence about loss of education or training opportunity. As a result, the Registrar concludes that there is no such loss of such matters. This conclusion, as well, is too far reaching. It is based only on the lack of evidence relating to such matters. Lack of evidence on such matters does not allow this Tribunal to conclude, necessarily, that such matters do not exist. Lack of evidence is only an indication that there is, in fact, no evidence on the matter. That is the only firm conclusion that can be reached in the absence of anything more. To conclude anything more is, again, speculation and assumption.

Nevertheless, in dealing with all the above issues, and despite this Tribunal's disagreement with some of the conclusions submitted by the Registrar, based only on the lack of evidence on certain matters, this Tribunal, for lack of evidence before it, can and must come to one conclusion. That conclusion is that the Applicant has not provided sufficient evidence to establish the various criteria, referred to earlier in these Reasons, which would allow this Tribunal to conclude that the Applicant suffered exceptional hardship as a result of the impoundment of her motor vehicle. The significance of this lack of evidence is that the Applicant has not proved her case on a balance of probabilities, which she has the onus to do, in order to succeed in this Appeal.

Not having met this onus, this Appeal must fail.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Kenneth W. Koprowski,
Presiding Member

RELEASED: March 20, 2003

1533-MED-ALCL

Appeal under Section 50(1) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 47(1) of that Act.

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ROSS C. BENNETT, M.D., Presiding Member

APPEARANCES: LYNDA DUNBAR
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF
HEARING: March 14, 2003

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

EXHIBITS:

- #1 Notice of Suspension to the Applicant from the Ministry dated September 21, 2002.
- #2 Notice of Appeal from the Applicant received at the Tribunal February 17, 2003.
- #3 File Summary introduced by the Respondent.
- # 4 Applicant's Driving Record.
- # 5 Medical Reports and Laboratory Reports from Physician #1.

FACTS:

The Applicant, a very pleasant 48 year old lady, who lives with her husband in a retirement community, had her driver's licence suspended, on September 21, 2002, pursuant to Section 47(1) of the *Highway Traffic Act*. Her problems began when she went to a neighbour's home on August 14, 2002 and had a couple of Martinis. She stated that she had never had a Martini before. While walking home she felt a little unsteady, but nothing severe. While making her husband's dinner she knocked over the cat's water dish, slipped on the ceramic tile floor and hit her head.

The Applicant's husband heard her fall, rushed into the kitchen and found her unconscious and bleeding from a scalp wound. He called her name and she apparently responded immediately, but was somewhat confused for awhile.

Two days later, on August 16th the Applicant was in the city and went to the Hospital E.R., because she felt nauseated and had a headache. The E.R. physician, Physician #2, took a history, examined her and ordered a CT scan, which revealed a tiny subdural hemorrhage.

Physician #2 forwarded a Medical Report to the Ministry, which contained the following statement: "Seen by me in Emergency Department for effects after blackout and head injury. Tells me she is a heavy drinker and blackouts are not uncommon".

The Applicant stated she was completely blindsided when she received the suspension notice from the Ministry. She denies ever saying that she was a heavy drinker. She says that she has never had a blackout where she has been unconscious or passed out due to alcohol. She admits to using the term "blackout", but in the context of memory loss. She also stated, she usually restricts her drinks to 2 beers. She admits telling Physician #2 that she was drinking the night she had the fall, but denies saying that blackouts are not uncommon.

Subsequent CT scans disclosed a tiny brain contusion in the right temporal lobe. A laboratory report dated September 18, 2002 shows normal GGT and MCV markers. The Applicant began attending the Simcoe Outreach (SOS) program, but says it is mainly for treatment of previous sexual abuse.

Exhibit # 6 is the Applicant's response to MTO's assessments and allegations. It would appear that her family physician should have assisted her in answering many of the questions, because her interpretations are illogical.

In a letter from the Medical Advisory Committee (MAC) dated November 25, 2002, a month after the Applicant saw Physician #3, a specialist in addictions and alcohol, a repeat request was made for a detailed assessment from a physician specializing in addiction medicine. A similar request was made by the MAC in a letter dated January 10, 2003 and a letter from the Ministry dated February 26, 2003. It would appear that the MAC simply does not want to accept Physician #3's assessment. He questions the initial reporting to the Ministry, of the circumstances of the Applicant's fall and states her alcohol intake is "sporadic and usually well controlled, recreational". Physician #3 reports that the Applicant has been abstinent from alcohol since September and her laboratory markers (MCV, GGT) were normal in September. He also states that the Applicant's goal is "maintenance of abstinence, even if her history does not indicate alcoholism".

The MAC, in the Report, dated January 10, 2003, appears to attack the Applicant by saying she was less than honest with Physician #3 and that her goal of abstinence and participation in a substance abuse program reaffirms that she is alcohol dependent. This is after she has been told repeatedly that she must remain abstinent and take a treatment program.

The Applicant saw a neurologist, Physician #4, on January 28, 2003, some five months after her slip and fall, and he could not detect any neurological problems and states there is no ongoing issue with alcoholism. He recommends reinstatement of her driver's licence.

A laboratory report dated January 30, 2003 from Medical Laboratories reports a GGT level of 12 and MCV of 60, which are both normal.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffer from any mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

The Deputy Registrar of Motor Vehicles was obligated to suspend the Applicant's driver's licence pursuant to Section 47(1) of the *Highway Traffic Act*, when Physician #2's Medical Report was received. The report stated she treated the Applicant for effects after a blackout and head injury. She adds that the patient said she was a heavy drinker and blackouts were not uncommon.

Investigation of this incident revealed it was 2 days before the examination and the Applicant had slipped in some spilled water and hit her head on a ceramic floor. "Blackout" was the word the Applicant admits to using, but it was inappropriate in this case. The Applicant denies telling Physician #2 she was a heavy drinker and blackouts were not uncommon. She states (Exhibit #6) that she has never passed out or been unconscious due to alcohol.

The Medical Advisory Committee appears to have based their judgement of the Applicant being an alcoholic on Physician #2's Medical Report and the answers on the Alcohol Assessment Form. The Applicant's comments on her answers to the questions, illustrate how confused she was at the time and that she did not understand the questions. The MAC was really reaching when it stated that her alcohol dependence is reaffirmed by her goal of

abstinence and participation in a substance abuse program.

The Applicant has received a clean bill of health from two specialists. Physician #3, the specialist in addictions and alcohol did not find the Applicant had any signs of alcoholism. Physician #4, the neurologist stated that he did not find any neurological abnormalities and that there did not appear to be any ongoing issue with alcohol.

The Applicant is obviously a drinker, like the majority of people in the province, but there is no evidence to indicate she is an alcoholic. She has followed through with every requirement made by the Ministry and the MAC, with the exception of the MRI, which the neurologist said she did not need.

The Respondent has failed to show that the Applicant suffers from a disability likely to significantly interfere with her ability to drive a motor vehicle and further the Respondent failed to prove that the Applicant is addicted to the use of alcohol or a drug to an extent likely to significantly interfere with her ability to drive a motor vehicle under Section 14 of Regulation 340/94.

After reviewing all of the evidence the Tribunal finds there is little, if any evidence, to prove that the Applicant has an alcohol problem or to justify the continued suspension of her driver's licence pursuant to Section 47(1) of the *Highway Traffic Act*.

DECISION:

Upon the application by the Applicant to appeal the decision dated September 21, 2002 of the Registrar of Motor Vehicles (the "Registrar") to suspend her driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be set aside.

LICENCE APPEAL TRIBUNAL

Ross C. Bennett, M.D.
Presiding Member

RELEASED: March 19, 2003

1535-ADLS-ASTHMA

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: ADELAIDE PINDER
Representative for the Registrar of Motor Vehicles

Applicant,
Unrepresented

DATE OF
HEARING: March 13, 2003

DECISION
RELEASED: March 14, 2003

REASONS FOR DECISION

A hearing was held on March 13, 2003 to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on March 14, 2003, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that her appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated January 28, 2003, and was received by the Tribunal on February 18, 2003, together with the prescribed fee of \$100.00, paid by cheque.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

Ms. Pinder asked if the videotape of The Applicant's breathalyzer session, introduced as evidence by the Respondent, had been viewed by the Tribunal. It is not the Tribunal's practice to review any submissions, prior to ensuring that the Applicant is aware of and consents to the evidence presented. Thus, the Tribunal ascertained from the Applicant that she had viewed the contents of the videotape and was prepared to comment if necessary.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice to Registrar dated January 13, 2003– issued by the Registrar of Motor Vehicles.
- b) Exhibit # 2 Notice of Appeal Form – received February 18, 2003.

By the Respondent:

- a) Exhibit # 3 Ministry of Transportation submissions – received March 10, 2003
- b) Exhibit # 4 Videotape of the Brethalyzer session test – received March 10, 2003

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

- 50.1(1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
 - (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
 - (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

- 15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
 - (a) the name, telephone number and address, with the postal code, of the medical practitioner;
 - (b) the name, date of birth and address of the person who is the subject of the report;
 - (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;

- (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
- (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

The Applicant's Driver's Licence was suspended "Jan 13 2003" as per Notice of Appeal.

Applicant's Evidence

The Applicant had page 2 of the Notice of Appeal prepared by her physician of some "10 years... Physician #1", on 28/1/03.

Physician #1's comments on page 2 of the Notice of Appeal follow:

"Details and Diagnosis of patient's condition ...history of asthma - likely unable to give a breathalyzer expiration breath under stress- able to provide blood sample if it was offered.

History of Condition ...has asthma more than 10 years.

Type of Measurements or recent tests taken with (date indicated): Reference to any pathology tests (e.g.PTF (SIC)) represent important corroboration of your medical opinion) ...x-rays – chest 6/1/03; stress test 21/1/03.

Relevant details of last visit and when your patient was last seen? ...6 /Jan/03 sinusitis – taking antibiotics."

At the hearing the Applicant asserted that she told the officers that she had asthma, in fact the officer gave the Applicant the inhalers. With respect to the breath sample, the Applicant testified: "...I tried as hard as I could ...it is my word against hers...".

In cross-examination, the Applicant reiterated her previous testimony that she was not immediately aware that the police were trying to pull her over, and that she had no idea why she was stopped until she was in the station.

According to the Applicant, on the advice of Duty Counsel she did not tell the officers that she was taking antibiotics for sinusitis since approximately January 6th 2003.

In reply to the Respondent's Representative's question if she was having any difficulty breathing the night in question, the Applicant replied: "...no, no, not until I started to blow into that machine did I feel my chest starting to get really tight...". The Applicant was not alarmed by the tightness in the chest as she has had asthma since she was about "...eighteen...". In the approximately ten years that the Applicant has suffered from asthma, her physician has never referred her to a pulmonary specialist.

The Applicant was not sure at what point she used the inhaler, but confirmed that she had not felt the need to take another puff during the breathalyzer session.

Asked if she was coughing or wheezing at the time, the Applicant responded, "...I don't believe so, no ...probably I was wheezing a little bit, if I breathe deep, I always have a little bit of a wheeze, usually..."

The Applicant's asthma is not affected by chronic sinusitis, but the Applicant verified that she does feel pressure on her face, when afflicted.

By way of clarification, the Tribunal asked the Applicant to describe the symptoms she was experiencing at the time of the breathalyzer. The Applicant answered: "...Just stress, I did not know if I was going to be able to do it properly, that's all."

In closing the Applicant accused Police Officer #1 of lying with respect to the Applicant's lack of effort to blow into the breathalyzer. The Applicant asserts that it must have been quite obvious that she was unable to provide an adequate sample due to asthma.

The Applicant is annoyed and does not understand why she was treated the way that she was. Further, the Applicant wondered why she was not asked to provide a blood sample.

Respondent's Evidence

The Respondent provided the following Documents:

1. Certified Copy of Notice to the Registrar, sealed February 18th, 2003.
2. Certified Copy of driving record of the Applicant, sealed February 18th, 2003.
3. Certified Copy of Vehicle Record, sealed February 18th, 2003.
4. Sworn Affidavit of Police Officer #2, sworn March 6, 2003.
5. Videotape of the breath session at Police Station dated January 13, 2003.

In an Affidavit sworn March 6, 2003, Police Officer #2, member of the Regional Police Service, employed “...since Jan 2001”, describes the events that led to the Applicant’s arrest and subsequent demand for a breathalyzer test.

Police Officer #2 confirms: “...26. At no time during my dealings with the accused did she inform me of a medical condition or ask for medical attention ...27. At no time did I observe anything to suggest a medical problem with The Applicant...”

The Respondent called Police Officer #1, as a witness. Police Officer #1 testified that she has been a police officer for approximately “...five years...”, and a breath technician for about “...a year and half...”

The Applicant was given “...several attempts...” to provide a breath sample, but failed to do so. Except for one attempt, each time the Applicant blew into the machine the screen registered an error message, indicating that no air was going through. The one time that the machine registered a tone, the Applicant did not blow long enough for the device to complete a reading.

Police Officer #1 observed that the Applicant appeared “...to just be putting her lips over the applicator...”, but was not blowing adequately. Police Officer #1 was able to tell that the Applicant was not blowing as Police Officer #1 did not hear or feel the air passing through the tube.

During her dealings with the Applicant Police Officer #1 did not notice the Applicant gasping for air, or wheezing. The Applicant did inform Police Officer #1 that she was asthmatic and specified that she had used the inhaler “...about half an hour...” earlier.

In her closing remarks, the Respondent’s Representative emphasized that it is the Registrar’s position that the Applicant does not suffer from a medical condition which would have prevented her from providing an adequate breath sample. The Respondent’s Representative argued that the Applicant simply had no intention of providing a breath sample. This argument is substantiated by the observations of both Constables, who at no time noticed any signs of breathing difficulties, as well as by the fact that the Applicant at no time asked for medical assistance.

Quoting from Physician #1’s medical report, the Respondent’s Representative maintains that there is no certainty in the statement: “...likely unable...” Further there are no specialist reports as to the reasons that the Applicant could not provide a breath sample.

In conclusion the Respondent’s Representative asked that the Tribunal uphold the Registrar’s decision.

APPLICATION OF THE LAW TO FACTS:

Although the total evidence presented was considered, the preceding notes reflect a summary of the proceedings. Evidence introduced not directly germane to the issue was not transcribed.

Prior to setting out the reasons for the decision, the Tribunal will address the issue raised by the Applicant concerning the possibility of a demand to provide a blood sample. Subsection 48.3 (3) 1 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H-8 as amended is clear in its provision, the concentration of alcohol in the blood may be obtained "...by an analysis of the person's breath sample or blood taken..." However, the decision to request a blood sample is at the discretion of the officers, according to established policy. At the time, the Applicant showed no visible signs of respiratory impairment, such as wheezing or choking. Thus, the issue of a blood sample is inconsequential.

With respect to the Applicant's complaint regarding the treatment she was subjected to while in custody, as the Tribunal has no jurisdiction to deal with such matters, no further comments will be made.

At issue, is not whether the Applicant was impaired or had been drinking at all. At issue, is whether the Applicant has a medical condition that could cause the Applicant to fail or not comply with the breath demand.

Section 50.1(2)(b) of the *Highway Traffic Act* allows for an appeal in circumstances where a

"...person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason..."

The Tribunal does not dispute that the Applicant is asthmatic. Nonetheless, the Tribunal concurs with the Respondent's Representative that Physician #1's surmising "...likely unable to give a breathalyzer expiration breath..." is inconclusive. Physician #1 does not specify the severity of the Applicant's condition, nor comment as to how the Applicant's condition could have prevented her from providing an adequate breath sample, Physician #1's seems to relate the inability to provide a breath sample to "...stress..."

The Applicant has not provided the Tribunal with medical reports from any specialists. In fact, it appears that Physician #1, who diagnosed the Applicant's asthma about ten years ago, did not feel that the Applicant's history was severe enough to warrant sending the Applicant to a respiratologist.

Thus, in order to assess how the Applicant's condition could have precluded the Applicant from providing a breath sample, the Tribunal considered the viva voce evidence of the Applicant and Police Officer #1, and the videotape of the breathalyzer test session. At the hearing, asked specifically, if she was experiencing any breathing difficulties the Applicant's

response was an emphatic: "...no, no...". The Applicant's reply seems consistent with the evidence of Police Officer #1, corroborated by the videotape of the breathalyzer session, wherein by her own admission, the Applicant confirmed that she had used her inhaler approximately half an hour prior to the session. Given the timing of the Applicant's use of the inhaler, it is conceivable that, as she testified, the Applicant would not be suffering from a breathing impairment during the breathalyzer. The Tribunal further alludes to the videotape, which demonstrates quite clearly, what appears to be the lack of effort on the part of the Applicant to provide an adequate breath sample. Further, and most importantly, the Applicant's demeanour is not indicative of an individual exhibiting any type of respiratory distress.

As there are certain unmistakable indicators of respiratory impairment that are visible even to an untrained person, the Tribunal also relied on the testimony of the eyewitnesses who were involved in the incident. Both, Police Officer #2 and Police Officer #1 were in direct contact with the Applicant. Neither officer noticed, at any time, the Applicant suffering from any type of respiratory distress.

The onus being on the Applicant to establish the merit of the appeal, the Tribunal finds that the Applicant's testimony albeit credible, fails to substantiate the basis for an appeal on medical grounds. Thus, the Tribunal finds that the Applicant does not meet the criteria of Section 50.1 (2) (b), in that the Applicant was not able to demonstrate that she suffers from a medical condition, which would prevent her from providing a breath sample.

DECISION:

Upon the application by The Applicant to appeal the suspension order dated January 13, 2003 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal **confirms** the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: March 19, 2003

HIGHWAY TRAFFIC ACT
R.S.O. 1990, Chap. H.8 as amended

IN THE MATTER of the ORDER to IMPOUND a MOTOR VEHICLE Order # 3602904 OWNED BY: Erin Motorway Investments Ltd. – Mississauga Honda, 2380 Motorway Boulevard, Mississauga, Ontario, L5L 1X3 made pursuant to section 55.1 of the *Highway Traffic Act*, effective on: March 8, 2003.

AND IN THE MATTER of a requirement for a hearing respecting an appeal of the said Order to Impound, pursuant to section 50.2 of the *Highway Traffic Act*.

ERIN MOTORWAY INVESTMENTS LTD. – MISSISSAUGA HONDA
Applicant

-and-

REGISTRAR OF MOTOR VEHICLES
Respondent

CONSENT ORDER

Upon the application to the Tribunal by Erin Motorway Investments Ltd. – Mississauga Honda, Applicant, and by the representative for the Registrar of Motor Vehicles, for the issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22, and having reviewed the written settlement signed by the Applicant and the Registrar of Motor Vehicles as to the disposition of these proceedings which is filed and attached hereto as Schedule “A”;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the facts and on the terms set out in the said Schedule “A”.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: March 14, 2003

Schedule "A"

LICENCE APPEAL TRIBUNAL

Between:

ERIN MOTORWAY INVESTMENTS LTD – MISSISSAUGA HONDA

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

1. On March 8, 2003, the motor vehicle described in Order to Impound #2501058 was impounded in accordance with subsection 55.1(3) of the *Highway Traffic Act*, R.S.O. 1990, c. H. 8 as amended.
2. Mr. Jabbaz Guillermo is the name shown on the vehicle and plate portion of the permit for the impounded motor vehicle, is the owner of the said vehicle.
3. The Applicant filed an appeal of the Order to Impound, in accordance with the grounds permitted under clause 50.2(3)(a) of the *Highway Traffic Act*, stating that the motor vehicle that is subject to the Order was stolen at the time in respect of which the Order was made.
4. Having investigated this matter and receiving the appropriate information from the police service, the Registrar is satisfied that the motor vehicle that is subject to the Order was stolen at the time in respect of which the Order was made.
5. The Applicant has had the opportunity to obtain independent legal advice with respect to consent to this Order.
6. The parties agree that this agreement does not bind the Ministry of Transportation or the Registrar of Motor Vehicles in any way, with respect to future hearings or Consent Orders.

JOINT SUBMISSION

Accordingly, the parties consent to an Order of the Licence Appeal Tribunal under subsection 50.2(5) of the *Highway Traffic Act* that the Tribunal set aside the Order to Impound.

Veronica Clavero

**Authorized Delegate for
Registrar of Motor Vehicles**

(signature of Applicant)

(signature of Respondent)

(date)

(date)

HIGHWAY TRAFFIC ACT
R.S.O. 1990, Chap. H.8 as amended

IN THE MATTER of the ORDER to IMPOUND a MOTOR VEHICLE Order #3501018 OWNED BY: Micheal K. Lindsay of: 356 York Street, Kingston, Ontario, K7K 1R9 made pursuant to section 55.1 of the *Highway Traffic Act*, effective on: March 12, 2003.

AND IN THE MATTER of a requirement for a hearing respecting an appeal of the said Order to Impound, pursuant to section 50.2 of the *Highway Traffic Act*.

MICHEAL K. LINDSAY

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

CONSENT ORDER

Upon the application to the Tribunal by the Applicant, Micheal K. Lindsay, and by the representative for the Registrar of Motor Vehicles, for the issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22, and having reviewed the written settlement signed by the Applicant and the Registrar of Motor Vehicles as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the facts and on the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: March 20, 2003

Schedule "A"

LICENCE APPEAL TRIBUNAL

Between:

MICHEAL K. LINDSAY

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

1. On March 12, 2003, the motor vehicle described in Order to Impound #3501018 was impounded in accordance with subsection 55.1(3) of the *Highway Traffic Act*, R.S.O. 1990, c. H. 8 as amended.
2. The Applicant, Micheal K. Lindsay, whose name is shown on the vehicle and plate portion of the permit for the impounded motor vehicle, is the owner of the said vehicle.
3. The Applicant filed an appeal of the Order to Impound, in accordance with the grounds permitted under clause 50.2(3)(a) of the *Highway Traffic Act*, stating that the motor vehicle that is subject to the Order was stolen at the time in respect of which the Order was made.
4. Having investigated this matter and receiving the appropriate information from the police service, the Registrar is satisfied that the motor vehicle that is subject to the Order was stolen at the time in respect of which the Order was made.
5. The Applicant has had the opportunity to obtain independent legal advice with respect to consent to this Order.
6. The parties agree that this agreement does not bind the Ministry of Transportation or the Registrar of Motor Vehicles in any way, with respect to future hearings or Consent Orders.

JOINT SUBMISSION

Accordingly, the parties consent to an Order of the Licence Appeal Tribunal under subsection 50.2(5) of the *Highway Traffic Act* that the Tribunal set aside the Order to Impound.

Micheal K. Lindsay

**Authorized Delegate for
Registrar of Motor Vehicles**

(signature of Applicant)

(signature of Respondent)

(date)

(date)

HIGHWAY TRAFFIC ACT
R.S.O. 1990, CHAP. H.8 AS AMENDED, SECTION 50(1)

IN THE MATTER of an application by the
Applicant to appeal the decision of the Registrar of
Motor Vehicles pursuant to section 47(1) of the
Highway Traffic Act;

AND IN THE MATTER of

THE APPLICANT

Applicant

and

REGISTRAR OF MOTOR VEHICLES

Respondent

ADJOURNMENT

WHEREAS an oral hearing in the above matter was scheduled to be held on Wednesday, March 19, 2003, at London, Ontario;

AND WHEREAS the Applicant's Counsel requested an adjournment of the hearing as he is scheduled to be in Court on that day out of town;

TAKE NOTICE, upon consent of all parties, the Tribunal Orders:

- (1) this matter is adjourned;
- (2) the appeal shall be heard at 1:30 p.m. on Wednesday, April 16, 2003 at LOCATION, London, Ontario.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: March 18, 2003

AUTO MART SUDBURY LTD. AND RICK TOULOUSE

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATIONS

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

DONALD C. PLAUNT, Counsel, representing the Applicants
AVIVA HARARI, Counsel, representing the Registrar, *Motor Vehicle Dealers Act*

DATES OF

HEARING: June 26, 2002, September 26, 2002 and March 25, 26 and 27, 2003

Toronto

ORDER

WHEREAS the Registrar under the *Motor Vehicle Dealers Act* (the "Respondent") issued a Proposal dated September 14, 2001 to revoke the registrations of Auto Mart Sudbury Ltd. and Rick Toulouse (the "Applicants") under the *Motor Vehicle Dealers Act*;

AND WHEREAS the hearing before this Tribunal of the Applicants' appeal to the Proposal commenced before the Tribunal on June 26, 2002, continued on September 26, 2002, and further continued on March 25, 26 and 27, 2003, but was not completed;

AND WHEREAS the Parties' Counsel agreed that the hearing be adjourned to 9:30 a.m. on May 9, 2003;

NOW THEREFORE, this Tribunal orders that:

1. The hearing of this matter shall, by consent of the parties' Counsel, be adjourned *peremptorily against both parties* to 9:30 a.m. on Friday, May 9, 2003 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: March 27, 2003

JOHN ZIMMER AND PHYLLIS ZIMMER

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL: Simon Dann, Member

APPEARANCES:

No one appearing on behalf of John Zimmer and Phyllis Zimmer, the Applicants

Karen R. Spector, representing the Registrar, Ontario New Home Warranty Program

No one appearing on behalf of Salcor Construction Ltd., the Added Party

DATE OF
HEARING:

March 3, 2003,

Toronto

AMENDED CONSENT ORDER

Upon the application to the Tribunal by John Zimmer and Phyllis Zimmer, Applicants, and Karen R. Spector for the Registrar, *Ontario New Home Warranties Plan Act*, and Salcor Construction Ltd., the Added Party for the issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedures Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicants and Counsel for the Ontario *New Homes Warranty Plan Act* and the Added Party as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Simon Dann, Member

Released: March 26, 2003

JAMES DELANEY

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: WILLIAM WARBURTON
Presiding Member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

JAMES DELANEY, Applicant
Unrepresented

DATE OF HEARING: August 30, 2002

DECISION RELEASED: September 13, 2002 Toronto

REASONS FOR DECISION

A hearing was held on August 30, 2002, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

The Tribunal released its Decision on September 13, 2002, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	James Delaney (the "Applicant")
Motor Vehicle:	1992 Ford F-150 XL, plate 2H2 8JY (the "vehicle")
Date of Appeal:	August 15, 2002

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on August 30, 2002 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

MY POSITION IS WITHOUT MY VEHICEL I WILL LOSE MY JOB. ALSO MY GIRLFRIEND WAS DRIVING UP TO AUG 9th WHEN SHE TOOK SICK I MOVE FROM MISSISSAUGA TO BLUE WATER BEACH A MONTH AGO I WILL SHOW THAT I HAD A DRIVER'S WORKING WITH ME UP AND TILL JUNE 27/02 WHEN I MOVED TO BLUE WATER BEACH. THEN MY GIRLFRIEND TOOK ME TO WORK UNTIL SHE GOT SICK. NEVER DID I DRIVE THE VEHICEL.

(sic)

Evidence of Barbara Vogtlaender

Ms. Vogtlaender resides with the Applicant and moved with him to Blue Water Beach, ON on June 27, 2002 from their former residence in Mississauga ON. Ms. Vogtlaender explained that the Applicant usually works with his younger brother and nephew on job sites in or near the Greater Toronto Area. The impounded vehicle is normally utilized as a "work truck" in addition to being used as a personal vehicle. After Ms. Vogtlaender and the Applicant moved to Blue Water Beach, the Applicant's older brother loaned to the Applicant and his younger brother another truck (an Astro van) to be used for work purposes. After moving to Blue Water Beach and prior to the impoundment of the vehicle, on working day mornings Ms. Vogtlaender drove the Applicant in the impounded vehicle from their home to his younger brother's residence in Tottenham ON. Subsequently, the Applicant, his brother and nephew would drive to the job site of the day in the borrowed Astro van. Ms Vogtlaender would return to her home in the impounded vehicle and use it throughout the day for personal travel.

Ms Vogtlaender is currently unemployed. She has applied for Employment Insurance, but she is uncertain about whether she is eligible to receive benefits. Since moving to Blue Water Beach she has been searching for employment in the greater vicinity of Barrie ON. Prior to the impoundment she was using the impounded vehicle for this purpose. Therefore, she asserted that the impoundment might result in the loss of employment opportunities for her. Since the impoundment she has been invited to two job interviews in Collingwood ON. However, she did confirm that she was able to attend both of those interviews. She drove to the interviews in a car that she borrowed from her brother.

Ms. Vogtlaender explained that following the impoundment of the vehicle she was able to borrow her brother's 1988 car. Normally this car is driven by her brother, for among other purposes, to commute from his residence in Hamilton ON to his place of employment in Woodbridge ON. Since loaning this car to his sister he has secured the usage of a company car to meet his transportation requirements. Since borrowing her brother's car Ms Vogtlaender has used his car as a substitute for the impounded vehicle. In particular, she has used this car to drive on working day mornings with the Applicant from their home to his younger brother's residence in Tottenham ON. Then, as prior to the impoundment, the Applicant, his brother and nephew would drive to the job site of the day in the borrowed Astro van. She would return to her home in her brother's vehicle and use it throughout the day for personal travel. In particular, she has been utilizing the car to facilitate her employment search.

However, Ms. Vogtlaender expressed anxieties concerning her brother's car. Firstly, she stated that the car is old (a 1988 model) and that it is in poor condition. More urgently, she was concerned that she will be required to return the car to her brother before the impounded vehicle is released from the pound on September 23, 2002. She asserted that an early return of the car would leave her with no means of transportation and in particular, with no ability to attend job interviews. However, she did not state the basis for her belief that she might soon be required to return the car to her brother. She pointed out that Blue Water Beach is approximately a 30 minute drive from Barrie, a 45 minute drive from Tottenham and that the nearest town is a 90 minute walk from her home. She stated that there are no modes of public transportation available to her.

Also, she stated that since moving to Blue Water Beach she and the Applicant have been looking for a second car to purchase. She confirmed that the decision to purchase a second car was not related to the impoundment.

Evidence of the Applicant

The Applicant is employed by a heating company on a piece work basis. He installs and maintains heating equipment. He is a specialist in high velocity heating equipment.

On the day of the impoundment he had a job that entailed the installation of a high velocity heating unit. This type of installation does not require the assistance of the Applicant's brother and nephew. They are not experienced with high velocity units. Therefore, the Applicant had planned to perform the installation by himself. Normally under such circumstances, Ms Vogtlaender would have driven the Applicant directly to the job site. However, on the day in question, Ms Vogtlaender was ill and she could not drive. Therefore, the Applicant drove the vehicle. He explained that it was very important that this installation be completed on schedule. He felt a strong sense of obligation to the client. Also, he feared that he would be fired by his employer if he did not attend at the job site and complete the installation on the day in question.

The Applicant stated that he was concerned that the impoundment could result in the loss of his job. In particular, he feared that an early return of Ms Vogtlaender's brother's vehicle, as outlined above, would leave him without the means to get to work.

The Applicant explained to the Tribunal that on the evening before the hearing his older brother's Astro van, that was loaned to him for use as a "work truck", was taken to an automotive shop for repairs. The Applicant said that he assumed that the van could be repaired but that he was not certain.

The Applicant is the registered owner of another vehicle, a 1987 GMC van. He explained that this vehicle is not in working condition and that it waiting to be towed away for scrap metal.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by James Delaney;
2. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
3. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Blood/Alcohol Content in Excess of .08 under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until January 25, 2003.

The Registrar's Representative did not present any evidence in addition to the documentary evidence summarized above. In her submission before the Tribunal she reviewed section 22 of Regulation 574 of R.R.O. 1990, as amended by Ontario Regulation 632/98, which defines "exceptional hardship" for the purposes of the Tribunal's deliberations. She asserted that the Applicant had failed to meet the burden of proof required by the Regulation in order to establish that a condition of exceptional hardship exists as a consequence of the impoundment of the vehicle.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
 - (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
- (b) financial or economic loss to any person;
- (c) loss of employment or employment opportunity to any person; or
- (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;

- (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant, to establish exceptional hardship, must first establish that there is no alternative to the impounded vehicle under Subsection 22(3) of Regulation 574 R.R.O. 1990. The Applicant's evidence demonstrates that there is an alternative, namely the motor vehicle loaned by Barbara Vogtlaender's brother. Fortunately, the Applicant has been able to rely on her and other family members for alternative transportation to work, as well as the assistance of his brother and nephew in traveling to various jobs.

Since there is an alternative to the impounded motor vehicle, the Tribunal cannot consider inconvenience, financial or economic loss, loss of employment or loss of training under Subsection 22(2) of Regulation 574 R.R.O. 1990. As a result the Applicant has failed to establish exceptional hardship as a ground for his appeal.

The Applicant has appealed on the grounds that the impoundment of her vehicle will result in exceptional hardship.

Under Section 22 of Regulation 574 of R.R.O. 1990, as amended by Ontario Regulation 632/98, the owner must establish that no alternative to the impounded vehicle is available as a prerequisite for a finding of exceptional hardship under subsections (1) or (3).

Ms. Vogtlaender stated that the impounded vehicle has historically been utilized as both a "work truck" and as a personal vehicle. Furthermore, she stated that after the Applicant and herself moved to Blue Water Beach, the Applicant's older brother loaned an Astro van to the Applicant for use as a work vehicle. Therefore, at the time of the impoundment, the impounded vehicle was only being used as a personal vehicle. Subsequent to the impoundment, Ms. Vogtlaender was able to use her brother's car as a personal vehicle as set out above. The Tribunal must conclude that an alternative to the impounded vehicle has been found. While

some anxiety was expressed regarding the possibility of the loss of the use of Ms Vogtlaender's brother's car before the release of the impounded vehicle and regarding the state of repair of the borrowed Astro van, no compelling evidence was presented to support the belief that the alternative arrangements that have been made cannot continue until the impounded vehicle is released.

Furthermore, the Applicant has also failed to establish any of the other conditions required for a finding of exceptional hardship. In addition to establishing that no alternative to the impounded vehicle is available, the Applicant must establish that the impoundment will result in:

- (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety...of a community in whose service the motor vehicle is ordinarily used; or
- (c) financial loss, loss of employment or education, or loss of employment or educational opportunity that will be immediate, significant and lasting, and where the loss will be sustained by a person ordinarily transported by the motor vehicle, excluding the driver whose driver's licence is under suspension.

Regarding (c) above, the Applicant expressed anxiety over the possibility that the impoundment may result in the loss of his employment. It should be noted that the Applicant has sustained his employment since the impoundment and he has been in attendance at the required job sites since the impoundment. The evidence presented before the Tribunal does not suggest any imminent threat to his employment. Furthermore, section 22.3(d)(i) of Regulation 574, does not permit the Tribunal to consider financial losses of the driver whose driver's licence is under suspension.

Also, regarding (c) above, Ms Vogtlaender, a person who is ordinarily transported by the impounded vehicle, expressed anxiety that the impoundment would impede her search for employment and could result in the loss of employment opportunities. However, since the impoundment, she has been invited to two job interviews. She utilized her brother's borrowed car as transportation and she was able to attend both of the interviews. It is most probable that any future interviews during the impoundment period will be attended via similar means. Therefore, the Tribunal must conclude that Ms. Vogtlaender has not sustained any loss.

Regarding (a) above, the health or safety of anyone is not at issue in this case.

Regarding (b) above, public health and safety is not at issue in this case.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

William Warburton,
Presiding Member

RELEASED: March 27, 2003

MATTHEW J. ELLIOTT

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*
TO REFUSE REGISTRATION

TRIBUNAL: BARBARA FRASER, Member

APPEARANCES: MATTHEW J. ELLIOTT, representing himself
A. MICHAEL ROTHE, Counsel, representing the Registrar.
Motor Vehicle Dealers Act

HEARING: March 20, 2003 Windsor

DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") from a Notice of Proposal issued by the Registrar, *Motor Vehicle Dealers Act*, (the "Registrar"), pursuant to section 7, of the *Motor Vehicle Dealers Act* (the "Act"). The Proposal dated November 29, 2002, seeks to refuse the registration of Matthew Joseph Elliott (the "Applicant") pursuant to section 7, of the Act, based upon:

1. Applicant's criminal convictions, and the nature of said convictions.
2. Applicant's failure to fully disclose his criminal record as required by question 9 on the application to become a motor vehicle salesperson.

Mr. Elliott, on behalf of himself, filed a Notice of Appeal dated, December 13, 2002. He did not dispute his criminal record.

THE LAW

- Section 5(1) the Act, an Applicant is entitled to registration or renewal of registration by the Registrar except where,
- (b) the past conduct of the Applicant affords reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.

- Section 6 (1) Subject to section 7 of the Act, the Registrar may refuse to register an Applicant where in the Registrar's opinion the Applicant is

disentitled to registration under section 5.

Section 7 (1) and (4) the Act, state:

Section 7(1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the Registrar shall serve notice of the proposal, together with written reasons therefore, on the Applicant or Registrant.

Section 7 (4) provides that an Applicant/Registrant requires a hearing; the Tribunal shall schedule a hearing. At that time, the Tribunal may order the Registrar to carry out or refrain from carrying out this proposal, or the Registrar take such action as the Tribunal considers appropriate, in accordance with the Act and the regulations.

Section 7 (5) the Act, provides that the Tribunal may attach such terms and conditions to its Order or to the registration, as it considers proper to give effect to the purposes of the Act

EXHIBITS:

1. Notice of Proposal to refuse Registration dated November 29, 2002, issued by the Registrar, *Motor Vehicle Dealers Act*.
2. Notice of Appeal form, with attached correspondence filed by the Applicant.
3. Package of six sheets including the covering letter dated March 3, 2003. Metropolitan Toronto Police Service, Applicant 's criminal record, filed by Registrar.
4. Red Binder containing seven files and a covering letter dated February 6, 2003, filed by Registrar, set out as follows:

Tabs 1 to 7

1. Notice of Proposal to Refuse Registration, November 29, 2002.
2. Notice of Appeal, 2 handwritten pages plus 7 letters attached.
3. Individual Application for Registration, October 11, 2002.
4. Criminal History check.
5. Correspondence from Ontario Motor Vehicle Industry Council (OMVIC), October 31, 2002.
6. Correspondence from Matthew Elliott, November 6, 2002.
7. Court certified information regarding Charges

Witness for the Registrar:

Jennifer Andrew, Inspector, *Motor Vehicle Dealers Act* (MVDA), affirmed, testified on behalf of the Registrar.

1. She stated that the primary purpose of the Act is to ensure consumer protection and she set out the criteria for registration of persons to ensure the protection of

the public when dealing with motor vehicle salespersons. Registration of the Applicant was refused because of the serious nature of the convictions.

2. Ms. Andrew stated that in a six-year period the Applicant received 20 convictions. She further testified that on his application to become a salesperson, the Applicant initially did not fully reveal all the convictions against him. The Applicant was released on parole from Saskatchewan Penitentiary on September 19, 2002, and is currently on parole, until May 13, 2003.
3. The Applicant's convictions were obtained in a criminal background search: (Exhibit 4 Tab 4). They are as follows:

May 8, 1992	Possession of credit card obtained by crime (5 Counts). Theft under \$1000.00 (2 counts)
April 15, 1993	Trafficking in a narcotic (2 counts) Failure to comply with Probation Order
February 26, 1998	Possession of Device to Obtain Telecommunication Facility or service.
November 16, 1998	Traffic in Schedule 1 Substance (2 counts) Possession of a Schedule 1 Substance for the purpose of Trafficking
June 15, 1998 to September 1998	Fail to comply with Recognizance (5 counts) Possession of a scheduled Substance for the purpose of Trafficking.

Witness for the Applicant:

Matthew J. Elliott, Applicant, stated that the convictions reviewed by Ms. Andrew were accurate. He said however, that it was not his intention to hide any of his convictions. He said that he was unaware that he had to state all of his past. He said that he had submitted a second letter with additional details.

The Applicant further said that he has turned his life around. He intends to become a correspondence student at McMaster University. He produced a letter from McMaster University, dated December 2002 (Exhibit 2) stating that the Applicant applied to the Addiction Studies Program, which is conditional on payment of a sixty-dollar fee. The Applicant admitted that he has not paid the fee; therefore he is not enrolled in the course of studies. He stated that he would like to become a drug and alcohol counselor

eventually. (Note that all of the documents referred to by the Applicant were filed jointly as Exhibit 2 and will be referred to as such.)

The Applicant stated that while he was in Yellowknife he was employed as a Sales Consultant for Yellowknife Chrysler Ltd. during the period January 2000 to April 2001 (Exhibit 2). A letter dated December 11, 2002, from Yellowknife Chrysler Ltd. stated that during the Applicant's employment, his performance was excellent. The Applicant stated that he thoroughly enjoyed his time as a salesman and only desires to do that work. He said that in Yellowknife there was no requirement to have a clean record and that is why he applied for a licence in Ontario.

The Applicant explained that he moved to Windsor to be near his mother who has been ill. The Applicant was asked if he was willing to be employed in work other than car sales. He replied he only wants to be a car salesperson, but said he had submitted resumes to various places of employment, but has not received any replies.

A letter dated April 11, 2002 (Exhibit 2), from Windsor Chrysler stating that Mr. Elliott has applied to become a sales professional at their dealership. The letter further states that it is their intention to hire him, and are awaiting the final decision from OMVIC. An undated letter, from the Drouillard Road Clinic, (Exhibit 2), states that the Applicant is a patient, and that since October, 2002 he has provided clean urine specimens.

A letter dated December 6, 2002, (Exhibit 2) by a medical doctor, stating that at the time of writing, the Applicant has been doing extremely well. It also stated that the Applicant is being maintained on a regular daily dose of methadone.

Exhibit 2 also contains another letter of support from a Windsor Parole Officer, dated December 6, 2002, stating that since his release there have been no known violations of Mr. Elliott's release conditions.

A letter dated December 6, 2002, (Exhibit 2) signed by a caseworker at St. Leonard's House states that the Applicant appears to be making a sincere effort toward making healthy lifestyle changes and choices. The letter further suggests that he is receiving family support.

The Applicant's mother Elfreda Stacey, stated that her son has made some mistakes in the past but that she believes he deserves another chance.

The Tribunal upon reviewing all of the evidence before it, is of the opinion that the Applicant's criminal past conduct affords reasonable grounds for the belief that he will not carry on business in accordance with law, with integrity and honesty.

The Tribunal is also of the opinion that the application for registration is premature in that the Applicant was released from the penitentiary only six months ago, and is still on parole until May 15, 2003. He has not had sufficient time to prove to this Tribunal and most importantly to himself that he has indeed reformed and will remain free of illegal

drugs. The Tribunal further suggests that the Applicant should be willing to accept any honest work as he wends his way to rehabilitation. Unfortunately, we are not always able to work in the fields of our choice.

Having said that however, the Tribunal does not wish to crush the hope of an individual who sincerely wishes to get on with his life and make a new start.

ORDER:

Pursuant to the authority vested in it by section 7 (4) of the *Motor Vehicle Dealers Act*, the Tribunal directs the Registrar to carry out its proposal dated November 29, 2002, against the Applicant with the following provision:

1. That the Applicant, if after a period of two years from the date of this decision, has indeed reformed, such that he: remains free of illegal drugs; maintains a criminal free record; then upon a further application for registration, the Tribunal directs the Registrar to register Matthew J. Elliott as a salesperson upon the following conditions:
 - a. That Matthew J. Elliott, within two years of this decision successfully completes the certification course offered by OMVIC.
 - b. That for a period of three years from the date of this decision, all bills of sale involving Matthew J. Elliott will require the signature of his sales manager who has the responsibility to supervise the work of the salespersons.
 - c. That Matthew J. Elliott, will not be given a supervisory position at a motor vehicle dealership, which involves the handling of money for a period of four years from the date of this decision.

LICENCE APPEAL TRIBUNAL

BARBARA FRASER
Presiding Member

Released: March 31, 2003

PREHEARING

TILBAR LEASING LIMITED

IN THE MATTER OF an application by Tilbar Leasing Limited dated February 10, 2003 for a hearing before the Licence Appeal Tribunal pursuant to section 50(1) of the *Highway Traffic Act*, to consider the appeal of the Suspension and Seizure Order of the Deputy Registrar dated February 6, 2003;

AND IN THE MATTER of the Commercial Vehicle Operator's Registration (CVOR) certificate 003-383-061 issued to Tilbar Leasing Limited;

AND IN THE MATTER of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8 as amended;

AND IN THE MATTER of the safety record and record of unpaid fines of Tilbar Leasing Limited;

TRIBUNAL: STUART CORK, Presiding Member

APPEARANCES: PATRICK MOORE, Counsel for the Respondent
HEATHER PERKINS-McVEY, Counsel for the Applicant

DATE OF

PRE-HEARING: March 17, 2003 *by teleconference*

ORDER

FOLLOWING attendances by teleconference on March 17, 2003 at a pre-hearing before this Tribunal of Patrick Moore, Counsel for the Registrar of Motor Vehicles, Ministry of Transportation (the "Respondent"), and Heather Perkins-McVey, Counsel for Tilbar Leasing Limited (the "Applicant") as set forth in the Tribunal's Notice of Pre-Hearing Conference dated February 20, 2003;

WHEREAS it was outlined at the Pre-Hearing Conference that:

- (a) The Registrar issued a Suspension and Seizure Order dated February 6, 2003, pursuant to section 47 and subsection 47(1) of the *Highway Traffic Act*, for Tilbar Leasing Limited;

- (b) The parties present at the Pre-Hearing confirmed that there was no resolution of the issues between them.

The Tribunal makes the following Orders respecting the hearing:

1. The hearing shall commence at 9:30 a.m. **Tuesday, June 17, 2003, and continue if necessary at 9:30 a.m. on June 18, 19 and 20, 2003**, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.
2. The parties shall file their submissions and any documents in support **on or before 4:00 p.m. June 6, 2003**.

Each party will file one copy with the Tribunal and deliver one copy to the other party. Disclosure shall be provided no later than 10 days prior to the hearing.

3. The Respondent shall present evidence and testimony from one witness, Sherry Atallah, a Carrier Safety Rating Administrator. Ms. Atallah shall provide evidence of all the Applicant's relevant records and information, including notes taken at a show cause meeting, the Applicant's safety history, operating records, MTO correspondence, warning letters and interviews.

Further evidence shall include all data relating to accidents, convictions and inspections for Tilbar Leasing Limited. Ms. Atallah's evidence shall also include CVOR records, analysis, and sanction analysis of the Applicant, covering in detail a period of two years prior to the Order. Further evidence including, warning letters and previous audits, prior to two years before the Order will also be presented.

4. The Applicant shall present evidence and testimony from two witnesses. Among the witnesses anticipated, will be Mr. Wayne Riddell, the owner and operator of Tilbar Leasing Limited. The other witness will be the shop foreman of Tilbar Leasing Limited. The witnesses for the Applicant will present evidence of the initiatives that the Applicant has taken to improve the safety record of the company.
5. Among the issues to be raised by the Respondent will be the safety record of Tilbar Leasing Limited, as sufficient evidence to support the Registrar's February 6, 2003 Suspension and Seizure Order.
6. Among the issues to be raised by the Applicant will be that the sanction being imposed upon it is too long and excessive. Furthermore, the Applicant had difficulties in the past, however, these have been remedied by mechanisms and procedures that have resulted in improvements in the Applicant's safety.

7. At the hearing of this matter, the Tribunal will be asked to review in detail a time period of two years prior to the date of the Suspension and Seizure Order.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

RELEASED: March 26, 2003

GREG CAERS

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE *ONTARIO
NEW HOME WARRANTIES PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL: JOHN ORT, Member

APPEARANCES: GREG CAERS, Applicant, representing himself,
KAREN SPECTOR, Counsel, representing
the Ontario New Home Warranty Program,
No-one appearing for Mattamy (Upper Glen Abbey)
Limited, the Added Party.

DATE OF
HEARING: March 12, 2003 Toronto

ADJOURNMENT ORDER

WHEREAS Greg Caers (the "Applicant") appealed a decision of the Ontario New Home Warranty Program (the "Respondent") dated October 31, 2002 (the "Decision"); pursuant to the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, Chapter O.31, as amended.

AND WHEREAS the Applicant filed an appeal with the Licence Appeal Tribunal (the "Tribunal") requesting a hearing;

AND WHEREAS at the pre-hearing on February 3, 2003, the Tribunal appointed a time and place for a hearing of the above matter on March 11, 2003, later adjourned to March 12, 2003, at the offices of the Tribunal, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario;

AND WHEREAS at the commencement of the hearing the Tribunal was advised that Greg Caers, the Applicant, requests an adjournment to provide his expert additional time to prepare a report in response to the decision and a supplementary decision letter provided to the Applicant by the Respondent on or about February 25, 2003;

AND WHEREAS the Respondent consented to the adjournment;

AND WHEREAS the Tribunal has an obligation to the public to act in an expeditious manner;

AND WHEREAS the Tribunal would be inconvenienced by further delaying the hearing;

AND WHEREAS only claim #3 in the supplementary decision letter from the Respondent relates to ground that is now frozen and not fully accessible;

AND WHEREAS the Applicant expressed the desire to withdraw all other claims;

AND WHEREAS the Applicant was provided with a brief recess to consider his position;

AND WHEREAS at the resumption of the hearing the Applicant confirmed his desire to withdraw all claims, save & except claim #3.

NOW THEREFORE, this Tribunal orders that:

1. All claims by the Applicant, save & except claim #3 are noted withdrawn at the request of the Applicant.
2. Only the hearing of claim 3 in the supplementary decision letter issued by the Ontario New Home Warranty Program in this matter is adjourned, *peremptory as against the Applicant*;
3. The hearing of said claim shall be held at the offices of the Tribunal, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, commencing at 9:30 a.m. on Tuesday, June 10, 2003; and
4. The Applicant shall be at the liberty to provide disclosure of a written expert report pursuant to Rule 6.4 of the Licence Appeal Tribunal Rules of Practice (relating to said claim) at least thirty days before the continuation of this hearing on June 10, 2003.
5. Any other party intending to provide an expert report relating to said claim shall provide disclosure at least twenty days before the continuation of this hearing on June 10, 2003.

LICENCE APPEAL TRIBUNAL

John Ort, Presiding Member

Released: March 28, 2003

DaCOSTA DEVELOPMENTS INC.

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE *ONTARIO NEW
HOME WARRANTIES PLAN ACT*

TO REFUSE REGISTRATION

TRIBUNAL: SIMON DANN, Presiding Member

APPEARANCES: TERRY DaCOSTA, Applicant, representing himself
CAROL STREET, Counsel, representing the Registrar, *Ontario
New Home Warranties Plan Act*

DATES OF
HEARING: March 17 and March 18, 2003 London

REASONS FOR DECISION AND ORDER

This is a hearing before the Licence Appeal Tribunal ("the Tribunal") arising out of a Notice of Proposal issued by the Registrar under the *Ontario New Home Warranties Plan Act* ("the Registrar" and "the Act" respectively). The Notice of Proposal dated October 31, 2002 proposed to refuse registration of DaCosta Developments Inc., ("DaCosta") under the Act.

BACKGROUND:

The Registrar under the Act proposed to refuse to renew the registration of DaCosta Developments Inc. The grounds relied upon by the Registrar for the Proposal are set out below:

1. The Applicant has failed or refused to:
 - (a) Provide security with respect to the construction and sale of units, as requested of the applicant by letter dated October 9, 2002;
 - (b) Provide the security required with respect to the construction and sale of units in the 5-unit Type B Phase 4 condominium project known as Scott's

Gate Condos located at 375 Scott St., in Strathroy, requested of the applicant by letter dated October 9, 2002;

- c) Enroll the homes located at Moore Street, in Strathroy, by submitting the completed Enrollment of Home forms together with the prescribed fees, requested of the applicant by letter dated October 9, 2002;
 - d) Enroll the condominium units for Phase 4 of a condominium project known as Scott's Gate Condos located at 375 Scott Street, in Strathroy, by submitting the completed Enrollment of Condominium Unit form together with the prescribed fees, as requested of the applicant by letter dated October 9, 2002
2. In failing or refusing to provide the above noted documentation, the Applicant has contravened the following provisions of the Ontario New Home Warranties Plan Act, R.S.O. 1990, Chapter O.31, (the "Act") as amended, and Regulations:
- (a) The Applicant has failed to comply with sections 8 and 9 of Regulation 892;
 - (b) Section 1.0.3 of Regulation 894 obliges the Applicant to provide such information or material relating to the Applicant's entitlement to registration as the Registrar may require and request;
 - (c) Section 7(1)(c)(i) and 8(1) of the Act allows the Registrar to refuse to register an Applicant where, having regard to the Applicant's financial position, it cannot reasonably be expected to be financially responsible in the conduct of its undertakings and where in the Registrar's opinion, the Applicant is disentitled to registration.

The Registrar subsequently issued a Supplemental Notice of Proposal, dated March 5, 2003 which, in addition to the grounds shown in the Notice of Proposal dated October 31, 2002, the Registrar added the following:

- 3. Pursuant to section 7(1)(c)(i), the Registrar has reasonable grounds for concluding that the Applicant cannot reasonably be expected to be financially responsible in the conduct of its undertakings, having had regard to the financial information provided to ONHWP from the Applicant and its officer/guarantor, Terry DaCosta.
- 4. Pursuant to section 7(1)(c)(ii) the past conduct of the sole officer/director of the Applicant affords the Registrar reasonable grounds for believing that the Applicant's undertakings will not be carried on in accordance with law and with integrity and honesty. In particular:

- (a) The said officer/director, Terry DaCosta, caused or allowed the Applicant corporation to commence construction of a condominium project located at 375 Scott Street in Strathroy, Ontario without having first become registered with ONHWP; without first enrolling the said project; without having first obtained the appropriate building permits on land owned by another unrelated company;
- (b) The said officer/director, Terry DaCosta, caused or allowed the Applicant corporation to enter into 4 Agreements of Purchase and Sale for units in the condominium project at 375 Scott Street in Strathroy, Ontario without first becoming registered with ONHWP and without first enrolling the said project;
- (c) The said officer/director, Terry DaCosta caused or allowed the Applicant corporation to construct 2 semi-detached homes located at 25-27 Moore Street in Strathroy, and entered into an Agreement of Purchase and Sale for one of the said homes without first becoming registered with ONHWP and without first enrolling the said homes
- (d) The said officer/director, Terry DaCosta, has behaved in an abusive and threatening manner towards representatives of ONHWP and others. For example, as a result of the actions referenced in paragraphs (a) (b), and (c) above, charges were laid against the Applicant corporation and the said officer/director, Terry DaCosta, in the Provincial Court, pursuant to section 22 of the *Ontario New Home Warranties Plan Act*. The said officer/director, Terry DaCosta, behaved in a threatening and abusive manner to a representative of ONHWP, Roger Ducharme, when the said charges were served on Terry DaCosta by Mr. Ducharme.

EXHIBITS:

- EXHIBIT #1 Notice of Proposal to Refuse Registration dated October 31, 2002
- EXHIBIT #2 Notice of Appeal Form, received November 15, 2002
- EXHIBIT #3 ONHWP Book of Documents (Tabs 1 through 35 incl)
- EXHIBIT #4 Terry DaCosta Personal Net Worth Statement
- EXHIBIT #5 Land Registry Abstract
- EXHIBIT #6 ONHWP Financial Risk Assessment document, March 16, 2003
- EXHIBIT #7 Fuller, Martin, Agreement of Purchase & Sale
- EXHIBIT #8 Notice of Sale Under Mortgage, G.M.S. Mortgagee

At the commencement of the hearing no one appeared for the Applicant at 9:33 a.m. on March 17, 2003. The hearing was adjourned for 15 minutes in case the Applicant was delayed. At 9:45 a.m., the Applicant arrived and the hearing commenced at 9:50 a.m.

FACTS

Opening Statements:

Ms. Carol Street, Counsel for the Registrar stated the Registrar's case would be presented under two headings. These would be (1) Financial and (2) Behavioural (Compliance).

Specifically the refusal decision to register DaCosta had been made on the basis that:

- (1) the Applicant did not have sufficient financial strength; and
- (2) there were compliance issues relating to the manner in which the Applicant
(a) commenced construction without a building permit, (b) sold homes without being a registrant and (c) sold without enrolling new home units with the Program.

The Applicant, Mr. DaCosta, indicated in his opening statement that he would cover much of the same ground as had been mentioned by Ms. Street and that he would review evidence of his enrollment and that he had been a previous registrant and there had been no complaints.

The Registrar's Witnesses were Kevin Brodie and Roger Ducharme

Evidence of Kevin Brodie

Mr. Brodie is a chartered accountant and has been with the Program since May of 2001. He currently holds the position of senior financial analyst and works in licensing and underwriting where he reviews applications for registration from first time applicants. Mr. Brodie stated he completed his CA training with BDO Dunwoody, in the Barrie, Ontario office in 2000 and that he has reviewed many financial statements.

Mr. Brodie confirmed the Applicant's file started with Connie Corriero after it was received by the Program on June 21, 2002. He stated that Ms. Carreiro is an Underwriting Analyst and that she is not an accountant. Only when it becomes evident that there are problems or financial questions with a file does that file go to an accountant staff member. The history of the DaCosta file shows:

- the initial application was received June 21, 2002 (E3-T5)
- the company's sole owner was Terry DaCosta
- the principal details of the construction proposal for the next 12 months were presented as being:

Residential Construction Planned over next 12 months	Total Units	Start Date
Single Detached/Semi	16	June 2002
Single	33	May 2002
Low-Rise Condominium	17	July 2002
Contract Home(s)	2	August
Homes on Septic System	1	June 2002

- the application included an out-of-date Guarantee Document (E3-T6)
- (E3-T7) the letter of June 26, 2002, by Ms. Carreiro requested additional information by July 12, 2002; specifically:
 1. to confirm the total number of units over next 12 months
 2. a project profile
 3. to complete the new indemnity form in place of old guarantee form
- on July 9, 2002, the Program received the completed indemnity and project profile forms (E3-T8, T9)
- the third page of the project profile form showed a total unit count of 47
- the July 11, 2002 letter from Ms. Carreiro requested confirmation for the total number of freehold units to be built over the next 12 months (E3-T10)
- the July 11, 2002 fax from DaCosta confirming Phase #3 is to be done in 4 phases for a total of 17 units (E3-T11)
- subsequently, the program was advised there would only be 6 freehold and 4 condominium units for a total of 10
- the Builder Risk Assessment Report produced on August 6, 2002 (E3-T15) showed that Mr. DaCosta did not have sufficient minimum equity for the proposed total number of units (the report was based on 10 units)
 - The Program was unable to include either the cash amount or the real estate shown on Mr. DaCosta's Personal Net Worth Statement (Exhibit 4) as there was no back-up in the form of bank statements, tax assessment form or deed
 - On the technical test it was acknowledged that while Mr. DaCosta initially obtained a below average business and technical skills rating, he did arrange to redo the test and obtained an improved score at that time however, it did not overcome the insufficient financial rating (E3-T19)

Mr. Brodie then referred to Builder Bulletin 28 which reviews how the Registrar carries out the risk assessments to ensure that registered builders are able to meet all financial and warranty obligations.

- the letter of August 7, 2002 (E3-T16) advised Mr. DaCosta his financial information showed insufficient financial equity and that the Program required a guarantor to support his application for registration; this letter requested a reply by August 21, 2002;
- on September 16, 2002, the Program received the following financial documents by fax:
 1. Pro-Forma Financial Statements for DaCosta Realty Inc. (E3-T12)
 2. Financial Statements for DaCosta Realty Inc. (E3-T13)

3. Financial Statements for DaCosta Developments Inc. (E3-T14)

Mr. Brodie testified that these documents were unable to assist his review as there was no back-up information and that "Pro-Forma" only means the company's best estimates. In addition, each page contained a disclaimer stating they were *"Prepared without Audit or Review of any kind by The Ellis-Dillon Group from information provided by management. Prepared for management purposes only."*

- on September 20, 2002, Ms. Carreiro obtained a second Builder Risk Assessment Report (E3-T17), taking for face-value the September 16th statements received from Mr. DaCosta; the resulting report showed there was still insufficient minimum equity;
- the letter of October 9, 2002 (E3-T18), from Mr. Pat Varcoe, Deputy Registrar, advised Mr. DaCosta that the Program was prepared to provide DaCosta Developments with registration based on the following terms and conditions:
 1. \$15,000 security per unit for the 5 condo units at 375 Scott Street (original request had been for \$20,000 per unit)
 2. to provide a declaration of deposit amount requested from buyer
 3. to provide \$10,000 per unit security for 2 freehold units at 25-27 Moore Street
 4. to submit appropriate enrollment applications with corresponding fees
 5. to obtain Program consent for any additional units
- though the Program requested a reply by October 18, 2002, none was received by that date;
- on November 13, 2002 the Program was advised by Mr. DaCosta (E3-T20) that he was not continuing with the condominium project at 375 Scott Street as 3 of the 4 offers to purchase had expired and he was returning the only deposit in his possession to the purchaser;
- Mr. DaCosta also advised that the only project left was the two semis at 25-27 Moore Street, Strathroy and they had been enrolled - front side only copies of a deposit refund (dated Nov. 12, 2002) and enrollment cheque (date was unclear whether Oct or Sept 26, 2002) were included

Mr. Brodie's testimony reviewed other facts, including:

- copies of four Agreements of Purchase and Sale (E3-T26, T27, T29, T30) which showed deposits had been taken for condominium units at Scott Street and that DaCosta was not a registered builder at the time the agreements were entered into;
- Mr. DaCosta's comments to Connie Carreiro during a telephone conversation of November 18, 2002 (E3-T21) in which Ms. Carreiro noted Mr. DaCosta's comment that "...he would sell the home registered or not. He will use his friend's number or sell it to himself ..."
- a letter from the law firm of Parker, Ross & Blain, December 17, 2002 (E3-T22) which included:
 1. a proposal for four units and a letter of explanation on past events from Mr. DaCosta
 2. a copy of the agreement of purchase and sale between DaCosta and The Hampton Group
 3. 4 mutual releases signed by purchasers of the proposed condominium units

4. copy of a building permit for the Moore Street property

Mr. Brodie also reviewed a second letter, from Parker, Ross & Blain, dated January 6, 2003 (E3-T23), which included document copies that had been discussed during a conference call on January 2, 2003. These were:

- (a) a copy of transfer/deed for Mr. DaCosta's personal residence
- (b) a copy of first mortgage to TD Bank
- (c) a copy of second mortgage to Cecilia DaCosta
- (d) a copy of mortgage on Moore St to G.M.S. Mortgage Funding
- (e) a copy of assessment notice on Mr. DaCosta's residence
- (f) a copy of listing agreement for Mr. DaCosta's residence
- (g) two construction cost sheets for 25-27 Moore Street

Mr. Brodie commented that he would not have been able to determine the profitability of the Moore Street, project as he had not received any proof of construction costs.

Ms. Street then introduced a copy of a land registry abstract (Exhibit 5) showing charges registered against DaCosta Realty Inc. by Finleigh Realty Inc., for \$31,000 and Coldstream Concrete Limited for \$2,560.

In summary, Ms. Street asked Mr. Brodie if he thought DaCosta had the financial strength to proceed with the proposed homes and he answered "No". Mr. Brodie also confirmed he had completed a new Risk Assessment on March 16, 2003 and based on the available information, DaCosta would still only score 13 points. According to the Bulletin 28 grid, that would still place this builder in the above average risk category.

On cross-examination of Mr. Brodie by Mr. DaCosta, the Tribunal heard:

- that in due course, it typically takes 4 to 6 weeks for a registration application to be processed if all the required information is received;
- confirmation that Mr. DaCosta's construction plan, submitted with the application, was for 17 homes (E3-T9pg3, E3-T11);
- that the first time Mr. Brodie saw the DaCosta financials was in January 2003 - however Mr. Brodie believed that Mr. Varcoe, who is also a CA, would have seen them before signing the condition of registration letter of October 9, 2002;
- Mr. Brodie confirmed the Program does not accept 'Pro-Forma' statements, as they are only estimates of what management thinks may happen, and that he also had no familiarity with the Ellis-Dillion Group, who had prepared the statements (to which Mr. DaCosta responded "You don't want to know");
- Mr. Brodie confirmed that he had not contacted Mr. DaCosta to discuss the statements.

Evidence of Roger Ducharme

Mr. Ducharme has been an Investigator with the Program's Enforcement Group for 10 years and investigates allegations concerning unenrolled homes and unregistered builders. Prior to joining the ONHWP he had been a police officer from 1973.

Mr. Ducharme received the DaCosta file on June 20, 2002 and prepared his report for the period from that date to November 2, 2002 (E3-T32). Highlights of Mr. Ducharme's investigation findings were reviewed through his testimony and include the following:

- as of June 25, 2002 there was no construction at 375 Scott Street and no building permit had been issued; Mr. Ducharme also learned that DaCosta was building a semi-detached unit at 25-27 Moore St and an expired ONHWP number had been used on the building permit application;
- on July 2, 2002, DaCosta entered into an Agreement of Purchase and Sale for one unit at Scott Street; a second agreement was dated July 30th; a third on August 19th and a fourth agreement was entered into on September 9th;
- on August 16, DaCosta Developments ordered concrete to be poured for 5 foundations at 43 to 47 Scott Street and this construction started August 26, 2002;
- on September 11th, 2 photos were taken of the 5 foundations at Scott Street (E3-T24) and it was learned that (i) no construction permits were in place and (ii) the property was still owned by the Hampton Group;

On the basis that DaCosta Developments was not a registered builder, that no permits had been issued and the 5 units were not enrolled in the Program, Mr. Ducharme contacted DaCosta to advise him that Section 12 of the Act required enrollment forms, fees and securities documentation to be completed and that he was in contravention of the regulations.

On September 20, Mr. Ducharme learned from DaCosta that the Moore Street units were rental units and therefore did not need to be enrolled. Mr. DaCosta also said the Program head office had received all the documents for registration and enrollments for the condo project would be sent when registration was completed.

On October 8, Mr. Ducharme visited the Scott Street site and learned that (i) no further construction had occurred, (ii) no permits had been issued or applied for and (iii) there were problems with the ownership of the property which now had foundations for 5 units.

On October 17, Mr. Ducharme learned from Connie Carreiro that Mr. DaCosta had advised her that (i) he would not submit the requested securities, (ii) that the condo project was on hold and that (iii) he wanted his file sent to Notice of Proposal as he intended to appeal the security requirement.

On October 22, Mr. Ducharme confirmed there was no further condo construction work taking place and that Coldstream Concrete had liened the property. In addition, he learned that there was now legal action between DaCosta and the Hampton Group.

On October 29, Mr. Ducharme met with:

- Dave Tennant, owner of the Scott St. property, and The Hampton Group, and obtained copies of various background documents regarding the Tennant/DaCosta relationship (E3-T32pg2);
- Ron Tyler, the real estate agent for DaCosta, and obtained copies of 4 Agreements of Purchase and Sale and deposit details;
- Bob Brown of Coldstream Concrete for copies of work invoices and concrete delivery tickets.

On November 4, Mr. Ducharme testified he met with Mr. DaCosta at 25 Moore Street to serve summonses regarding charges for failing to enroll, for not being a registered vendor and for not being a registered builder.

Mr. DaCosta's response to being served was "confrontation, menacing, abusive" as described in Mr. Ducharme's Threatening Call/Contact report (E3-T35). Mr. Ducharme also took photographs of units 25 and 27 Moore Street (E3-T24pg5).

On cross-examination of Mr. Ducharme by Mr. DaCosta, the Tribunal heard...

- that rental units are not covered by the Program;
- that Mr. Ducharme had not seen any deposits during the course of his meeting with Ron Tyler;
- there had been no complaints from any of the purchasers about getting their money back;
- that the situation with DaCosta is not out of the ordinary.

Mr. DaCosta also raised the matter of when he might have received the August 30, 2002 fax letter from The Hampton Group's law firm (E3-T28) advising him to "cease and desist all work on the site...") and Mr. Ducharme testified that by September 6th, all the Coldstream concrete forms had been stripped and were off-site.

The Applicant, Mr. DaCosta, then provided the following testimony on his own behalf:

- he is an electrician and has knowledge in other trades;
- he has taken management courses;
- in the 1995-97 period he did some personal construction work as well as for others;
- between 1997 and 2000 he worked in the maintenance department at the Toyota plant and then at the Ford plant in Oakville until 2001;
- after the position at Ford he looked at home construction for self-employment;

- regarding the original Notice of Proposal (E3-T1), only item 1(a) should be in dispute as items 1 (b) and (d) had been halted and were not proceeding while 1 (c) was completed and enrolled

Regarding the Supplementary Notice of Proposal (E3-T2), Mr. DaCosta believed it was similar to the original Notice of Proposal and that he had wanted to enroll the semi units at Moore Street and that “no others were happening”.

Highlights of Mr. DaCosta's testimony are noted as follows:

- he still has not received a letter stating “here is your equity and here is what we need (security);
- that he remembered his 1990-91 experience when he had not needed security;
- that he needed to have his registration first before the bank would lend money;
- the first project he considered was the Mogg Street parcel (see E3-T12, T13 - which is listed on the Balance Sheet pages in the Total Current Assets - Inventory section) but he then got the Moore Street property on which he planned to build and rent;
- he then contacted The Hampton Group about buying Phase 3 of Scott Gate;
- Mr. DaCosta confirmed he started the ONHWP application in June of 2002 and after completing the Indemnity Form he also spoke with Connie Carreiro to find out how to reduce the security amount required;
- that his agreement with The Hampton Group (E3-T22pg7) allowed him to start construction with the submission of building plans;
- he confirmed that the Moore Street units were rented by November 2002 with the sale of one having closed March 12, 2003;
- he stated that he felt his personal net worth statement (Exhibit 4) was “pretty accurate”;
- he confirmed that he had received only one actual deposit, which was from Hustler, and that the site photos shown in E3-T24 were correct.

Mr. DaCosta testified that following the January 2, 2003 conference call (referenced in E3-T23), he provided information to the Program but never received a reply and that he was disappointed his request for a Pre-Hearing had not been agreed to by the Program.

Mr. DaCosta referred to the Program's letter of October 9, 2002 (E3-T18) and (i) agreed with paragraphs 1 and 3. He suggested the 2 Moore Street units might require \$5,000 each and claimed he was told that “under normal circumstances maybe not at all”. He also felt the security should be held for 1 year not 2 years.

On equity, Mr. DaCosta also pointed out that his equity should be \$104,000 and while that was originally for 10 units he is now down to 2 units.

Ms. Street then offered an updated Risk Assessment report, dated March 16, 2003, which showed that Mr. DaCosta still did not meet the minimum equity requirement. This was accepted as Exhibit 6.

On cross-examination of Mr. DaCosta, the Tribunal heard:

- that while the Moore Street property only closed in July 2002, DaCosta began clearing the land between May and July and then started construction in July even though it had not been enrolled;
- on being shown a copy of the Agreement of Purchase and Sale, for 25 Moore Street, to Fuller and Martin (Exhibit 7), which was in place before construction started (which shows a date of June 1, 2002), it was noted that the second page of the Agreement was missing; Mr. DaCosta refused to answer when asked if he denied the existence of the second page;
- that Mr. DaCosta had told Mr. Ducharme the Moore Street units were rental units;
- that Mr. DaCosta did not disclose pending litigation to the Program as he did not consider it relevant;
- that DaCosta Realty Inc. was in default to G.M.S. Mortgage Funding Corporation for the Moore Street property mortgage and had not disclosed this to the Program;
- that the financial statements found at E3-T13 listed assets (Mogg Street) which Mr. DaCosta did not own;
- that while advising the Program he would only be doing 4 condos, he actually poured 5 foundations;
- that by signing the ONHWP Vendor Agreement (E3-T3) and the ONHWP Builder Agreement (E3-T4), Mr. DaCosta had committed to the terms detailed in Article 1.3 of the Vendor Agreement and Article 1.4 of the Builder Agreement.

In response to a question from the Tribunal member regarding the discrepancy between the deposit amount of \$5,000 noted in the original Presseault Agreement of Purchase and Sale versus the amount of \$3,500 noted in the Presseault Mutual Release, Mr. DaCosta said he did not know anything about that as his real estate agent had prepared the Release and he had just signed the form.

In closing argument for the Program, Ms. Street reviewed the evidence presented during the course of the hearing and concluded by asking the Tribunal to consider...

- the Applicant was building in 2 locations;
- the Applicant had submitted misleading information
- the Applicant was selling homes without being registered;
- the Applicant had not enrolled homes for sale;
- the Applicant had submitted misleading information on deposits.

And, since the Program could not rely on the information supplied by the Applicant, it also could not rely on the Applicant to do what it was supposed to do.

Further, as the Applicant was involved in an altercation with Mr. Ducharme, and as he deals with the public, there is a potential for other altercations to occur. Therefore, the Applicant's conduct cannot be relied upon.

In his closing argument, Mr. DaCosta submitted the following:

- it was only through this hearing that he had a view of the Risk Assessment Report;
- the Program was only valuing his personal property at the year 2000 value and that it had a higher current value and in fact, the higher value would give him equity of \$104,000;
- that the \$15,000 cash shown in his statements should have been considered;
- that he was never given the opportunity to go into the Program offices to personally review his Risk Assessment Report;
- that he considered the different 'Total Equity' number shown in Exhibit 6 versus that shown in E3-T17 pg 2 to be discriminatory;
- that based on his asset and equity calculation he should have scored between 34 and 37 points depending on whether he was planning 4 or 2 units.

Regarding his conduct, Mr. DaCosta suggested that as there were no witnesses, it should not be considered. However, he did agree that he had not provided the information regarding the construction lien and litigation but that he did have an interest in the Mogg Street property and that was why it had been listed as an asset.

As far as the deposits were concerned, he had relied on his real estate agent to complete the offers and release documents. He had also relied solely on the accountants who had prepared the financial statements on his behalf.

Mr. DaCosta acknowledged that he had not enrolled homes nor provided required security but expressed the view that denying him registration was unfair as he had money that was now tied up.

In closing, Mr. DaCosta stated that if everything was resolved, there would be no problem in providing new financial statements, enrolling homes and providing security as required, especially as he now had a better understanding of the Risk Assessment analysis.

Mr. DaCosta called for more collaboration between the Program and Applicants to allow for better understanding of the process and he acknowledged he had made mistakes and had learned from them. He asked the Tribunal to consider a compromise solution.

In reply, Ms. Street emphasized that contrary to Mr. DaCosta's argument, the Tribunal should consider that:

- (1) the Program could not consider the value of any assets as the financial statements were not reliable;
- (2) Moore Street started without building permits;
- (3) Mr. Ducharme's version of the dispute is the only evidence on record as Mr. DaCosta did not challenge it;
- (4) that it would be difficult for the Program to consider a compromise as the Program does not have the necessary confidence in Mr. DaCosta;
- (5) in accordance with section of the Act, Mr. DaCosta could make a new application for registration based on new or other evidence or where it is clear that material circumstances have changed.

ISSUE:

Does the Registrar, *Ontario New Home Warranties Plan Act* have sufficient grounds to refuse the registration of the Applicant as a builder under the said Act?

THE LAW

Sections 6,7(1)(c)(1) and 8(1) of the Act and section 9 of Regulation 892 state as follows:

Section 6 of the Ontario New Home Warranties Plan Act (the "Act") is clear in requiring that

No person shall act as a vendor or a builder unless the person is registered ... under this Act.

Section 7 states:

- 7 (1) An applicant is entitled to registration by the Registrar except where,
 - (1) (c) the applicant is a corporation and,
 - (1) (i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its undertakings,

Section 8(1) of the Act states as follows:

- 8 (1) Subject to section 9, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 7.
- 9 (1) Each applicant desiring registration under the Plan shall complete, execute, and deliver to the Registrar such form or forms of application as the Registrar may require from time to time.

9 (3) The applicant shall furnish to the Registrar:

9 (3) Financial statements of the applicant and such other information relating to the applicant's financial affairs as the Registrar may require.

APPLICATION OF LAW TO FACTS:

Based on the evidence presented by both the Program's counsel and the Applicant through his own testimony and closing submission, the Tribunal finds as a fact that DaCosta Developments Inc. had not enrolled homes or provided the security requested in the Program's 'Condition of Registration' letter of October 9, 2002 (E3-T18) contrary to subsection 9(3) of the Act.

The Tribunal finds that the Applicant failed to comply with the Act and the regulations. The Applicant proceeded to sell and build in contravention of the Act's requirements and it is not unreasonable to consider that he may have done so with some fore-knowledge of the requirements. The attitude displayed by the Applicant towards Mr. David Tennant and then Mr. Ducharme is also of some concern. However, the Tribunal takes note of the fact that the Applicant did resolve the matters of owed deposits and other debts.

The Tribunal further finds as a fact that the Registrar established (through the evidence of Mr. Ducharme) that the applicant engaged in construction and sales activities in 2002 without becoming an ONHWP registered vendor or builder, contrary to section 6 of the Act, and that this evidence was not challenged by the Applicant.

The Tribunal notes that the Applicant substantially reduced its construction plans from 17 units to 10 to 2 (4 units were also mentioned) and was making efforts to complete a registration application.

The Tribunal further finds that the evidence presented through Mr. Ducharme regarding construction and sales activities in 2002 without registration which therefore acting as a vender or builder, contrary to section 6 of the Act was not challenged by the Applicant.

Regarding the matter of security and the financial strength of the Applicant, the Tribunal considers this issue of greatest concern, especially as the financial reliability of a builder is generally of great importance to a home buyer.

The fact that the Applicant failed to present any documentary evidence, at the hearing, to counter the Program's concerns about his asset base or financial capabilities left the Tribunal in the position of only being able to consider the Applicant's failure to provide security or finance the closing of his real estate deal with The Hampton Group and also fail to bridge finance his obligations to Finleigh Realty Inc. and to Coldstream Concrete Limited.

Further, when presented with the opportunity to obtain registration through the support of a guarantor (ONHWP letter of August 7, 2002, E3-T16) and then through the provision of requested security (ONHWP letter of October 9, 2002, E3-T18), the Applicant failed to respond in either instance.

The failure or refusal of the builder to provide the security required as a condition of registration places in serious jeopardy the financial ability of the builder to meet its contractual and warranty obligations or to respond to unexpected circumstances.

The evidence and testimony shows that at present, the Applicant cannot reasonably be expected to be financially responsible in the conduct of its undertakings as required by s 7(1)(c)(1) of the Act.

In summary, the Tribunal believes the Registrar is entitled to expect and receive complete and credible disclosure of an Applicant's financial details, in complete accordance with the Act, if that Applicant is seeking approval to construct housing which, of necessity, exposes the warranty program to potential liability for claims.

In the absence of an acceptable explanation, failure to provide such disclosure may in itself be capable of constituting reasonable grounds for the Registrar's belief that the Applicant will not be financially responsible in the conduct of its undertakings.

DECISION:

Accordingly, by virtue of the authority vested in it under section 16(3) of the *Ontario New Home Warranties Plan Act*, the Tribunal directs the Registrar, *Ontario New Home Warranties Plan Act* to refuse the application for registration.

LICENCE APPEAL TRIBUNAL

Simon Dann, Presiding Member

Released: March 31, 2003

ROBERT AND CATHERINE SEYMOUR

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MICHAEL H. TURK, Vice-Chair

APPEARANCES:

ROBERT and CATHERINE SEYMOUR, the Applicants
KEN ROSENBERG, Counsel, representing the Ontario New Home
Warranty Program
FRED SPENCER, Agent, representing New Millennium Homes Inc.,
Added Party

DATE OF
HEARING: March 26, 2003 Toronto

ORDER

THIS HEARING was held this day in the presence of Robert and Catherine Seymour, Applicants; Ken Rosenberg, Counsel, representing the Ontario New Home Warranty Program (hereinafter the "Program") and Fred Spencer, the President of New Millennium Homes Inc., (hereinafter, the "Added Party").

WHEREAS this hearing commenced and the Tribunal heard testimony from Robert Seymour;

AND WHEREAS the hearing then recessed, at which time the parties embarked upon settlement discussions.

AND UPON hearing the submissions of the Applicants, the Program and the Added Party that this matter has been settled and upon confirmation of the specific terms thereof, the Tribunal does hereby make the following order :

1. New Millennium Homes Inc. shall replace the existing sewer pipe from the Applicants' home to the street and backfill on top of the said sewer pipe;

2. New Millennium Homes Inc. shall ensure that all work relating to the replacement of the sewer pipe shall be inspected by the City of Hamilton and performed in accordance with the requirements of the City of Hamilton;
3. New Millennium Homes Inc. shall provide the Applicants with two (2) clear days notice prior to the commencement of its work herein;
4. Save and except the work to be performed by New Millennium Homes Inc. pursuant to this order, the Applicants do hereby release New Millennium Homes Inc. from any further claim that they may have relating to their driveway;
5. The Program shall pay to the Applicants the sum of \$750.00 by way of recompense and shall not seek reimbursement of the same from New Millennium Homes Inc.;
6. Payment of the sum of \$750.00 by the Program to the Applicants shall be in settlement of the Applicants' claim herein and the Applicants shall execute the Program's standard form of release in order to receive this sum;
7. All work to be performed by New Millennium Homes Inc. shall be completed no later than 90 days following delivery by the Applicants to New Millennium Homes Inc. and to the Program of written confirmation from the Applicants' neighbour, Rick Schott, 1 Pimlico Drive, Dundas, Ontario:
 - (a) permitting the replacement of the sewer line which runs across his property; and
 - (b) that New Millennium Homes Inc. shall not be responsible for any repairs to the driveway or landscaping at 1 Pimlico Drive other than to back fill on top of the sewer pipe.
8. On the basis of the foregoing, the claim of the Applicants is hereby withdrawn.

LICENCE APPEAL TRIBUNAL

Michael H. Turk,
Vice-Chair, Presiding

RELEASED: March 31, 2003

MARIO BELFRUTTO

IN THE MATTER OF the *Motor Vehicle Dealers Act*, R.S.O. 1990, c. M.42 and Regulations, as amended;

AND IN THE MATTER OF an Application by Mario Belfrutto dated December 16, 2002, for a hearing before the Licence Appeal Tribunal pursuant to section 7 of the *Motor Vehicle Dealers Act* appealing the Notice of Proposal to Refuse Registration of the Registrar, *Motor Vehicle Dealers Act*, dated December 4, 2002.

TRIBUNAL: JOHN ORT, Member

APPEARANCES: JORAM GOLD, Agent, representing the Applicant,
Mario Belfrutto

YOVANKA McBEAN, Agent, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF HEARING: March 13, 2003 Toronto

DECISION AND REASONS

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") by Mario Belfrutto (the "Applicant") respecting a Notice of Proposal to Refuse Registration of the Registrar, *Motor Vehicle Dealers Act* (the "Registrar" and the "Respondent"), dated December 4, 2002.

ISSUE:

Should the Tribunal direct the Registrar to carry out the Registrar's proposal or to refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with the *Motor Vehicle Dealers Act* (the "Act") and the regulations?

EXHIBITS:

- Exhibit #1 - Notice of Proposal to Refuse Registration dated December 4, 2002, issued by the Registrar, *Motor Vehicle Dealers Act*;
- Exhibit #2 - Notice of Appeal received by the Tribunal on December 17, 2002, filed by the Applicant;
- Exhibit #3 - Respondent's Book of Documents; and
- Exhibit #4 - February 26, 2003, letter to Mr. Joram Gold from Ms. Yovanka McBean re s.35 of the *Evidence Act*.

FACTS:

The evidence on behalf of the Registrar consisted of the testimony of Mary Jane South together with documents introduced through her. The testimony of Mario Belfrutto was the evidence on behalf of the Applicant.

Mary Jane South

Ms. South has been a Deputy Registrar at the Ontario Motor Vehicle Industry Council (OMVIC) since 1997.

In November 2002, the Applicant applied for registration under the Act as a motor vehicle salesperson. The application appears at tab 3 of exhibit 3. Question 9 on the application asks:

Have you ever been found guilty or convicted of an offence under any law or are any charges pending? (This includes those instances, where a conditional or absolute discharge has been ordered). If yes, list all charges and/or convictions, and the circumstances surrounding each (attach additional sheets if necessary).

The Applicant checked off *No*. A note at the bottom of question 9 adds: "Applicants are subject to background and criminal record searches. Submitting a false or incomplete disclosure is an offence under the MVDA and will result in disqualification. Do not assume that convictions are automatically deleted from your record. If you have any questions about the information you must disclose please call OMVIC.

The application for registration under the Act also states in capital letters:

IT IS AN OFFENCE UNDER SECTION 22(1)(A) OF THE MOTOR VEHICLE DEALERS ACT TO KNOWINGLY PROVIDE FALSE INFORMATION ON THIS APPLICATION.

Above the signature of Mario Belfrutto on the application appears:

I certify that the information provided by the undersigned in support of this application is to the best of my knowledge and belief true.

The Ontario Provincial Police provided a search of the criminal record held in the CPIC Identification Data Banks, page 2 of tab 4 of exhibit 3, which states the following:

NAME:	BELFRUTTO, MARIO	
D.O.B:	OCTOBER 31, 1960	
<u>DATE & PLACE</u>	<u>CHARGE</u>	<u>DISPOSITION</u>
MAY 23, 1991 TORONTO	ASSAULT SEC 266 CC	SUSP SENT & PROBATION 2 YRS
JUL 13, 1992 TORONTO	TRAFFICKING IN A NARCOTIC (5 CHGS)	5 YRS LESS 1 DAY ON EACH CHG CONC

The Applicant was contacted and he provided a signed letter to Mike Razo of OMVIC dated November 28, 2002, which appears at tab 5 of exhibit 3. That letter says the following:

Please note that I, Mario Belfrutto, am the individual with the positive Criminal record check. I was rushed at the time when filling out my application and didn't thoroughly look at the question "in question". I was under the impression that I had checked off "yes" to the prior conviction question.

My convictions were: Trafficking Narcotics 1992
Assault - 1992.

Mario Belfrutto

Mr. Belfrutto testified that he correctly understood question 9 on his application to become a salesperson under the Act. He stated under oath that he answered question 9 *no* just to see if it goes through. He added, "Yes, I lied; I know I lied."

Mario Belfrutto also testified that the letter of explanation to OMVIC at tab 5 of exhibit 3 is not true. He stated, "This letter is a lie."

LAW:

The *Motor Vehicle Dealers Act* states the following:

5. (1) An Applicant is entitled to registration or renewal of registration by the Registrar except where,

- (a) having regard to the financial position of the Applicant, the Applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
- (b) the past conduct of the Applicant affords reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty; or
- (c) the Applicant is a corporation and,

- (i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, or
- (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or
- (d) the Applicant is carrying on activities that are, or will be, if the Applicant is registered, in contravention of this Act or the regulations.

6. (1) Subject to section 7, the Registrar may refuse to register an Applicant where in the Registrar's opinion the Applicant is disentitled to registration under section 5.

7. (4) Where an Applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the Application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

22. (1) Every person who, knowingly,

- (a) furnishes false information in any application under this Act or in any statement or return required to be furnished under this Act or the regulations;
- (b) fails to comply with any order, direction or other requirement made under this Act; or
- (c) contravenes any provision of this Act or the regulations,

and every director or officer of a corporation who knowingly concurs in such furnishing, failure or contravention is guilty of an offence and on conviction is liable to a fine of not more than \$25,000 or to imprisonment for a term of not more than one year, or to both.

APPLICATION OF LAW TO FACTS:

Mr. Belfrutto admitted under oath that he lied on his Application for Registration under the Motor Vehicle Dealers Act, tab 3 of exhibit 3. He knew that he was convicted of offences under the Criminal Code, yet he answered that he had not been found guilty or convicted of an offence under any law on the application. The Applicant knowingly furnished false information in an application under the Act contrary to section 22 of the *Motor Vehicle Dealers Act*.

Mr. Belfrutto was advised by OMVIC that a criminal record check revealed convictions against him. In response, Mario Belfrutto wrote an explanation to OMVIC in a letter dated November 28, 2002. Mr. Belfrutto testified that the letter is a lie.

The past conduct of Mario Belfrutto as set out above affords reasonable grounds for the belief that he will not carry on business in accordance with law and with integrity and honesty, as required by subsection 5(1)(b) of the Act.

According to subsection 6 of the Act, the Registrar may refuse to register an Applicant where in the Registrar's opinion the Applicant is disentitled to registration under section 5. The Registrar's proposal to refuse the Applicant's registrations conforms with subsection 6 of the Act and it is correct and reasonable.

ORDER:

Accordingly, by virtue of the authority vested in it under section 7 of the *Motor Vehicle Dealers Act*, the Tribunal directs the Registrar to carry out the Notice of Proposal to Refuse Registration dated December 4, 2002, to refuse the registrations of Mario Belfrutto under the Act.

LICENCE APPEAL TRIBUNAL

John Ort, Member

Released: March 28, 2003

1541-ADLS-RESP

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: LUBA NEUWRITH
Representative for the Registrar of Motor Vehicles

Applicant
Unrepresented

DATE OF
HEARING: March 14, 2003

DECISION
RELEASED: March 17, 2003

REASONS FOR DECISION

A hearing was held on March 14, 2003 to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on March 17, 2003, with Reasons to follow.

THE TRIBUNAL RULED TO SET ASIDE the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated February 19, 2003, and was received by the Tribunal on February 21, 2003, together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice to Registrar dated November 24, 2002 – Issued by the Ministry of Transportation.
- b) Exhibit # 2 Notice of Appeal Form – received February 21, 2003.
- c) Exhibit # 3 Additional submissions by the Applicant – 4 pages – received March 6, 2003
- d) Via fax transmission on March 7, 2003, the Applicant submitted to the Tribunal and to Ms. Kim Beintema, (Hearing Officer) three pages containing: a "Brief Event Summary", prepared by the Applicant; photocopies of prescriptions from the District Hospital and from the office of Physician #1; photocopy of a note from the District Hospital signed by Physician #2 attesting to the fact that the Applicant had been diagnosed with sinusitis on November 29, 2002; and a "Crown Brief Synopsis".

By the Respondent:

The Representative of the Ministry provided the Tribunal with original certified copies of Ministry of Transportation documents on file.

- a) Exhibit # 4 Ministry of Transportation submissions – received March 7, 2003
- b) Exhibit # 5 Police Officer #1 Notes – 8 pages – received March 14, 2003

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* (“HTA”) states:

- 50.1(1) “A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
 - (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
 - (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason”.

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1), (2) and (3) requires that a medical report must contain:

- 15.(1) “a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

- (a) the name, telephone number and address, with the postal code, of the medical practitioner;
 - (b) the name, date of birth and address of the person who is the subject of the report;
 - (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
 - (3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

The Applicant's Driver's Licence was suspended on "Nov. 24, 2002" as per Notice of Appeal, filed as Exhibit # 2.

Applicant's Evidence

The Applicant had page 2 of the Notice of Appeal prepared by his physician of "20 years, ...months" Physician #1, on "20/2/03".

Physician #1 indicated under the headings:

"Details and Diagnosis of patient's condition ...29.11.02 – *sinusitis & cough*
...2.12.02 *sinusitis & cough*...

History of Condition ...*present for 1 week after inhaling dust*...

Type of Measurements or recent tests taken with (date indicated): *Reference to any pathology tests (e.g. PTF (SIC)) represent important corroboration of your medical opinion) ...clinical diagnosis*

Relevant details of last visit and when your patient was last seen? *...last visit 18.02.03...*

In a letter dated February 18th, 2003 Physician #1, opines that: *"...the above medical conditions can possibly produce coughing on forced expiration..."*

The Applicant in a letter dated November 24th, 2002, explained his view of the incident and stated: *"...On February 19th, the Judge after examining all the evidence allowed my 'not guilty' plea to stand. He was satisfied that there was enough evidence to allow my 'Not Guilty' plea".*

The Applicant explained that he had spent the day clearing a very dusty building and had apparently inhaled a considerable amount of dust. Although the Applicant's eyes were red and watery, the Applicant did not immediately feel any respiratory effects. The Applicant began to cough after being required to force himself to expel a strong breath for the breathalyzer. During the remainder of the night, the Applicant was unable to sleep and continued to cough. The following day the Applicant was advised to go to emergency, but chose not to go until a few days later. Upon his attendance at emergency, the Applicant was diagnosed with sinusitis and prescribed antibiotics. The following Monday the Applicant attended at the office of his family physician and was prescribed an inhaler as well as other medication.

Concluding his testimony in chief, the Applicant restated the comments in his letter to the Tribunal commenting that the judge accepted his plea of not guilty of failing to blow and dismissed the charge against him.

In cross-examination, the Applicant offered further reasons for being required to clean the building, and remarked that he requested the officer to visit the building but she refused.

Being health conscious the Applicant exercises regularly and believes himself to be in exceptionally good health for his age. The Applicant has not in the past suffered from any respiratory illnesses or allergies.

At the hearing, the Applicant detailed the events of the evening prior to his being stopped and the demand to provide a breath sample. The Applicant emphasized that he is aware that the location where he was stopped is well known as a R.I.D.E. programme site, and noted that had he wanted to, he could have avoided the locale by taking another route.

The Applicant confirmed that he was given eight attempts to provide a sample but was unable to do so.

The Applicant did not immediately begin to cough, after inhaling the dust. Approximately ten hours later, during the breathalyzer test the Applicant had a bad coughing spell. The cough got progressively worse and the Applicant felt compelled to go to emergency. During his visit to his family physician, Physician #1 assessed the hospital's diagnosis as correct but also found the Applicant's lungs to be congested. The Applicant subsequently developed pneumonia. Further, the Applicant testified that his physician also implied that the dust incident might have triggered allergies as the immune system had been weakened.

In closing, the Applicant stressed that he has perfect driving record, that he was behaving responsibly by not allowing his friend to drive, and that he could have avoided the R.I.D.E. programme.

The Applicant recapped his previous remarks that he was unaware of his condition until he visited his physician, at which time he was told that he had sinusitis and a "*bronchial infection which to this day ...suffering from...*".

The Applicant concluded by suggesting that he was a victim of circumstances and asked the Tribunal to afford him the benefit of the doubt.

Respondent's Evidence

The Respondent provided the following Documents:

1. Certified Copy of Notice to the Registrar, sealed February 24th, 2003
2. Certified Copy of driving record of the Applicant, sealed February 21st, 2003
3. Copy of Vehicle Record, sealed February 21st, 2003

The Respondent's Representative called Police Officer #1, a member of the Ontario Provincial Police as a witness.

Police Officer #1 described the events that transpired after the Applicant was stopped and demanded a breath sample.

According to Police Officer #1 the Applicant's eyes were "*...quite red and watery...*" The Applicant was cooperative at all times but visibly nervous and asking several questions as to the consequences of a high reading.

Police Officer #1 described each of the eight attempts made by the Applicant to provide a breath sample. While the Applicant was attempting to provide a breath sample, Police Officer #1 noticed that air was escaping out of the sides of the Applicant's mouth as it appeared that the Applicant "*...had not formed a complete seal over the mouthpiece...*". Since insufficient air was entering the device, the machine indicated an error reading.

During the third attempt, the Applicant "*...began coughing ...this coughing then went on for*

approximately the next five minutes. He was coughing uncontrollably ...noticed that he was burping and gagging and a lot of coughing of and burping.... The Applicant was allowed a further five opportunities to provide a sample but failed to do so.

Police Officer #1 pointed out that the Applicant did not cough during the “...*twenty minutes...*” that he spent in the presence of Police Officer #1 after the breathalyzer test, nor did he request medical assistance.

The Applicant in cross-examining Police Officer #1 alluded to Police Officer #1’s notes, focusing on her reference to the Applicant’s “...*red rimmed watery eyes...*”. The Applicant also questioned the number of attempts routinely administered during a breathalyzer session, in contrast to the number of attempts he was permitted.

Police Officer #1 emphatically clarified that she did not agree to the Applicant’s request to visit the building in question, as it was not her job to do so.

Under questioning by the Applicant, Police Officer #1 confirmed that there are options that can be exercised in the event an Applicant is physically hurt and not being able to provide a breath sample. Nonetheless, Police Officer #1 felt that Applicant’s circumstances did not warrant such measures.

In her closing remarks, the Respondent’s Representative asserted that it is the Registrar’s position that sinusitis is not sufficient medical grounds to substantiate the Applicant’s appeal. According to the Respondent’s Representative, the Applicant had no intention to provide a breath sample.

The Applicant’s medical report does not link the illness, in this case sinusitis, to the Applicant’s ability to provide a breath sample. There are no respiratory test or pulmonary measurement tests results to show the Applicant’s lung capacity.

The Respondent’s Representative lay emphasis on the fact that the Applicant waited to have his case dismissed in Judicial Court prior to appealing. Ms. Neuwirth pointed out that these proceedings are different from the actions undertaken in the Judicial Courts and asked that Tribunal not be influenced by the Judicial Court’s decision to dismiss the “Refuse to Provide a Breath Sample – Approved Screening Device s. 254 (5) CC” charge laid against the Applicant.

In conclusion the Respondent’s Representative asked that the Tribunal uphold the Registrar’s decision.

APPLICATION OF THE LAW TO FACTS:

Although the totality of the evidence presented was considered, the preceding reflects a summary of the proceedings. Evidence introduced not directly germane to the issue was not transcribed.

Prior to setting out the reasons for the decision, the Tribunal will address the issue alluded to by the Applicant regarding blood samples.

While subsection 48.3 (3) 1 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H-8 as amended is clear in its provision, that the concentration of alcohol in the blood may be obtained “...by an analysis of the person’s breath sample or blood taken...”, the decision to request a blood sample remains at the discretion of the officers. According to established policy, no blood samples are to be demanded unless there are obvious visible physical signs preventing the individual from providing a breath sample. As no such signs were present, the issue of a blood sample is inconsequential.

An appeal was brought by the Applicant under Section 50.1 (2) (b) of the *Highway Traffic Act*, which prescribes:

“...person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason...”

The issue is not whether the Applicant was impaired, had been drinking, or expressed a vocal refusal to provide a breath sample. The subject of this appeal is whether the Applicant had a medical condition that at the time, could cause the Applicant to fail or not comply with the breath demand.

The Respondent’s Representative insists the Applicant’s failure to comply with the breath demand was not due to a medical condition, but that the Applicant simply had no intention to provide a breath sample. The Tribunal disagrees. The Tribunal must accept Physician #2’s and Physician #1’s diagnosis as incontrovertible evidence, which cannot be ignored. Physician #2 examined the Applicant at emergency in the District Hospital, a few days after the incident, and found him to be suffering from: “...sinusitis...”. The Applicant’s physician, Physician #1 confirmed the sinusitis and further diagnosed lung congestion which, subsequently deteriorated into full blown pneumonia. There is no doubt that the Applicant, albeit not aware at the time, was in fact in the process of contracting a serious lung infection.

The Tribunal is satisfied with the Applicant’s justification for waiting a few days before going to emergency. According to the Applicant, Physician #1, the Applicant’s family physician was away, although advised to go to emergency immediately, the Applicant decided to wait and see if the condition would improve. The Applicant has now consulted his physician on several occasions as he continues to be treated for the condition.

The Respondent’s Representative maintains that the medical reports do not connect the condition to the Applicant’s failure to provide a breath sample. Thus, in order to assess

whether the Applicant's condition prevented the Applicant from providing a breath sample, the Tribunal considered the viva voce evidence of the Applicant and Police Officer #1.

The Applicant's testimony that he began to cough upon being forced to exhale into the device is unequivocally supported by Police Officer #1, who testified that during the third attempt to provide a sample the Applicant "...began coughing ...this coughing then went on for approximately the next five minutes. He was coughing uncontrollably ...noticed that he was burping and gagging and a lot of coughing of and burping..."

Further, Police Officer #1's observations of the Applicant's eyes being "...quite red and watery..." is consistent with the possible allergy symptoms resulting from the Applicant's contact with the dust.

Based on the evidence before the Tribunal, and on a balance of probabilities, the Tribunal finds that the Applicant meets the criteria of Section 50.1 (2) (b), in that he was able to demonstrate that at the time of the breath demand, he was suffering from a medical condition which would prevent him from providing a breath sample.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated November 24, 2002 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal orders the suspension **set aside**.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: March 26, 2003

HOI THI LAI

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: MALCOLM FEALING
Presiding member

APPEARANCES: ADELAIDE PINDER
Representative for the Registrar of Motor Vehicles

HOI THI LAI, Applicant
Assisted by DANG ANNA (translator).

DATE OF HEARING: MARCH 4, 2003

DECISION RELEASED: MARCH 10, 2003 HAMILTON

REASONS FOR DECISION

A hearing was held on March 4, 2003, at Hamilton, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Hoi Thi Lai (the "Applicant")
Motor Vehicle:	Toyota Camry, plate ANYN 450 (the "vehicle")
Date of Appeal:	February 13, 2003

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on March 4, 2003 and proceeded as oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

I need the car to go to work to Toronto.

I asked Nop Sarann to se his licens befor I lend him the car, he told me he dint have them with him, that they wer at his hoose. He then said that ones I get the car, I will go get my licenc at home. So I said macke shure. [sic]

In her oral evidence Ms. Hoi stated that Mr.Savann, who is the friend of a friend wanted to borrow the car to go to pick up his girlfriend. She claimed that she asked him whether he had a valid driver's license, and that his response was in the affirmative.

She said that she works as a cook in a Vietnamese restaurant at Highway Seven and Markham. She normally works from Wednesday through Sunday, but has only been able to go to work on Saturday and Sunday.

She admitted that she also owns a 1993 Dodge Minivan, but said that it is presently being used by her sister who works in Dundas. She advised that she is unable to use the car during the week because her sister leaves for work at 5.00 a.m., and she has to be at home to prepare her 9-year old son for school She moved from Montreal to Hamilton approximately one year ago, and has no friends in Hamilton who could assist her in getting her son to school.

When asked whether she had explored the possibility of using the GO Bus to get to Markham, Ms. Hoi declared that she did not know how to use the Bus, and had not made any effort to learn.

Ms. Hoi is presently losing three days wages of approximately \$240.00, and she says that her employer has warned her that he will have to let her go if she does not find a way to get to work during the week. Her sister assists with the monthly expenses, Ms. hoi pointed out that they also have to send money to their parents in Vietnam and that loss of wages will constitute a hardship for both herself and her parents.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Nop Sarann;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;

4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of dangerous driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until May 23, 2005.
5. The Registrar stated that not having use of the car did not pose a threat to the health and safety of either Ms. Hoi or her son. The financial loss, while significant could be solved if Ms. Hoi would find a way to juggle schedules with her sister. It might be easier for her sister to get to Dundas by public transport while Ms. Hoi uses the van.
6. In any event getting to Markham by Go Bus while inconvenient is not very difficult.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

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- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
 - (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
 - (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
 - (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

As to the issue filed the evidence established that Ms. Hoi does have immediate access to a second automobile. The Dodge Minivan is registered in her name. She has demonstrated that she has made any effort to discuss with her sister means by which they could solve their transportation problem. It is also very apparent that Ms. Hoi has not explored any other means of getting to work other than by using her car. The Go Bus is a viable alternative which has not been considered.

Since an alternative to the impounded motor vehicle exists, The Tribunal cannot consider subsection 22(1)(a) and (b); threat to health and safety, nor can it consider subsection 22(2): inconvenience, financial or economic loss, loss of employment or of education.

The only other person immediately affected is Ms. Hoi's son, who is seen to school by her. Although the applicant, whose English is unfortunately poor, and who seemed to be unfamiliar with the accessibility of public transportation has experienced some inconvenience and financial loss, there is no evidence before the Tribunal to indicate that she has experienced exceptional hardship as a result of the impoundment of her automobile as defined by the Act or the regulations.

The Applicant does have a claim against the suspended driver for her financial loss and expenses pursuant to subsection 55.1(21) of the *Highway Traffic Act*:

"The owner of a motor vehicle that is the subject to an order to impound under this section may bring an action against the driver of the motor vehicle at the time the order was made to recover any costs or other losses incurred by the owner in connection with the order.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Malcolm Fealing, Presiding Member

RELEASED: March 10, 2003