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PREHEARING

CRAIG A. WINDLEY

IN THE MATTER OF THE *BAILIFFS ACT*
REVISED STATUTES OF ONTARIO, 1990, CHAPTER B.2

NOTICE OF PROPOSAL TO REVOKE THE APPOINTMENT OF
CRAIG WINDLEY UNDER THE *BAILIFFS ACT* AS ASSISTANT
BAILIFF PURSUANT TO THE PROVISIONS OF THE *BAILIFFS*
ACT REVISED STATUTES OF ONTARIO, 1990, CHAPTER B.2
("THE "ACT")

TO REVOKE APPOINTMENT

TRIBUNAL: VICTOR L. DREVNIG, Q.C. Vice-Chair

APPEARANCES:

CRAIG A. WINDLEY, Applicant, self-represented

ALVIN TORBIN, Counsel, and DAVID BLACKBURN, Complaints
Officer, representing the Registrar of Bailiffs, the Respondent

DATE OF
PRE-HEARING:

September 11, 2002

Toronto

PRE-HEARING ORDER

Pursuant to the provisions of section 10(1) of the Act, the Registrar of Bailiffs (the "Registrar") proposes to revoke the appointment of Craig Windley as Assistant Bailiff for failing to comply with subsections 14(1) and 14(2) of the Act in that he failed to post a bond in the prescribed amount and form with the Registrar.

DECISION

The Tribunal therefore makes the following orders respecting the hearing to be heard before the Tribunal:

1. The parties to the hearing are the Applicant and the Registrar.
2. On consent of the parties, the Applicant will post a bond in the prescribed amount and form and provide proof of compliance to the Registrar and the Licence Appeal Tribunal on or before the 30th day of September 2003 by facsimile service.
3. If the Applicant complies with paragraph 2 above, the appeal shall be withdrawn and the Registrar shall cancel the revocation of the Applicant as an Assistant Bailiff. The hearing will not proceed and the hearing date will be cancelled.
4. If the Applicant fails to comply with paragraph 2 above,
 - (1) The hearing will take place at the Tribunal's Chambers, at 9:30 a.m., 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario on Friday, the 24th day of October 2003, and the hearing is estimated to take one full day.
 - (2) The parties shall fully comply with Rules 6.3 and 6.4 of the Tribunal's Rules of Practice.

LICENCE APPEAL TRIBUNAL

Victor L. Drevnig, Q.C.
Vice-Chair

RELEASED: September 18, 2003

FILENAME: 1743.ba.Windley.pre.hrg.



BAILIFFS ACT
Revised Statutes of Ontario, 1990, Chapter B.2

IN THE MATTER OF the APPOINTMENTS of
WILLIAM GEORGE McFADDEN and BILL McFADDEN LTD.
as bailiffs

AND IN THE MATTER OF the PROPOSAL of the
Registrar under the *Bailiffs Act*
made pursuant to section 10 of the *Bailiffs Act*
TO REVOKE THE APPOINTMENTS
- Proposal dated: February 17, 2003

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

WILLIAM GEORGE McFADDEN and
BILL McFADDEN LTD.

Applicants

- and -

REGISTRAR, *BAILIFFS ACT*

Respondent

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter on June 9 and 10, 2003;

AND WHEREAS, upon consent of the parties, the hearing was adjourned to July 23, 24 and 25, 2003;

TAKE NOTICE, upon consent of the parties, the Tribunal further adjourns the hearing *peremptory against all parties* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on September 15, 16 and 17, 2003.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: July 7, 2003



Pursuant to the provisions of Section 10(1) of the Act, the Registrar of Bailiffs (the "Registrar") proposes to revoke the appointment of William George McFadden and Bill McFadden Ltd. (the "Applicants") as bailiffs and have served a notice of his proposal dated the 17th day of February, 2003 (the "Proposal") on the Applicants. The Applicants appealed the Proposal by a notice of appeal dated May 28, 2002, (the "Appeal") which was received

by the License Appeal Tribunal (the "Tribunal") on May 28, 2002. The Appeal requested a prehearing conference to be convened by the Tribunal and participation in the prehearing conference was scheduled for June 24, 2002, in accordance with the Rules of Practice of the Tribunal. At the prehearing conference (the "Prehearing Conference"), both the Registrar and the Applicants were represented by counsel.

Pursuant to the said Rules of Practice, no testimony of witnesses was heard by the Tribunal at the Prehearing Conference and all statements made by the Parties thereat were confidential and without prejudice to the various rights of the Parties at the eventual hearing of the issues by the Tribunal. At the Prehearing Conference submissions were received from each Party and heard by the Tribunal as to the manner in which this matter should proceed in an orderly and expeditious way.

It became apparent at the Prehearing Conference that the facts relied upon by the Registrar in the Proposal took place in March 2000, and later during the months of September, October and November of 2000 at the time of the investigation respecting the theft of a transport trailer. What communications took place during those periods of time were central to the alleged conduct of the Applicants and the issues raised and decided by the Registrar in the Proposal. This Tribunal is content with the discovery process which took place at the Prehearing Conference and it was generally agreed that the hearing would occupy two to three days in July 2003.

DECISION:

The Tribunal therefore makes the following Order respecting the hearing to be heard before the Tribunal:

1. The Parties to the hearing are the Applicants and the Registrar;
2. The hearing shall take place at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, on Wednesday, July 23, 2003, commencing at 9:30 a.m., and shall be continued on Thursday, July 24, 2003, and Friday, July 25, 2003, if necessary; and
3. The Parties shall fully comply with Rules 6.3 and 6.4 of the Tribunal's Rules of Practice.

LICENCE APPEAL TRIBUNAL

Terence A. Wardrop,
Vice-Chair

RELEASED: JUNE 13, 2003

File name: 1546.nhw.McFadden.pre.hrg.ord.



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Decisions under Building Code Act

Fiscal Year 2003 - 2004

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- >> There has been no decision released under this Act, yet, as there was no appeal filed with the Tribunal.

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Fiscal Year 2003 - 2004

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SHARON LATHAM, operating a children's residence at 10 Sheldrake Court, Brampton, Ontario, under the name of REISTA'S PLACE

APPEAL FROM A DECISION OF THE DIRECTOR FOR THE
PURPOSES OF THE CHILD AND FAMILY SERVICES ACT
TO REFUSE TO RENEW A LICENCE

TRIBUNAL: MICHAEL H. TURK, Vice-Chair

APPEARANCES: KATHARINE E. RENISON, Counsel, representing the Director, Child
and Family Services Act, Respondent
TERRI PAULI, Supervisor, Records Bureau, Peel Regional Police

DATE OF
MOTION: January 12, 2004 Toronto

ORDER

THIS MOTION for an Order that the Peel Regional Police produce forthwith its records of incidents from 10 Sheldrake Court, Brampton, Ontario from November 14, 2000 forward was heard by the Tribunal this day.

UPON READING the Notice of Motion dated December 22, 2003, and upon hearing the submissions of counsel for the Respondent that the Applicant does not object to the Motion and counsel's further submissions regarding the relevance and necessity to have these records produced prior to the hearing which is scheduled to commence on February 9, 2004 for five (5) consecutive days,

AND UPON hearing the submissions of Terri Pauli, the Records Bureau Supervisor from the Peel Regional Police that the Peel Regional Police will provide the requested records but require a formal Order from the Tribunal in order to release the requested records, and upon Terri Pauli providing the Tribunal with the records from June 2002 through March 2003 and advising the Tribunal that seven (7) days are required to deliver the remaining records from November 14, 2000 through May 2002, the Tribunal does hereby make the following Order.

1. The Peel Regional Police shall produce its records of incidents from 10 Sheldrake Court, Brampton, Ontario from November 14, 2000 through March 2003 within seven (7) days hereof.

LICENCE APPEAL TRIBUNAL

Michael H. Turk,
Vice-Chair, Presiding

RELEASED: January 15, 2004

File name: 1041.cfsa.Reista.motion

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SHARON LATHAM, operating a children's residence at 10 Sheldrake Court, Brampton, Ontario, under the name of REISTA'S PLACE

APPEAL FROM A NOTICE OF INTENTION ISSUED BY HER
MAJESTY IN RIGHT OF ONTARIO AS REPRESENTED BY THE
DIRECTOR FOR THE PURPOSES OF *THE CHILD AND FAMILY
SERVICES ACT* TO REFUSE TO RENEW A LICENCE

TRIBUNAL: WILLIAM McINTOSH, Vice-Chair
CECILIA TAYLOR, Member
MALCOLM FEALING, Member

APPEARANCES: SHARON LATHAM, the Applicant, not appearing

KATHARINE E. RENISON, Counsel, representing the Director, Child
and Family Services Act, Respondent

DATE OF
HEARING: March 8, 2004 Toronto

ORDER

WHEREAS the parties were duly notified of the hearing dates in this matter of
March 8 & 9, 2004;

AND WHEREAS the Applicant notified the Tribunal on or about 6:40 a.m. on March
8, 2004 that due to illness she was unable to attend;

AND WHEREAS the Applicant delivered to the Tribunal a medical report confirming
her condition;

AND WHEREAS all parties have agreed to a continuation of March 17, 2004;

AND WHEREAS the matter before the Tribunal is of significant public interest and
must proceed expeditiously;

IT IS ORDERED that the matter proceed March 17, 2004 at 9:30 a.m.

IT IS FURTHER ORDERED that the matter proceed peremptory.

LICENCE APPEAL TRIBUNAL

WILLIAM McINTOSH,
Vice-Chair

CECILIA TAYLOR,
Member

MALCOLM FEALING,
Member

RELEASED: March 8, 2004

File name: 1892.cfsa.Reista.order.doc



SHARON LATHAM, operating a children's residence at 10 Sheldrake Court, Brampton, Ontario, under the name of REISTA'S PLACE

CHILD AND FAMILY SERVICES ACT
Revised Statutes of Ontario 1990, Chapter C. 11

SHARON LATHAM, operating a children's residence at 10 Sheldrake Court, Brampton, Ontario, under the name of REISTA'S PLACE

AND IN THE MATTER of the NOTICE OF INTENTION by
the Director, under the *CHILD AND FAMILY SERVICES ACT*
TO REFUSE TO RENEW
- Notice dated: August 4, 2003

TRIBUNAL: WILLIAM McINTOSH, Vice-Chair
CECILIA TAYLOR, Member
MALCOLM FEALING, Member

APPEARANCES: RON MARZEL, Counsel, representing the Applicant

KATHARINE E. RENISON, Counsel, representing the Director, Child
and Family Services Act, Respondent

DATE OF
HEARING: December 1, 2003 Toronto

REISTA'S PLACE

Applicant

- and -

DIRECTOR, UNDER THE *CHILD AND FAMILY SERVICES ACT*

Respondent

ORDER

Following attendances on December 1, 2003 at a hearing before this Tribunal of Sharon Latham, operating a children's residence at 10 Sheldrake Court, Brampton, Ontario, under the name of REISTA'S PLACE, Ron Marzel, Counsel for the Sharon Latham (the "Applicant"), Katherine Renison, Counsel, representing the Director, *Child and Family Services Act* (the "Respondent");

The Tribunal makes the following Order:

1. The materials provided to the Tribunal from the records of the various Children's Aid Societies shall not form part of the public record and will be limited in their distribution to the Tribunal, the parties and to Dr. Richard Meen.

LICENCE APPEAL TRIBUNAL

WILLIAM McINTOSH,
Vice-Chair

CECILIA TAYLOR,
Member

MALCOLM FEALING,
Member

Released: February 10, 2004

file name: 1892.cfsa.Reista's Place.doc

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SHARON LATHAM, operating a children's residence at 10 Sheldrake Court, Brampton, Ontario, under the name of REISTA'S PLACE

APPEAL FROM A NOTICE OF INTENTION ISSUED BY HER
MAJESTY IN RIGHT OF ONTARIO AS REPRESENTED BY THE
DIRECTOR FOR THE PURPOSES OF *THE CHILD AND FAMILY
SERVICES ACT* TO REFUSE TO RENEW A LICENCE

TRIBUNAL: WILLIAM McINTOSH, Vice-Chair
CECILIA TAYLOR, Member
MALCOLM FEALING, Member

APPEARANCES: RON MARZEL, Counsel, representing the Applicant

KATHARINE E. RENISON, Counsel, representing the Director, Child
and Family Services Act, Respondent

DATE OF MOTION: December 1, 2003 Toronto

ORDER

A NOTICE OF MOTION was heard before the Tribunal on the above date for an Order striking out Allegations A 1 (1), A 13, A 15, and B 7 of the Director's Notice of Intention.

UPON READING the filed material and hearing the submissions of counsel the Tribunal issues the appended reasons and makes the following Order.

1. The Motion for an Order striking out allegations A 1 (1), A 13, A 15, and B 7 fails and the hearing will proceed on the basis of the Notice of Intention as filed.

LICENCE APPEAL TRIBUNAL

WILLIAM McINTOSH,
Vice-Chair

CECILIA TAYLOR,
Member

Malcolm Fealing, Member

RELEASED: February 3, 2004

File name: 1892.cfsa.Reista.orderandreasons

REASONS

A Notice of Intention to refuse to renew the licence to operate a children's residence held the Applicant was issued under the authority of a Director for the purposes of the *Child and Family Services Act* R.S.O. 199, c C 11 ("CFSA") dated August 4, 2003. The present appeal is taken from that Notice of Intention pursuant to section 197(2).

The authority for the issuance of the Notice of Intention is contained in Section 196 (a) (l) of the CFSA. It reads:

- A Director may refuse or may revoke a licence wherein the Director's opinion
- (a) the licensee or an employee of the licensee or if the licensee is a corporation an officer or director of the corporation has contravened or has knowingly permitted a person under his or her control or direction or associated with him or her to contravene
 - (i) this act or regulations

Allegation A 1(1) asserts the failure of the Applicant to comply with section 74 of Regulation 70 of the CFSA; specifically that there was a failure to properly and accurately maintain a daily log in the residence. Specifically it is alleged that there were pages removed, the log was out of sequence and/or there were pages missing or undated. Two examples were cited: September 6, 2002 to November 3, 2002 and December 15, 2002.

The Notice of Motion seeks an Order striking out the allegations listed on the basis of there being “no basis in law on which to proceed. The way in which the Director has plead (sic) the above mentioned allegations....does not constitute a breach of Regulation 70.”

Section 74 of Regulation 70 reads:

- (1) Every licensee shall ensure that a daily log is maintained in each residence operated by the licensee.
- (2) Each incident that may effect or in the opinion of the licensee may effect the health, safety or well being of a staff person in the residence or a resident shall be included in the daily log.

The Applicant asserts that the Notice, as drafted, does not disclose a breach of the Regulation. Counsel claims that as long as logs were in fact kept the content of the logs can not form the basis of an Allegation of a breach as the requirements of the Regulation have been met in that the entries are determined by the licensee.

The Respondent claims that the Regulation must be read to mean not merely the keeping of a log but must also include, by necessary inference, a complete and accurate log. The point of keeping a log under any circumstances is to enable a third party to reconstruct events. The Tribunal in attaching a broad reading to the governing legislation due to the delicacy of its mandate to the regulator should parallel that scope of interpretation to the regulations; particularly requirements such as the present that permit the regulator a look into the daily operations of the residences. The sections should not be read conjunctively as claimed by the Applicant. Rather the section should be understood to mean that both incidents that affect health, safety and well being must be logged as well as incidents that subjectively may affect health, safety and well being. There is a two-fold requirement.

Ruling: The governing legislation states as its founding premise in section 1(1);
 “The paramount purpose of this Act is to promote the best interests and well being of children.”

The Tribunal finds the interpretation pressed by the Respondent more consistent with the plain meaning of the section and the purpose of the Act than that urged by the

Applicant. There are two requirements implied in the section, one to log the obvious, another to log incidents or circumstances which may be relevant to the effective running of the residence. Whether these requirements were met is a question of evidence. The precision of particulars insisted upon by the Applicant is requiring a four corners rule with which the Tribunal can not concur. The Applicant has not convinced the Tribunal that as pleaded the Respondent has put forth a case with no possible nexus between the offence and potential evidence.

Allegation A13 contends that there was a breach of subsection 109(1)(b)(ii) of Regulation 70 in that there was a failure to keep consistent and accurate records regarding fire drills in the residence.

The relevant sections of Section 109 read:

- (1) Every licensee shall ensure that in each residence operated by the licensee'
 - (a) all staff persons and residents are instructed in a manner suitable for their understanding the procedures to be followed when a fire alarm is to be activated;
 - (b) the procedures referred to in clause (a) are,
 - (ii) practiced at least once a month and a record is kept of each practice.

The Respondent cites examples of what it believes to be breaches of the subsection;

On February 18, 2002 the fire drill record notes that two fire drills were required due to the time it took residents to exit. There was no corresponding notation in the communications log for February 18. However the communication log for February 19 notes that the residents had to conduct the drill three times before it was correct. There was no fire drill record for February 19.

On July 29, 2002 the communication log provides that the fire drill was conducted at 7:10 p.m. and that there were no issues or concerns. However the fire drill form for the same day provides that the drill took place at 6:45 p.m. and that there was a need for two drills because the residents were unruly.

On April 8, 2002 fire drill sheet notes seven children in the residence at the time of the drill. Child R.B. is noted as "friend of resident". The fire drill resident sheet has "friend" R.B.'s last name and additional information whited out and written over. On January 15, 2002 fire drill resident sheet lists resident D.W. as being present and taking part in the fire drill. Reista's Place Children in Care 2002 documents notes D.W. being admitted March 1, 2002.

It was the Applicant's submission that the allegations as on their face do not enable the trier of fact to conclude that there was a breach of the subsection; that clearly there were monthly practice drills carried out and a record kept.

The Respondent repeated its position brought forth on the previous item in the Motion, namely that there must be a meaningful interpretation given to the regulations. In this

case as before if the regulations call for a “log” or a “record” to be kept it must be read as both the physical act of opening a page and making notations and that those notations are an accurate reflection of the matters observed. Reliance upon the accuracy of the record by a third party is the essence of log keeping. The logs are not there to inure to the benefit of the log keeper (although that may well be a salutary consequence), they are kept, as in this case, as part of a regulatory oversight regime. Here there are alleged log keeping inaccuracies. It would be an improper reading of the subsection if this fact is to be overlooked by the Tribunal inserting an interpretation that the four corners of the subsection end at the simple keeping of a log. This would foreclose the Respondent from pursuing the issue of the accuracy of the record keeping of an establishment under its regulatory purview.

Ruling: As above the Tribunal holds that there may well be an argument that the Applicant should not suffer regulatory discipline because on the facts the actions of her staff met the appropriate standards set out in the regulations. The Tribunal at this pre hearing stage is not in a position to declare that on a reasonable reading of the Regulation there is no case to be met at all.

Allegation A.15 states that there was a failure to comply with section 106 of Regulation 70. The section reads:

Every licensee shall ensure that each residence operated by the licensee meets the following requirements.

11. The outdoor play space is maintained in a safe and sanitary condition.

The Notice of Intention alleges that the breach of the section resulted from an inspection which found an over the counter cold medication on the premises.

The Applicant submits that the allegation should be struck as there has been no determination of whether the drug in question was of such a nature to have represented an unsafe condition and therefore a breach of the section. As the subject medication no longer exists it was submitted that the Applicant has not had an opportunity to verify the allegation.

The Respondent says in response that the position set forth in the Motion are questions of fact for the Tribunal. The factual Allegation as it stands if proven could lead a trier of fact to conclude there was a breach of the Regulation.

Ruling: The submissions of the Applicant are essentially questions of admissibility, not of inadequate pleading. There is no doubt what the case to be met involves. The weakness of that case is another matter. For there to be any hope of the Allegation succeeding the factual basis will have to be established to the satisfaction of the Tribunal. The Applicant will have the opportunity to impeach the witness called in support of the Allegation. This part of the Motion is denied.

Allegation B. 7 of the Notice of Intention states that there was a failure to comply with

section 109.1(2), 109.3(2)(3)(4) of Regulation 70. The section dealing with the use and procedures for the use of physical restraints was amended March 11, 2002 and came into effect April 1, 2003.

The Notice of Intention states that the licensee's policies are not consistent with the regulatory requirements governing the use of physical restraints.

The Applicant says that an allegation based upon a regulatory requirement not in force at the relevant time can not form the basis of an allegation. There were no children in the Applicants care at the time. The only subsection that could possibly form the basis of a breach of the section is 109.1(3) dealing with written policies and procedures and it is not cited in the Notice of Intention.

The Respondent asserts that there being no children under care at the time of the coming into force of the regulation is irrelevant. The section should be read as requiring policies and procedures to be in place by the effective date. The words "Policies and Procedures" were cited in the Notice of Intention and this should be sufficient to in effect subsume 109.1(3) into the Allegation.

Ruling: The difficulty here is that the subsection requiring policies and procedures to be in place is not actually cited in the charging document. The question for the Tribunal is whether this omission is sufficient to prejudice the Applicant's ability to meet the case against her. In this situation the Tribunal sees no surprise and therefore insufficient prejudice to strike the Allegation. It will be open to the Respondent to amend the Allegation to include 109.1(3).

LICENCE APPEAL TRIBUNAL

WILLIAM McINTOSH,
Vice-Chair

CECILIA TAYLOR,
Member

Malcolm Fealing, Member

RELEASED: February 3, 2004

File name: 1892.cfsa.Reista.orderandreasons

PREHEARING

GAIL MARCIA AIRD operating as EMMANUEL B.A.Y. CENTRE

APPEAL FROM A PROPOSAL OF THE DIRECTOR
UNDER THE *CHILD AND FAMILY SERVICES ACT*

TO REFUSE TO RENEW LICENCE

TRIBUNAL:

CARL F. DOMBEK, Chair, Presiding

APPEARANCES:

GAIL MARCIA AIRD, Applicant
KATHARINE RENISON, Counsel for the Director

DATES OF
PRE-HEARING:

May 6, 2003

Toronto

ORDER

BACKGROUND:

Following the attendances on May 6, 2003 at a pre-hearing before the Licence Appeal Tribunal of Gail Marcia Aird, Applicant and Katharine Renison, Counsel representing the Director, Child and Family Services Act, the Tribunal orders that:

1. The hearing will commence at 9:00 a.m. on Monday, July 7, 2003 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, and continue daily until Friday, July 11, 2003.
2. The normal sitting hours for the hearing will be from 9:00 a.m. to 5:00 p.m.
3. As partial disclosure by the parties of documents and witness lists was made on May 6, 2003, the parties will have until 4:00 p.m. Friday, May 30, 2003 to disclose to each other any other documents that may be relied upon at the hearing.

4. As allegations A.2, A.5 and A.11 found in the Notice of Intention were conceded by the Applicant, no evidence on those allegations need be produced at the hearing.
5. The Applicant must ensure that if she retains Counsel, the retained Counsel is available on the scheduled hearing dates. Counsel who are retained on or after May 6, 2003 shall only accept the retainer if he or she is available on that date.
6. In the event that the Applicant wishes to abandon her appeal she shall immediately advise the Tribunal and Counsel for the Respondent in writing.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek, Chair Presiding

RELEASED: May 9, 2003

File name: 1609.cfsa.Emmanuel.pre.doc

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



NANCY AND PETER (KEVIN) KENNEDY

APPEAL FROM A DECISION OF THE BOARD OF
DIRECTORS OF THE FAMILY AND CHILDREN'S
SERVICE OF THE NIAGARA REGION

TO CLOSE A FOSTER HOME

TRIBUNAL: CARL F. DOMBEK, Chair

APPEARANCES: NANCY KENNEDY, Applicant, appearing on her own behalf
and on behalf of the Applicant, Peter (Kevin) Kennedy

LINDA C. HENRY, Counsel for the Respondent, Family and
Children's Service of the Niagara Region

DATE OF
HEARING: June 11, 2003 Toronto

ORDER

Upon hearing and reading the submissions of the Applicant and of Counsel for the Respondent and upon reading the affidavits of Kevin Kennedy and William Charron;

The Tribunal Orders that:

1. In accordance with the oral reasons given at the termination of the Motion, the Motion is dismissed as the Tribunal finds that it does not have the jurisdiction to determine the merits of the appeal pursuant to s. 197 of the *Child and Family Services Act*.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek, Chair

RELEASED: June 11, 2003

FILE NAME: 1612.cfsa.Kennedy.motion.doc



PREHEARING

REISTA'S PLACE

APPEAL FROM A PROPOSAL OF THE DIRECTOR
UNDER THE *CHILD AND FAMILY SERVICES ACT*

TO REVOKE THE LICENCE OF SHARON LATHAM, OPERATING A
CHILDREN'S RESIDENCE UNDER THE NAME OF REISTA'S
PLACE

TRIBUNAL:

TERENCE A. WARDROP Q.C., Vice Chair.

APPEARANCES:

RONALD MARZEL, Counsel, representing Sharon Latham,
operating a children's residence under the name of Reista's Place

KATHARINE RENISON, Counsel, representing a Director under the
Child and Family Services Act

DATE OF
PRE-HEARING:

October 1, 2003

Toronto

ORDER

BACKGROUND:

This appeal came before this Tribunal as a prehearing conference on September 17, 2003, and that conference was adjourned to October 1, 2003, in order that the Notice of Appeal could be completed by counsel acting on behalf of the Appellant so as to "provide details of (the Appellant's) reasons for appeal" pursuant to the undertaking of the said counsel. At that time this Tribunal found that the Notice of Appeal was incomplete due to the absence of any reasons for the appeal and a total lack of any particulars upon which to base the appeal.

The appeal comes once again before this Tribunal for a prehearing conference but once again without the Notice of Appeal being in any way complete due to the failure of the said counsel to perform that which he undertook to provide and also due to the withdrawal of that counsel from this case. It is apparent that new counsel has been instructed by the Appellant to pursue the appeal on her behalf and more time is required to prepare the appeal and provide the necessary reasons therefore so that the Respondent is made aware of the case to be met in the Notice of Appeal. A proper prehearing conference to understand the issues is at this time not possible but a further delay is likewise inappropriate.

Pursuant to the said Rules of Practice, no testimony of witnesses was heard by the Tribunal either at this conference or the conference convened on September 17, 2003, and all statements made by the parties thereat were confidential and without prejudice to the various rights of the parties at the eventual hearing of the issues by the Tribunal. At these conferences submissions were received from each party and heard by the Tribunal as to the manner in which this matter should proceed in an orderly and expeditious way.

As Counsel for both the Director and the Appellant were uncertain as to how many witnesses would be called and the number of expert witnesses required, it was generally conceded that the said hearing would occupy at least five days.

This Tribunal then made an oral order at the conference as to the continuing of this matter in an orderly and expeditious manner, which was agreed upon by both Counsel. The oral Order of this Tribunal was to be confirmed by a written order to be issued by the Tribunal.

DECISION:

The Tribunal therefore makes the following Order respecting the prehearing conference and the hearing to be heard before the Tribunal:

1. The parties to the hearing are the Appellant and the Director;
2. The hearing shall take place on a peremptory basis at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, on Monday, December 1 2003, commencing at 9:30 a.m., and shall be continued, if necessary, on Tuesday, Wednesday, Thursday and Friday, December 2, 3, 4, and 5, 2003;
3. The prehearing conference is adjourned on a peremptory basis to Wednesday, November 5, 2003, to be heard by this Tribunal at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, commencing at 9:30 a.m.;
4. On or before Wednesday, October 22, 2003, Counsel for the Appellant shall

“provide details of (the Appellant’s) reasons for appeal” pursuant to the undertakings made so that the Respondent is made aware of the case to be met in the Notice of Appeal;

5. Counsel for both the Appellant and the Respondent shall meet together prior to the prehearing conference on November 5, 2003, in an attempt to agree upon a statement of facts in order to reduce the number of witnesses and/or the time necessary to examine witnesses at the hearing;
6. The parties shall agree upon the number and identities of expert witnesses to be called by both parties at the hearing;
7. A subpoena shall be issued to a peace officer in order to make available to the Tribunal an offence record as requested by Counsel for the Appellant; and
8. The parties shall fully comply with Rules 6.3 and 6.4 of the Tribunal’s Rules of Practice.

LICENCE APPEAL TRIBUNAL

Terence A. Wardrop, Q.C.

RELEASED: October 29, 2003

File name: 1892.cfsa.Reista’s Place.pre.doc

PREHEARING

REISTA'S PLACE

APPEAL FROM A PROPOSAL OF THE DIRECTOR
UNDER THE *CHILD AND FAMILY SERVICES ACT*

TO REVOKE THE LICENCE OF SHARON LATHAM, OPERATING A
CHILDREN'S RESIDENCE UNDER THE NAME OF REISTA'S
PLACE

TRIBUNAL: TERENCE A. WARDROP Q.C., Vice Chair.

APPEARANCES: RONALD MARZEL, Counsel, representing Sharon Latham,
operating a children's residence under the name of Reista's Place

KATHARINE RENISON, Counsel, representing a Director under the
Child and Family Services Act

DATE OF
PRE-HEARING: November 5, 2003

Toronto

ORDER

BACKGROUND:

This appeal came before this Tribunal as a prehearing conference on September 17, 2003, and again on October 1, 2003, and was adjourned further to November 5, 2003, in order that the Notice of Appeal could be completed by counsel acting on behalf of the Appellant so as to "provide details of [the Appellant's] reasons for appeal" pursuant to the undertaking of the said counsel.

Pursuant to the Rules of Practice of the Tribunal, no testimony of witnesses was heard by the Tribunal either at this conference or at the earlier conferences convened as hereinbefore noted, and all statements made by the Parties thereat were confidential and without prejudice to the various rights of the Parties at the eventual hearing of the issues by the Tribunal. At these conferences submissions were received from each Party and

heard by the Tribunal as to the manner in which this matter should proceed in an orderly and expeditious way.

It became apparent at the conferences that there were many and varied facts upon which the Respondent relied in the Proposal and which the Appellant disputes, or alleges either have been since rectified or which took place beyond the control of the Appellant. The Respondent thence cited previous inspections by the Director and the past history of the Appellant's operation of the children's centre which the Respondent alleges fell into default under the Act subsequent to temporary remedial action by the Appellant.

This Tribunal is content with the discovery process, which took place at the conferences and counsel had a full, open discussion on the possible settlement of the issues contained in the Proposal and the Appeal.

As Counsel for both the Director and the Appellant were uncertain as to whether or not the said hearing could be completed within the five days stated in the Order of this Tribunal issued on October 29, 2003, it was agreed that a further extension of time, if necessary for the hearing, should be allotted at this time in early January of 2004, so as to expedite the completion of the hearing.

Counsel for the Appellant gave notice that a Motion would be made before the Tribunal to strike out all or parts of allegations made by the Respondent in the Proposal issued by a Director under the Act as having no basis in law.

This Tribunal then made an oral order at the conference as to the continuing of this matter in an orderly and expeditious manner, which was agreed upon by both Counsel. The oral Order of this Tribunal was to be confirmed by a written order to be issued by the Tribunal.

DECISION:

The Tribunal therefore makes the following Order respecting the prehearing conference and the hearing to be heard before the Tribunal:

1. The Parties to the hearing are the Appellant and the Director;
2. The hearing shall take place on a preemptory basis at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, on Monday, December 1, 2003, commencing at 9:30 a.m., and shall be continued, if necessary, on Tuesday, Wednesday, Thursday and Friday, December 2, 3, 4, and 5, 2003;
3. In the event that the hearing is not completed on December 5, 2003, the hearing shall be continued at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor,

Toronto, Ontario, on Monday, January 12, 2004, at 9:30 a.m., and be continued, if necessary, on Tuesday, Wednesday, Thursday and Friday, January 13, 14, 15 and 16, 2004, or as otherwise ordered by the Tribunal presiding at the hearing;

4. On or before Monday, November 24, 2003, Counsel for the Appellant shall deliver a Notice of Motion to strike out all or parts of allegations made by the Respondent in the Proposal issued by a Director under the Act as having no basis in law, together with any supporting material to be relied upon, and Counsel for the Respondent shall, on or before Friday, November 28, 2003, deliver a Reply and Joinder of Issue to such Notice of Motion, together with any supporting material to be relied upon;
5. The Motion, set forth and described in section 4 hereof, shall be heard by the Tribunal at the opening of the hearing on Monday, December 1, 2003;
6. Counsel for the Respondent withdrew those parts of the Proposal issued by a Director under the Act, as follows:
 - (a) subclause (b) in section A11 on page 12 thereof commencing with the words on or around September 23, 2002, ...”, and
 - (b) subclause (b) in section B1 on page 15 thereof commencing with the words “a young person, RW, ...”;
7. The Parties shall agree upon the number and identities of expert witnesses to be called by both Parties at the hearing;
8. For the purposes of expediting the hearing and limiting the number of witnesses, Counsel for the Appellant agreed to accept that part of the documentary evidence originating in the files of the Director and provided by the Respondent in its Book of Documents except such part thereof as the Appellant specifically disputes or attributes a differing meaning thereto; and
9. The Parties shall fully comply with Rules 6.3 and 6.4 of the Tribunal’s Rules of Practice.

LICENCE APPEAL TRIBUNAL

Terence A. Wardrop, Q.C.
Vice-Chair

RELEASED: November 19, 2003

File name: 1892.cfsa.Reista's Place.pre.doc



REISTA'S PLACE

CHILD AND FAMILY SERVICES ACT
Revised Statutes of Ontario 1990, Chapter C. 11

IN THE MATTER OF
REISTA'S PLACE

AND IN THE MATTER of the NOTICE OF INTENTION by
the Director, under the *CHILD AND FAMILY SERVICES ACT*
TO REFUSE TO RENEW
- Notice dated: August 4, 2003

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

REISTA'S PLACE

Applicant

- and -

DIRECTOR, UNDER THE *CHILD AND FAMILY SERVICES ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on December 1, 2, 3, 4 and 5, 2003;

AND WHEREAS, upon consent of the parties, the hearing was adjourned to December 4 and 5, 2003;

TAKE NOTICE, upon consent of the parties, the Tribunal further adjourns the hearing *peremptory against the parties* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on February 9, 2004, and to continue February 10, 11, 12 and 13, 2004, if necessary.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

file name: 1892.cfsa.Reista's Place.adj.



Decisions under Collection Agencies Act

Fiscal Year 2003 - 2004

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- >> [BRIAN RAVI SINGH ADJOURNMENT](#)
- >> [LANA TRINA ROSE](#)
- >> [ANTHONY FIORE](#)
- >> [ANTHONY FIORE CONSENT ORDER](#)
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BRIAN RAVI SINGH

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *COLLECTION AGENCIES ACT*

TO SUSPEND REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice Chair, Presiding
CLARK WALLACE, Member

APPEARANCES: BERNARD B. GASEE, Counsel, representing the Applicant
JAMES STEBBING, Counsel, representing the Registrar,
Collection Agencies Act

PRE-HEARING: November 13, 2003

Toronto

CONSENT ORDER

WHEREAS a prehearing was scheduled to be heard on November 13, 2003;

AND WHEREAS Counsel for Brian Ravi Singh, the Applicant, and Counsel for the Registrar, *Collection Agencies Act* attended the prehearing on November 13, 2003;

AND WHEREAS at the prehearing held on November 13, 2003 the Applicant and the Registrar, *Collection Agencies Act*, therein represented by their respective Counsel arrived at a settlement of the issues referred to in the Registrar's Notice of Proposal dated July 26, 2003;

AND WHEREAS pursuant to the settlement arrived at by the aforesaid parties, Counsel for such parties informed the Tribunal that by consent of both parties it was agreed that the Applicant would forthwith file with the Tribunal a Notice of Withdrawal of his Notice of Appeal, which he filed, with the Tribunal;

AND WHEREAS the Applicant's Notice of Withdrawal of his appeal and the abandonment

of such appeal have been filed with the Tribunal;

NOW THEREFORE upon the consent of the parties this Tribunal orders that the proceedings in this matter are disposed of without a hearing pursuant to Section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, Chapter S.22 and the Applicant's appeal is abandoned.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair,
presiding

Released: November 19, 2003

File name: 1930.caa.RaviSingh.consentorder

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



BRIAN RAVI SINGH

COLLECTION AGENCIES ACT
Revised Statutes of Ontario, 1990, Chapter C.14

IN THE MATTER OF the REGISTRATION of
BRIAN RAVI SINGH
as a collector

AND IN THE MATTER OF the PROPOSAL of the
Registrar under the *Collection Agencies Act*
made pursuant to Section 8 of the *Collection Agencies Act*
TO SUSPEND REGISTRATION
- Proposal dated: July 26, 2003

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

BRIAN RAVI SINGH

Applicant

- and -

REGISTRAR, *COLLECTION AGENCIES ACT*

Respondent

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a pre-hearing in the above matter on November 4, 2003;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the pre-hearing *peremptory against all parties* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Thursday, November 13, 2003.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair, Presiding

RELEASED: November 4, 2003

FILE NAME: 1930.caa.Singh.adj.doc

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



LANA TRINA ROSE

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF
THE *COLLECTION AGENCIES ACT*

TO SUSPEND REGISTRATION

TRIBUNAL: BRIAN K. MAROTTA, Vice-Chair

APPEARANCES: JOEL MISKIN, Counsel, representing the Applicant

JAMES STEBBING, Counsel, representing the Registrar,
Collections Agencies Act

DATE OF
PREHEARING: November 6, 2003 Toronto

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a pre-hearing and hearing in the above matter;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the pre-hearing *peremptory against all parties* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Tuesday, December 16, 2003.

AND TAKE NOTICE, upon the consent of the parties, the Tribunal adjourns the hearing *peremptory against all parties* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, at 9:30 a.m., on Thursday, January 8, 2004.

LICENCE APPEAL TRIBUNAL

Brian K. Marotta,
Vice-Chair, Presiding

RELEASED: November 13, 2003

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



ANTHONY FIORE

COLLECTION AGENCIES ACT
Revised Statutes of Ontario, 1990, Chapter C.14

IN THE MATTER OF the REGISTRATION of
ANTHONY FIORE
as a collector

AND IN THE MATTER OF the PROPOSAL of the
Registrar under the *Collection Agencies Act*
made pursuant to Section 8 of the *Collection Agencies Act*
TO SUSPEND REGISTRATION
- Proposal dated: July 26, 2003

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

ANTHONY FIORE

Applicant

- and -

REGISTRAR, *COLLECTION AGENCIES ACT*

Respondent

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a pre-hearing in the above matter on November 4, 2003;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the pre-hearing *peremptory against all parties* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 1:30 p.m., on Thursday, November 13, 2003.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair, Presiding

RELEASED: November 4, 2003

FILE NAME: 1933.caa.Fiore.adj.doc

ANTHONY FIORE

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *COLLECTION AGENCIES ACT*

TO SUSPEND REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice Chair, Presiding
CLARKE WALLACE, Member

APPEARANCES: BERNARD B. GASEE, Counsel, representing the Applicant

JAMES STEBBING, Counsel, representing the Registrar,
Collection Agencies Act

PRE-HEARING: November 13, 2003

Toronto

CONSENT ORDER

WHEREAS a pre-hearing was scheduled to be heard on November 13, 2003;

AND WHEREAS Counsel for Anthony Fiore, the Applicant, and Counsel for the Registrar, *Collection Agencies Act* attended the pre-hearing on November 13, 2003;

AND WHEREAS at the pre-hearing held on November 13, 2003 the Applicant and the Registrar, *Collection Agencies Act*, therein represented by their respective Counsel arrived at a settlement of the issues referred to in the Registrar's Notice of Proposal dated July 26, 2003;

AND WHEREAS pursuant to the settlement arrived at by the aforesaid parties, Counsel for such parties informed the Tribunal that by consent of both parties it was agreed that the Applicant would forthwith file with the Tribunal a Notice of Withdrawal of his Notice of Appeal, which he filed, with the Tribunal;

AND WHEREAS the Applicant's Notice of Withdrawal of his appeal and the abandonment of such appeal have been filed with the Tribunal;

NOW THEREFORE upon the consent of the parties this Tribunal orders that the proceedings in this matter are disposed of without a hearing pursuant to Section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, Chapter S.22 and the Applicant's appeal is abandoned.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair
Presiding

RELEASED: November 19, 2003

FILE NAME: 1933.caa.Fiore.consentorder.doc

Licence
Appeal
Tribunal

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PRE-HEARING

LANA TRINA ROSE

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
COLLECTION AGENCIES ACT

TO SUSPEND REGISTRATION

TRIBUNAL: MICHAEL H. TURK, Vice-Chair

APPEARANCES: JOEL MISKIN, Counsel, representing Lana Trina Rose
(the "Applicant")

JAMES STEBBING, Counsel, representing the Registrar,
Collections Agencies Act (the "Respondent")

DATE OF
PRE-HEARING: December 16, 2003 Toronto

ORDER

FOLLOWING attendances on December 16, 2003 at a pre-hearing before this Tribunal of Joel Miskin, Counsel, representing Lana Trina Rose (the "Applicant") and James Stebbing, Counsel, representing the Registrar, *Collection Agencies Act* (the "Respondent");

AND WHEREAS the above said Parties advised the Tribunal that all issues remain outstanding for the purpose of the forthcoming hearing, the Tribunal does hereby make the following Order:

1. The Parties to the hearing are the Applicant and the Respondent.
2. The Applicant and Respondent shall comply with Rule 6 of the Tribunal's Rules of Practice as it relates to the exchange of all additional documentary evidence to be relied upon at the hearing.

3. The hearing shall take place at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario at 9:30 a.m., on Thursday, January 8, 2004 and that the said date shall be peremptory against all parties.

LICENCE APPEAL TRIBUNAL

Michael H. Turk, Vice-Chair

RELEASED: December 18, 2003

FILE NAME: 1041.caa.rose.prehrg.doc



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There has been no decision released under this Act, yet, as there was no appeal filed with the Tribunal.

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Fiscal Year 2003 - 2004

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There has been no decision released under this Act, yet, as there was no appeal filed with the Tribunal.

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Decisions under Day Nurseries Act

Fiscal Year 2003 - 2004

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- >> [RICHVIEW DAY CARE CENTRE INC. O/A RICHVIEW DAY CARE CENTRE](#) 
- >> [RICHVIEW DAY CARE CENTRE INC.](#) 
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PREHEARING

HAPPY CHILD DAY CARE CENTRE LTD.

APPEAL FROM A NOTICE OF PROPOSAL TO REFUSE TO
RENEW A LICENCE DATED MARCH 28, 2003 OF THE DIRECTOR
UNDER THE *DAY NURSERIES ACT* RESPECTING HAPPY CHILD
DAY CARE CENTRE LTD., UNDER SECTION 15 OF THE *DAY
NURSERIES ACT*

TRIBUNAL: STUART CORK,
Presiding Member

APPEARANCES: MARK ALTER, Counsel for Applicant

KATHARINE E. RENISON, Counsel for the Director under the
Day Nurseries Act, Respondent

DATE OF
PRE-HEARING: May 2, 2003

Toronto

ORDER

WHEREAS, Happy Child Day Care Centre Ltd, (the "Applicant") has requested a hearing before the Licence Appeal Tribunal to appeal the Notice of Proposal by the Director dated March 28, 2003, (the "Director") under the *Day Nurseries Act*, respecting Happy Child Day Care Centre Ltd., located at 1545 Jane Street, under Section 15 of the *Day Nurseries Act*.

AND WHEREAS, a pre-hearing was conducted by the Tribunal on May 2, 2003 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, as set forth in the Tribunal's Notice of Pre-Hearing Conference dated May 2, 2003.

The Tribunal makes the following Orders respecting the hearing:

1. The hearing of this matter will require up to eight days to be heard at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto, Ontario, commencing at 9:30 a.m. on Monday, June 9, 2003 and continuing through until Thursday June 12, 2003, and to further continue on Tuesday, June 17, 2003 through until Friday June 20, 2003.

2. The Applicant and the Respondent will comply with the disclosure requirement set out in the Tribunal's Rules of Practice.
 - (1) On or before 4:30 p.m. on May 16, 2003, the Respondent will provide one copy to the other party and 4 copies to the Tribunal of any documents that she wishes to rely upon at the hearing, including witness lists and summaries of witness anticipated statements.
 - (2) On or before 4:30 p.m. on May 26, 2003, the Applicant will provide one copy to the other party and 4 copies to the Tribunal of any documents that they wish to rely upon at the hearing, including witness lists and summaries of witness anticipated statements.

It was noted that the Tribunal's Rules of Practice requires full disclosure 10 days prior to the hearing of all documents on which a party wishes to rely as evidence at the hearing.

3. The Respondent will call approximately ten witnesses, including the Director, Ms. Darlene Chandon, Licence Specialist with the Ministry, two witnesses from the City of Toronto dealing with child care services, one witness from the Board of Education, one witness from Public Health, four parents, and three former staff. The Respondents witnesses will provide evidence in relation to the items detailed in the Proposal, as observed from each of their particular roles.
4. The Applicant will call approximately six witnesses, including Mr. Abudu Adam, secretary to the Applicant, Ms. Lilian Nwaehie, on site supervisor, current employees and staff, possibly an employee of the City of Toronto, and parents. The Applicant's witnesses will give evidence regarding how the issues listed in the Proposal are in the past and that they have been dealt with in a positive manner.
5. There was no resolution of the issues between the parties, which are set out in the Notice of Proposal of the Director dated March 28, 2003.

LICENCE APPEAL TRIBUNAL

Stuart Cork,
Presiding Member

Released: May 15, 2003



DAY NURSERIES ACT

Revised Statutes of Ontario, 1990 Chapter D.2,
as amended by the *Licence Appeal Tribunal Act*,
1999, S.O. 1999, Chapter 12, Schedule G

IN THE MATTER of the REGISTRATION of
RICHVIEW DAY CARE CENTRE INC.
O/A RICHVIEW DAY CARE CENTRE

AND IN THE MATTER of the NOTICE OF DIRECTION of the
Director under the *Day Nurseries Act*
made pursuant to section 12 of the *Day Nurseries Act*
TO REFUSE TO RENEW REGISTRATION
- Notice dated: April 24, 2003

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

RICHVIEW DAY CARE CENTRE INC. O/A
RICHVIEW DAY CARE CENTRE

Applicant

- and -

THE DIRECTOR, UNDER THE *DAY NURSERIES ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by Richview Day Care Centre Inc. o/a Richview Day Care Centre, the Applicant, and counsel for the Director under the *Day Nurseries Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Director under the *Day Nurseries Act* as to the disposition of these proceedings which is filed and attached hereto as Appendix 1;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings are disposed of without a hearing on the basis of the terms set out in Appendix 1.

IN THE INTEREST of assisting the parties, the Applicant and Respondent may seek the input of the Tribunal on any issue required to clarify this order.

LICENCE APPEAL TRIBUNAL

Maurice Power, Presiding Member

Barbara Prouse, Member

Malcolm Fealing, Member

RELEASED: July 28, 2003

FILE NAME: 1663.dna.Richview.consent.doc

PREHEARING

RICHVIEW DAY CARE CENTRE INC.

IN THE MATTER OF THE *DAY NURSERIES ACT*
R.S.O. 1990, CHAPTER D.2, AS AMENDED BY THE
LICENCE APPEAL TRIBUNAL ACT, 1999, S.O. CHAPTER
12, SCHEDULE G (THE "ACT")

TRIBUNAL: TERENCE A. WARDROP Q.C., Vice Chair.

APPEARANCES: STUART D. REDDINGTON, Counsel, representing the
Applicant, Richview Day Care Centre Inc.

KATHERINE RENISON, Counsel, representing the
Respondent, a Director under the *Day Nurseries Act*

DATE OF
PRE-HEARING: June 3, 2003 Toronto

BACKGROUND:

Pursuant to the provisions of Section 13(1) of the *Day Nurseries Act*, R.S.O. 1990, Ch. D. 2, as amended, (the "Act"), a Director for all or any of the purposes of the Act (the "Director") proposes to revoke the licence of Richview Day Care Centre Inc. (the "Applicant") to operate or maintain a day nursery and has served a notice of the Director's proposal dated the 24th day of April, 2003 (the "Proposal") on the Applicant.

The Applicant appealed the Proposal by a Notice of Appeal dated April 29, 2003, (the "Appeal") which was received by the License Appeal Tribunal (the "Tribunal") on May 1, 2003. The Applicant requested a prehearing conference to be convened by the Tribunal and participation in the prehearing conference was scheduled for June 3, 2003, in accordance with the Rules of Practice of the Tribunal. At the prehearing conference (the "Prehearing Conference"), both the Director and the Applicant were represented by counsel.

Pursuant to the said Rules of Practice, no testimony of witnesses was heard by the Tribunal at the Prehearing Conference and all statements made by the Parties were confidential and without prejudice to the various rights of the Parties at the eventual hearing of the issues by the Tribunal. At the Prehearing Conference submissions were received from each Party and heard by the Tribunal as to the manner in which this matter should proceed in an orderly and expeditious way.

As a result of the submissions of the parties it became apparent at the Prehearing Conference that there were many and varied facts upon which the Director relied in the Proposal, which the Applicant alleges in its Appeal either have since been rectified or which were beyond the control of the Applicant or otherwise were isolated single-occurring events which would not in all probability be repeated. The Director, in her rejoinder, thence cited previous inspections by the Director and the past history of the Applicant's operation of the day care nursery, which it was alleged fell into default under the Act and regulations subsequent to temporary remedial action by the Applicant.

This Tribunal is content with the discovery process, which took place at the Prehearing Conference, As Counsel for the Director proposes to call nine witnesses to testify at the eventual hearing of the issues and the Applicant proposes to call three or four witnesses in reply, it was generally conceded that the said hearing would occupy five days.

Insofar as Counsel for the Applicant informed the Tribunal of certain matters, it was expedient to specify the location for service of documents upon the Parties.

ORDER:

The Tribunal therefore makes the following Order respecting the hearing to be heard before the Tribunal:

1. The Parties to the hearing are the Applicant and the Director;
2. Service of documents upon the Applicant shall hereafter be made upon Richview Day Care Centre, 180 Mississauga Valley, Unit 103, Mississauga, Ontario, Canada, L5A 3M2;
3. Service of documents upon the Director shall hereafter be made upon Katherine Renison, Ministry of the Attorney General, 17th Floor, 56 Wellesley Street West, Toronto, Ontario, Canada, M7A 1E9;
4. The hearing shall take place at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, on Monday, July 28, 2003, commencing at 9:30 A.M., and shall be continued, if necessary, on Tuesday, Wednesday and Thursday, July 29, 30 and 31, 2003, and Friday, August 1, 2003; and

4. The Parties shall fully comply with Rules 6.3 and 6.4 of the Tribunal's Rules of Practice.

LICENCE APPEAL TRIBUNAL

Terence A. Wardrop,
Vice-Chair

Released: July 17, 2003

HAPPY CHILD DAY CARE CENTRE INC.

APPEAL FROM A NOTICE OF INTENTION DATED
MARCH 28, 2003 OF THE DIRECTOR UNDER THE *DAY
NURSERIES ACT* RESPECTING HAPPY CHILD DAY
CARE CENTRE INC. OPERATING A DAY NURSERY AT
1545 JANE STREET, IN THE PROVINCE OF ONTARIO,
UNDER SECTION 15 OF THE *DAY NURSERIES ACT*

TO REFUSE TO RENEW A LICENCE

TRIBUNAL: MICHAEL H. TURK, Vice-Chair
CECILIA J. TAYLOR, Member

APPEARANCES: ABUDU ADAMS, board member of Happy Child
Day Care Centre Inc., Applicant

KATHARINE RENISON, Counsel, representing the Director,
Day Nurseries Act, Respondent

DATE OF
HEARING: June 9, 10, 11, 12, 17, 18, 19, 20, 2003;
July 21, 22, 31, 2003; August 12, 13, 2003
September 8 and 12, 2003 Toronto

REASONS FOR DECISION AND ORDER

The Applicant, Happy Child Day Care Centre Inc. appeals to the Licence Appeal Tribunal from a decision of the Director, *Day Nurseries Act* (hereinafter the "Act") set out in a Notice of Intention dated March 28, 2003 refusing to renew its licence to operate a day nursery at 1545 Jane Street, Toronto, Ontario.

BACKGROUND:

The Respondent's Notice of Intention is 32 pages and alleges that the Applicant has 231 items of non-compliance relating to 63 sections of the Act and the Regulations thereunder. The Notice of Intention was entered and marked as Exhibit Number 3.

At the outset of the hearing the parties advised the Tribunal that 114 allegations referred to in the Notice of Intention were admitted and that 4 allegations were being withdrawn. As the hearing proceeded, the Applicant did not admit any other allegations and the Respondent withdrew 7 additional allegations.

THE EVIDENCE

The Applicant was represented by Mr. Abudu Adams, the Secretary of the Board of Directors and called three witnesses:

Claudia Duncan	parent
Tameka Montano	parent
Lillian Nwaehie	supervisor of the Applicant

The Respondent was represented by Katharine Renison, legal counsel and called nine witnesses:

Darlene Chandon	Ministry of Community and Social Services Licensing Specialist
Kimberly Moon	former teacher at the Applicant
Susan Samonig	Food for Tots
Anne Gellatly	former teacher at the Applicant
Richard Winters	City of Toronto Consultant with the contracting services unit,
Stan Billah	City of Toronto Public Health Inspector
Pam Roberts	City of Toronto Program Manager
Terry Masliwec	Supervisor at Danforth Day Care Centre
Judy MacLeod	Manager of Compliance Review Services

Exhibits

The Respondent submitted 6 volumes of documentary evidence, which were entered and marked as Exhibit Number 5 and the Applicant submitted 1 volume of documentary evidence which was entered and marked as Exhibit Number 6. Throughout the hearing, the parties submitted an additional 17 items of documentary evidence which were entered and marked as Exhibits.

RESPONDENT'S EVIDENCE

Darlene Chandon

The Respondent's first witness was Darlene Chandon, a licensing specialist with the Respondent whose role is to inspect day care centres to ensure compliance

with the Act and Regulations and assist day care centres in achieving compliance with the Act and Regulations.

Ms. Chandon referred to Tab 125 of Exhibit Number 5 which provides a history of the Applicant's licences. The summary establishes that from September 1, 2000 through March 2003 the Applicant was granted a total of 7 licences 4 of which were provisional.

As it relates to the granting of provisional licences, Ms. Chandon testified that provisional licences were granted due to the Applicant's continued and repeated non compliance with the Act and Regulations. Ms. Chandon testified that the last two licences were for 3 months and 1 month respectively which were consistent with the serious concerns that the Respondent had with respect to the Applicant.

As it relates to provisional licences, Ms. Chandon reviewed the licences and the reasons why they were provisional. The provisional licences are contained at Tabs 41, 60, 86 and 109 of Exhibit Number 5.

The first provisional licence is dated September 21, 2001 and was provisional as a result of the Applicant's failure to keep a record of the monitoring of behaviour management practices, failure to maintain daily attendance records showing the arrival, departure or absence of each child and insufficient staff who have the required academic qualifications.

The second provisional licence was issued on December 14, 2001 and identifies the Applicant's failure to provide records of fire alarm testing, insufficient play equipment for the pre-school children, insufficient staff for the number of children enrolled, the supervisor spends more than half of her time with the children and does not have time to perform administrative duties and the Applicant has not ensured that each staff, before beginning work have had health assessments and immunizations as recommended by Public Health.

The third provisional licence was issued on October 14, 2002 and identified that the Applicant did not have sufficient play equipment and that the operator had not assumed responsibility for the operation and management of the centre which may include the program, financial and/or personnel administration.

The fourth provisional licence was issued on February 14, 2003 and contains a myriad of violations. These consist of inter-alia, the following: that the Applicant has failed to comply with the requirement of the board of health in that window cleaners were not labeled, the kitchen was dirty, soap and paper towels were not provided in the kitchen, paper towels were not available for children's hand washing, the centre was not being kept warm enough, equipment and furnishings in the centre were inadequate and not in a good state of repair, which consisted of electrical outlets and power supply in the kitchen not being

sufficient, no toilet paper in one washroom, food warmer not being used properly, worn and ripped cloth change pad, toilet not flushing properly, children's wash cloths not having been recently laundered, dirty carpets,

insufficient qualified staff, improper storage of food, failure to record variations in the daily program and emergency information of each child is not readily available.

Ms. Chandon continued her testimony by referring to Tab 126 of Exhibit Number 5 which is a summary of the Respondent's visits and non-compliances. As the hearing progressed the Respondent submitted a more detailed version of this document which was entered and marked as Exhibit Number 23.

Ms. Chandon testified that Tab 126 of Exhibit Number 5 contains a summary of the Respondent's 13 licensing visits, licensing follow-up visits and monitoring visits, the corresponding 70 items of the Act, Regulations terms and conditions and policy directives that were not in compliance. Exhibit Number 23 provides a more legible copy of Tab 126 Exhibit Number 5 and also provides a reference to the Respondent's notes and findings on each visit, the corresponding Exhibit and Tab that the same can be referenced and confirmed.

Ms. Chandon continued her testimony by reviewing each item of non-compliance referred to in Exhibit Number 3. In this regard Ms. Chandon testified methodically about each item of non-compliance and the specifics of each occurrence. Ms. Chandon's testimony as it relates to the issues of non-compliance can be summarized as follows:

- 1) failure to hire competent management personnel and failure to pay staff;
- 2) failure to maintain proper dishwashing fluid, disinfectant and the proper concentration thereof;
- 3) defective fire alarm system, lack of fire drills, blockage of fire exit, no records of tuberculosis testing;
- 4) improper staff ratios, failure to ensure that staff ratios were met, failure to ensure that there were 5 full-time employees as required to meet ratios, failure to ensure that at least one qualified person with an ECE diploma was hired for each group of children;
- 5) insufficient toys, books, dramatic play material, insufficient cognitive and manipulative material for rotation among children;
- 6) failure to maintain the proper room temperatures;
- 7) failure to remove broken toys;

- 8) rooms dirty, toilets dirty and broken, play areas were dirty, dirty carpet, holes in walls, broken table, broken toaster, broken puzzles, and playground equipment potentially hazardous;
- 9) failure to maintain copies of the reports of the public health officer;
- 10) failure to have a written fire policy approved by the local fire chief, failure to post the written fire drill policy, failure to conduct fire drills at least once per month;
- 11) failure to note names and addresses of doctors on emergency cards, addresses and telephone numbers for parents were missing, children's health numbers were missing, no record of allergies for 2 children and emergency contact sheets were missing;
- 12) failure to maintain written records of serious occurrences and failure to make entries of children's illnesses in the daily record;
- 13) proper sanitary procedures were not followed; there was not enough toilet paper, staff did not wash hands thoroughly, insufficient sinks for dishwashing and hand washing, no thermometer to record food temperature and detergent not strong enough;
- 14) failure to ensure that children were properly immunized and that the children's files contained these records;
- 15) incomplete policy for serious occurrences;
- 16) failure to notify the program advisor about a serious occurrence within 24 hours of it taking place;
- 17) failure to ensure that all drugs and medications were stored in a place that was inaccessible to children;
- 18) failure to ensure that food brought from home was labeled with the child's name;
- 19) failure to record food temperatures, failure to ensure that food was prepared and served at the correct temperature, failure to ensure that food warmer was working, failure to ensure that drinks from the child's home were refrigerated;
- 20) failure to ensure that sufficient quantities of food were ordered for the children and that the food was delivered by the caterer;

- 21) failure to ensure that the children were being served nutritious between meal snacks as snacks contained too much sugar;
- 22) failure to ensure that menus were posted and that meals were properly recorded;
- 23) failure to post a list of children who have food allergies;
- 24) failure to ensure that a child's special dietary arrangements are carried out in accordance with the instructions of the child's parents;
- 25) use of harsh and degrading measures such as the use of physical force , negative guidance strategies, forcibly holding a child's face and developmentally inappropriate expectations of children under 30 months;
- 26) failure to ensure that the behaviour management policy was reviewed with employees and signed by the employees;
- 27) failure to ensure that there is a written procedure for monitoring behaviour management practices and that a record is kept for at least 2 years from the date the entry was made;
- 28) failure to ensure that up-to date-records are kept on the premises for each child enrolled;
- 29) failure to ensure that up-to-date records on special instructions from the parent were kept on the premises for each enrolled child;
- 30) failure to maintain a record of daily attendance for each children;
- 31) failure to maintain a daily attendance record showing the arrival, departure and absence of children;
- 32) failure to ensure that the program activities are varied and flexible;
- 33) failure to post a daily program plans;
- 34) failure to record variations to the daily program;
- 35) failure to separate children under 30 months of age from older children during active outdoor play and to ensure that these children had two hours of outdoor play;
- 36) failure to ensure that each child 18 months of age is outdoors for a period of 2 hours each day;

- 37) failure to ensure that prior to commencing employment, all employees have a health assessment and immunization.
- 38) failure to keep financial records.
- 39) failure to comply with the provisions of the *Employment Standards Act*.
- 40) contravention of the terms of its licence which consisted of failing to ensure that the licensing poster was posted, failure to monitor staff behaviour management, failure to provide an action plan for health and safety concerns, failure to obtain consultation from an outside agency, failure to obtain a memorandum of understanding with the Toronto Police with respect to criminal checks, failure to verify criminal checks on 2 employees, failure to ensure that playground policy contained a record of the requirement for monthly and seasonal inspections, failure to complete monthly playground inspections and inadequate behaviour management.

The following is a further summary of the items of non-compliance and the frequency thereof referred to in the testimony of Darlene Chandon and as contained in Exhibit Number 23:

Section of Act	Brief Description	Frequency of Non-Compliance & Regulations
27 (1) (a)	no evidence of approved fire safety plan or fire drill procedure	1
27 (1) (e)	fire drill records and/or fire safety equipment inspection records not maintained or available	4
35 (b)	serious occurrence policy does not include definitions and full reporting responsibilities	1
35 (b)	serious occurrence not reported within 24 hours	1
46 (3) (a)	behaviour management policy not reviewed with employees	4
47.2 (2)	no signature of supervisor after reviewing behaviour management policy with staff	4
47.2 (3)	records of behaviour management policy	1

	reviews not being kept	
47.3 (1)	written procedure for monitoring behaviour management practices not maintained	1
47.3 (3)	records of monitoring behaviour management policy practices not being kept	3
4 (1) (b)	directions of local medical officer of health not being followed	4
6 (1)	play activity space insufficient for number of children	1
12	temperature of premises not maintained at least 20 degrees Celsius	5
12	Insufficient equipment	7
16	equipment not maintained in a safe and clean condition and a good state of repair	11
4 (1) (b)	direction of local medical officer not being followed re: sanitary procedures	3
4 (1) (f)	fire code requirements not being met	2
25 (1)	public health and/or fire inspection reports not being kept on site or sent to Ministry	3
25 (2)	no records of public health inspections	2
26 (a)	failure to provide current insurance policy	1
29.1	heath card number missing from emergency information	5
29	work addresses of parents missing from emergency information	4
29.3	children's allergies missing from emergency information	2
30	daily log not being recorded	3
33 (1)	children's immunization records missing	

	from files	
48 (1)	health card number missing from child's file	1
48 (1) (m)	parental feeding instructions not on file	1
48 (3)	attendance records not accurate	6
31 (1) (2)	no evidence that operator is responsible for operation of the day nursery	3
3 (5)	failure of supervisor to plan, direct program or oversee staff	1
55 (3)	insufficient number of staff	7
55 (7) (b)	supervisor may be program staff up to half the time	1
55 (8) (b)	at least 2 staff required when six or more children are present	3
57	children not supervised at all times	2
59 (1) (a) (b)	insufficient number of qualified staff or no evidence of qualifications	7
62 (1)	no evidence of health assessments and staff immunization	6
39 (b)	parent supplied food/drink not labeled	5
39 (c)	food not prepared or stored properly to prevent contamination	8
40 (1) (a) 3	insufficient quantity of food	
40 (1) (b)	snacks not nutritious	2
41 (1)	snack substitutions not posted	1
42	allergy list not posted	1
43	special feeding arrangements not followed	1

53 (1) 1.2.3	planned activities not executed	3
53 (2) (a)	no evidence of posted program plan	2
53 (3)	variations in program not noted	4
53 (4) (b)	toddlers not separated from preschool children during outdoor play	1
53 (4) (d)	children not outdoors for at least 2 hours each day	5
53 (5) (b)	toddlers not taken outside for up to 2 hours per day	1
53 (5) (c)	child unable to sleep more than 1 hour	1
53 (2) (2)	daily program plan posted/not executed	2
37 (1) (b) (iii)	medication not accessible to children	1
37 (1) (b) (iv)	no locked medication containers	2
36	no first aid kit	
1		

In addition to the above items of non-compliance, the Applicant's licence was subject to the following terms and conditions and policy directives:

- (a) conduct behaviour management training for staff
- (b) obtain management consultation
- (c) send audited financial records to Ministry
- (d) ensure proper number of qualified staff at all times
- (e) submit action plan to address playground safety concerns
- (f) post licensing poster in a conspicuous place

Policy Directives & Frequency of Non-Compliance

- (a) criminal reference check policy not implemented 2

- 4
- (b) playground safety policy not reviewed with staff
 - (c) playground does not meet CSA standards 1
 - (d) playground safety policy not developed and 3
 - (e) daily, monthly and annual playground inspections not conducted 5

Ms. Chandon was cross-examined collectively by Abudu Adams, Secretary of the Board of Directors of the Applicant, Seville Farley, Chair of the Board of the Applicant and Lillian Nwaehie, Supervisor of the Applicant.

During the cross-examination, Darlene Chandon maintained her view that the performance of the Applicant required the issuance of provisional licences, that the behaviour of the children was chaotic, staff had difficulty dealing with children, her recommendations and advice were not followed and the history of non-compliances resulted in her conclusion that the Applicant should be closed.

Darlene Chandon steadfastly denied that there was any hidden agenda or plan to terminate the Applicant's licence.

Kimberly Mae Moon

Kimberly Mae Moon, an assistant teacher at the Applicant from February 2001 to March 2002, was the Respondent's second witness.

Both on examination in chief and on cross-examination this witness had a very limited memory of the specifics relating to the number of children present, toys and inspections and therefore Ms. Moon's evidence was of no assistance to the Tribunal.

Susan Samonig

The Respondent called Susan Samonig, a customer service representative for Food For Tots as its third witness.

Ms. Samonig testified that Food for Tots is a licensed caterer that provides food to 70 day care centres. Ms. Samonig testified that there were times when food was not delivered to the Applicant due to the Applicant's failure to pay outstanding invoices and that the Applicant did not always order one meal per child as is required.

The cross-examination of Ms. Samonig did not reveal any issues of significance.

Anne Gellatly

The Respondent called Anne Gellatly, a former ECE teacher at the Applicant from February 2002 through October 2002 as its fourth witness.

Ms. Gellatly testified that she is ECE qualified and has 28 years experience in day care. Ms. Gellatly continued by testifying candidly about her experience as an employee of the Applicant.

Ms. Gellatly testified that there was not always enough soap or paper towels, face cloths were only washed once per week, insufficient staff, at the beginning the children did not go outside at all, she had safety concerns, saw broken toys, the children slept for 2 1/2 hours, children's emergency cards were incomplete,

insufficient food, bottles were not labeled and that she was overwhelmed by what she described as a lack of team effort.

Ms. Gellatly was referred to Tab 122 of Exhibit Number 4 at which time she identified her handwritten notes, which confirmed that the Applicant had insufficient staff on 4 separate dates in September 2002.

On cross-examination by Mr. Adams, Ms. Gellatly stated that without direction, she took it upon herself to remove the broken toys, reiterated that at times there were insufficient staff and that she had concerns over the children's safety and described the environment as confusing.

Richard Winters

Richard Winters, a consultant with the City of Toronto, Community and Neighborhood Services, was the Respondent's fifth witness.

Richard Winters testified that he has an ECE Diploma from Seneca College, an Honours BA from York University and has worked with children with special needs and behaviour management.

Mr. Winters testified that his involvement with the Applicant commenced with the Applicant's application to the City of Toronto for a day care subsidy and that his role was to ensure that the Applicant is eligible, meets the City's criteria and that he would work with the Applicant to assist in achieving compliance.

Mr. Winters testified that the criteria depended on age group and consisted of the issues of health and safety, administration, playground, food/caterer, parental involvement and child/teacher interaction and that if a day care centre

does not meet criteria, the City would issue a stop admission order on the centre.

Mr. Winters testified in detail about the involvement that both he and the City of Toronto had with the Applicant. This involvement consisted of 27 meetings & site visits, 20 letters and numerous telephone conversations.

Mr. Winters continued by testifying about the issues of non-compliance that he encountered with the Applicant. These consisted of inter-alia the Applicant's failure to comply with the serious occurrence policy, insufficient supervision, lack of anti-racism policy, inadequate record keeping, incomplete attendance records, insufficient toys, failure to implement behavior management policy and failure to immunize staff.

As it relates to financial issues, Mr. Winters testified that the Applicant's budget was based entirely upon the City's subsidy, that he experienced difficulties in obtaining audited financial statements, business plans, corporate records and by-laws and meeting with the Board of Directors of the Applicant.

Mr. Winters testified that in accordance with the financial statements submitted, the Applicant had financial problems, which in his view contributed to the staffing problems and its failure to order sufficient quantities of food for the children.

Mr. Winters testified that the City of Toronto issued 3 stop admission orders against the Applicant. The first stop admission order is contained at Tab 137 of Exhibit Number 5 and states at paragraph 2 thereof "There were numerous serious infractions listed on the licence, which cause a great deal of concern from Children's Services perspective for the safety of the children enrolled in the centre." This stop admission order was lifted on October 26, 2001 when the Applicant obtained compliance with the *DNA* requirements.

The second stop admission order was placed on June 20, 2002 and is contained at Tab 154 of Exhibit Number 4. This letter states: "I am writing to advise you that your contract is in Jeopardy, a stop admission order has been placed on your centre effective June 20, 2002." The correspondence continues by requiring that the Applicant deliver minutes of a Board of Director's meeting appointing an Auditor, a formal letter of engagement from the auditor, a contract with a bookkeeper and monthly financial statements. This stop admission order was lifted on August 6, 2002.

The third stop admission order was placed on December 11, 2002 and is contained at Tab 161 of Exhibit Number 5. The second paragraph of the correspondence states that the stop admission was placed due to 2 circumstances:" at 11:40 a.m. there were four children in attendance at the centre not marked as being present on the attendance clipboards. This is a very serious safety concern. There was also inadequate staffing in violation of the

Day Nurseries Act. The toddler room needs the equivalent of a full time ECE on staff, or on-site using supply staff. Only four hours per day of ECE staff in the toddler room was in place on December 11, 2002." Paragraph 3 of the said Exhibit states:" As this is the third stop admission in the last 14 months, this places your contract with the City of Toronto in jeopardy".

Mr. Winters testified that in addition to the foregoing, the correspondence listed a number of items that were outstanding as of November 5, 2002 as follows: copies of Board of Director's by-laws, a request for an invitation to attend a meeting of the full Board of Directors, monthly balance sheets, income statement, and cash flow statements signed by 2 board members and receipts totaling the sum of \$6,602.56 or a plan how the Applicant will spend the monies provided for the playground.

Mr. Winters referred to Tab 168 of Exhibit Number 5, correspondence from the City of Toronto dated February 25, 2003, wherein the City of Toronto writes in the third paragraph: "The Stop Admission imposed on Happy Child Day Care Centre on December 11, 2002 will remain in effect until all outstanding requirements have been met". They are listed as follows:

- (a) confirmation that the Applicant has met its legal responsibility to have the required number of ECE's on staff.
- (b) copy of an attendance procedure that clearly outlines the steps to be followed to ensure appropriate attendance recording.
- (c) copy of the Human Resources policy that outlines the steps that will be taken if staff fail to carry out their duties.
- (d) a statement from the caterer Food for Tots confirming that the order is for the current enrolment.
- (e) By-Laws of the Applicant.
- (f) Board meeting dates and an invitation to attend.

In addition, as the Applicant had failed to meet its payroll obligations for January 2003, failed to remit withholding taxes to Revenue Canada for November and December and owed back rent to its landlord, the City of Toronto required the following financial information:

- (a) receipts for invoices paid from Food for Tots.
- (b) receipt for rent paid to Medallion Properties noting whether there are any arrears.

- (c) signed statement from staff that their paycheques are up to date.
- (d) documentation regarding all outstanding loans and particulars of the loans that have been prepaid.
- (e) particulars of the status of lawsuits.
- (f) documentation for the playground money not spent.
- (g) monthly cash flow statements.

Mr. Winters referred to Tab 196 of Exhibit Number 5 which are notes from a March 24, 2003 meeting with Mr. Adams and Mr. Farley of the Applicant which confirmed that aside from the issue of attendance records and procedures all of the above items were still outstanding. Mr. Winters stated that as of March 28, 2003 he had received a guaranteed investment certificate indicating that the Applicant's maintain their excess playground funds.

As it relates to Mr. Winter's experience with the Board of Directors of the Applicant, he testified in general about his frustrations with the Board of Directors and noted that since his involvement he had contact with 5 different Chairpersons, Mr. Okoroji, Mr. Emeadware, Ms. Acheampong , Mr. Effraim and Mr. Farley.

Mr. Winters was cross-examined at length by Mr. Adams at which time Mr. Winters recounted his extensive involvement with the Applicant, the advice and direction he offered and agreed with Mr. Adams' suggestion that the Applicant strived for excellence. Mr. Winters did not agree with Mr. Adams' suggestion that the Applicant should remain open and stated that while the Applicant has followed many of his recommendations he would only support this when all of the outstanding issues have been met and that he is not convinced that staff and Board of the Applicant can operate in a functional manner.

Notwithstanding the length of Mr. Adams' cross-examination, Mr. Winters maintained the evidence he gave in-chief and did not disclose any issues of significance.

Stan Billah

The Respondent's sixth witness was Stan Billah, City of Toronto Public Health Inspector.

Mr. Billah testified that on his first inspection he found that the Applicant did not have soap in the soap dispenser (filled while he was present), did not have test strip to test the strength of the sanitizer and that they needed a commercial thermometer.

Mr. Billah also noted that while the Applicant's had a dishwasher, it was not proper for commercial use, was not acceptable and that a 2 compartment sink was required.

Mr. Billah testified that on re-inspection all was rectified but that on his second inspection the Applicant's again did not have the test strips and that the food warmer was not working properly.

Mr. Billah concluded his testimony by stating that upon his further re-inspection everything was okay.

On cross-examination by Mr. Adams, Mr. Billah testified that he explained to Lillian Nwaehie the method of measuring the strength of the sanitizer, that the Applicant had complied with his recommendations and he reiterated the requirement for a 2 compartment sink.

Terry Masliwec

The Respondent's seventh witness was Terry Masliwec, Supervisor of Danforth Daycare and former Supervisor of Willowridge Child Care Centre.

Prior to this witness commencing her testimony, the Applicant objected to the Respondent being able to call Ms. Masliwec as a witness on the grounds that a confidentiality agreement was executed between the parties that prohibits this witness from discussing the issues from her involvement with the Applicant.

The agreement in question is found at Tab 190 of Exhibit Number 5 and provides inter-alia for Terry Masliwec to provide consultation to the Applicant and states under paragraph A titled confidentiality as follows:

"Staff from Happy Child Day Care agrees to keep confidential any information pertaining to individual children, parents and staff of Willowbridge Child Care Centre that may be revealed to them during the course of the consultation.

Staff from Willowridge Child Care Centre agree to keep confidential any information pertaining to individual children, parents and staff of Happy Child Day Care that may be revealed to them during the course of the consultation."

In view of the objection by the Applicant, the Tribunal embarked upon a voir dire in order to examine the agreement in question and determine whether the terms thereof would prohibit the Respondent from calling Terry Masliwec as a witness.

Voir Dire

The Respondent called Pam Roberts, Program manager of the City of Toronto, Mr. Winter's supervisor and author of the document to give evidence.

Pam Roberts testified that the agreement arose out of concerns that the City of Toronto had regarding the operations of the Applicant and that the agreement provides support to the Applicant in management supervision. Terry Masliwec would work with Lillian Nwaehie, the supervisor of the Applicant to improve strategies, policies, procedures and Terry Masliwec would identify issues and assist in the management of these issues.

The intent was for Terry Masliwec, an experienced supervisor at Willowridge Day Care Centre to work with Lillian for 20 hours over four weeks, the results would be evaluated and there would be a meeting to discuss where to go from there. As it relates to confidentiality, Pam Roberts testified that the parties only agreed that anything observed in each other's day care centre would be confidential.

On cross-examination by Mr. Adams, Pam Roberts testified that she expected Terry Masliwec to report any breaches and that the confidentiality only applied to information pertaining to children's parents and staff and that it was assumed that there would be an evaluation to ensure that criteria are being met.

Pam Roberts' cross-examination was completed with her stating that she would have never signed the agreement if the City would have been unable to use the information obtained.

The Respondent then called Terry Masliwec to testify on this issue. Terry Masliwec testified that the confidentiality only applied to not disclosing information about staff, children and parents from each other's day care centre and that it was expected that she would report her finding to Pam Roberts and Dick Winters, who were also signatories to the agreement. Terry Masliwec concluded by stating that her role was to assist the Applicant in achieving compliance and that after her period of involvement they would determine whether more time was needed to address the problems of the Applicant.

On cross-examination by Mr. Adams, Terry Masliwec testified that she shared her notes with Pam Roberts and Dick Winters and she re-stated that her role was to assist the Applicant in achieving compliance.

The Applicant called Lillian Nwaehie to testify on this issue. Ms. Nwaehie testified that she personally did not like the idea of Terry coming to tell her how to run the day care centre and that Terry wanted to overhaul the set up, administratively. As it relates to the issue of confidentiality, Ms. Nwaehie testified that it was her understanding that she would not discuss whatever happened at Willowridge and that what Terry found out was just between them.

Ruling

The Tribunal refers to the written document referred to above which states that "the staff of Happy child Day Care Centre Agree to keep confidential any information pertaining to individual children, parents and staff of Willowridge Child Care Centre that may be revealed to them during the consultation" and that a mirror clause exists with respect to Willowridge Child Care Centre.

The Tribunal found that the clause in question pertained to interaction between two day care centers and information that may be obtained during this interaction and that there was no agreement prohibiting Terry Masliwec from testifying about her findings and recommendations.

Terry Masliwec

Terry Masliwec testified that her first visit with Lillian Nwaehie was on December 19, 2002 when they had a walk through of the Applicant in order to make an outline. Ms. Masliwec stated that the Applicant required an administrative overhaul as she found problems with filing, management, efficiency of the office set-up, emergency cards were not in order, files that should have been locked were open (ie serious occurrence reports), postings, listings of numbers were absent, playground notices and checklists were not up to date, daily and monthly checks had not been done, fire drill records could not be found, there was no knowledge of workplace hazardous information, the policy book was incomplete, staff files did not contain information about immunization and medical reports and police checks.

Ms. Masliwec continued her testimony by stating that on December 20, 2002 there were insufficient staff as she viewed staff asleep in the pre-school room and that she reviewed all of this and the above issues at length with Lillian Nwaehie with the intent to follow up these issues upon her next visit.

Terry Masliwec testified that her next visit was on January 21, 2003 and at that visit she noted problems with the diapering routine not being posted, the centre had the smell of urine, products were not properly labeled, the food warmer was not working, the centre did not have a cold weather policy and that she reviewed the policy regarding cleansers.

Terry Masliwec testified that while on her January 21, 2003 visit some of the issues that she had discussed with Ms. Nwaehie were addressed, she noted that emergency procedures were not posted, the centre did not have a written anti-racism procedure, did not have any written child abuse procedures, the centre did not have written sanitary procedures and a list of reportable diseases as required by the public health department.

Terry Masliwec continued by referring to her January 30, 2003 visit at which time she testified that the Applicant still had not provided anti racism procedures, had not contacted public health, reviewed once again, sanitary practices and it was clear to her that Ms. Nwaehie was not aware of the proper sanitary practices and the necessity of reporting diseases.

As it relates to her February 6, 2003 visit, Terry Masliwec testified that the anti racism policy & procedures were still incomplete and that she provided the Applicant with her copy to borrow for one week, the diapering procedure was not posted, playground safety policy checklist was not in place and that she again reviewed with Ms. Nwaehie the use of cleansers and disinfectants, labeling of bottles and lack of proper maintenance of records.

Ms. Masliwec continued by testifying that on her February 13th visit the first aid manual was incomplete, there was no eye wash and the filing system was still disorganized and that the staff schedule was not posted.

Ms. Masliwec testified that it was her feeling that despite giving clarification and sample copies, that unless she did all the work for Lillian Nwaehie, the work was not being completed.

Terry Masliwec's last visit was on February 18, 2003 and she testified that it was a short visit due to the fact that nothing was complete. She testified that there was still no first aid manual, no safety data sheets, anti racism policy was not complete, the behaviour management policy had not been signed by staff and the outdoor policy had not been posted.

The complete summaries of Ms. Masliwec's visits, observations and advice are found at pages 3-9 at Tab 190 of Exhibit Number 5.

On cross-examination started by Ms. Nwaehie and completed by Mr. Adams, Terry Masliwec stated that her objective was to provide administrative support for the centre and that she was not there to create a problem or to obtain evidence to be used against the centre. Ms. Masliwec was insistent that her role was to assist the Applicant and testified again, that she noticed that the Applicant did not have a record of fire drills, incomplete records for playground inspections and that there was no daily schedule posted.

At this point of the cross-examination the Applicant asked Ms. Masliwec whether she had her original notes to which the witness replied that she thought they were at her residence in two boxes. The Tribunal recessed in order to permit Ms. Masliwec to retrieve the said notes.

Upon resumption of the hearing Ms. Masliwec testified that she was unable to locate her notes and upon cross-examination did not agree with Mr. Adams' allegations that she destroyed the notes or that the Respondent's position was racially motivated.

Judy MacLeod

The Respondent's 9th and final witness was Judy MacLeod:

Judy MacLeod testified that it is not common for the Respondent to issue provisional licences and that in total there are currently 859 child care licences in the Province of Ontario and that out of this 859 there are currently only 21 provisional licences and that 2 -3 provisional licences are all that should be required for an operator to achieve compliance.

As it relates to the issuance of a Notice of Refusal to Renew, Judy MacLeod testified that only 4 times since 1999 has the Director issued this type of notice, that the previous three followed emergency closures and that the Applicant is the fourth.

Judy MacLeod testified that the licence history is critical in that past behaviour will generally reflect future behaviour and that in her view the key in this case was the nature and frequency of non-compliance.

Judy MacLeod continued by testifying that the following items were of most concern to her:

- 1) failure to maintain fire drill records;
- 2) failure to ensure compliance with behaviour management policy;

- 3) directions of the local health officials were not being followed;
- 4) equipment and furnishings were not safe & repaired when necessary;
- 5) inconsistent and inaccurate records;
- 6) instability & inconsistency of staffing;
- 7) nutrition - insufficient lunches, food served below proper temperature;
- 8) failure to implement adequate programs; and
- 9) policy directives - very concerned that playground policy has not been implemented.

Judy Macleod completed her testimony in chief by referring to the Respondent's correspondence contained at Tabs 83, 93, 102, 105 and 116 of Exhibit Number 5 and testified that despite the numerous meetings, reports, correspondence and support by the Respondent and the City of Toronto the failure of the Board was fundamental, the number of non compliances continued and that she saw no other alternative other than to issue the Notice.

On cross-examination by Mr. Adams, Judy MacLeod testified about her 11 years experience in child care, that there were no allegations of any molestation or deaths at the Applicant and that she did not personally attend at the Applicant's place of business.

With respect to the issue of food, Judy MacLeod testified that she was not aware of what portion of food was left over and stated that the Respondent is concerned with the amount of food that is ordered.

As it relates to the issue of serious occurrences, Judy MacLeod testified that the Applicant had 5 such occurrences as follows:

- 1) flood of toilet in the toddler room;
- 2) parent complaint about the centre not opening;
- 3) child being forced into its chair;
- 4) child bumped its head on a post;
- 5) staff cheques bounced.

In response to Mr. Adams' suggestions that the Respondent's actions were improperly motivated, Judy MacLeod stated that the decision was not arbitrary and that she never rushed to judgment to close down the day care centre.

Judy MacLeod continued by stating that the efficiency of the supervisor has been a concern and that a new board would make a difference. With respect to questions about the level of support provided by the Respondent, Judy MacLeod testified that the level of assistance provided was sufficient and that she doesn't agree with the suggestion that her decision was biased.

In response to questions from the Tribunal as to what the Applicant could do to maintain its operation, Judy MacLeod testified that changing the supervisor would not in and of itself be sufficient, that the operator needs to assume responsibility and that despite the assistance from the Respondent and the City of Toronto the non compliances continue, which can only be addressed through a cohesive board, qualified staff and financial stability.

Judy MacLeod continued by discussing the problems between the Board of Directors and the supervisor where one blames the other together with a high board turnover which has seen 5 Chairs. On this basis, Judy MacLeod stood by her decision to issue the Notice.

APPLICANT'S EVIDENCE

Claudia Duncan

The Applicant's first witness was Claudia Duncan, a parent of a child enrolled at the Applicant.

Claudia Duncan testified that her son, who is 5 years old has been enrolled at the Applicant since he was 18 months, that she has noticed positive changes in her son and that he enjoys his time at the Applicant.

Ms. Duncan continued by stating that she does not have any problems with the Applicant, that the Applicant has strived to be involved in the community that the location of the Applicant is convenient, that she is satisfied and has no reason not to send any of her future children to the Applicant.

On cross-examination by Katharine Renison, Claudia Duncan testified that she works in a day care centre in the City of Toronto, drops her son off at the Applicant and doesn't stay long at the Applicant.

Tameka Montano

The Applicant's second witness was Tameka Montano, a parent enrolled at the Applicant.

Tameka Montano testified that she works at a collision reporting centre and her 2 year old child has been enrolled at the Applicant since the child was 18 months old.

Ms. Montano continued by testifying that she had no problems with the Applicant, that her child is well advanced and has learned a lot, that she cannot think of anything that the Applicant should do to improve and that the closure of the Applicant would have a great impact.

On cross examination by Katharine Renison, Tameka Montano agreed that her child was enrolled at 15 months of age, that she drops her child off and that she never watched what was going on at the Applicant.

Lillian Nwaehie

Lillian Nwaehie, supervisor at the Applicant was the Applicant's third and final witness.

Lillian Nwaehie testified that she was a teacher back home in Nigeria, has 10 years experience in Canada, obtained a Bachelor of Arts in History from York University in 1990 and her ECE diploma from Seneca College in 1991.

Lillian Nwaehie testified that prior to her involvement with the Applicant her employment history consisted of working at Candy Factory Day Care, Neighborhood Day Care and Royal Day Care. At Royal Day Care Ms. Nwaehie testified that she was the principal teacher in the toddler room and described in detail her role and responsibilities at Royal Day Care. These consisted of planning programs, interviews and parent concerns, feeding and bathing the children, remove broken toys, make sure that proper forms were there, disinfect tables before meals, record the temperature of the food and throw out left over food.

Lillian Nwaehie testified that the Applicant was her creation as was Neighborhood Day Care, that she started looking for a location for the Applicant after Neighborhood Day Care did not work out that well, that she opened the Applicant as non-profit with 3 partners and that no grant money was received other than for playground enhancement.

Lillian Nwaehie continued by recounting her first contact with the Respondent as the Applicant opened, with the City of Toronto with respect to obtaining a subsidy and that she was the assistant supervisor at the Applicant for its first 2 years.

Lillian Nwaehie testified that when she was the assistant the number of teachers were adequate, that she was performing dual functions but that the City of Toronto suggested that it would be better to have a half day supervisor and half day in class and that as she was required to take direction from the Respondent and the City of Toronto, the Applicant followed their suggestions.

Ms. Nwaehie testified that in November 2001 the position of supervisor became vacant as the then supervisor resigned before she was fired and that as she had the experience and qualifications, she took the position of supervisor. Ms. Nwaehie stated that at the request of the City of Toronto she upgraded her education and took courses through Dellcrest. Receipts from The Hinks Dellcrest Institute for courses in communication skills for supervisors, exploring cultural diversity through art, externalizing & internalizing disorders in children performance appraisals & management and policy & procedures were submitted and marked as Exhibit Number 15.

Lillian Nwaehie testified about the relationship with the Respondent and the City of Toronto, that the Ministry and the City recommended a change to the physical layout of the premises which was adopted by the Applicant and increased the licenced capacity of the centre. Ms. Nwaehie continued by stating that there were times that when the Respondent came for a visit, they interrupted and interfered with the program and at the same time wrote a violation, which in her view, was caused by the presence of the Respondent's staff.

As it relates to specific allegations, Ms. Nwaehie testified that police checks were not on file as it takes 3 months, that she does not know why the licence was not posted as perhaps it fell off the wall, she did not have any training for filing but shouldn't need training for this. Ms. Nwaehie acknowledged that there was no documentation for a health and safety plan, hat financial statements were ultimately provided and that fire drills are done once per month.

Ms. Nwaehie continued by referring to allegations in the Respondent's Notice of Intention and testified that no wages were outstanding but were perhaps one day late as a result of the City of Toronto being late in paying, that no overtime policy existed, that on March 11, 2003 she was short one ECE as one staff was not feeling well, although she thought the manager of the pre-school room was an ECE, she was not as she had one course left to finish, acknowledged that on December 30, 2003 there was insufficient staff during the children's sleep period

and that at times one staff would leave the centre to purchase items for the centre.

As Ms. Nwaehie continued to go through various items from the Notice of Intention she admitted that there were problems with the number of staff and stated that she would re-hire a part time staff (Hawa Saeed), that there were problems with the children's attendance records, behaviour management policy was not signed, and one lunch was not ordered for each child.

As it relates to the issue of food, Ms. Nwaehie testified that there was sufficient food, that the children were not malnourished, that no children got sick from the food and that no complaints were received from the parents regarding food.

As it relates to fire safety, Ms. Nwaehie testified that the Applicant has never had a fire, that they inspect the fire extinguishers once per year and that they have instructed staff on how to use fire extinguishers.

Ms. Nwaehie testified that the Applicant has sufficient sinks for washing, properly marked, and stored detergent containers and adequate hand cloths for the children to wash their hands.

As it relates to serious occurrences, Ms. Nwaehie acknowledged the situations that resulted in the filing of serious occurrence reports and in one situation that she was unsure whether a flood constituted a serious occurrence so she called the City of Toronto to find out.

Ms. Nwaehie continued her testimony by stating that as of March 28, 2003 the Applicant had hired a full time bookkeeper, that financial statements had been filed and that the Board of Directors had a fair relationship with the staff.

Lillian Nwaehie's examination in chief concluded with her testifying that the Director, Judy MacLeod, had not attended at the Applicant, was not familiar with the Applicant and that in her view the decision by Ms. MacLeod not renew the Applicant's licence was based upon a misunderstanding, false information, inaccurate information given by the previous supervisor, that there is a sabotage going on from the previous supervisor and that the Board of Directors has done a good job with the limited resources.

On cross-examination by Katharine Renison, Lillian Nwaehie testified that if food was brought at the wrong temperature she would call for replacement food, that the day care centre she started at 1710 Midland Avenue never reached the stage of getting a licence, that the investors in the Applicant knew that it was non-profit, and monies for the playground were used to pay off debt. The

balance of Ms. Renison's cross examination did not disclose any facts that had not been previously testified to or admitted.

On re-examination, Mr. Adams asked Ms. Nwaehie how she rates her performance to which she testified that she tried her best, maybe not her very best, she needs assistance, perhaps an assistant supervisor, will have to do exactly what the legislation says and that if she is given a second chance she will make sure the legislation is followed vigorously, order food properly, check attendance and employ properly qualified people. In all other respects, Mr. Adams' re-examination repeated Ms. Nwaehie's previous testimony.

Procedural Issues Throughout the Hearing

Evidence

During the course of Darlene Chandon's evidence the issue arose whether the Tribunal should hear evidence of events subsequent to the date of Exhibit Number 3, the Notice of Intention, being March 28, 2003. The Respondent submitted that the Tribunal should only accept evidence up to and including the date of the said Notice of Intention.

Whereas the Tribunal stated that it was prepared to accept evidence up to the date of the hearing, Mr. Adams on behalf of the Applicant, agreed with the Respondent's position that only evidence to the date of the Notice of Intention would be relied upon.

Subsequent to this ruling Mr. Seville Farley, Chair of the Applicant, appeared to represent the Applicant and requested the Tribunal to admit post notice-evidence.

The Tribunal granted Mr. Farley's request. However, the following day, when Mr. Adams resumed his role as agent, he requested that the Tribunal disregard Mr. Farley's request and that only evidence up to the date of the Notice of Intention should be admitted. The Tribunal noted that no post notice evidence had been heard and therefore on the consent of the parties, the Tribunal accepted Mr. Adams' request and no evidence post notice was accepted.

Request that the Tribunal Take a View

The Applicant requested that the members of the Tribunal personally attend at the Applicant's place of business to view for themselves the day care centre and the operation thereof.

The Tribunal found that there was no issue before the Tribunal with respect to the adequacy of the Applicant's premises, that the Tribunal would not benefit from taking a view of the premises and therefore dismissed the Applicant's request that the Tribunal take a view.

Disclosure of Financial Information

The Applicant noted that a person present in the hearing room was taking notes at a time when financial information regarding the Applicant was to be disclosed and asked that this person be excluded from the hearing room.

The Tribunal ruled that in accordance with Section 9 (1) (b) of the *Statutory Powers Procedure Act*, as it relates to the issues of the financial viability of the Applicant, the hearing will be held in the absence of the public and that the financial records be sealed.

Composition of the Tribunal

For the first 8 days of the hearing the Tribunal consisted of a panel of 3, namely, Michael H. Turk, Vice-Chair, Cecilia J. Taylor, Member and Clarke Wallace, Member. Whereas Mr. Wallace was absent on July 20 and 21, in accordance with Section 4.4 (1) of the *Statutory Powers Procedure Act*, the hearing continued thereafter with a panel of 2.

Videotape

During the cross-examination of Mr. Winters, Mr. Adams advised the Tribunal that he wanted to present a videotape that was made at the Applicant.

As this videotape had not been provided to the parties prior to the hearing, the Tribunal permitted the Respondent to view the videotape in the absence of the members of the Tribunal following which the Respondent advised that it did not object to the introduction of the videotape into evidence. On that basis, the videotape was entered and marked as Exhibit Number 7 and viewed during Mr. Winter's cross-examination for his comments.

ISSUES:

There is one issue.

- 1) Did the Respondent have reasonable grounds to refuse to renew the licence of Happy Child Day Care Centre Inc. to operate a day nursery at 1545 Jane Street, Toronto, Ontario.

THE LAW:

The relevant sections of the Act are as follows:

12. (1) Subject to section 13, a Director may refuse to issue a licence wherein in the Director's opinion,
 - (a) the applicant or any employee of the applicant or, where the applicant is a corporation, its officers, directors or employees is or are not competent to establish, operate or maintain a day nursery or a private-home day care agency, as the case may be, in a responsible manner in accordance with this Act and the regulations;
 - (b) the past conduct of the applicant or any employee of the applicant or, where the applicant is a corporation, of its officers, directors or employees affords reasonable grounds for belief that the day nursery or private-home day care agency, as the case may be, will not be established, operated or maintained in accordance with this Act and the regulations; or
 - (c) the building or buildings or accommodation in which the applicant proposes to establish, operator maintain the day nursery to provide private-home day care, as the case may be, does not comply with the requirements of this Act and the regulations.
- 12 (2) Subject to Section 13, a Director may refuse to renew or may revoke a licence issued to a day nursery or private-home day care agency when in the Director's opinion,
 - (a) the licensee or any employee of the licensee, or where the licensee is a corporation, any officer, director or employee thereof, has contravened or has knowingly permitted any person under the control or direction of or associated with the licensee, officer, director or employee as he case may be, to contravene,
 - (i) any provision of this Act or the regulations or of any other Act or the regulations thereunder applying to the establishment, operation or maintenance of the day nursery or the provision of private-home day care, as the case may be, or
 - (ii) any term of the licence;
 - (b) the building or buildings or accommodation in which the day nursery is established, operated or maintained or the private home-day care is provided, does not comply with the requirements of this Act and the regulations;
 - (c) the day nursery is established, operated or maintained or the private home-day care is provided in a manner that is prejudicial to the health, safety or welfare of the children cared for in the day nursery or in the place or places where private home-day care is provided;

(d) any person has made a false statement in the application for the license or renewal thereof, or in any report document or other information required to be furnished by this Act or regulations or by any other Act or regulation that applies to the day nursery or private-home day care agency as the case may be; or

(e) a change in the officers or directors of the applicant would, if the applicant were applying for the licence in first instance, afford grounds for refusing to issue a licence under clause (1) (b) R.S.O. 1990, c. D.2, s.12 (2).

13. (1) Where a Director proposes under section 12 to refuse to issue a license or to refuse to renew or to revoke a license issued under that section, the Director shall cause notice to be served of the director's proposal together with written reasons therefor, on the applicant or the licensee, as the case may be.

13. (2) A notice under subsection (1) shall inform the applicant or licensee, as the case may be, that the applicant or licensee is entitled to a hearing by the Tribunal if the applicant or licensee mails or delivers, within fifteen days, after the notice is served on the applicant or licensee, a notice in writing to the Director and to the Tribunal, requiring a hearing and the applicant or licensee, as the case may be, may so require such a hearing.

13. (3) Where an applicant or licensee does not require a hearing by the Tribunal in accordance with subsection (2), the director may carry out its proposal stated in the Director's notice under subsection (1) without a hearing.

13 (4) Where an applicant or licensee requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, at the hearing, may by order direct the Director to carry out the Director's proposal or refrain from carrying out the Director's proposal and to take such action as the Tribunal considers the Director ought to take in accordance with this Act and the regulations, and, for such purposes, the Tribunal may substitute its opinion for that of the Director.

13 (5) Sections 199, 201 and 202 of Part IX of the *Child and Family Services Act* apply with necessary modifications to proceedings before the Tribunal, to the powers of the Tribunal under this act and to appeals therefrom.

13 (6) Where, within the time prescribed therefor or, if no time is prescribed, before expiration of a license, a licensee has applied for renewal of a licence and paid the prescribed fee, the licence shall be deemed to continue,

(a) until the renewal is granted; or

(b) where the licensee is served with notice that the Director proposes to refuse to grant the renewal, until the time for requiring a hearing has expired and, where a hearing is required, until the Tribunal has made its decision.

SUBMISSIONS

The Applicant and Respondent provided the Tribunal with written and oral submissions.

The Respondent provided the Tribunal with an updated copy of the Notice of Intention marked as Exhibit Number 3, which provided references to which items had been admitted, whether the items of non compliance had been remedied and at what Tab the testimony in support of an item was located.

The Respondent submits that the past conduct of the Applicant provided the Respondent with reasonable grounds that the Applicant would not be able to comply with the provisions of the *Day Nurseries Act* and that unless the Applicant can demonstrate that the Respondent was wrong and does not have reasonable grounds then the Tribunal should uphold the decision of the Respondent.

The Applicant provided the Tribunal with a 6 page written submission in addition to Mr. Adams' oral submissions.

In the 4th paragraph of the first page the Applicant writes "we contend that the Director's decision was inappropriate and unjust, as it was founded upon misinformation, malice and much witch-hunting."

As it relates to the issue of health, the Applicant writes in the last paragraph of page 1 "The Director's misinformation by her Licensing Officer, Ms. Sandra Ciolfi and Ms. Darleen Chandon, that we failed to comply with any recommendation of the Health Officer. The Health Officer never said that staff did not wash their hands thoroughly to prevent cross contamination of food as it is stated in the their notice page 11 # 19 (i). It is quite unthinkable that the Director and her Licensing Officials could so wrongly insult the staff.

As it relates to the issue of food, the Applicant writes that "on a daily basis lots of food is thrown away due to the fact that little children don't eat too much food.", and submits that there have never been any complaints from parents, they are happy with the food their children eat and that in the future they will order food according to the number of children enrolled.

As it relates to program administration the Applicant writes "Almost all the allegations made by the Director against the Centre, was either complied with, carefully explained, or never happened."

As it pertains to the Respondent's specific allegations, the Applicant writes "Menu is always posted appropriately, and the place where it is posted has been the same since the commencement of the Centre, and it was posted there when Sandra Ciolfi wrote in her report that it had not been posted. And nobody has ever complained about it. Again misinformation and bias".

With respect to the required signature of behaviour management, the Applicant submits that an explanation was provided but the licensing specialist refused to listen and that when issues of non-compliance were raised they were remedied as the licensing inspector recommended.

The Applicant's submissions continued by stating that Darleen (Darlene) Chandon gave misleading information and that Terry Misilis (Masliwec) disguised herself as an inspector and that "Terry lied about the original handwritten script she was supposed to be using in her dubious and misleading consultations."

The Applicant accepted the evidence of Mr. Winters as being just and fair.

Page 5 of the Applicant's written submissions is the conclusion portion of the written submissions and states the following: "We, the Board of the Happy Child Daycare Centre, affirm that these allegations are baseless, untrue and malicious. Exhibits also show that the Ministry is in receipt of stamped, compliance documents. Yet these Inspectors went on forging and manufacturing reasons to deny the renewal of the licence for the continued operation of Happy Child Daycare Centre at 1545 Jane Street."

The Applicant is critical of the Respondent's cross-examination of Ms. Nwaehie and writes "This again clearly indicates their malicious and misleading intentions, and how deceitful they are in their plans. This is an abuse of their office, using their power and position to suppress those less privileged. Lillian deserves to be given the chance to show whether she did or did not provide evidence showing that those recommendations were actually done. The Director and her Inspectors acted unfairly, knowing full well that those recommendations were actually undertaken and completed by the Centre. During the Director's testimony in cross examination, she found out that the Centre has reliable documentation as proof that the Centre complied with, and fulfilled the Director and her Inspector's recommendations. In the case of Inspector Darleen Chanson, she was confused, rather inept and did not know that she was measuring temperature with a toy thermometer, their witness, Terry Masliwec, lied about her original handwritten notes."

In the second paragraph of page 6 the Applicant writes "The Director of Licensing was meddling in the administration of the Centre by covertly helping some individual take-over the control of Happy Child Daycare Centre under false pretensions.

The Director knows fully well that her duty is to inspect and make recommendations, and not to take over the Administration of Happy Child Daycare Centre. In her abuse of power, the Director shows no regard for the

Board of Directors. Otherwise, she would have stuck to her prerogative of inspection. "

The Applicant's written submissions continue by discussing the improvements and changes since Ms. Nwaehie became the supervisor, stating that assistants no longer take children for walks unaccompanied by an ECE, monthly fire drills have taken place, policies and procedures are written up and on file, children's files are complete, allergy checklist is posted, menu is posted, playground policy, fire drill policy and immunization policy are posted.

The written submissions formally conclude by writing "In all, the allegations of the Province brought against the Centre were dealt with. Some were proven to be false. Some with documented evidence proved the Centre's compliance. Some were well explained. The Centre has promised to order food according to the number of children enrolled in the future. The Centre again promised only to hire only qualified E.C.E. Staff and trained Assistant."

THE APPLICATION OF THE LAW TO THE FACTS & DECISION:

The Tribunal heard testimony from Darlene Chandon, Richard Winters, Terry Masliwec and Judy MacLeod about the allegations of non-compliance and their efforts to work with the Applicant in order to assist the Applicant in achieving compliance with the Act and Regulations. The Tribunal found these witnesses to be candid, forthright, truthful, that they were not challenged in any meaningful way in cross-examination and the Tribunal therefore accepts the evidence of these witnesses.

The Tribunal also heard evidence from Anne Gellatly about her experience as a teacher at the Applicant, Stan Billah's role in educating the Applicant in proper health procedures and from Susan Samonig that the Applicant did not order one meal for each child enrolled. The Tribunal found these witnesses to be candid, forthright, truthful, that they were not challenged in any meaningful way in cross-examination and therefore the Tribunal accepts the evidence of these witnesses.

The Tribunal heard testimony from Tameka Montano and Claudia Duncan parents of children enrolled at the Applicant who testified that they did not have any complaints or problems with the Applicant. Ms. Montano and Ms. Duncan testified that they did not spend any time within the Applicant other than in dropping and picking up their children.

Whereas the Tribunal found these witnesses to be forthright and truthful, they were not able to assist the Tribunal in determining the Applicant's ability to achieve and maintain compliance with the Act and Regulations.

The Tribunal heard testimony from Lillian Nwaehie, supervisor of the Applicant. Whereas Ms. Nwaehie testified at length about the day to day operation of the Applicant, it is the Tribunal's view that notwithstanding the countless and ongoing efforts by the Respondent, Ms. Nwaehie has failed to demonstrate an understanding of the Act, its Regulations and the ability to maintain the Applicant in compliance with the Act and Regulations.

The Tribunal notes that the inability of the Board of Directors to operate the Applicant was evident during the hearing as Mr. Adams and Ms. Nwaehie repeatedly argued between them over testimony, cross-examination, witnesses, Mr. Adams overruled a decision of its Chair and the Tribunal was introduced to a new Chair who was not present other than for his introduction to the Tribunal.

Throughout the hearing the Applicant contended that the Respondent had a hidden agenda, had rushed to judgment and that the decision to issue the Notice of Intention was racially motivated. In its written submissions, the Applicant expanded upon this theme and allege inter-alia that the Respondent's allegations are baseless, untrue, malicious, covert, that the decision was founded upon witch-hunting and that the Respondent's witnesses were inept, biased and lied.

As it relates to the allegations contained in the foregoing paragraph, the Applicant did not provide any credible evidence or independent witnesses to support these allegations. The Tribunal finds that there is no substance whatsoever to any of these allegations and dismisses them outright.

The Respondent's Notice of Intention which was entered and marked as Exhibit Number 3 contains 231 items of non-compliance with respect to breaches of 63 Sections of the Act and Regulations.

The Tribunal heard evidence that of these 63 Sections of the Act and Regulations in which non-compliances are alleged, 45 sections have multiple allegations of non-compliance relating to the following:

- 1) On 4 inspections the Applicant failed to comply with the directions of the local Medical Officer of Health as required by Section 4 (1) b of the Regulation to the Act whereby it failed to have the proper strength of dishwashing fluid, not strong enough disinfectant or no disinfectant;

- 2) On 5 instances on 4 inspections the Applicant failed to comply with Sections 4 (1) (c) and (f) of the Regulations to the Act by having a fire alarm that was damaged, a fire alarm that was not installed, a deficient fire alarm system and a blocked fire exist;
- 3) On 40 instances on 7 inspections the Applicant did not comply with Section 16 of the Regulation to the Act to ensure that the equipment and furnishings used in the day nursery were maintained in a safe and clean condition and in a good state of repair as there were broken toys, equipment was broken and chipped, there were holes in walls, a dirty toilet in the toddler room, the preschool washroom needed to be disinfected, the playground playhouse was unsafe, all 3 toilets had urine on the seats and grime in the bowls and 4 soiled wash cloths were still available for use;
- 4) On 2 inspections the Applicant failed to comply with Section 27 (1) (d) (e) of the Regulation to the Act by failing to have a monthly fire drill or keep records of the fire drill and fail to have records of fire alarm testing or fire extinguishers;
- 5) On 4 inspections the Applicant's failed to comply with Section 29 of the Regulation to the Act to ensure that emergency information was available as addresses of doctors were missing, work addresses were missing, parent work and home addresses were missing and there were no records of allergies for 2 children;
- 6) On 4 inspections the Applicant failed to maintain proper sanitary practices contrary to Section 32 of the Regulation to the Act as there was no toilet paper in the pre-school washroom, did not have separate sinks for hand washing and dishwashing, staff did not thoroughly wash hands and there was not a thermometer to record food temperature;
- 7) On 3 inspections the Applicant failed to comply with Section 39 (b) of the Regulation to the Act to ensure that children's food brought from home was labelled;
- 8) On 9 inspections the Applicant failed to comply with Section 39 (c) of the Regulation to the Act to ensure that all food or drink is stored, prepared and served to retain maximum nutritive value and prevent contamination as the temperature of the food was not recorded and food and drinks were not refrigerated;
- 9) On 5 inspections the Applicant failed to comply with Section 40 (1) (a) of the Act to ensure that each child is provided with one meal as insufficient

food was being ordered and on 2 inspections the Applicant failed to provide nutritious in between meal snacks in violation of Section 41 (1) (b) of the Regulations of the Act.

- 10) On 5 inspections the Applicant used harsh and degrading measures that would humiliate a child or undermine his self respect in violation of Section 45 (1) (b) of the Regulation to the Act as they used physical force to make children sit in chairs, used negative guidance strategies, used inappropriate behaviour management techniques and in one instance forcibly held a child's face turning him to face the teacher as she spoke to him;
- 11) On 3 inspections the Applicant failed to ensure that a review of the behaviour management policy with employees took place; on 4 inspections failed to ensure that the behaviour management policy was signed by the person who made the review; on 2 inspections failed to ensure that there was a written procedure for monitoring behaviour management practices and on 7 inspections failed to ensure that a record of behaviour management practices was maintained for at least 2 years in contravention of Sections 46 (3), 47.2(2) and 47.3(3) of the Regulation to the Act;
- 12) On 7 inspections the Applicant failed to maintain a daily attendance record showing the arrival, departure and absence of children contrary to Section 48 (3) of the Regulation to the Act;
- 13) On 25 instances on 17 inspections the Applicant failed to maintain proper staff to child ratios contrary to Section 55(3) and 55(8) of the Regulation to the Act;
- 14) On 6 inspections the Applicant failed to have sufficient ECE's on staff contrary to Section 59 (1) (a) (b) of the Regulation to the Act; and
- 15) On 5 inspections the Applicant failed to ensure that every employee had a health assessment and immunization as required by Section 62 (1) of the Regulation to the Act;
- 16) On 8 inspections the Applicant contravened a term of or condition of its licence pertaining to monitoring of staff behaviour, review of diapering practices, failure to obtain a consultation from an outside agency, failing to provide an action plan to deal with health and safety concerns and

failure to ensure that the required number of staff were present in accordance with Section 12 (2) (a) (ii) of the Act; and

- 17) On 7 inspections the Applicant operated the day nursery in a manner prejudicial to the health, safety and welfare of the children as it failed to obtain a memorandum of understanding with the Toronto Police, no criminal reference checks were conducted on 2 employees, playground policy was not complete, playground items were not CSA approved and daily playground inspections were not completed in contravention of Section 12 (2) (c) of the Act.

The Tribunal finds as a fact that the Applicant did not comply with the provisions of the Act and Regulations as referred to above and in accordance with Exhibit Number 3 and the summary contained at page 7 of this decision.

The Tribunal finds further that the evidence shows a history of the Applicant failing to comply with the Act and Regulations, that compliance, once achieved after an inspection would re-occur at a later inspection, that many items of non-compliance were never remedied and that the allegations of non-compliance have been proven to its satisfaction.

The provisions of the Act and Regulations have the overriding purpose of ensuring the health, safety and welfare of children in day nurseries. The Tribunal finds that the evidence of the Respondent was overwhelming in support of its decision that the Applicant could not comply with the provisions of the Act and Regulations and the Tribunal therefore upholds the decision of the Respondent under Section 12 (2) of the Act to refuse to renew the licence of the Applicant.

LICENCE APPEAL TRIBUNAL

Cecilia J. Taylor, Member
Chair

Michael H. Turk, Vice-

RELEASED: *November 25, 2003*

Filename: 1608.dna.Happy Child Day Care

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.



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>> There has been no decision released under this Act, yet, as there was no appeal filed with the Tribunal.

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CHON-WAH FUNERAL CHAPEL (INC.)

FUNERAL DIRECTORS AND ESTABLISHMENTS ACT
Revised Statutes of Ontario, 1990, Chapter F.36

IN THE MATTER OF
CHON-WAH FUNERAL CHAPEL (INC.)

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Funeral Directors and Establishments Act*
TO REFUSE TO ISSUE THE LICENCE
- Proposal dated: September 25, 2003

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

CHON-WAH FUNERAL CHAPEL (INC.)

Applicant

-and-

REGISTRAR, *FUNERAL DIRECTORS AND ESTABLISHMENTS ACT*

Respondent

ADJOURNMENT ORDER

PURSUANT to the provisions of the *Funeral Directors and Establishments Act*, R.S.O. 1990, Chapter F.36, as amended, Chon-Wah Funeral Chapel (Inc.) (the "Applicant") appealed a Proposal of the Registrar, *Funeral Directors and Establishments Act* (the "Registrar"), set out in a Proposal dated September 25, 2003;

WHEREAS, the Tribunal appointed a time and place for a pre-hearing in the above matter on December 8, 2003;

AND WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter on January 28 and 29, 2004;

AND WHEREAS, the Tribunal was advised that the parties, on consent, have agreed to adjourn the scheduled pre-hearing and hearing;

NOW THEREFORE upon consent of the parties, this Tribunal Orders:

1. that the pre-hearing in this matter is adjourned, *peremptory against all parties*, to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Wednesday, January 28, 2004;
2. that the hearing in this matter is adjourned, *peremptory against all parties*, to commence at the Tribunal's above Chambers at 9:30 a.m. on Thursday, February 19, 2004, and to continue Friday, February 20, 2004, if necessary.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: December 23, 2003

FILE NAME: 2000.fdea.ChonWah.adj.doc



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Decisions under Highway Traffic Act

Section 32(12)(b)(i) - Medical

Fiscal Year 2003 - 2004

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>> [1525-MED-CARD](#)



>> [1538-MED-DOWN](#)



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1525-MED-CARD

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

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

TRIBUNAL: JOHN CHARMICHAEL, M.D., Presiding Member

APPEARANCES: KYLE M. BIEL
Representative for the Registrar of Motor Vehicles
by written submissions only

Applicant,
by written submissions only

DATE OF
HEARING: March 26, 2003

written

DECISION AND REASONS

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

FACTS:

The Applicant is a 60-year-old male with a known history of asymptomatic coronary artery disease since 1997 (Exhibit). The history available to the Tribunal is patchy. It appears that the Applicant maintained his Class "AC" licence in 1998 and 1999 on the basis of annual Medical Waiver Certificates under Regulation 340/94 of the H.T.A.

The Applicant's "AC" class licence was granted 2000 and 2001 on the basis of Medical Waiver Certificates completed by Physician #1, cardiologist (Exhibits 2 and 3). Numerous assessments are tabled suggesting that the Applicant's coronary artery disease during this period was stable.

In January 2002 the Medical Advisory Committee (hereinafter the "M.A.C.") reviewed the Applicant's "AC" waiver request. The decision was to downgrade the Applicant's licence to class "G" with the recommendation that further assessments be performed before a final decision could be made (Exhibit 4). The Applicant is appealing this decision. In support appeal is a letter from Physician #2 (Exhibit 5) giving the results of further assess without giving an opinion re. the Applicant's cardiac status. These results were reviewed by the M.A.C. (Exhibit 6) which requests further studies before a class "AC" licence can be considered.

ISSUES:

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

LAW:

Regulation 340/94, Section 14 states:

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

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

Regulation 340/94, Section 17 and 18 states:

- 17. (1) Qualifications required by an applicant for a holder of a Class A, B, C, D, E or F driver's licence are that the applicant or holder,
 - (a) has no history or clinical diagnosis of diabetes that requires insulin for control;
 - (b) is not taking any drug that could, in the dosage prescribed or in the dosage recommended by the manufacturer, impair his or her ability to drive a motor vehicle of the applicable class safely;
 - (c) has no established medical history of myocardial infarction, angina pectoris, coronary insufficiency or thrombosis;

- (d) has no established medical history of heart disease including arrhythmia or of respiratory dysfunction likely to interfere with the safe driving of a motor vehicle of the applicable class;
 - (e) is not suffering from an aortic aneurysm, whether resected or not;
 - (f) is not suffering from hypertension accompanied by postural hypotension resulting in giddiness when under treatment;
 - (g) has no established medical history of loss of consciousness or awareness due to a chronic or recurring condition;
 - (h) has no established medical history of a disorder of the musculoskeletal or nervous system that may interfere with the safe driving of a motor vehicle of the applicable class;
 - (i) has no established medical history of an intractable psychotic or psychoneurotic disorder, having particular regard for sustained hostile, aggressive, paranoid, suicidal or other destructive tendencies or depression unless it is medically determined that the condition from which the person has suffered is corrected or controlled;
 - (j) has a visual acuity by Snellen Rating, with or without the aid of corrective lenses, no poorer than 20/30 in the better eye and 20/50 in the weaker eye; and
 - (k) has a horizontal visual field of at least 120 degrees in each eye as measured by confrontation tests.
- (2) An applicant for or a holder of a Class A, B, C, D, E or F driver's licence who fails to meet the qualifications referred to in clauses (1)(a) to (i) may, despite the failure, qualify for the class of licence applied for or held if he or she demonstrated the ability to drive a motor vehicle in the applicable class as safely as any person who meets those qualifications.
- (3) An applicant for or a holder of a Class D driver's licence who fails to meet the qualification referred to in clause (1)(c) may, despite the failure, qualify for that class of licence if it is medically determined that he or she has made a full recovery and there is no established history of a second occurrence of myocardial infarction, thrombosis or recurring angina pectoris.
- (4) An applicant for or a holder of a Class B, C, E or F driver's licence whose hearing in one ear is better than in the other must be able to perceive in the better ear, with or without a hearing aid, a forced whisper at a distance of 1.5 metres or, if an audiometer is used to test the person's hearing, must not have a loss in the better ear of more than 40 decibels at 500, 1,000 and 2,000 hertz.
18. An applicant for or a holder of a G, G1, G2, L, M, M1, M2, or R driver's licence must have,
- (a) in the case of a person whose vision in one eye is better than in the other, visual acuity in the better eye that is no poorer than 20/40 as measured by Snellen Rating; and

- (b) a horizontal visual field of at least 120 degrees as measured by confrontation tests.

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

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

Section 47(1) states:

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

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

Section 50 of the Act states:

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

APPLICATION OF THE LAW TO FACTS:

The Applicant operates a tractor trailer driving on average 10 hours per day and 120,000 miles per year. He has for some time held a class "AC" licence despite Regulation 340/94 section 14 (c) of the H.T.A. on the basis of a Medical Certificate under Regulation 340/94 section 14(2) of the H.T.A. It is apparent that the M.A.C. is now concerned re. the Applicant's current cardiac status.

The M.A.C. states in a letter to the Applicant dated May 22, 2002:

...at the present time, you should not hold a licence higher than a Class "G". This decision has been based on the fact that the medical information provided indicates that you have significant heart disease and your test results do not meet the required medical waiver standards. However, we will be pleased to reconsider your case for a class "AC" licence upon receipt of a satisfactory cardiologist's assessment including results of all investigations and a thallium stress test which indicates that you are able to complete a stage II without developing symptoms or evidence of ischemia.

In response the Applicant filed a Notice of Appeal and included a letter from his cardiologist, Physician #2, dated January 7, 2003, as well as certain medical test results, which are summarized below.

Physician #2, Cardiologist at Mount Sinai Hospital and Assistant Professor of Medicine, University of Toronto states:

I am writing to provide you with an assessment of the Applicant's cardiac status. The reason for this correspondence is that the Applicant has lost his class "AC" licence, and apparently he wishes to appeal this decision.

I have been the Applicant's cardiologist since 1997. By way of background, the Applicant is 60 years old. He had an angiogram performed by myself in April of 1997. This demonstrated a 40% narrowing in his circumflex, and a completely occluded mid-LAD with collateral flow from a normal RCA. Since then, the Applicant has been well with no symptoms of angina despite his coronary artery disease.

The Applicant has had cardiac investigations completed recently. These have been attached with this correspondence. An echocardiogram demonstrated left ventricular hypertrophy with normal ventricular function and essentially normal valvular structures. The Applicant also had a Holter Monitor study performed. This demonstrated infrequent premature atrial contractions and ventricular contractions. There were no higher grade rhythm disturbances and his heart rhythm was normal sinus throughout.

The Applicant had a stress nuclear study performed on September 25, 2002. He exercised for 11 minutes on the Bruce protocol. The investigation was positive in that he developed ischemia both electrically and by nuclear images. However, it is important to note that the Applicant exercised into stage 4 of the Bruce protocol, and this seems to meet the requirement for being able to complete stage 2 without symptoms or evidence of ischemia.

The Applicant's medical regimen now includes Metoprolol 50 mg bid, Lisinopril 10 mg bid, ECASA 325 mg daily, and Amlodipine 10 mg. od.

I trust this information will assist you in arriving at decisions regarding the Applicant's fitness to hold a class AC licence. Should you require any further information, please feel free to contact me with the Applicant's permission. I should note that the Applicant provided written permission for me to correspond with regarding this issue.

Physician #2 does not arrive at an opinion regarding the Applicant's fitness to drive.

Physician #3 of North York General Hospital, Branson Division, in an imaging report printed on 21/10/2002 states under the heading interpretation:

Findings are strongly suggestive for LAD territory ischemia at submaximal stress.

Physician #4, Cardiologist at Mount Sinai Hospital prepared an Echo Doppler report, dated December 19, 2002, which states under the heading of summary:

1. Concentric LVH with normal LV function. Mild age-related sclerosis of the aortic and mitral valves with normal valve function. LAE.

Physician #5, Cardiologist, Mount Sinai Hospital, states in a report based upon an ambulatory ECG (Holter Monitor) Report of December 19, 2002:

The patient described no subjective symptomatology during the study.

The M.A.C. was concerned about the Applicant's test results. There was evidence of ischemia. His cardiologist could only state in regards to the stress test that "this seems to meet the requirement for being able to complete stage 2 without symptoms or evidence of ischemia."

Since it was not clear to M.A.C. whether or not the ischemia actually started at stage 2 of a stress test, a repeat Sestamibi stress test was requested January 23, 2002. (Exhibit 6) No further medical reports were provided by the Applicant.

In the absence of a clear opinion by a doctor supported by appropriate medical tests stating that he is fit to drive safely, the Tribunal finds that the Applicant's physical health due to coronary artery disease prevents him from qualifying for the Class "AC" licence since he suffers from continuing heart disease that is likely to interfere with the safe driving of a motor vehicle pursuant to Regulation 340/94 of Section 17(1)(d.)

Although the Tribunal is sympathetic to the Applicant's appeal for the reason that he remains asymptomatic, the Applicant has failed to provide clear medical evidence to clarify the uncertainty regarding the ischemia.

It is the Tribunal's finding that the Applicant's evidence and reports are inadequate since the onset of ischemia has an important impact upon the Applicant's ability to drive a motor vehicle safely. As a result the Registrar's decision to downgrade the Applicant's "AC" class licence must stand.

The Tribunal encourages the Applicant to complete the requested further assessment as quickly as possible.

DECISION:

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

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

LICENCE APPEAL TRIBUNAL

John Charmichael, M.D., Presiding Member

RELEASED: April 17, 2003

The period to appeal a decision to the Superior Court of Justice or Divisional Court is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

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1538-MED-DOWN

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

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

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

APPEARANCES: KIM BEINTEMA, Respondent
Representative for the Minister

Applicant
Counsel for the Applicant

DATE OF
HEARING: April 16, 2003 London

DECISION AND REASONS

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

EXHIBITS

1. Notice of Downgrading of Driver's Licence dated August 8, 2002.
2. Notice of Appeal from the Applicant received at the Tribunal February 19, 2003.
3. Adjournment Order Released by the Tribunal March 1, 2003
4. File Summary Introduced by the Respondent.

5. Applicant's Driving Record from the Ministry of Transportation.
6. Curriculum Vitae of Physician #1 Introduced by the Applicant's Counsel.
7. Curriculum Vitae of Physician #2 Introduced by the Applicant's Counsel.

FACTS:

The Applicant, a 36 year old truck driver, had his driver's licence downgraded from a Class A to a Class G on August 8, 2002. The Deputy Registrar of Motor Vehicles received an unsolicited medical report dated June 9, 1999 from Physician #1 (CV Exhibit # 6); informing the Ministry of Transportation that the Applicant has a medical condition that in his opinion may preclude safely operating a motor vehicle.

On July 22, 1999 the Ministry received a solicited medical report from the Applicant's family physician, Physician #3, reporting that the Applicant suffers from cardiovascular disease and had a myocardial infarction on February 25, 1999. He included additional medical information, which was provided in more detail in a letter from Physician #1 dated June 9, 1999 and received by the Ministry December 24, 1999. Physician #1 explained that the Applicant had received an implantable cardioverter defibrillator (ICD), due to an episode of induced ventricular fibrillation during an Electrophysiology Study (EP) being done to investigate a known Wolf-Parkinson-White Syndrome (WPW).

Physician #1 added:

"It has been six months since implantation and he has had no events recognized or therapies delivered by this device. As such, consideration should be given to returning his Class A licence." At this time the Applicant still had his Class A licence because the Ministry had not yet taken any action.

"Decisions made with respect to his Class A licence need to be made carefully. This is not a man who has sustained cardiac arrest, ventricular fibrillation or ventricular arrhythmia. Rather he had a ventricular fibrillation induced during an EP study. Consensus guidelines do not cover this particular situation. Decisions with respect to his Class A licence are obviously left in your hands."

Apparently these letters fell between the cracks at the Ministry of Transportation for 3 years and did not receive any real action until August 2002. During this period the Applicant had recovered from his myocardial infarction and returned to work. He had changed jobs and was now driving a ready mix cement truck.

On June 21, 2001 the Applicant received a letter from the Ministry of Transportation advising him that he must apply for a waiver of the medical standards pursuant to Regulation 340/94 of the *Highway Traffic Act* in order to retain his Class A licence.

Physician #1 forwarded a Medical Waiver to the Ministry on July 20, 2001. This was followed up with a letter dated July 26, 2001, which stated the Applicant was being followed every 6 months since the ICD had been implanted and it has not discharged since that time. He added, "We see no reason why he should not maintain his current level of driving."

The Medical Advisory Committee did a Case Study on October 4, 2001 and requested the results of an exercise test to determine if the Applicant develops ischemia due to his myocardial infarction and the reason the EP study was conducted.

Physician #4, another member of the Arrhythmia Service at the University wrote to the Ministry on February 26, 2002, enclosing copies of records already sent in the past. He repeated that the defibrillator was inserted because of the surprising finding of readily inducible ventricular fibrillation at an EC study 3 years ago. There was no recurrence of arrhythmia or shock from the defibrillator.

Physician #5, another cardiologist forwarded the results of an exercise stress test performed April 23, 2002. The Applicant had displayed good exercise tolerance and did not manifest any evidence of myocardial ischemia. The EP study was evaluating a known Wolf-Parkinson-White syndrome and found it did not require therapy. Although it was apparent on a resting ECG it disappeared with exercise.

Despite the receipt by the Deputy Registrar of Motor Vehicles of all of this information, it downgraded the Applicant's driver's licence on August 8, 2002 from a Class A to a Class G because of Heart Disease.

Physician #2 (CV Exhibit # 7), Director of Arrhythmia Service, and Professor of Medicine at the University of Western Ontario gave evidence at the Hearing, and wrote to the Applicant's family physician on December 24, 2002 presenting a complete overview of the case. Some of his comments are:

- 1) The WPW syndrome plays no role in his fitness to drive since there has been no incapacitation from any of the tachycardia spells that he has experienced.
- 2) The residual left ventricular function, post myocardial function has been excellent.
- 3) The Applicant would not normally have had an EP study routinely after a MI and would have been permitted to return driving after up to 6-8 weeks following a MI. The ICD was implanted purely as a prophylactic primary preventative measure and he has had no device activation in the 3-year interim. This suggests that the finding at the EP study was non-specific and the Applicant was at no greater increased risk for cardiac death post MI, than any other patient who has suffered an inferior wall MI

and did not have an EP study. Therefore, if an individual with a commercial driver's licence suffers an uncomplicated inferior wall MI and makes a complete recovery is able to return to commercial driving subsequently, the Applicant should be treated similarly.

The Medical Advisory Committee (MAC) did a case study on March 4, 2003 and denied the commercial licence-waiver consideration for the following reasons:

1. It cannot ignore that the driver has an implanted defibrillator and therefore, cannot ignore both the National Safety Code (N.S.C.) and the Canadian Medical Association (C.M.A.) guidelines, which are unequivocal in that individuals with implanted defibrillators, are precluded from holding a commercial licence.
2. The Applicant did not have spontaneous ventricular tachycardia, therefore, whether the fibrillation was inducible or non inducible, in MAC's opinion is irrelevant. The fact remains that the device was implanted, likely due to a false/positive test.

Physician #2 testified that he would be willing to remove the defibrillator if the Applicant requested, because it was proven unnecessary. He had neither experienced an arrhythmia nor had the defibrillator discharged in the 4 years it has been implanted.

ISSUES:

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

The Applicant no longer suffers from a mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely?

LAW:

Regulation 340/94, Section 14 states:

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

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

Regulation 340/94, Section 17 and 18 states:

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

qualification referred to in clause (1)(c) may, despite the failure, qualify for that class of licence if it is medically determined that he or she has made a full recovery and there is no established history of a second occurrence of myocardial infraction, thrombosis or recurring angina pectoris.

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

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

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

Section 50 states:

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

APPLICATION OF THE LAW TO FACTS:

The Tribunal had some difficulty reviewing this case because of the way it was handled by the Ministry of Transportation over a period of 3 years. The Respondent said it had fallen between the cracks at the Ministry because of a massive backlog of cases, but the Ministry had been sent at least 10 letters from 4 different cardiologists and one family physician, with information regarding the implant, along with a Waiver Package with his Employer's Statement and Driver's Questionnaire.

In turn the Ministry had requested additional information in 5 letters, but showed little interest in the implanted defibrillator until August 8, 2002, after the Applicant had been discharged from the Arrhythmia Service and virtually given a clean bill of health. The Applicant had been driving a truck for 3 years without any difficulties whatsoever. The reason given for the downgrading his driver's licence was heart disease, after all of his attending cardiologists agreed that he had suffered an uncomplicated inferior wall MI and made a complete recovery.

On March 4, 2003 the Medical Advisory Committee did a Medical Case Study, which ignored the collective reports from 5-6 specialists stating that the implanted defibrillator had not served any purpose for 4 years and could be removed. The stand taken is that it is present and the N.S.C. and C.M.A. recommendations cannot be ignored.

The Tribunal believes that the special circumstances in this case should be taken into consideration: that is the ICD was a prophylactic measure. The claim by the Ministry that the defibrillator was determined to be necessary after the EC test, so it should still be necessary seems to be pretty weak when it has not been triggered in 4 years. Furthermore, Physician #2 is willing to remove it if the Applicant requests, in order to get his licence back.

After reviewing all of the evidence and applying the law to the facts the Tribunal does not find that the Respondent has established on a balance of probabilities that the Applicant suffers from a disability likely to significantly interfere with his ability to drive a commercial vehicle of the applicable class safely per Regulation 340/94, section 14. Further the Respondent failed to prove that the Implanted Defibrillator was of any consequence or would interfere with his ability to drive safely.

Clearly over the last three years, the Applicant has demonstrated the ability to drive a motor vehicle in the applicable class as safely as any person who meets those qualifications since he has been driving a truck for three years without any medical difficulties per Regulation 340/94, section 17(2).

DECISION:

Upon the application by the Applicant to appeal the decision dated August 8, 2002 of the Minister ("Respondent") to change the class or classes of motor vehicle in respect of which the licence was issued pursuant to Section 32(12)(b)(i) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Respondent and of the Applicant;

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

LICENCE APPEAL TRIBUNAL

Ross C. Bennett, M.D.
Presiding Member

RELEASED: April 25, 2003



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Decisions under Highway Traffic Act

Section 47(1) (b) - Medical

Fiscal Year 2003 - 2004

LAT Decisions are exempt from translation under Ontario regulation 411/97 of the French Language Services Act

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1531-MED-ALCL

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: JOHN A. CARMICHAEL, Presiding Member

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles

Applicant,
Unrepresented

DATE OF
HEARING: March 26, 2003

Toronto

DECISION AND REASONS

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

FACTS:

The Applicant is a forty five year old female who was charged with a careless driving offence July 7, 2002 (Exhibit 1). The M.T.O. received a letter July 12, 2002, from her family physician stating that the Applicant at the time of the accident was intoxicated, and that her alcohol as well as her medications and substance abuse might make her a dangerous driver on the road (Exhibit 2). The physician did not identify the medications or the substances being abused. On July 29, 2002 the Applicant was informed that her licence was suspended and steps to be taken to have the licence renewed (Exhibit 3).

November 4, 2002 the Ministry of Transport Alcohol Assessment form was completed (Exhibit 4). This report identified that the Applicant had undergone an alcohol rehabilitation program in 1992 and was up until the time of her accident continuing to use alcohol to a moderate and sometimes excessive degree. Blood laboratory results (Exhibit 5) although nonspecific support this observation.

On November 11, 2002 the Medical Advisory Committee recommended that the Applicant's licence remain suspended and that she provide confirmation that she has remained abstinent from alcohol for one year. This to be confirmed by her physician accompanied by prevention counselling and supported by biochemical markers (MCV & GGT). (Exhibit 6) In a letter to the M.T.O. Feb. 1, 2002 (Exhibit 7) the Applicant correctly identifies that she was not charged with an alcohol related offence at the time of her accident (July 7, 2002).

ISSUES:

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

LAW:

Regulation 340/94, Section 14 states:

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

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

Section 47(1) states:

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

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

Section 50 of the Act states:

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

APPLICATION OF THE LAW TO FACTS:

The Tribunal is sympathetic to the Applicant's request that the decision of the M.T.O. be reversed and recognizes that the precipitating event here may well have been an immediate acute and distressing family crisis with or without an alcoholic component. The Tribunal cannot however ignore the evidence that the Applicant has a real and continuing alcohol problem. Until there is real evidence of abstinence (other than the Applicant's testimony), including a statement from her physician counsellor regarding the satisfactory completion of a rehabilitation program the Tribunal remains concerned that the Applicant suffers from disability likely to significantly interfere with her ability to drive a motor vehicle safely and is addicted to the use of alcohol and drugs to an extent per section 14 of Regulation 340/94. The Tribunal therefore upholds the decision of the M.T.O. due to this concern for her safety and that of the public. The Tribunal further finds that the reasons for the suspension of the Applicant's driver's licence are sufficient.

DECISION:

Upon the application by the Applicant to appeal the decision dated July 12, 2002, of the Registrar of Motor Vehicles ("Registrar") to suspend her driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

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

LICENCE APPEAL TRIBUNAL

John A. Carmichael, Presiding Member

RELEASED: April 15, 2003

1545-MED-SEIZ

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: JOHN CARMICHAEL, M.D.
Presiding Member

APPEARANCES: ADELAIDE PINDER
Representative for the Registrar of Motor Vehicles
by written submissions only

Applicant,
by written submissions only

DATE OF
HEARING: APRIL 3, 2003 Written Hearing

DECISION AND REASONS

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

FACTS:

The Applicant is a 27 year old male with a history of epilepsy, described as "complex partial seizures" beginning at 12 years of age (Exhibit 3). When placed on appropriate medication (Tegretol) the seizures were satisfactorily controlled for several years. An EEG in May 2001 was reported as normal (Exhibit 4). In June 2001, under the neurological guidance of Physician #1, the medication was gradually decreased and discontinued in September 2001 (Exhibit 5).

In a letter dated October 17, 2002 the attending neurologist, Physician #1, reported to the M.T.O. that the Applicant had suffered a seizure in July 2002 and "doesn't seem willing to go back on his Tegretol" (Exhibit 6). Neurological clinical examination at that time was negative. No other investigation was performed and the Applicant left the care of Physician #1, to move elsewhere. On October 23, 2002, the Applicant was informed of his licence suspension (Exhibit 7). A detailed neurologist's assessment regarding the reported seizure, including the result of all investigations (EEG, MRI, CT Scan), prescribed treatment and possible cause for the seizure, as well as a narrative of the Applicant's previous seizure were requested at that time. The Applicant's neurologist responded by sending his consultation notes with a copy of the one and a half year old EEG (Exhibit 8), which predated the July 2002 seizure, stating "this should be more than enough to make a decision regarding his case".

In December 2002, the Medical Advisory Committee (MAC) of the M.T.O. refused the Applicant's request for reinstatement on the basis that he was a non-compliant epileptic at high risk of further seizures, and no longer under medical supervision (Exhibit 9). MAC required a neurologist's assessment confirming a year free of seizures and comments regarding any treatment before reinstatement could be considered. The Applicant was so informed January 17, 2003.

In February 2003, the Applicant appealed this decision stating:

My seizure occurred in early August 2002 and was reported to my neurologist in October 2002, when I saw him last. I have not had any seizures for years prior to being weaned from my medication in November or December 2001. Likewise I have (sic) had any seizures since the August 2002 incident. I am currently still not taking any medication.

My last EEG taken sometime in 2001 indicated no seizure activity whatsoever. If need be, I am willing (sic) undergo another EEG to prove once again there is no seizure activity.

The suspension of my licence severely limits my ability to find and sustain gainful employment. In fact, I was forced to quit my job in Ottawa as a result.

In summary, he has been free of seizures since August 2002, some eight (8) months, is "currently still not taking any medication", and has not provided an up-to-date EEG, although he is willing to do so.

On March 27, 2003 the Applicant wrote to the Ministry stating as follows: “at no time was I ever diagnosed with tonic clonic activity” and further he believed that the seizure of July 2002 “was an isolated incident” and furthermore that this observation is supported by the same, albeit normal EEG dated May 2001 (Exhibit 10).

ISSUES:

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

LAW:

Regulation 340/94, Section 14 states:

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

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

Section 47(1) states:

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

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

on the grounds of,

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

Section 50 of the Act states:

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

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

APPLICATION OF THE LAW TO FACTS:

The Applicant's request for reinstatement of his licence is governed by subsection 14(a) of Regulation 340/94, of the HTA. A licensee must not suffer any nervous or physical disability likely to significantly interfere with his ability to drive a motor vehicle safely.

Does this Applicant presently suffer from a disability likely to significantly interfere with his ability to drive a motor vehicle safely?

The Tribunal has considered the evidence of both the Applicant and the Respondent and finds that the Applicant does suffer from such a disability, for the following reasons: First and foremost, the Applicant, in September 2001 discontinued his medication with his doctor's concurrence and encouragement. Ten months later, he suffered a seizure in July 2002. But for that one seizure, he advises that he has been seizure free since August 2002, a period of some eight (8) months. His last EEG in May 2001 was normal. His doctor indicates that the consultation notes that were sent to the Ministry and the May 2001 EEG "should be enough". However, his doctor does not express the opinion that the Applicant can operate a motor vehicle safely. The Ministry requires more – the results of all investigations (EEG, MRI, CT Scan), the prescribed treatment and probable cause for the seizure.

The Ontario public is entitled to the assurance that only those drivers that are capable of operating a motor vehicle safely are granted the privilege of a motor vehicle permit. Although the Applicant has offered to obtain a more recent EEG, this Tribunal does not have such a recent independent test, nor does it have the benefit of other such reports, or indeed the recommendation of the Applicant's own neurologist stating categorically that he is able to operate a motor vehicle safely. If such information were readily available, the Tribunal could more easily determine whether or not the Applicant suffers from a disability likely to significantly interfere with his ability to drive a motor vehicle safely.

All this information is not before the Tribunal and it must therefore consider whether the Ministry's position that the Applicant's driver's licence should remain suspended is appropriate.

The Tribunal finds that the Ministry acted properly when it originally suspended the Applicant's licence in October 2002 as a result of a letter from his doctor stating that his

patient had a seizure in July 2002. Eight (8) months have elapsed, and the Applicant submits that he should have his licence back.

The Tribunal disagrees. This type of disability left untreated is unpredictable and could involve disastrous consequences. The Applicant no longer takes medication and is not followed by a physician, since his medication was discontinued. He suffered a seizure, which fortunately did not occur while operating a motor vehicle, or he would have certainly suffered personal injury to himself and caused significant harm to others.

In the absence of medication and medical follow up, and based upon the previous history of this Applicant, as well as the more recent seizure, the Tribunal remains concerned that the Applicant continues to suffer from a disability likely to significantly interfere with his ability to drive a motor vehicle safely. The Applicant has unfortunately failed to provide the Ministry, and this Tribunal with more recent tests; he remains without medication and is no longer under the care of a physician. Given these factors, the Tribunal finds that a seizure resulting from the Applicant's disability would likely significantly interfere with his ability to drive a motor vehicle safely.

The Tribunal encourages the Applicant to obtain follow up medical advice with further tests, should he wish to be considered for a driver's licence.

The Tribunal notes that the Applicant fails to meet Medical Standards For Drivers (Revised 06/99) clauses 6.3.1 b) and c), in that he has demonstrated non-compliance in the past and is not presently under regular medical supervision. The Tribunal further notes the recommendation of the Canadian Medical Association "Determining Medical Fitness To Drive" A Guide For Physicians (Sixth Edition) section 5.4.2 requirement of a 12 month seizure free period on medication, before an Applicant's licence may be considered for reinstatement.

DECISION:

Upon the application by the Applicant to appeal the decision dated November 1, 2002 of the Registrar of Motor Vehicles (the "Respondent") to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

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

LICENCE APPEAL TRIBUNAL

John Carmichael, M.D.
Presiding Member

RELEASED: *April 15, 2003*

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



1554-MED-CARD

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ROY MELVIN, M.D., Presiding Member

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

Counsel, Representative for the Applicant

DATE OF
HEARING: April 8, 2003

Toronto

DECISION AND REASONS

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

FACTS:

On November 25, 2002, the Applicant was attending a meeting in Montreal when he had a fleeting episode of light-headedness followed by sudden loss of consciousness for approximately one minute. He was admitted to Hospital and kept under observation in their cardiac intensive care unit in view of his previous history of mild LV dysfunction demonstrated by chronic left bundle branch block. An Echocardiogram on November 25, 2002 showed severe LV dysfunction, an ejection fraction of 25% with normal left ventricular size. A coronary angiogram performed on November 26, 2002 showed normal coronary arteries and dilated cardiomyopathy.

His past medical history is not significant except for a familial history of heart disorders.

He was started on oral medications viz aspirin, b-blocker, and ACE Inhibitor.

While in hospital, his cardiac consultants decided to implant an Intra Cardiac Device (hereinafter "ICD") which was done on December 4, 2002 – a Marquis model which is both a pacemaker and defibrillator. Their reports are not on file but it is presumed that this "empirical" treatment was done to prevent even the most serious possible event following a syncope of unknown cause – namely sudden death due to ventricular fibrillation. It appears that the presence of previous LV dysfunction contributed to this decision.

He made an uneventful recovery following the I.C.D. and was allowed to return home to Peterborough a few days later where he has been monitored by his cardiologist Physician #1 and family doctor Physician #2.

A full report has been received from Physician #1 dated December 12, 2002 who on the same date notified the Ministry of Transportation of Ontario (the "M.T.O"). as required. On December 22, 2002, the M.T.O. notified the Applicant that his licence was suspended as per section 47(1) and that reconsideration would be based on receipt of appropriate medical reports. Physician #1 submitted a follow-up report dated December 20, 2002 in which he argues that his patient's driving restriction should be based on the guidelines for "single syncope of unknown origin" namely a one month waiting period without symptoms for a person with a "G" licence. CMA 8.1.4-C.

The M.T.O. responded in a letter dated January 7, 2003 to continue licence suspension because of the I.C.D. implantation and the provisions of section 8.1.4 B. apply to this case.

On January 9, 2003, Physician #1 submitted a further report indicating that the Applicant has remained stable. The bulk of this letter argues for his patient's licence reinstatement on the basis that the Applicant has never demonstrated ventricular arrhythmia and so the Canadian Medical Association, (hereinafter "C.M.A") guidelines have been applied wrongly.

The Ministry's Medical Advisory Committee (hereinafter "M.A.C.") review of January 15, 2003 upholds this suspension on the basis that the I.C.D. was implanted due to high risk for further episodes of dysrhythmia. the Applicant was so informed on January 17, 2003 and again requested a follow-up report especially as it related to the use of any anti-arrhythmic medication.

Physician #1's report of January 28, 2003 indicated that the Applicant is doing well and has had no pacing or shocking from his I.C.D. His medication ACE Inhibitor (Ramspril) and beta-blocker (Carvedilol) have been titrated appropriately. He again argued for his patient's licence to be reinstated.

The M.A.C. reviewed this case again on February 13, 2003 to recommend that Applicant's licence remain suspended but suggests a six month waiting period without adverse events based on the CMA guideline 8.1.4-B for disturbances of cardiac rhythm with I.C.D. and anti-

arrhythmic drug. The beta blocker (carvedilol) may be considered an anti-arrhythmic drug although this is not its primary indication in this case.

However taking this view enables the waiting period to be shortened to 6 months. The M.T.O. so informed the Applicant on February 26, 2003 which was followed by an appeal to the L.A.T. on March 3, 2003.

the Applicant's cardiologist Physician #1 submitted a follow-up report dated March 3, 2003. Physical examination was essentially negative. The I.C.D. monitor showed two episodes of non-sustained ventricular beats – both asymptomatic. Holter Monitor was essentially negative. Cardiac Scan showed an improvement in the ejection fraction to 56%. the Applicant has been feeling well and has resumed his work as well as his exercise routines.

Another review by the M.A.C. on March 28, 2003 is essentially the same – that the Applicant's licence remains suspended and recommends a 6-month waiting period without symptoms or I.C.D. anti-arrhythmic activity.

Further documentation presented at the hearing was accepted by the M.T.O. This was a letter from Physician #1 to the Applicant's solicitor outlining his position relative to the Applicant's rights to have his driver's licence reinstated.

ISSUES:

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

LAW:

Regulation 340/94, Section 14 states:

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

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

Section 47(1) states:

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

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

on the grounds of,

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

Section 50 of the Act states:

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

APPLICATION OF THE LAW TO FACTS:

the Applicant suffered an attack of syncope, which required medical investigation and treatment. His attending physician reported this event to the M.T.O. as required by law whereupon his driver's licence was suspended as per Ontario Regulation 340/94 subsection 14(a).

Reinstatement depends upon the Applicant's medical improvement to an acceptable risk based on medically accepted standards, such that he no longer suffers from a physical disability likely to significantly interfere with his ability to drive a motor vehicle of the applicable class safely.

The Applicant's syncope attack was his first and its cause could not be absolutely determined.

In view of his previous L.V. dysfunction and early cardiomyopathy, it was decided by his medical specialists to implant an I.C.D. pacemaker defibrillator. He was discharged to the care of his cardiologist and is maintained on medications including a beta-blocking agent, which may be considered to have anti-arrhythmic effects. His progress has been totally satisfactory.

The Applicant claims that the syncope was a first attack of unknown origin in which case the CMA guidelines for reinstatement of a class G. Licence is one month. The M.T.O. is withholding driving privileges for 6 months based on guidelines for patients with ventricular arrhythmia.

The Applicant and his doctor claim that ventricular arrhythmia has never been demonstrated, does not exist and that there is a low probability that it will occur.

However, the fact remains that he was treated with the implantation of an I.C.D. – something that is not done for simple syncope. The I.C.D. is an extra precaution to address even the most unlikely but serious eventuality. The M.T.O. takes the view that they too must take extra precaution in this case and lengthen the waiting period from one month to six months. It is the decision of this Tribunal that it is reasonable to lengthen the waiting period given the serious nature of the medical intervention and the impact on the Applicant's ability to drive a motor vehicle safely.

DECISION:

Upon the application by the Applicant to appeal the decision dated February 25, 2003 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the Highway Traffic Act ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

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

LICENCE APPEAL TRIBUNAL

Dr. Patrick Coffey, M.D., Member

Dr. Roy Melvin, M.D.
Presiding Member

RELEASED: April 17, 2003

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



1556-MED-SEIZ

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

TO APPEAL A SUSPENDED LICENCE

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

APPEARANCES: LUBA NEUWIRTH
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF
HEARING: APRIL 1, 2003

HAMILTON

DECISION AND REASONS

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

EXHIBITS:

1. Notice of Suspension of Driver's Licence effective May 31, 2002.
2. Notice of Appeal Form received at the Tribunal March 4, 2003, filed by the Applicant.
3. File Summary introduced by the Respondent.
4. File of copies of faxes and letters introduced by the Applicant.

FACTS:

The Applicant, a 38 year old project manager at a construction company had his driver's licence suspended on May 31, 2002 after the Deputy Registrar of Motor Vehicles received a Medical Report, dated February 24, 2002 from a Physician #1, at the _____ Emergency Medical Services. The report stated that the Applicant had suffered an epileptic seizure on February 24, 2002 as a result of an arterio-venous malformation (AVM). The seizure had occurred while the Applicant was sleeping and his first awareness of it was when he awoke in the hospital.

Physician #2, a neurosurgeon at the Toronto Western Hospital wrote to the Ministry on June 14, 2002 with some background information on the Applicant. Physician #2 had been treating the Applicant since he had experienced a single brief episode of disorientation in August of 2000, which was diagnosed as a partial complex seizure. This led to the discovery of a left parietal arterio-venous malformation in his brain. In April 2000, the AVM was embolized, to prevent bleeding and then resected. An Angiography verified a cure and there were no post-operative problems. Physician #2 stated the risk of subsequent seizures was very low and the risk of intracranial hemorrhage was essentially zero.

The Medical Advisory Committee (MAC) recommended continued suspension until the Applicant has remained seizure free for 1 year.

A Medical Condition Report was sent to the Ministry of Transportation (M.T.O.) on December 9, 2002 by a Physician #3 from the _____ Hospital stating that the Applicant had suffered a seizure on that date. Apparently the Applicant believed he was to stop the Dilantin when the prescription was finished. His Dilantin blood level was 0 at the hospital. In Physician #2's letter of June 14, 2002 to the Ministry, he stated that the Applicant is being tapered off his Dilantin. Physician #2 subsequently left his practice and moved to the United States.

Another Medical Condition Report was forwarded to the Ministry by a Physician #4 from the same hospital, reporting that the Applicant had experienced an Aura Pre-Seizure and Confusion, on February 12, 2003.

Physician #5, an associate of Physician #2, sent an update of the Applicant's status to the Ministry on February 20, 2003 and stated that the Applicant had been seizure free for 12 months and he could see no reason why the Applicant's licence could not be reinstated. It is not clear if Physician #5 was aware of the December 2002 seizure and the Aura Pre-Seizure and Confusion incident in February.

An additional series of letters and faxes (Exhibit # 4) were introduced by the Applicant at the beginning of the hearing. They are as follows:

1. A copy of a fax from the Applicant's family physician, Physician #6, stating that the Applicant had suffered a seizure after stopping his medication, but otherwise he had been seizure free and compliant with his medication regime.
2. Copies of 2 faxes, a letter from the Deputy Registrar of Motor Vehicles to the Applicant, dated March 20, 2003 and a copy of a Release of Medical Information Form, which has not been completed.
3. A copy of a letter dated February 20, 2003 from Physician #5 to Physician #6 describing the Applicant's Aura Pre-Seizure and Confusion, stating that that he has not had a seizure since February 2002 and his view that there is no reason why his licence should not be reinstated.

ISSUES:

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

LAW:

Regulation 340/94, Section 14 states:

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

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

Section 47(1) states:

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

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

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);

- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

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

APPLICATION OF THE LAW TO FACTS:

Applying the above noted excerpts from the *Highway Traffic Act*, Regulation 340/94, Section 14(a) and Section 47(1)(g) to the facts, the Tribunal finds that the Deputy Registrar of Motor Vehicles properly suspended the Applicant's driver's licence when informed that the Applicant had suffered a generalized seizure for the reason that the Applicant suffered from a disability likely to significantly interfere with his ability to drive a motor vehicle safely.

The M.T.O. requested further medical information to assess the Applicant's health and his ability to drive safely since the surgery.

The Canadian Medical Association's "Determining Medical Fitness to Drive", A Guide for Physicians states: "after surgery to prevent epileptic seizure-private drivers may resume driving if 12 months seizure free after surgery".

Unfortunately, the Applicant stopped taking his Dilantin medication and suffered a seizure in December 2002, 10 months after the last one. His two neurosurgeons had believed the problem had been relieved when the arterio- venous malformation was resected in April 2002. Physician #2 stated in his letter of June 14, 2002, that the Applicant was being tapered off his Dilantin. It appears no specific instructions were given to the Applicant in this regard and the Applicant continued taking the drug until the prescription was finished and then seized.

The evidence suggests the Applicant must still have an underlying problem, which is indicated by the Aura Pre Seizure and Confusion episode on February 12, 2003, and which occurred after he had restarted the Dilantin. This particular event resembles the initial occurrence in August 2000 when he first saw Physician #2.

After considering all of the evidence and the application of the law to facts, this Tribunal finds that the Applicant continues to fall within Section 14 of Regulation 340/94, in that he

suffers from a medical disability likely to significantly interfere with his ability to drive a motor vehicle.

The Tribunal finds that the Applicant continues to suffer from a disability, which results in seizures. A full 12 month seizure free period should be demonstrated before his licence is reinstated under Section 47(1) of the *Highway Traffic Act*.

Given the unpredictable nature of the seizures, it is recommended that the Applicant remain under the care of a physician for further ongoing treatment.

DECISION:

Upon the application by the Applicant to appeal the decision dated May 31, 2002 of the Deputy Registrar of Motor Vehicles (the "Respondent") to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

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

LICENCE APPEAL TRIBUNAL

Ross C. Bennett, M.D.
Presiding Member

RELEASED: *April 15, 2003*

**Licence
Appeal
Tribunal**

**Tribunal
d'appel en
matière de permis**



1558-MED-ALCL

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ROY MELVIN, M.D., Presiding Member

APPEARANCES: LUBA NEUWIRTH
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF
HEARING: April 15, 2003 Toronto

DECISION AND REASONS

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

FACTS:

The Applicant, age 46, is the _____ for _____ - a responsible and stressful job he has held for about four years - having been with this company for 23 years. He is married, has four children and has a stable family life.

On Saturday, July 28, 2002 he and his wife attended a barbeque party at which he consumed several alcoholic drinks as was his custom. They arrived home towards midnight and about 1:00 a.m. he decided to do some unfinished work in his basement. One of the overhead fluorescent lights was burnt out. He stood on a milk carton to change it, but fell, striking his head on the hard floor. At first his symptoms were not alarming but demonstrated fluctuating drowsiness and restlessness. It wasn't until about 16 hours later when he showed no improvement that his family became worried and took him by ambulance to the local hospital. Here it became apparent that he needed immediate special care for his head injury and was transferred to St. Michael's Hospital in Toronto.

A C.T. scan revealed epidural haematoma due to subarachnoid haemorrhage which required immediate decompression craniotomy which was performed by Physician #1 - neurosurgeon. The Applicant's post-operative progress was very good and he was transferred to the Toronto Rehabilitation Institution under the care of Physician #2. At first he had mild cognitive dysfunction, mild hearing impairment on the left, but no visual problems or seizures. Overall he was in hospital about 6 weeks, then followed as an outpatient by the Toronto Rehabilitation Institute and his family doctor.

Following the Applicant's accidental fall of July 29, 2002, notification was properly received by the Ministry of Transportation ("MTO") from his attending doctors to reassess his driver's licence because he suffered from a condition that might have made it dangerous to operate a motor vehicle. Physician #1's letter of August 2, 2002 indicates a diagnosis of "Epidural Hematoma, Alcohol Abuse and Delirium Tremens." (sic) Physician #2's letter of August 28, 2002 provides a diagnosis of "Closed Head Injury." As a result the MTO notified the Applicant on September 25, 2002 that his drivers licence was suspended as per Section 47(1) of the *Highway Traffic Act*.

Because of the diagnosis "... Alcohol Abuse and Delirium Tremens" (sic) reconsideration would be given on receipt of a detailed assessment from his neurologist or neurosurgeon and completion of the Alcohol Assessment Form to include results of bio-chemical markers. Physician #1's report of October 10, 2002 describes his operative findings and a satisfactory post-operative course. There was no evidence of any gross mental defect. the Applicant was left with anosmia (lack of taste and smell) which is not unusual after this type of injury. There is no mention of any alcohol related disorder.

The Applicant's family doctor, Physician #3 in Oakville, submitted the MTO Alcohol Assessment Form on November 20, 2002. It did not show alcohol abuse or any suspicion of chronic alcoholism, but does advise reduced drinking. The biochemical markers, GGT and MCV were normal.

During his rehabilitation he was referred to a Psychologist, Psychologist #1, in order to reduce his general level of stress prior to returning to his responsible job, with special emphasis on reducing his use of alcohol as a way of managing stress. Psychologist #1 submitted an extensive report dated December 18, 2002. His overall impression after eight sessions was that the Applicant showed good orientation and no discernable cognitive, perceptual or memory difficulties. His overall mood was positive. Treatment consisted of

recognizing the stresses and learning new methods to cope with them in order to place his own value systems within the context of his personal needs rather than those arising from his employer. Psychologist #1 outlined a planned program to prepare the Applicant for return to work. With regard to alcohol he saw no evidence that the Applicant was alcoholic and that since his injury the Applicant has been well able to monitor his use of alcohol.

A Medical Advisory Committee ("MAC") report of February 6, 2003 recommended continued suspension on the basis of the diagnosis of "... Alcohol Abuse and Delirium Tremens" (sic) in Physician #1's notification.

Physician #2's report of March 24, 2003 states that the Applicant tests normally for motor function and vision. He has no sensory or hearing deficits. His attention and concentration are normal. There were some mild memory difficulties but these were expected to improve. Physician #2 felt that there were no contraindications for allowing the Applicant to resume driving. He also felt that he need not be followed by a neurologist (Physician #4 by referral from the neurosurgeon) since this would be redundant.

ISSUES:

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

LAW:

Regulation 340/94, Section 14 states:

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

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

Section 47(1) states:

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

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

on the grounds of,

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

Section 50 of the Act states:

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

APPLICATION OF THE LAW TO FACTS:

The Tribunal has carefully reviewed the medical evidence before it. It finds, however, that the additional medical evidence before it no longer supports the initial diagnosis of "... Alcohol Abuse and Delirium Tremens" (sic) by Physician #1.

Moreover, it is difficult to envision how he could have made this diagnosis when his first contact with the Applicant was approximately 18 hours after the injury and he did make a definitive diagnosis of intracranial haemorrhage necessitating immediate surgery. Bleeding within the brain causes bizarre neurological symptoms and perhaps the differential diagnosis of Delirium Tremens was listed for exclusion.

The Applicant's rehabilitation specialist and family doctor have both stated that he does not suffer from alcohol addiction. Since he has now recovered sufficiently from surgery following his head injury the Tribunal finds that the Applicant no longer suffers from a medical condition likely to significantly interfere with his ability to drive a motor vehicle safely and does not fall under Regulation 340/90 Section 14 of the HTA.

DECISION:

Upon the application by the Applicant to appeal the decision dated October 5, 2002 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

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

LICENCE APPEAL TRIBUNAL

Roy Melvin, M.D., Presiding Member

RELEASED: April 23, 2003

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



1560-MED-ALCL

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

TO APPEAL A SUSPENDED LICENCE

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

APPEARANCES: LUBA NEUWIRTH
Representative for the Registrar of Motor Vehicles

Agent for Applicant

DATE OF
HEARING: April 10, 2003

Toronto
(By teleconference)

DECISION AND REASONS

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

EXHIBITS:

1. Copy of Notice of Suspension from the Ministry dated July 24, 2002.
2. Copy of Notice of Appeal from the Applicant received March 6, 2003
3. File Summary introduced by the Respondent.

4. Copy of a letter by Physician #1, Family Physician dated March 4, 2003 with two laboratory reports received with the Notice of Appeal from Applicant.

FACTS:

The Applicant, a 76 year old retired technical engineer's, had his licence suspended August 3, 2002. The Deputy Registrar of Motor Vehicles had received an unsolicited letter from Physician #2, dated July 16, 2002, which reported the Applicant had presented to the Emergency Department of the local hospital with acute alcoholic intoxication and had been noted in the past to drive while under the influence of alcohol.

The Applicant's family physician and neighbour, Physician #1 appeared as his agent. Physician #1 has known the Applicant for about 30 years. He brought out in the evidence that the Applicant had been a chronic alcoholic 10-12 years ago, after his son was killed in an MVA. Ten years ago he joined AA and attended meeting regularly. He stopped drinking completely until May 2001 when he went on a 3-day bender. He did not drink again until this episode on July 16, 2002, when he collapsed and was taken to the Hospital Emergency. The reason given for this was July 16 was the 20th anniversary of his son's death.

Physician #1 said that he keeps a close eye on the Applicant because he is diabetic and he sees him for a check-up every month; the Applicant cuts the doctor's lawn and clears his snow in the winter. As well he monitors the Applicant's attendance at AA.

Physician #1 mentioned that he had erred in completing the Alcohol Assessment Form in that he filled it out as the Applicant used to drink 10 years ago, but is "NOT alcohol dependent". These were two isolated incidents in the last two years in an otherwise blemish free period of abstinence. This is supported by independent evidence that both of the Applicant's biochemical markers were reported normal on March 4, 2003 (Exhibit # 4).

ISSUES:

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

LAW:

Regulation 340/94, Section 14 states:

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

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

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

Section 47(1) states:

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

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

Section 50 of the Act states:

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

APPLICATION OF THE LAW TO FACTS:

The Deputy Registrar of Motor Vehicles had no option but to suspend the Applicant's driver's licence pursuant to Section 47(1) of the *Highway Traffic Act*, when Physician #2 reported that the Applicant had been brought into the Hospital Emergency in a drunken state and has been noted to drive while under the influence in the past.

Evidence was given that the Applicant had been an alcoholic 10-12 years ago but had been abstinent for 10 years and attended AA regularly. This would mean driving under the influence was a decade ago, since he has only had just two binges since that time. One lasted 3 days and the other one was about 48 hours when he collapsed and was taken to

the hospital on July 16, 2002. Since that time he has remained abstinent from alcohol under the watchful eye of Physician #1.

The only justification for continuing the licence suspension under Section 47(1) is abiding by the recommendations of the C.M.A., in the Guide for Physicians "Determining Fitness to Drive", which states:

"Patients demonstrating drinking and driving behaviour, where there is either evidence or high probability of driving while impaired must not drive for 12 months".

The Tribunal did not find evidence to indicate that the Applicant drove while impaired or is likely to drive while impaired. The Applicant is an active man, healthy for his age who lives in a small community and his driving would be minimal. The Applicant's physician stated that his friend and patient had learned a valuable lesson about drinking and doubts whether he will ever drink again.

After considering all of the evidence and applying the law to the facts, this Tribunal does not find that the Applicant continues to fall under Section 14 of Regulation 340/94 of the *Highway Traffic Act*. He does not suffer from a medical disability likely to significantly interfere with his ability to drive a motor vehicle.

DECISION:

Upon the application by the Applicant to appeal the decision dated July 24, 2002 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the Highway Traffic Act ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

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

LICENCE APPEAL TRIBUNAL

Ross Bennett, M.D.
Presiding Member

RELEASED: April 25, 2003



Licence Appeal Tribunal

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A.M.A.N. LOGISTICS LTD.
AMAN ENTERPRISES (1989) LTD.
AND NATIONWIDE EXPEDITED FREIGHT INC.

Appeal under section 50. (1) of the *Highway Traffic Act* R.S.O. 1990, Chapter H.8 as amended (the "Act") from the Suspension and Seizure Order of the Deputy Registrar pursuant to section 47(1) of the Act.

TO APPEAL A SUSPENSION AND SEIZURE
ORDER ISSUED BY THE DEPUTY REGISTRAR OF
MOTOR VEHICLES

TRIBUNAL: G. MAURICE POWER
Member, Presiding

APPEARANCES: PATRICK Di MONTE
Counsel for the Applicant

PATRICK MOORE
Counsel for the Respondent

DATE: October 15, 16, and 17, 2003

Toronto

REASONS FOR DECISION

BACKGROUND:

The present appeal is brought under section 50(1) of the *Highway Traffic Act* R.S.O. 1990 Chapter H.8 as amended, (the "Act") from a decision of the Deputy Registrar of Motor Vehicles to issue a 30-day Suspension and Seizure Order relating to the Applicant's Ontario Commercial Vehicle Operator Registration (CVOR) certificate dated June 13, 2003 pursuant to section 47 and 47(1) of the Act.

A CVOR certificate is the document that permits a commercial carrier to legally transport goods for hire over Ontario roads. One certificate covers a carrier's entire fleet. A copy of the certificate is carried in each vehicle.

At the start of the hearing, Mr. Di Monte indicated that he would be presenting evidence and making submissions only on behalf of the Applicant A.M.A.N. Logistics Ltd., as the Applicants AMAN Enterprises (1989) Ltd., and Nationwide Expedited Freight Inc. were no longer operating commercial carriage in Ontario, so the suspension issue with respect to those two Applicant's would have no practical effect for them.

The 30 day Suspension and Seizure Order was to take effect June 23, 2003 at 9:00 a.m. Eastern Standard Time. The Order was preceded by the issuance of a Notice of Suspension and Seizure also issued under sections 47 and 47(1) dated May 8, 2003 and was accompanied by a letter of same date advising the Applicant that its safety rating had been categorized as UNSATISFACTORY. The Notice advised the Applicant that it could meet with the Deputy Registrar prior to the issuance of the Suspension and Seizure Order to show cause why its (CVOR) certificate should not be suspended.

The show cause meeting was held in St. Catherines on May 22, 2003 with the Deputy Registrar and several staff members of the Ministry of Transportation of Ontario and Sandeep Powar, a representative of the Applicant A.M.A.N. Logistics Ltd., in attendance.

The effect of the Order if enforced is to suspend for a period of 30 days the operations of all three Applicants in Ontario.

The Applicant A.M.A.N. Logistics Ltd. is a long distance haulage company operating out of Surrey British Columbia. Its operations extend down into the State of California in the United States and east in Canada to Ontario. It has been operating in Ontario since March, 1999. The majority of its fleet is made up of owner operators, individuals who own their own rigs and operate under the Applicant's CVOR. The remainder of the drivers are employees driving rigs owned by the Applicant. At the time of the Order of Suspension the fleet was approximately 28 vehicles having grown substantially over the past three years. Approximately 400,000 km of the on road mileage is done in Ontario.

The Applicant A.M.A.N. Logistics Ltd. obtained it's CVOR in Ontario on March 29, 1999. On August 14, 2001, a warning letter was issued. Although a copy of the warning letter was not entered into evidence at the hearing, it was apparently a standard letter which would have alerted the Applicant to problems with it's safety record in Ontario.

The Respondent in opening put forth the position that the evidence would show that the sanction sought in this case is appropriate. The Respondent as regulator is obliged under the governing legislation to monitor and sanction commercial motor vehicle operations. Here the Respondent has reasonably exercised its authority under the Act in calling for the suspension of the Applicants' right to use Ontario highways for purposes of commercial carriage through Suspension of their CVOR certificates. It has done so based upon an examination of the Applicants' safety records in this province as indicated under an evaluation scheme established by the regulations.

The Applicant A.M.A.N. Logistics Ltd. took the position in opening that the evidence would disclose that the sanction of 30-day Suspension, which is usually a prelude to issue of Notice of Cancellation by the Respondent, is excessive in this case. Counsel admitted that the Applicant may well merit a Suspension, but argued that a shorter suspension was appropriate, particularly in light of the improvement in the Applicant's safety record in the most recent six months and improvements the Applicant was putting in place in its safety-monitoring practices.

EVIDENCE:

Bernadette McKenna:

The Respondent's witness, Ms. McKenna, is a Carrier Safety Rating Administrator with the branch of the Ontario Ministry of Transportation ("the Ministry") responsible under the Highway Traffic Act and the regulations there under ("The legislation") for a regulation of the commercial-carrier trucking industry in this province. Much of her testimony was given to an explanation of and application of the Commercial Vehicle Operator Registration (CVOR) System maintained by the Ministry. The witness is very familiar with the system, having served on Target 97, a joint industry-government task force that developed the recommendations upon which the present system is based.

Carriers operating in Ontario have been required to register with the Ministry since July of 1989. The carrier need not be the vehicle owner but it must hold a valid CVOR certificate when using vehicles that are leased or contracted.

The Ministry maintains operator records for each operator, and for each licensed driver employed or previously employed by a CVOR holder, detailing the safety record of that operator or driver in Ontario. Summaries of these records are available for a small fee to the operator or driver at any time on application through a Ministry office or on the Ministry web site. The Ministry recommends that operators obtain copies of driver records before hiring, and of their own current record and the records of each of their drivers every six months. This latter recommendation is in part because there may be incidents involving drivers, which the driver has not reported to the operator, but which form part of the operator's safety record. It is important that the operator know what information the Ministry is relying on in compiling its safety record for that operator.

This is because the system also provides for regulatory actions and penalties based on the operator's safety record. First, it provides for establishment of a Safety Rating for the CVOR holder, compared to other CVOR holders. Secondly, it establishes thresholds which prompt various activities by the Ministry, such as the warning letter sent to the Applicant A.M.A.N. Logistics Ltd. in this case, and thirdly it assists the Ministry to determine when it is appropriate to impose one of a number of regulatory penalties, called "Sanctions".

In order to track the very large number of commercial vehicles in operation on Ontario roads under the approximately 100,000 CVOR certificates, the Ministry has developed

an analytical system in which points are assigned for each accident in which an investigating officer noted driver impropriety in his or her accident report. Accidents in which no impropriety was noted by an officer, including accidents reported to an Ontario Collision Reporting center by the drivers involved, are also recorded, but no points are assigned for these accidents. Points are also assigned for each conviction registered against the CVOR holder or a driver operating a vehicle under the CVOR certificate where that conviction is deemed to be safety-related. Points are also assigned for each incident in which a vehicle operating under the CVOR certificate was stopped and inspected on an Ontario road and there were 'out of service' defects found on the vehicle. 'Out of service' defects are those serious enough for it to be considered dangerous to continue to operate the vehicle on the public road until the defective item has been properly adjusted or repaired. The number of points assigned is greater for more serious accidents or violations, and in calculating an overall average for the three categories tracked twice the weight is assigned to accidents as to convictions and 'out of service' incidents. Points in each of the categories stay on the record for a floating two-year period figured backwards from the month preceding the current month of the year, after which they are removed.

In order to treat fairly and equally both carriers operating entirely in Ontario and those which operate their vehicles in other jurisdictions as well (including out-of-province-based carriers such as the Applicants), in calculating an average point rate the Ministry uses the concept of adjusted fleet size. This is based on the actual number of vehicles in the carrier's fleet multiplied by the percentage which the mileage traveled in Ontario is of the total mileage traveled by the fleet. (It is the responsibility of the carrier to inform the regulator within 15 days of a change in fleet size of 20%.) Thus a carrier with an actual fleet size of twenty vehicles, which did only 10% of the total fleet mileage in Ontario, would normally have an adjusted fleet size of two. However, the adjusted fleet size can be increased, up to double, if the carrier reports that it is operating some or all of its vehicles in Ontario on a 'double-shifted' basis. Since there are limitations on the length of time a driver of a commercial vehicle can operate the vehicle in a given period of time, carriers operating long-haul vehicles could face an uneconomic percentage of 'downtime' for the vehicle if they send it long-distance with only a single driver. In order to avoid this, a second driver often goes along, with the two drivers operating the vehicle alternately in such a way that the time limitations for neither driver are exceeded on the trip. This practice is known as 'double shifting'. Increasing the adjusted fleet size by the percentage of time that vehicles are double-shifted recognizes that a larger percentage of driver time, and thus opportunity for safety-related incidents, is being spent on Ontario roads than a simple percentage-of-total-mileage calculation realistically reflects.

The averages in each category, and the overall weighted average, are compared to those for all CVOR holders in order to establish a 'threshold' of 100%. This is the value currently exceeded by only 0.15% of Ontario CVOR holders. As a carrier approaches this threshold in its overall weighted average the Ministry will be alerted to consider and take actions, called 'interventions', such as sending a warning letter, calling the carrier in for an interview, and for Ontario-based carriers conducting a facility audit of the

carrier's operations. When the threshold is exceeded sanctions will normally be considered, ranging from limitations on fleet size, through suspension for from 7 to 30 days, to permanent cancellation of the carrier's CVOR certificate in the most serious and persistent cases.

The witness noted, however, that while the threshold analysis is used to alert the Ministry to consider various actions, the action taken is based on the actual safety record, including any recent serious incidents, such as wheel separations, and any relevant information the Ministry has about the carrier from other jurisdictions in which it operates.

In addition to taking various actions, the Ministry is required to assign a Safety Rating to the carrier, which can range for Excellent to Unsatisfactory, and to notify the carrier of the assignment of and any change in the Rating. Carriers under sanction are assigned an Unsatisfactory Rating for the duration of the sanction. Upon completion of the sanction, the carrier is assigned a Conditional Rating, the second lowest rating.

In March of 2002, analysis of the safety record of the Applicant A.M.A.N. Logistics Ltd. indicated that it had exceeded 65% of the threshold value for sanction. This is the level at which the Ministry proposes and then after short period implements a Conditional Safety Rating for a carrier. Only 2½% of carriers operating in Ontario exceed this level. In addition to assigning the Conditional Rating, since the Applicant was an out-of-province-based carrier, a letter was also sent to the regulator in the Applicant's home province of British Columbia informing them of the situation and suggesting that appropriate action be considered. In response, the Ministry received the results of an audit conducted by the National Safety Code Office in British Columbia. Later the results of a second audit were received. Excerpts of the two audit reports were at tabs 12 and 13 of Exhibit 3, the Respondent's Book of Documents filed for the hearing.

In May 2003, the witness was asked to conduct a full safety review of the Applicant A.M.A.N. Logistics Ltd. After obtaining and reviewing B.C. company searches for the Applicant A.M.A.N. Logistics Ltd. and the Applicant AMAN Enterprises 1989 Ltd., portions of which are reproduced at tabs 14 and 15 of Exhibit 3, the witness noted that several of the officers and directors of the two companies were the same. The witness also attempted to contact both Applicants by telephone, and discovered that they now had phone numbers which differed by only two digits, both of which answered "The AMAN group". She concluded that the two companies were "related" within the meaning of that term in section 17, subsection 4 of the Highway Traffic Act. She therefore included the safety record of AMAN Enterprises 1989 Ltd. in her review of A.M.A.N. Logistics Ltd.

The witness's conclusion was not challenged at the hearing, and in fact Mr. Di Monte made an admission on behalf of the Applicant A.M.A.N. Logistics Ltd. that it and AMAN Enterprises 1989 Ltd. were "related" as defined in the legislation.

The results of the safety review were reproduced at tab 6 of Exhibit 3. The summary of that review states in part:

A.M.A.N. Logistics currently has an overall violation rate of 119.2%. The safety record contains 6 accidents, 19 convictions and 10 inspections. The accident and conviction rates are well above the allowable thresholds and the out of service for the current year is 50%.

Staff of the National Safety Code office in British Columbia has provided reports of two facility audits conducted in that province. Both audits resulted in 'unsatisfactory' and after the second audit were conducted [sic], and the result still unfavorable there has been a recommendation to the [sic] cancel the operator's National Safety Code certificate.

The review highlighted the safety record of AMAN Enterprises 1989 Ltd. between May 4, 1998 and November 2000 (sometime after which it ceased operating in Ontario). That record included 20 accidents (11 pointable), 56 convictions (2 non-pointable), and 39 inspections (21 out of service), culminating in a Suspension and Seizure Order April 30, 2001, which was unsuccessfully appealed to this Tribunal, and then to the Ontario Divisional Court. (Although that further appeal was apparently abandoned when the company ceased to operate vehicles.)

The review also noted:

A review of the safety records for A.M.A.N. Logistics Ltd. and AMAN Enterprises 1989 Ltd. indicate that 8 of the drivers involved in events on A.M.A.N. Logistics Ltd. Also had events on AMAN Enterprises 1989 Ltd.

At the time of this review, Ministry information as provided by A.M.A.N. Logistics Ltd. indicated that the company operated 28 vehicles, and did 6.3% of its mileage in Ontario. The witness therefore used an adjusted fleet size of two (rounded up from 1.76) for her calculations for the review. She testified that subsequent to the Show Cause meeting, at which there was discussion of the number of vehicles actually operated in Ontario, the Ministry obtained new information in the form of 'IFTAs' (fuel/mileage documentation) from the company regarding fleet size. Although she indicated that she thought this information was in part inconsistent with the information provided by Mr. Powar at the meeting, the witness nevertheless prepared a revised summary analysis for the hearing based on the new information, in the form of her carrier control performance analysis report, which was entered as Exhibit 4. Based on the new information, the witness used an adjusted fleet size of four for the period of April 8, 2001, to January 1, 2002, and the adjusted fleet size of two only for the period from January 1, 2002, to April 7, 2003, the end of the 24-month period covered by the report. She also included in the report, however, calculated figures for the last six months, only, of that period. In brief, the report shows the revised overall violation rate for the 24-month period to be 113.4 % of threshold, while that for the last six months of the period is 85.4% of threshold. Accident and Conviction rates for the 24 months are both over 138% of threshold, while accidents are 105.9% of threshold and Convictions 129.9% of threshold for the six months.

The witness indicated that the disciplining of drivers by the Applicant A.M.A.N. Logistics Ltd. was a particular area of concern for the Ministry. The B.C. audits indicated numerous instances of falsification of log entries by drivers, as well as some indications of driving excessive hours, in violation of applicable hours-of-work limitations. Besides several serious accidents in Ontario, including one incident of wheel separation, there were many points for speeding. At the Show Cause meeting, Mr. Powar had produced copies of warning letters to the drivers involved, explaining that the company preferred to warn the drivers and give them another chance, rather than dismissing them immediately even if there were recurring problems. When it was pointed out to Mr. Powar that the dates on some of the warning letter preceded the date of conviction for the offence for which the warning was issued, he claimed that the drivers were required to turn in offence tickets and the letters were based on these. Although he was asked at the meeting and promised to provide copies of these tickets from the drivers' files, the Ministry never received these. The Tribunal notes that in a fax memo dated May 30, 2003 to the Ministry, Mr. Powar had claimed that the company was unable to locate these tickets at that time, due to an office move the preceding month and the fact that some of their files were in storage as a result. (Exhibit 3, Tab 23, page 279). However, no copies of tickets were produced at the hearing either, and in his evidence Mr. Powar claimed the company had never been able to locate these. There was also no signed acknowledgement of receipt of the warning letters by the drivers, which is usual and the Ministry expects to see it. At the Show Cause meeting Mr. Powar had admitted that he was unable to say whether the drivers concerned had seen or read the warning letters to them. One of the letters appeared to be identical to a letter produced to the Ministry at an earlier Show Cause meeting on behalf of AMAN Enterprises 1989 Ltd., but as part of their files, not those of A.M.A.N. Logistics Ltd., and at that time the letter had been shown as signed by another individual, and not by Mr. Powar. The witness noted that a statement from A.M.A.N. Logistics Ltd. provided by the Mr. Powar subsequent to the Show Cause meeting to prove that the company was indeed deducting fines for tickets from the drivers as claimed showed a deduction of \$175 from driver Hardeep Butter, which the Ministry believed, had also been made by AMAN Enterprises 1989 Ltd. The drivers' manual, which Mr. Powar sent them for A.M.A.N. Logistics Ltd., was identical to the manual they had received earlier from AMAN Enterprises 1989 Ltd., except for minor changes, to company name, etc.

Under cross-examination, the witness stated that even if the warning letters were done based on tickets in file as Mr. Powar claimed, the Ministry regarded this as improper, as it was tantamount to assuming guilt by taking punitive measures before a finding of guilt. She claimed this was not the same as the Ministry assigning points for the CVOR, that the Ministry does not assess CVOR points unless there is a conviction. When it was drawn to her attention that this is only true for conviction points, and that accident points are assigned based on the opinion of an investigating officer that there had been driver impropriety, she stated that it was possible for the CVOR holder to approach the officer to have him change his report (in which case the Ministry would presumably delete the points when the revised report was received). She noted that there is recently a formal procedure for a CVOR holder to approach a third party, the Transportation Safety Association who can review an officers report to determine whether it should be

changed. She admitted that neither procedure was mentioned in the Guideline sent to CVOR holders neither by the Ministry, nor on the Ministry website on the Internet. The Ministry doesn't consider this proper as it involves third parties, but she would be surprised if the Applicants claimed they did not know about these procedures. She admitted that she had followed up a claim by Mr. Powar at the Show Cause meeting that they were approaching the British Columbia auditor to get him to change his report because of errors he had made in reviewing hours of work due to misinterpretation of fueling data times. The auditor, Mr. Golub, informed her that he was not going to revise his audit report, as he did not agree with Mr. Powar that the fuel data figures supported Mr. Powar's claims. She thinks the follow up may have been requested by Deputy Registrar, Mr. Beatty, and believes she had spoken to the auditor and given Mr. Beatty the information from the auditor before he made his decision to issue the proposal to suspend the Applicants' registrations on June 8, 2003. However, she believes the British Columbia audit information did not influence Mr. Beatty's decision because he did not even mention the audits to her in the course of dictating the suspension proposal. She also claimed that A.M.A.N. Logistics Ltd. would have been sanctioned even if there had not been a wheel separation incident, due to exceeding 100% threshold and number of other serious concerns the Ministry had about their safety record and their relationship with AMAN Enterprises 1989 Ltd. and the safety record of that company.

Although she had been on several committees in the Target 97 group that developed the recommendations upon which the present system of analysis used by the Ministry is based, the witness did not know why adjusted fleet size rather than total mileage in Ontario was chosen as the criterion for assessment, but claimed to recall that more of the carriers over the 100% threshold were Ontario-based than out-of-province. Later in answer to another question, the witness referred to a study of 15000 fleets comparing adjusted fleet sizes and performance. She admitted that the Ontario mileage figures for A.M.A.N. Logistics Ltd. were low, based on the number of units in their fleet. But she claimed that the mileage had been verified by the IFTA (fueling) reports which the Ministry had received, and was consistent with the fleet spending only 6% of its' time in Ontario. She also noted that the 410,000 kilometers worked out to about 1300 kilometers for each vehicle a month, or about on trip a month to Ontario, and conceded this was not a high number of kilometers per vehicle (compared to other carriers). But she stated that the Ministry would be concerned about the safety record of this carrier even if they were only doing 100,000 kilometers a year on Ontario roads

She admitted that she was aware of another audit of A.M.A.N. Logistics Ltd., in the United States, that was satisfactory and that Mr. Powar may have had the report from this with him at the Show Cause meeting, though she claimed to know of an additional audit in the United States that was unsatisfactory. (The Tribunal notes that no such unsatisfactory audit report was introduced in evidence for the hearing.) And she admitted that the drivers manual used by both A.M.A.N. Logistics Ltd. and AMAN Enterprises 1989 Ltd. was based on one produced by J.J. Keller (a producer of training materials for the trucking industry) which she has seen other carriers use.

The witness did not agree that the safety record of A.M.A.N. Logistics Ltd. is improving. (Exhibit 6 is a CVOR summary for the 24 months September, 2001, to September, 2003. The overall rate is 124.5% of threshold, and there have been five convictions (3 for speeding), an accident with driver impropriety, and an inspection with out of service defects added to the record since May, 2003.

Sandeep Singh Powar:

The evidence on behalf of the Applicant A.M.A.N. Logistics Ltd. was given by Mr. Powar. He testified that he was originally a power engineer by trade. (In answer to a question on cross-examination, he explained that this is a person trained to operate stationary equipment such as boilers.) After completing high school in British Columbia, he attended vocational school and obtained his power engineer's certificate in 1979. He subsequently took an upgrading course through the B.C. Institute of Technology, obtaining his 1st Class power certificate in 1991. He also studied with Fraser Valley, and affiliate of the University of British Columbia, for a year at about that same time. He worked as a power engineer at a Canadian Forces base in Chilliwack, British Columbia, for 16 years, until the base was closed. While working there, he also operated a travel agency for about three years.

He currently resides in Surrey, B.C. with his wife and children. While employed by the Canadian Forces base, he served as base Safety Officer for a couple of years. After the base closed, he took courses in transportation safety, including Transportation of Dangerous Goods and Substance Abuse in the Workplace. (In cross-examination he admitted these were one-day courses.) He was employed full-time in safety with the Applicant AMAN Enterprises 1989 Ltd. from about January or February 1999, until that company ceased active trucking operations in 2001. He subsequently joined Scanner Enterprises, a fish plant in British Columbia, where he works full-time to the present. That company uses a thermal process, which he has obtained a diploma in the use of.

In June 2002, he also began to work part-time with the Applicant A.M.A.N. Logistics Ltd. This company took over the business of the Applicant AMAN Enterprises 1989 Ltd. Kultar Sanghera, the Sanghera brother who had been running AMAN Enterprises 1989 Ltd., didn't want to run a company anymore, but his son Amarpreet Sanghera started the new company to take over and improve the business. The witness explained that Amarpreet was unable to attend the Tribunal hearing as the company had just received a number of new trailer units, which had to be checked out, as part of their expansion efforts.

The witness is usually spends about 15 to 20 hours a week working for the Applicant A.M.A.N. Logistics Ltd. There is no set time, but he usually goes there a few evenings during the week for a few hours between about 5 and 8 pm, plus about 6 to 8 hours one day on the weekend. The company's office is presently located in Delta, British Columbia, a town close to his home in Surrey. The office consists of about five rooms on the second floor of a building. The yard where the trucks are parked and the mechanics are is about 15 to 20 minutes drive away from the office. A full-time

mechanic and a yard manager work out of a trailer at the yard while six employees including himself work at the office. The company now owns 17 trucks and about 35 to 40 trailers, and there are about 27 owner-operated trucks operating with the company in addition. These owner-operators work only for the company and carry only the company's loads. They look after repair of their trucks, but the company has to make sure they do so. The company hauls forest products, fresh fruits and produce, and general freight. They do most of their business, about 70 to 80% he thinks, in the United States, where they are subject to scrutiny by the U.S. Department of Transportation. Their trucks are inspected regularly, and if the drivers have violations the company is contacted. They also come to the company offices in British Columbia to conduct audits. On the latest audit by the U.S. Department of Transportation in September, 2002, the company received a rating of Satisfactory. He brought the report from this audit with him to the Show Cause hearing, but is not sure whether the Ministry staff had any questions about it. (The Tribunal notes that the audit report is not reproduced in the Ministry's Show Cause material at tab 21 of Exhibit 3, nor was a copy of it introduced by the Applicant A.M.A.N. Logistics Ltd.) He did raise at the Show Cause a "big issue" he had with Mike Golab's audit report in British Columbia. When he was finally able to obtain copies of the driver's logs which Mr. Golab had taken with him for the audit and compare them to the audit report, he realized that Mr. Golab had concluded the logs were falsified in many cases because he had compared them to the fueling report figures. But he had failed to take into account the fact that the drivers logs were in the local time, usually West Coast time, and that there was a two-hour difference from the Central Time in which Petro Canada reports all fueling times in their fueling reports. A fax from Petro Canada to the company confirms this time recording (Exhibit 5, tab 2, first page). As an example, Exhibit 5, tab 4, the first page Petro Canada Super pass record shows fuel purchase in Corning (California) at 00:50 am on December 2, 2002, while the driver's log record, at the fourth page of the same tab, shows this fuel stop at 11 pm on December 1, 2002. Based on this Mr. Golab noted this in his audit as both a falsified log, and excessive hours of driving. After adjusting for the two-hour time difference, however, the log and fueling report times match and there is no excessive driving. After numerous attempts he finally spoke to Mr. Golab by telephone and persuaded him to send a letter to Petro Canada requesting confirmation, with a copy by fax to him. (Exhibit 5, Applicant's book of documents, Tab 2, pages 2 and 3.) He subsequently left numerous further messages for Mr. Golab, with no response. However, after faxing Mr. Golab's superior, Susan Watson, on July 3, 2002, he did receive a phone call from her in which she told him she had spoken to Mr. Golab, who had admitted he was wrong, and had the necessary figures to correct his error and would redo his audit. To date, however, Mr. Powar has received nothing further from either Mr. Golab or Ms. Watson. The company therefore continues to have a conditional safety rating in British Columbia, although they can still operate there and in all other Canadian provinces.

The witness testified that all driver logs are in fact reviewed very carefully at the company. He either performs or supervises this review. He provided an example at tab 1 in Exhibit 5, driver logs for Wayne Spillett, a driver he indicated is no longer with the

company. He took the Tribunal through a review of these logs, pointing out how hours of service were taken from the logs and entered in the company records.

The witness also reviewed the company's procedures for hiring and monitoring drivers. Before a driver is hired he is asked to come for an interview and to bring his resume with him. His driving record is checked and sometimes the company will do a security clearance check on the driver. Iqbal Sanghera, the witness's full-time assistant as safety manager at the company, who is fluent in both English and Punjabi, usually conducts the interview. If the interview is satisfactory, the driver is then sent to the company yard where the yard manager gives them a road test. The requirements for the 1st class driver's license for commercial drivers in British Columbia are very strict, involving a course of study, and the driver must pass both written and road tests on commercial vehicles. He believes the requirements for a Class A commercial driver's license in Ontario are similar. The company has never hired an unlicensed driver, and hires experienced candidates whenever it can.

The witness reviews the driver's files when he goes in to the office in the evenings. There are three separate files, one for the driver, one for any accidents and one for tickets. Drivers are required to hand in any tickets they get promptly. If he finds any tickets in file, he sees that the driver gets a warning letter. If it is a second (or more) ticket for this driver, the driver also gets a verbal warning, usually from Iqbal Sanghera. For a third offence, the driver is also fined. He doesn't recall seeing cases where there is a fourth offence by the same driver.

In the three or four years he has been involved, he does not recall ever getting a police report that was changed, and did not know until he heard it at the hearing that it was possible to lobby a police officer to do this. Because of the expense of fighting tickets (in Ontario), even where the driver was not at fault, they have generally felt that it was better to spend the time driving rather than fighting it, and just pay the ticket. After what he has heard at the hearing, however, he will consider fighting any tickets where the driver claims he was not at fault, because of the effect on the company's CVOR even where the driver is an owner-operator.

The witness estimated that about 70% of the company's trucks are operated double-shifted at any time, and thinks 100% of them are on trips into Ontario. After being hired drivers are shown where the driver handbooks are kept in the vehicles and told to come to the office if they have any trouble completing logs, etc. A J.J. Keller video on logbook keeping is available in the office, and the witness is available to answer any questions on weekends. The witness is fluent in both Punjabi and English, which are the languages most of the drivers speak, though there are a few that speak Hindi. The company presently has about 60 drivers, who may bring any one of 28 vehicles into Ontario.

In cross-examination, the witness claimed that the company is reluctant to terminate drivers, especially those with many years experience. But he stated that he recalled "three or four" drivers being terminated. He claimed that the driver involved in the wheel

separation incident had been terminated for lying about the cause of the incident even though he did not have four offences on his record.

The witness stated that he left AMAN Enterprises 1989 Ltd. because as operations wound down there was little work there. He confirmed that when he first started there, he was working alone, as Iqbal Sanghera was occupied acting as operations manager for that company on a daily basis. He was shown the operation by a Damon Grewal, who stayed about two weeks before leaving to join R.T.S. another Surrey trucking company. The witness himself did some work for R.T.S. for about 10 days, helping to check logs. (R.T.S. is a company whose Ontario CVOR was revoked because of its safety record. The Tribunal confirmed the revocation on appeal.)

The witness admitted that most of the people at the office are just leaving or have left when he goes in after his day at the fish plant. (He has his own key.) So he doesn't know much about the day-to-day operations, except for what the drivers happen to write down in the logbooks he reviews. He had to admit he had no idea whether the company's trucks had done more mileage in Ontario in 2003 than in 2002, though he had claimed the company was expanding, and in fact stated that they were looking at expanding to as many as 60 trucks. But he thinks that adjusted fleet size is the 'wrong way' of doing things. He has told four or five trucking companies in B.C. they're "out of luck in Ontario" and believes every out-of-province company is going to be in trouble here.

The witness claimed that the new trucks the company was receiving were speed-limited by the supplier, but admitted that he did not know whether the setting was to be at 100 or 110 KMPH.

The witness disagreed with the identification of himself in Mr. Golab's second audit as 'the person contracted by the company to do log analysis'. (Exhibit 3, tab 13, page 174).

He confirmed that one of the driver's Hardeep Butter, who was still with the company had received a warning letter dated December 4, 2002, after he had accepted a Dangerous Goods shipment from the dispatcher despite the fact that his Dangerous Goods Certificate to his license had expired. The witness explained that the company had previously tracked these Certificates in its system and reminded drivers to renew them when they expired. But in 2002, the company installed a new computer system. Even though they paid \$25,000 for the system, it failed to 'pick-up' the tracking of Certificates properly from the old system, and as a consequence a few drivers may have been driving with expired Certificates. (Although he admitted in answer to a question from the Tribunal that he was only guessing that this was the explanation.)

He explained the lack of an address in this or some of the other letters on the basis that the letters were usually given to drivers along with their monthly statements.

Asked to explain a comment in his evidence in chief that he didn't know how long he would be with the company as he was contemplating other options, he indicated that he was considering a career in the political field and might even run for office himself.

However, he stated that even if he left the company tomorrow, Iqbal (Sanghera) and others could carry on his safety duties in his absence.

THE LAW:

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

3. (2) The Registrar shall act under the instructions of the Minister and Deputy Minister and has general supervision over all matters relating to highway traffic within Ontario, and shall perform the duties that are assigned to him or her by this Act, by the Lieutenant Governor in Council, or by the Minister or Deputy Minister.

4. There shall be a Deputy Registrar appointed by the Lieutenant Governor in Council who shall have all the powers and may perform all the duties of the Registrar.

16(2) No person shall drive or operate a commercial motor vehicle on a highway unless the operator is the holder of a CVOR certificate that is not under suspension.

47(1) Subject to section 47.1, the Registrar may suspend or cancel,

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

47.1 (1) Before taking any action under clause 47 (1) (a) or (c) or subsection 47 (2), the Registrar shall notify the person whose plate portion of a permit or CVOR certificate is to be affected of his or her proposed action

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

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

CASES:

A number of cases were presented for review:

Brenner v Ontario (Registrar of Motor Vehicle Dealers and Salesman) 1983 O. J. No. 1017 Ontario Supreme Court-High Court of Justice Divisional Court This was an appeal by the Registrar of Motor Vehicle Dealers and Salesmen from a decision of the Commercial Registration Appeal Tribunal in which the Tribunal directed the Registrar to grant a conditional registration to the Respondent. The Applicant had a very serious criminal record, which he had disclosed in his application but he had not disclosed three further convictions, which were considered by the Registrar to be minor offences. The Tribunal heard evidence from a potential employer and a criminal lawyer who testified that the Applicant was rehabilitating himself. The Tribunal found that “possibly the applicant will in the future, be a person of honesty and integrity”, and the Tribunal expressed a willingness to “encourage that objective”. The Court found that the Tribunal had not applied the proper test, and set out this test in paragraph nine of the judgment as follows:

The Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was the possibility that he, indeed, might have reformed himself.

The Court in paragraph 11 of the judgment noted that a year had passed since the decision of the Tribunal and the Registrant had received a conditional licence and had continued to work for almost a year. In these circumstances the Court found it would be unjust for to order the Registrar to carry out the Proposal as:

It may be that the Tribunal, if it heard the matter afresh and gave effect to the principles that we have laid down in our reasons, might now be able to conclude that the past conduct of Brenner no longer affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty, despite his lengthy criminal record. Such a conclusion might be reached after a consideration of his conduct during the past year, and if Brenner adopts a more forthright attitude in his evidence regarding the conviction for fraud in Michigan or gives a credible explanation as to why he refused to reveal to the Tribunal the nature of the offence to which he pleaded guilty.

The matter was referred back to the Tribunal for rehearing with the order appealed from remaining in place until the Tribunal had made a decision on the second hearing.

Equipment Express Inc. a decision of the Tribunal released December 27, 2000, on an appeal from a decision of the Registrar to impose a 30-day fleet limitation. The decision was set aside by the Tribunal. The Tribunal found that the Applicant had made the commitment to safety and had taken the necessary steps to ensure that its record came into and remained in compliance in all respects.

IBL Transport Co. a decision of the Tribunal released July 26, 2002, on an appeal of a seven-day Suspension and Seizure decision. The Tribunal upheld the decision but did

not impose a longer suspension even though the witness put forward by the Applicant was not familiar with the performance of individual drivers and there was a lack of documentation by the Applicant concerning critical safety-related areas of its operations, and no evidence of what effect the suspension would have on its business.

Landstar Ranger Inc. a decision of the Tribunal heard November 17, 18, 19 and December 2, 1998 was an appeal to the Tribunal from a Suspension and Seizure order dated May 21, 1998. The decision of the Registrar to issue the 7 day suspension order was set aside. It was set aside on the grounds of inaccurate information used by the Regulator to support his safety findings and upon a lack of procedural fairness involved in the “show cause” meeting and interviews.

Muscillo Transport v. Ontario (Licence Suspension Appeal Board) [1997] O.J. No. 3111:

This matter came before Chapnick J on appeal in June 1997 from a decision by the Licence Suspension Appeal Board (the Board) dated March 4, 1997, which was in turn an appeal from a Cancellation and Seizure order of the Registrar of September 24, 1996. Cancellation order had been preceded by an order of suspension, which was also appealed. In short progressive steps in the sanction process were taken prior to the decision to remove the operator's privilege of using Ontario highways. The court dismissed the appeal in part. The court also approved the Board's view that present compliance that is at the time of the hearing is the issue. The implication being that with every stage an operator could, on appeal, lead evidence of putative improvements to be instituted through a period of monitoring then another Order and an Appeal, perhaps with a stay, and so on.

This matter was appealed further. In a decision heard April 1, 1998 the majority found...“no error in principle in the reasons of the Board. It has not been shown that the sanction imposed was manifestly unfit.” Borins JA dissenting in part held that companies related to the principal Appellant should have had monitored sanctions and should not have had their records co-mingled with that of Muscillo.

R&S Transportation Inc, 590029 B.C. Ltd. and Harj-Min express Carriers Inc., a decision of the Tribunal released August 1, 2002 dealt with an appeal like the present from an Order of Suspension and Seizure. The final sanction was preceded by the various interventions. The Tribunal found that the evidence revealed no inconsistencies or errors in arriving at the finding of a safety record of over 100%. Most importantly the Tribunal found that the carriers had sufficient warning through interventions of an impending serious sanction.

R.T.S. Transport Ltd., a decision of the Tribunal released August 27, 2002, appealing a Cancellation and Seizure order of the Registrar. The order was upheld as the Tribunal found the Applicant's safety record in evidence together with inadequate evidence of improvements taken to approach safer operations convinced the Tribunal that the

primary concern for highway safety weighed against continued operation of the Applicant in Ontario.

Quick Service Transportation Ltd., a decision of the Tribunal released October 7, 2003, appealing against a Cancellation and Seizure decision of the Registrar. The Tribunal upheld the decision, even though the Applicants overall violation rate had declined from 180 to 98.1% of threshold before the hearing. The Tribunal believed in nature of ongoing violations resulting in 2 accidents it was more important to ensure the safety of the public than to give the Applicant additional time to improve it's safety record.

Star Van Systems Inc., a decision of the Tribunal released December 23, 2002, on an appeal against a decision of the Registrar to impose a seven-day suspension and seizure order. The imposition of the sanction was deferred for six months by the Tribunal which found that after learning he had been deceived by employees about the seriousness of the situation, the owner of the company had intervened promptly and had taken positive steps wholly consistent with the ultimate goal of ensuring highway safety, but which would take several months further to have full effect.

APPLICATION OF LAW TO FACTS:

The Applicant's counsel Mr. Di Monte argued that the Applicant A.M.A.N. Logistics Ltd. should receive a suspension, if only for the 'colossal omission' in not once but twice filing fleet information, which failed to indicate that, any of their trucks were being operated double-shifted in Ontario. This omission may have doubled their violation rates in the Respondent's analysis from what they should have been. He also pointed out the current truck list in Exhibit 5 indicating 44 trucks, which if properly filed with the Registrar, could also increase the adjusted fleet size to as much as 9. Although he did not suggest the Tribunal adopt this fleet size he did ask that the Tribunal take into account that the sanction was based on incorrect information. He also argued that the carrier can be penalized under the Ontario system simply because the carrier does a large number of kilometers travel outside of Ontario, and that a carrier with a low resulting fleet size can be brought to the level of sanction with as little as a single five-point accident in two years. He also argued that that the Tribunal should consider the significant steps the Applicant A.M.A.N. Logistics Ltd. was taking to improve it's record, as in the Brenner case, and that although there was some 'continuity' between the Applicants A.M.A.N. Logistics Ltd. and AMAN Enterprises 1989 Ltd., there were also significant differences in the operation of the two companies.

Mr. Moore, the counsel for Respondent, argued that despite any problems with the information before the Deputy Registrar at the time the proposal was issued, the Respondent still had ample grounds to believe, based on the Applicant A.M.A.N. Logistics Ltd.'s CVOR record that it would not operate with due regard to safety. Even if there was some question with regard to the adjusted fleet size and the British Columbia audit information, it was only the old cases that referred to singling out the 'worst offender', and modern case law indicated that longer suspensions were appropriate

where as in this case there were serious safety concerns. The Respondent pointed out that that Mr. Powar had candidly indicated in his evidence that most of the same people were involved in the operations of the Applicant A.M.A.N. Logistics Ltd. as had been involved in the Applicant AMAN Enterprises 1989 Ltd., which had received a 30 day suspension previously, and that in the first R&S Transportation case the Tribunal had held that a previous intervention should have served to alert the Applicants in that case to the serious problems with their safety record, and thus justified a 30 day suspension. The Respondent suggested that there was no evidence of recent improvement in the safety record of the Applicant, nor in particular that Mr. Powar's involvement had contributed to any improvement. In view of this and of his limited experience in the industry all with companies that had problems with their safety record, the Respondent argued that the Tribunal should not take seriously his claims that the system was unfair to out-of-province carriers such as A.M.A.N. Logistics Ltd.

In it's Decision in the R.T.S. Appeal, this Tribunal declined to consider granting the appeal on the ground that the regulatory scheme used by the Respondent in this case was unfair, noting:

"This Tribunal is given, under the governing legislation, broad discretionary powers over the decision of the Registrar by section 5(1) and (2) above

Oversight tribunals approach the substance of regulations with caution particularly if the intent of the regulation in question falls four squares within the terms of the enabling legislation. The oversight function broadens when the enabling legislation requires the regulator to exercise his discretion upon reasonable grounds implying the requisite degree of procedural fairness. In short it is not generally the Tribunal's place to re-write codes or systems that the regulators choose to employ to carry out their mandates. It is the Tribunal's place to ensure that in employing the chosen system the regulator has acted reasonably and fairly without favor or caprice. In the present case the authorization for the administrative action taken, the Suspension Order, is contained in 47(1)(f). The section explicitly directs the Registrar to take into account the safety record of the subject carrier as a basis for his decision.

Having reviewed the CVOR rating system established by the regulator in furtherance of its mandate contained in section 3(2) the Tribunal can see nothing of substance that would manifestly put that system beyond the regulator's legislated purview. It is therefore not within the Tribunal's competence to offer the Applicant relief by a finding that the CVOR monitoring system is somehow so arbitrary or unfair in substance to disallow its use by the regulator." (R.T.S August 27, 2002, pages 13-14)

That Decision should have served as a wake-up call to out-of-province CVOR holders such as the Applicants in this case that failing to make reasonable efforts to understand and comply with the Ontario system because they believe it to be somehow unfair is simply not an option if they wish to continue to operate in this province. And whatever changes in management there may have been between the Applicant AMAN Enterprises 1989 Ltd. and the Applicant A.M.A.N. Logistics Ltd., Mr. Powar was

involved with both and knew the new company had inherited a very serious safety problem. Yet the testimony of Mr. Powar at the hearing demonstrates that neither he nor anyone else at the Applicant A.M.A.N. Logistics Ltd. took the trouble to understand the CVOR system enough to complete the required fleet size forms correctly, nor to understand the importance of failing to do so.

The Tribunal agrees with the Respondent's position that a regulator must rely on the information provided to it in applying the regulations. But the Tribunal cannot ignore the obvious discrepancies between that information as it was before the Registrar at the time of the proposal, and the evidence in regard to both double-shifting of the Applicant's fleet operating in Ontario, which makes sense, and obvious errors in the British Columbia audit information. The Tribunal finds that the Registrar was acting on incorrect information and were therefore in error in proposing to suspend the Applicant A.M.A.N. Logistics Ltd.'s CVOR for a full 30 days. Had there been correct information on fleet size and usage before the Respondent this could, as Mr. Di Monte pointed out, have resulted in an adjusted fleet size, which would have lowered the overall rating below the 100% threshold at which the Registrar usually applies the suspension sanction at all. Moreover, although the Tribunal accepts Ms. McKenna's claim that the Registrar does not base its decisions on out-of-province information, the Tribunal finds that the incorrect conclusions in the British Columbia audits must have been in the mind of Deputy Registrar Beatty when he issued the proposal in this case, and certainly would have influenced his decision on the length of the suspension, even though he may not have spoken of this to Ms. McKenna.

Due perhaps to his unfamiliarity with the day-to-day operations, as indicated in his testimony, Mr. Powar did not offer the Tribunal much more than vague information to assist it in determining what the impact of a suspension of that length would be upon the Applicant A.M.A.N. Logistics Ltd. However, cases suggest that the effect upon an inter-provincial carrier, especially, of a suspension for a full thirty days could be devastating. It is significant to the Tribunal that the owners of the Applicant AMAN Enterprises 1989 Ltd. decided to wind up the active operations of that company when faced with a confirmed suspension of just that length.

At the same time, the Tribunal has considered the seriousness and the number of the incidents on the Applicant A.M.A.N. Logistics Ltd.'s CVOR record. Mr. Moore drew to the Tribunal's attention, for example, the fact that the record discloses the same driver who was involved in the wheel separation had only hours before been stopped in the same vehicle and was eventually convicted of speeding on Ontario roads. (Although Mr. Powar testified that that driver, at least, had been terminated.) And despite the fact that the indications of falsification of documents in the British Columbia audits are either incorrect (with respect to logs) or cannot be relied because of the evident failure of the auditor to correct his errors, the Tribunal was not satisfied with the explanation it received from Mr. Powar as to why a number of the warning letters to drivers signed by him were dated at times before he joined the company. Falsification of documents presented to a regulatory authority is always a serious matter, as it tends to sabotage

the regulator in carrying out its duties to ensure the safety of the public. That shortcoming which is not disclosed cannot be required by the regulator to be corrected.

The Tribunal is not satisfied that the seven day suspension suggested by Mr. Di Monte would be sufficient to bring home to the Applicant A.M.A.N. Logistics Ltd. the seriousness of its actions and of complying with Ontario regulation in operating in this province.

The Tribunal therefore finds that the Respondent, properly informed, should have imposed a 14-day suspension.

DECISION:

The Tribunal therefore, after considering the evidence and pursuant to the authority vested in the Tribunal under section 50.(2) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, directs that the Deputy Registrar of Motor Vehicles issue a 14 day Suspension and Seizure order to the Applicant, A.M.A.N. Logistics Ltd., rather than the 30 day order proposed. As there was no evidence that the decision with respect to the other Applicants was incorrect, the Tribunal confirms the decision of the Deputy Registrar of Motor Vehicles to issue a 30-day Suspension and Seizure order as proposed for those Applicants.

LICENCE APPEAL TRIBUNAL



G. Maurice Power,
Presiding Member

RELEASED: January 20, 2004

FILE NAME: 1771.cvor.aman

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

FUNLAND OUTDOOR AMUSEMENTS LTD.

IN THE MATTER of an Application by Funland Outdoor Amusements Ltd. for a hearing before the Licence Appeal Tribunal pursuant to Section 50(1) of the *Highway Traffic Act* appealing the Suspension and Seizure Order of the Deputy Registrar dated February 18, 2003

AND IN THE MATTER of the Highway Traffic Act R.S.O. 1990, Chapter H.8. as amended;

AND IN THE MATTER of the Commercial Vehicle Operator's Registration (CVOR) certificate #123-495-391 issued to Funland Outdoor Amusements Ltd.

AND IN THE MATTER of the plate portion of permits issued to Funland Outdoor Amusements Ltd.

AND IN THE MATTER of outstanding fines;

TO APPEAL THE SUSPENSION AND SEIZURE ORDER

TRIBUNAL: DEREK ISRAEL, Vice-Chair, Presiding
BARBARA PROUSE, Member

APPEARANCES: FUNLAND OUTDOOR AMUSEMENTS LTD., the Applicant,
was represented by JOHN WIDEMAN, Agent

PATRICK MOORE, Counsel, Representing the Registrar under
the *Highway Traffic Act*

DATES OF HEARING: June 6, 2003

Toronto

Order

WHEREAS the Deputy Registrar of Motor Vehicles issued a Suspension and Seizure Order (the "Order") against Funland Outdoor Amusements Ltd. (the "Applicant");

AND WHEREAS the Order was issued regarding the safety record and unpaid fines of the Applicant;

AND WHEREAS the Order was appealed by the Applicant to the Tribunal;

AND WHEREAS Harvey Dennis in his capacity as Agent for the Applicant filed a Notice of Appeal to the Order on behalf of the Applicant;

AND WHEREAS the Applicant's appeal was set down for hearing for June 6, 2003 and written Notice of Hearing thereof was sent to and received by Harvey Dennis;

AND WHEREAS on June 4, 2003 Harvey Dennis' office was advised of the appeal hearing set down for June 6, 2003;

AND WHEREAS Counsel for the Deputy Registrar communicated by telephone with Harvey Dennis on June 5, 2003 and informed the said Harvey Dennis that the hearing would take place on June 6, 2003;

AND WHEREAS Counsel for the Deputy Registrar confirmed by letter dated June 5, 2003 addressed and faxed to Harvey Dennis that the appeal would commence on June 6, 2003;

AND WHEREAS Harvey Dennis made no mention to the Deputy Registrar's Counsel that he would not be appearing on behalf of the Applicant at the appeal on June 6, 2003;

AND WHEREAS Harvey Dennis did not attend at the hearing of the Applicant before the Tribunal on June 6, 2003 nor did he communicate with the Tribunal to explain his absence;

AND WHEREAS John Wideman the Vice-President of the Applicant did appear before the Tribunal on June 6, 2003 and there represented the Applicant;

AND WHEREAS Counsel for the Registrar and John Wideman entered into Terms of Settlement on June 6, 2003 which Terms of Settlement, by consent of the parties, are to be made an Order of the Tribunal;

NOW THEREFORE, upon the consent of the parties, in terms of Section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, Chapter s.22, the Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms of settlement set forth in Schedule "A" attached hereto.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair, Presiding

Barbara Prouse, Member

Released: June 11, 2003

Filename: 1584.cvor.Funland Outdoor Amusements

SCHEDULE "A"**Funland Outdoor Amusements Ltd.****And****Registra of Motor Vehicles****CONSENT**

The Parties agree that the Licence Appeal Tribunal issue an Order resolving this matter according to the following terms

1. The Suspension and Seizure Order dated February 18, 2003 is confirmed.
2. The Suspension and Seizure Order shall not be imposed if the Appellant,
 - a) Pays outstanding fines in the amount of \$409.50 (fines listed on page 10 of Respondent's Appeal Book) by 5 p.m. on June 6, 2003; and
 - b) Pays any fines imposed by the court on its appeal of its conviction of Operate Unsafe Vehicle (offence date July 20, 2002) within such time period that is specified by the court
3. If the Appellant complies with 2(a) and 2(b) the Suspension and Seizure Order shall not be imposed
4. The Appeal to the Tribunal is hereby concluded.

June 6, 2003

Patrick Moore
Counsel for the Respondent

John Wideman
Vice President, Appellant

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



**1126312 ONTARIO INC. AND
888754 ONTARIO INC.**

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

AND IN THE MATTER OF an Application by 1126312
Ontario Inc. and 888754 Ontario Inc. for a hearing before
the Licence Appeal Tribunal pursuant to Section 50(1) of
the *Highway Traffic Act* appealing the Suspension and
Seizure Order dated March 24, 2003;

AND IN THE MATTER OF the Commercial Vehicle
Operator's Registration certificates 123-224-530 and 102-
101-891 issued to 1126312 Ontario Inc. and 888754
Ontario Inc., respectively;

AND IN THE MATTER OF the plate portion of permits
issued to 1126312 Ontario Inc. and 888754 Ontario Inc.;

AND IN THE MATTER OF the safety record and unpaid
fines of 1126312 Ontario Inc.

TRIBUNAL: JOHN ORT, Presiding Member
IRVIN H. SHERMAN, Vice-Chair

APPEARANCES: 1126312 ONTARIO INC. and
888754 ONTARIO INC., both represented by
Patrick Doran, Agent

THE REGISTRAR OF MOTOR VEHICLES, represented
by Patrick Moore, Counsel

DATE OF
HEARING: May 16, 2003

Toronto

WITHDRAWAL ORDER

WHEREAS the Deputy Registrar of Motor Vehicles issued a Suspension and Seizure Order dated March 24, 2003, ordering that, pursuant to Sections 47 and 47.1 of the *Highway Traffic Act*, as of March 28, 2003, the Commercial Vehicle Operator's Registration certificates 123-224-530 and 102-101-891 issued to 1126312 Ontario Inc. and 888754 Ontario Inc., respectively, and the plate portion of permits for all commercial motor vehicles and trailers issued to 1126312 Ontario Inc. and 888754 Ontario Inc. be suspended for 7 days and the plate portion of permits, or if issued by a jurisdiction other than Ontario, the permits, and the number plates be seized;

AND WHEREAS the Applicants 1126312 Ontario Inc. and 888754 Ontario Inc. requested a hearing before the Licence Appeal Tribunal to appeal the above-noted order;

AND WHEREAS the Tribunal scheduled a hearing of this matter to commence at 9:30 a.m. on May 16, 2003, at the Tribunal's Chambers;

AND WHEREAS at the beginning of the hearing on May 16, 2003, the Applicants 1126312 Ontario Inc. and 888754 Ontario Inc. withdrew their request for a hearing before this Tribunal;

NOW THEREFORE this Tribunal orders that these proceedings are concluded before this Tribunal.

LICENCE APPEAL TRIBUNAL

JOHN ORT, Presiding Member

IRVIN H. SHERMAN, Vice-Chair

RELEASED: June 4, 2003



HIGHWAY TRAFFIC ACT
R.S.O. 1990, Chap. H.8 as amended

IN THE MATTER OF

B.I.Z. MECHANICAL INC.

IN THE MATTER OF an application by B.I.Z. Mechanical Inc. dated April 4, 2003 for a hearing before the Licence Appeal Tribunal pursuant to section 50(1) of the *Highway Traffic Act*, to consider the appeal of the Cancellation and Seizure Order of the Deputy Registrar dated March 21, 2003;

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

AND IN THE MATTER of the Commercial Vehicle Operator's Registration CVOR certificate 142-610-422 issued to B.I.Z. Mechanical Inc.;

AND IN THE MATTER of the Notice of Cancellation and Seizure issued to B.I.Z. Mechanical Inc. on the 29th day of January, 2003;

AND IN THE MATTER of the safety record of Brander Trucking Ltd.;

AND IN THE MATTER of the Suspension and Seizure Order in effect for Brander Trucking Ltd.;

AND IN THE MATTER of the unpaid files for Brander Trucking Ltd., Bisignani, Sam and Bisignani, Franco;

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

B.I.Z. MECHANICAL INC.

Applicant

- and -

REGISTRAR OF MOTOR VEHICLES

Respondent

CONSENT ORDER

Upon the application to the Tribunal by the Franco Bisignani, Agent for the Applicant, B.I.Z. Mechanical Inc., and Counsel for the Registrar of Motor Vehicles for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar of Motor Vehicles as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

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

LICENCE APPEAL TRIBUNAL

William McIntosh,
Vice- Chair

Bruce L. Wright,
Member

Released: August 12, 2003

File No. 1603.cvor.BIZ.consentorder

SCHEDULE "A"

CONSENT

The parties agree that the Licence Appeal Tribunal issue an order with the following terms;

1. The Tribunal confirms the Cancellation and Seizure Order of March 21, 2003.
2. The Respondent shall enforce the Order unless the unpaid fines of the following persons are paid:

Brander Trucking Ltd.	-	\$40,331.75
Sam Bisignani	-	\$ 2,708.75
Franco Bisignani	-	\$ 981.25
3. The unpaid fines noted in paragraph 2 shall be paid in the amount of \$1,500 per month on or before the 22nd day of each month with the first payment due by August 22, 2003.
4. The Applicant shall ensure that proof of payment is provided to the Respondent by facsimile to (905) 704-2039 by the 23rd day of each month.
5. The Applicant shall ensure that no other fines against Brander Trucking Ltd., B.I.Z. Mechanical Inc. or Franco Bisignani go into default before all fines noted in paragraph 2 are paid.
6. If the Applicant does not comply with the terms specified in paragraphs 3, 4 or 5, the Respondent shall enforce the Cancellation and Seizure Order.

Patrick Moore,
Counsel for the Respondent

Franco Bisignani,
President, B.I.Z. Mechanical Inc.

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



RTS TRANSPORT LTD.

Appeal under section 50.0(1) of the *Highway Traffic Act* R.S.O., Chapter H.8 as amended (the "Act") from the Cancellation and Seizure Order of the Deputy Registrar pursuant to section 47(1) of the Act.

TO APPEAL A CANCELLATION AND SEIZURE ORDER ISSUED
BY THE DEPUTY REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: WILLIAM McINTOSH, Vice Chair, presiding

APPEARANCES: PATRICK Di MONTE; Counsel for the Applicant
PATRICK MOORE; Counsel for the Respondent

DATE: June 23, 24, 25 and 26, 2003

Toronto

REASONS FOR DECISION

BACKGROUND:

The present appeal is brought under section 50(1) of the *Highway Traffic Act* R.S.O. 1990 Chapter H.8 as amended, (the "Act") from a decision of the Deputy Registrar of Motor Vehicles to issue a Cancellation and Seizure Order relating to the Applicant's Ontario Commercial Vehicle Operator Registration (CVOR) certificate dated March 31, 2003 pursuant to section 47 and 47(1) of the Act.

A CVOR certificate is the document, which is evidence of the fact that a commercial carrier is legally entitled to engage in for-hire carriage in Ontario. One certificate covers a carrier's entire fleet. A copy of the certificate is carried in each vehicle.

The Cancellation and Seizure Order was to be made effective April 11, 2003 at 9:00 a.m. Eastern Standard Time. The Order was preceded by the issuance of a Notice of Cancellation and Seizure also issued under sections 47 and 47(1) dated March 4, 2003 and was accompanied by a letter of same date advising the Applicant that its safety rating had been categorized as UNSATISFACTORY. The Notice advised the Applicant that it could meet with the Deputy Registrar prior to the issuance of the Cancellation and

Seizure Order to show cause why its (CVOR) certificate should not be terminated. The show cause meeting was held in Toronto on March 19, 2003 with the Deputy Registrar and representatives of the Applicant and the Ministry of Transportation of Ontario in attendance. The effect of the Order if enforced is to permanently terminate the Applicant's operations in Ontario.

These 2003 proceedings were preceded in 2002 with the issuance of a 30 day Suspension and Seizure Order dated January 28, 2002 suspending the Applicant's CVOR certificate and the seizure of the plate portions of permits for commercial vehicles registered in the Applicant's name for that period. This Order was preceded by the issuance of a Notice as in the present case. The Suspension and Seizure Order was appealed to this Tribunal and was heard May 30 and 31, 2002. The Tribunal released its decision on July 5, 2002 upholding the Deputy Registrar's decision. Accordingly, the Applicant was informed that it would be under the Suspension and Seizure order commencing July 15, 2002. There was a subsequent appeal to the Divisional court by Notice dated July 19, 2002, which has yet to be heard. The Applicant continues to operate in Ontario under a stay of the Deputy's Registrar's Order pending appeal.

The Applicant is a long distance haulage company operating ("base plated") out of Surrey British Columbia. Its operations extend throughout the United States and east in Canada to Quebec. It has been operating in Ontario for three years. The majority of its fleet is made up of owner operators, individuals who own their own rigs and operate under the Applicant's CVOR. The remainder of the drivers are lessees from the Applicant. At the time of the Order of Cancellation the fleet was upwards of thirty vehicles having grown substantially over the past two years. It was stated that approximately forty percent of the Applicant's revenues are derived from carriage in Ontario. Approximately 18% of the on road mileage is in Ontario. The following chronology reflects the Applicant's relationship with the Ontario Regulator:

- June 30 2000; CVOR certificate issued
- June 27, 2001: Warning letter issued
- August 9, 2001: Satisfactory-Unaudited safety rating assigned
- December 14, 2001 Notice of Suspension and Seizure Order issued
- January 16, 2002: Show Cause meeting
- January 25, 2002 Suspension and Seizure order issued
- January 25, 2002: Conditional Safety Rating assigned
- February 4, 2002 Appeal of Suspension Order appealed to Licence Appeal Tribunal
- May 30, 2002: Licence Appeal Tribunal Hearing
- Jul 5, 2002: LAT decision issued-appeal denied
- July 15, 2002: Suspension and Seizure order issued
- July 15, 2002: Unsatisfactory Safety Rating assigned
- July 18, 2002: Inspection - Operating with Suspended CVOR, Seizure of Plates and Permits
- July 19, 2002: Appeal from LAT decision filed

- July 25, 2002: Order to Stay issued
- July 25, 2002: CVOR re-instated pending appeal
- July 25, 2002: Conditional Safety Rating assigned

EVIDENCE:

The Respondent in opening put forth the position that the evidence would show that the sanction sought in this case is appropriate. The Respondent as Regulator is obliged under the governing legislation to monitor and sanction commercial motor vehicle operations. Here the Respondent has reasonably exercised its authority under the Act in calling for the cessation of the Applicant's right to use Ontario highways for purposes of commercial carriage through cancellation of its CVOR certificate. It has done so based upon an examination of the Applicant's safety record in this province as recorded by an evaluation scheme established under the regulations.

The Applicant took the position in opening that the evidence would disclose that the sanction of cancellation is draconian under the circumstances. Counsel stated that there are other levels of sanction available to the Regulator short of putting a carrier out of business in Ontario. As well the safety monitoring system has as its subject the CVOR certificate holder or operator. This being the case the operator can be put out of business through bad driving habits of employees and owner operators operating under its certificate. Such drivers can get other employment but the CVOR certificate holder is banned. Counsel also argued that the monitoring system is too arbitrary given the consequences of its application and objected to the "show cause" hearing not hewing closely enough to accepted standards of review. There should have been allowance made for the routes and weather conditions involved in the Applicant's operation and the individual accident reports should have been re-analysed. Finally it was argued that the evidence would show it was open to the Regulator to place the Applicant under a safety rating, which would permit operations under ongoing scrutiny for a determined period to track improvements the Applicant was putting in place.

The System:

A good portion of the testimony was taken up in the explanation of and application of the Commercial Vehicle Operator Registration (CVOR) System. It is described in a document promulgated by the Ministry as:

"an automated system monitoring system that tracks the on-road safety performance of commercial vehicle operators."

Carriers operating in Ontario have been required to register with the Ministry since July of 1989. Entities that must so acquire CVOR certificates are:

“person directly or indirectly responsible for the operation of a commercial vehicle including the conduct of the driver and the carriage of goods or passengers, if any, in the vehicle or combination of vehicles.”

The carrier need not be the vehicle owner but it must hold a valid CVOR certificate when using vehicles that are leased or contracted.

This information and the operator records are available through a web site.

The system is tripartite in its operation. It first applies a “Safety Rating” to the CVOR holder; secondly it establishes criteria, which trigger “Interventions” by the Ministry, and thirdly it informs the Ministry when it is appropriate to impose the series of Regulatory “Sanctions”.

Safety Ratings:

Excellent:

- 24 months of operation in Ontario
- overall violation rate of 10% or less of assigned accident threshold
- maintains an accident violation rate of 10% or less of assigned accident threshold
- achievement of 80% on both vehicle and driver audit

Satisfactory:

- six months of demonstrated operation in Ontario
- the carrier maintains an on road performance level of 65% or less of its overall CVOR threshold
- the carrier has been audited and the facility audit score is 55% or better on each of the driver and vehicle profiles

Satisfactory-Unaudited:

- a carrier that has not been audited would normally receive this rating provided it maintains an on road performance level of 65% or less of its overall CVOR threshold.

Conditional:

- if the on road performance exceeds 65% of the overall CVOR threshold
- if the carrier does not achieve at least 55% in each of the driver and vehicle profiles in a facility audit
- upon the expiry of a suspension or plate seizure.

Unsatisfactory:

- if there is less than 55% compliance on an audit
- CVOR threshold exceeds 100%

- a combination; for example there could be a better than 55% audit compliance but a bad road record exceeding 100% of the assigned carrier threshold

Interventions:

- a warning letter when the evaluation system identifies a carrier's overall violation rate is at 35% of its assigned threshold
- when the violation rate reaches 65% an audit can be called for
- when the violation rate exceeds 80% of threshold there is an interview with the carrier.

Sanctions:

- a limitation on the size of the carrier's fleet
- an order by the Registrar to seize the permit and number plates issued by jurisdictions outside Ontario for a period of time defined by the Registrar.
- suspension of the carrier's operating privileges and/or seizure of Ontario issued plates or permits applying to vehicles and trailers under the carrier's control for a period of time defined by the Registrar.
- a cancellation of the carrier's operating privileges. Such cancellations are permanent and apply to all vehicles and trailers under the carrier's control.

The information the CVOR system monitors and tabulates in order to allow the Registrar the ability to grant safety ratings, to intervene and to impose sanctions consists of:

Carrier information
 Convictions
 Reportable accidents
 Vehicle mechanical safety inspections
 Ministry interventions

This data from field reports and other sources specific to an individual carrier is compared to a database of provincial wide averages for carriers of similar sizes. The resulting CVOR record is updated over rolling two-year periods and is recorded on a document referred to as an abstract. As new information is collected some data will drop off as two-year intervals elapse. This gives the Regulator what was described as two-year "moving window" on a carrier's operations.

The province wide data referred to resulted from an analysis of a large number of carrier operations. From that sampling a "threshold" curve has been established for carriers of similar "adjusted fleet sizes" for the stated measurement criteria of Accidents, Convictions and Inspections.

Adjusted Fleet Size:

As some vehicles under an operators CVOR certificate are double shifted and as only a portion of the operation may be on Ontario highways each operator is assigned an

“adjusted fleet size” to arrive at a realistic operational figure against which to apply the threshold. This figure is arrived at by taking the number of vehicles (allowing for those spending twice the permissible legal time on the road through double shifting) and dividing by the percentage of road travel in the province. If for example a carrier has 30 vehicles and operates 80% in Ontario its adjusted fleet size is 24. It is the responsibility of the carrier to inform the Regulator within 15 days of a change in fleet size of 20%.

Accidents:

Using data collected from police reports demerit points are assigned to the carrier’s record according to an accident-weighting table. The Regulator is interested for rating purpose in accidents involving driver impropriety or “pointable accidents”. For example if there is property damage and/or injury and no driver impropriety noted by the investigating officer then there are no demerit points assigned. If there is a causal link to the driver then points are assigned in accordance with the severity of the result. For example personal injury with driver impropriety results in 8 points.

The assigned points are divided by the number of vehicles to arrive at the points per vehicle figure. For example if the 8 points were divided by 2 vehicles the figure is 4. The points per vehicle (4) is then divided by the number of months operated (the 24 month “moving window”) to arrive at a points per vehicle per month figure; in this case 0.1667. This figure is in turn compared to a table of “threshold values” for this size of carrier to find the points per vehicle per month accident threshold value (in this case 0.1574). Finally the former is divided by the latter to arrive at the variance between the threshold accident rate and that of the actual carrier expressed as a percentage. In the example $0.1667/0.1574=105.9\%$ of accident threshold. That is carrier’s accident violation rate is above the accident threshold for operators of this particular adjusted fleet size.

Convictions:

A similar analysis to that carried out to arrive at the accident violations is done in the case of convictions. There are some 20 pages covering some 900 possible offences for which a driver or operator could be responsible. Points for breaches range from 0 for improper bill of lading to 10 for failure to remain at an accident scene or 15 for impaired driving. The total convictions are divided by the number of vehicles to arrive at the total conviction points per vehicle. Then a like analysis to that of Accidents is carried out to reach a figure expressed as a percentage of the subject carrier’s conviction rate to that of the threshold.

Inspections:

Each time an inspection is carried out on a carrier’s equipment the results are recorded. If a minimum of two have been done in the 24-month “moving window” a usable inspection violation rate figure can be achieved. Again that figure is arrived at by first determining a base line for the individual carrier from the inspection reports and comparing it to the threshold figure established province wide for all carriers of similar

size. The final figure expressed as a percentage will show the variance between the subject carrier's inspection violation rate and the acceptable established threshold.

Carrier Overall Performance:

The Accident, Conviction and Inspection violation rates as described are tallied in a ratio of 2:1:1, the Accident rate being weighted double to the other two. Simply, the percent of Accident threshold x2 is added to the percent of Conviction and Inspection thresholds. The resulting figure is then divided by four to arrive at a figure expressed as a percentage, which is called the Percent of Overall Threshold. This final figure will prompt action by the Regulator if it falls within the range of the Interventions and Sanctions listed above. For example should this figure be 70% then, according to the evidence of the Respondent an audit of the carrier should be called for along with a Conditional safety rating with an eye to an interview should the figure reach 80% of threshold.

RTS Transport:

The Applicant carrier was assessed using the above methodology for the two-year period January 2001 to January 2003. In February 2003, prior to the issuance of the "Notices" dated March 4 this assessment was sent in a document entitled Safety Record Review. The Applicant was also informed of the proposal to assign an "UNSATISFACTORY" safety rating to its operation for purposes of Ontario carriage. Data requested by the Regulator in November 2002 revealed a total fleet of 24 vehicles, all of them double shifted. As some 17% of the Applicant's total mileage was on Ontario highways the resultant "adjusted fleet size" for purposes of the CVOR tracking system analysis was rounded up to 9 ($48 \times .07 = 8.1$). As the actual fleet size had varied during the period of the "window" so did the adjusted fleet size, in fact from 1 to 9. This factor was incorporated into the final analysis. That is, for some months in the "window" the accident, conviction and inspection violation rates upon which the overall safety record was computed used different fleet sizes to ensure a fairer final tally, or as the Respondent's witness put it to level the playing field between carriers. The Ministry actually did a re-assessment from the period October 2002 to January 2003 on the basis that the adjusted fleet size revealed by the Applicant in November 2002 was incorrect by a factor of 2. When incorporated into the safety record upon which the Regulator relied for decision the accident violation rate diminished slightly. Unfortunately from the same November 2002 date there was an increase of 10 convictions. All told the percentage of threshold was still in the 250% range. Regardless of the fleet size used or the monthly periods within the "window" analyzed the Applicant at all times exceeded 100% of threshold.

Looking at the three categories individually the witness Ms McKenna, a Carrier Safety Rating Administrator did note that "inspection" data revealed the vehicles to be well maintained. To her the fleet was mechanically sound but badly driven. As stated the majority of vehicles were owner operated under the Applicant's CVOR certificate.

Under the “accident” and “conviction” headings the picture is quite different. Under “accidents” there were 11 events over the period of the “window” resulting in 28 assessed accident points. Under “convictions” there were 53 events for 135 total conviction points. The resultant overall figure using the formulae outlined above could not be anything but far in excess of threshold values.

As stated the Regulator’s analysis was introduced through Ms. McKenna a Carrier Safety Rating Administrator. As background to her findings she explained that of the approximately 100,000 carriers in the province only .1% wind up falling into the 100% of threshold area establish under the CVOR safety rating system. She stated that the Applicant has been over 100% for two and one half years but that it was the deterioration in the record after July 2002 that led to the registrar’s decision to, as she put it, to get RTS off of Ontario roads. As outlined the Applicant was at this time (and still is) operating under a stay, pending appeal, of an existing Suspension Order.

Under cross-examination Ms McKenna stated that of the 100 to 150 operators per year under sanction about 32 are “base- plated” out of province. Some operators that have exceeded the 100% threshold are still operating under supervision.

On the issue of the “show cause” meeting it was pointed out that the operator cannot challenge the point allocations used in the assessment. These are taken from the point allocation determined by the investigating officer. Should an operator wish to challenge the points it has to contact the individual investigating officer. Much of the cross examination was spent going over the individual accident reports which formed part of the analysis.

Daman Grewal:

The evidence in support of the position put forth by the Applicant was introduced through Mr. Grewal. Mr. Grewal stated that he has a grade 12 education along with some Community College attendance in 1997. After his schooling he worked at another carrier until 1997 when he met Mr. Pandher. After a stint with a second carrier he went to the Applicant in 2001. At that time RTS had 13 trucks. He continued with courses involving the trucking business, including freight forwarding and safety code compliance. He currently holds the position of safety supervisor and operations manager with the Applicant and attended the “show cause” meeting in March on its behalf. At the time of the show cause there was actually another employee in charge of safety for the Applicant who was unable to attend.

Mr. Grewal put into evidence the factual basis upon which the Applicant sought to have the Regulator’s intention as expressed in the Notices of Cancellation and Seizure overturned or modified. That evidence consisted of the relationship between the Applicant and the Regulator as well as steps and programs being introduced into its operations. According to the testimony of Sukminder Pandher President of the

Applicant Mr. Grewal worked as dispatcher and progressed to safety manager. Both Messrs. Grewal and Pandher attended the show cause meeting and produced the documentation supporting company policies examined there. He complained that the show cause was unsatisfactory in terms of its examination of the operations and further that in any event the Applicant was unaware it was running into problems with the Ontario Regulator although such information is available. There was an airing of the record of the Applicant at the meeting and an examination of its programs. The meeting lasted some three hours.

Under cross-examination several indications of Mr. Grewal's lack knowledge of the requirements of carrier safety and of the position of safety supervisor were apparent. This could be explained away in part due to his age and inexperience. Indeed he seemed like a bright young man. There was a period prior to the show cause meeting where the position of safety officer was being co-occupied with another and he admitted that he only attended the meeting as a replacement. He went on to explain that as at May of 2003 he is full time at the job. One example of a discrepancy in the Applicant's record keeping came from an examination of the company "Log Book Checker" a document kept for each driver to record the number of hours worked in a month to ensure drivers do not exceed the permissible hours on the road over various cycles. For example after 75 hours on duty over 14 days there has to be a 24-hour break. In an examination of the sample of "Log Checkers" produced by the Applicant it was shown through Mr. Grewal that miscalculations had occurred in the tabulation of permissible on road hours.

Mr. Grewal had also testified before the Tribunal in May of 2002 during the disposition of the appeal from the Suspension and Seizure Order, which is currently stayed pending appeal. At that hearing the record of the Applicant was reviewed to that point in time. That review showed essentially the same operational circumstance as the present, namely a fleet that was well enough maintained but badly driven. This despite the warnings from the Regulator that improvement needed to be shown or further sanctions were to be expected. There was no improvement between the issuance of the Warning Letter of June 2001 and the Issuance of the Notice of Suspension the following December. Ms McKenna who also testified at this prior hearing described the CVOR monitoring system and its then finding of a 224% of threshold performance rating for this period.

The Applicant's record between the release date of the Tribunal's decision on the Suspension Order in July of 2002 and May of this year shows a similar lack of improvement in the Applicant's record. It was this lack of improvement after intervention by the Regulator that was stressed as being particularly relevant to the appropriateness of further sanction.

THE LAW:

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

3.(2) The Registrar shall act under the instructions of the Minister and Deputy Minister and has general supervision over all matters relating to highway traffic within Ontario, and shall perform the duties that are assigned to him or her by this Act, by the Lieutenant Governor in Council, or by the Minister or Deputy Minister.

4. There shall be a Deputy Registrar appointed by the Lieutenant Governor in Council who shall have all the powers and may perform all the duties of the Registrar.

16(2) No person shall drive or operate a commercial motor vehicle on a highway unless the operator is the holder of a CVOR certificate that is not under suspension.

47(1) Subject to section 47.1, the Registrar may suspend or cancel,

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

47.1 (1) Before taking any action under clause 47 (1) (a) or (c) or subsection 47 (2), the Registrar shall notify the person whose plate portion of a permit or CVOR certificate is to be affected of his or her proposed action

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

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

CASES:

A number of cases were presented for review:

Muscillo Transport v. Ontario (Licence Suspension Appeal Board) [1997] O.J. No. 3111:

This matter came before Chapnick J on appeal in June 1997 from a decision by the Licence Suspension Appeal Board (the Board) dated March 4, 1997, which was in turn an appeal from a Cancellation and Seizure order of the Registrar of September 24, 1996. Similar to the present case the Cancellation order had been preceded by an order of Suspension, which was also appealed. In short the same progressive steps in the sanction process were taken prior to the decision to remove the operator's privilege of using Ontario highways. The court dismissed the appeal in part by citing circumstances similar to the present. The court also approved the Board's view that present compliance that is at the time of the hearing is the issue. The implication being that with every stage an operator could, on appeal, lead evidence of putative improvements to be instituted through a period of monitoring then another Order and an Appeal, perhaps with a stay, and so on.

This matter was appealed further. In a decision heard April 1, 1998 the majority found..."no error in principle in the reasons of the Board. It has not been shown that the sanction imposed was manifestly unfit." Borins, J. dissenting in part, held that companies related to the principal Appellant should have had monitored sanctions and should not have had their records co-mingled with that of Muscillo.

R&S Transportation Inc, 590029 B.C. Ltd. and Harj-Min express Carriers Inc., a decision of the Tribunal released August 1, 2002 dealt with an appeal like the present from an Order of Cancellation and Seizure. The final sanction was preceded by the same levels of interventions as in this matter. The Tribunal found as here that the evidence revealed no inconsistencies or errors in arriving at the finding of a safety record of over 100%. Most importantly the Tribunal found that the carriers had sufficient warning through interventions of an impending serious sanction.

Landstar Ranger Inc. a decision of the Tribunal heard November 17, 18, 19 and December 2, 1998 was an appeal to the Tribunal from a Suspension and Seizure order dated May 21, 1998. The decision of the Registrar to issue the 7 day suspension order was set aside. It was set aside on the grounds of inaccurate information used by the Regulator to support his safety findings and upon a lack of procedural fairness involved in the "show cause" meeting and interviews.

APPLICATION OF LAW TO FACT:

The position of the Applicant in argument addressed both the system under which commercial carriage in Ontario is regulated and its application in the instant case. While no significant issue was taken with the accuracy of the numbers produced in the Respondent's calculations it was submitted that the system under which a carrier is judged is too arbitrary given the consequences (cessation of operations) of running afoul of that system. On the basis of the evidence of Mr. Grewal of implementation of operating standards and case law the sanction if any should have been something in the order of suspension or continued operations under strict monitoring. After all the system is appropriately set up to do just that. It would be a different matter if as under other industry regulatory schemes the Regulator would have to dedicate additional resources to ensure compliance by a currently sub standard company. Here the monitoring system is already in place and can be activated within a set period of scrutiny if unacceptable operations continue. As there is no re-application available once a CVOR certificate is cancelled and that certificate is required to carry on business it is accepted law that such administrative deprivations of the "right to make a living" must be scrupulously fair.

Counsel pointed out that some imperfections in the monitoring system exist such as the inputting of raw data from the notations of investigating officers without follow up as to their eventual disposition. Counsel referred to this as looking at the "flavour" of accidents where for example the officer's notation said simply "too fast for conditions". No specific instances of such misgivings were pointed out that would have made a difference in the CVOR record before the Tribunal but were put forth to show that if there are frailties in a system with such consequences the Tribunal should make the appropriate allowances. In instances where the monitoring system was dealing with an operator on the cusp of acceptability this argument may have some merit but in the present case where the "threshold" has been so grossly exceeded it approaches bricks without straw.

Finally, counsel stated the evidence discloses that it is the CVOR certificate holder who pays the regulatory price for the poor driving habits of owner-operators running rigs under that certificate. He reasoned that this fact did nothing to advance the legislative intent of improved highway safety in that these same drivers simply hire on with another CVOR certificate holder.

The Respondent submits in argument that since there is more than ample evidence that the Applicant has grossly exceeded the established "threshold limits" of safe operations and that given the duty imposed upon the Respondent to ensure overall highway safety, the sanction of CVOR certificate cancellation of the Applicant's CVOR is appropriate. This Regulatory duty becomes more focused when as in the present case no improvement occurs in a carrier's operation even after safety shortfalls are brought to its

attention through interventions. It was further submitted that aside from the legislated obligation upon the Regulator to review the past record of carriers the only rational tool available to predict future behavior and therefore the effect upon highway safety is such a record. Accordingly there should be a heavy evidentiary onus placed upon carriers who wish to show that despite any such record their operations are bound to improve. Such an opportunity was already given at the show cause meeting, which upon the evidence met the rules of fairness appropriate to a regulated industry.

As to the assertion that the CVOR certificate holder is an inappropriate focus for the Regulator, an alternative focus was not established. The Regulator has chosen to track the operations of those parties to whom the CVOR certificate is issued.

As to the point that the Tribunal should review the Applicant's safety numbers right up to time of hearing even after the productions have been formalized pursuant to the rules, the argument of finality was raised in opposition. The Regulator and the reviewing Tribunal must operate within a time frame. The Tribunal finds that evidence of a two-month improvement between the filing and the hearing should be viewed as happenstance, and is not evidence of nascent long-term improvement. This short improvement within the appeal period is not sufficient to convince the Tribunal to revisit the framework period referred to by the Registrar of Motor Vehicles as Regulator to arrive at its decision. Furthermore, the Applicant's record did not get below "threshold." The Applicant had a year between the Suspension and this hearing to improve and as at May 2003 the Applicant's record of accidents, convictions and inspections was still far in excess of the Regulator's assigned threshold for operators of the Applicant's adjusted fleet size.

This Tribunal is given, under the governing legislation, broad discretionary powers over the decision of the Registrar by section 5(1) and (2) above

Oversight tribunals approach the substance of regulations with caution particularly if the intent of the regulation in question falls four square within the terms of the enabling legislation. The oversight function broadens when the enabling legislation requires the Regulator to exercise his discretion upon reasonable grounds implying the requisite degree of procedural fairness. In short it is not generally the Tribunal's place to re-write codes or systems that the Regulators choose to employ to carry out their mandates. It is the Tribunal's place to ensure that in employing the chosen system the Regulator has acted reasonably and fairly without favour or caprice. In the present case the authorization for the administrative action taken, the Cancellation Order, is contained in section 47(1)(f) of the Act. The section explicitly directs the Registrar to take into account the safety record of the subject carrier as a basis for his decision.

Having reviewed the CVOR rating system established by the Regulator in furtherance of its mandate contained in section 3(2) of the Act, the Tribunal can see nothing of substance that would manifestly put that system beyond the Regulator's legislated purview. It is therefore not within the Tribunal's competence to offer the Applicant relief

by a finding that the CVOR monitoring system is somehow so arbitrary or unfair in substance to disallow its use by the Regulator.

As to whether the Regulator acted reasonably in the application of the CVOR system, that is in his belief that " ...having regard to the safety record..." of the RTS Transport Ltd. the company "...will not operate a commercial motor vehicle safely..." in the province of Ontario, the Tribunal finds insufficient cause to overturn the Regulator's decision to issue the Cancellation and Seizure Order.

The Applicant's safety record, as placed into evidence, along with the inadequacy of the Applicant's evidence of improvements to be taken in its approach to safer operations convinces the Tribunal that the primary concern of highway safety has been appropriately weighed against allowing the continuation of the Applicant's operations in Ontario even on terms.

The appeal of the Applicant against the Order of the Respondent fails.

DECISION:

The Tribunal therefore, after considering the evidence and pursuant to the authority vested in the Tribunal under section 50.(2) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, confirms the decision of Deputy Registrar of Motor Vehicles to issue a Cancellation and Seizure order to the Applicant, RTS Transport Ltd.

LICENCE APPEAL TRIBUNAL

William McIntosh, Vice Chair,
Presiding Member

RELEASED: August 27, 2002

FILE NAME: 1621.cvor.RTS

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice or Divisional Court is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

2023517 ONTARIO INC. O/A ABEST CARRIERS

IN THE MATTER OF an application by 2023517 ONTARIO INC. O/A ABEST CARRIERS, dated April 14, 2003 for a hearing before the Licence Appeal Tribunal pursuant to section 50(1) of the *Highway Traffic Act*, to consider the appeal of the Notice of Refusal to Issue an Operating Licence dated March 31, 2003 and the Notice of Refusal to Issue a Commercial Vehicle Operator's Registration Certificate dated March 13, 2003, as issued by the Registrar of Motor Vehicles;

AND IN THE MATTER OF the *Motor Vehicle Transport Act*, 1987, S.C. 1987, Chapter 35, as amended by R.S. 1989, Chapter 29 and the *Truck Transportation Act*, R.S.O. 1990, Chapter T.22 as amended;

AND IN THE MATTER of an Application for Licence by 2023517 Ontario Inc. O/A Abest Carriers;

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

AND IN THE MATTER of an application by 2023517 Ontario Inc. O/A Abest Carriers for a Commercial Vehicle Operator's Registration Certificate;

TRIBUNAL: WILLIAM McINTOSH, Vice-Chair

APPEARANCES: PATRICK MOORE, Counsel for the Respondent

PARAMJIT SINGH SANDHU, on behalf of the Applicant

DATE OF
HEARING: July 4, 2002

Toronto

REASONS FOR DECISION

BACKGROUND:

The present appeal is brought under section 50(1) of the *Highway Traffic Act* R.S.O. 1990 Chapter H.8 as amended from a decision of the Deputy Registrar of Motor

Vehicles to issue both a Refusal to Issue a Commercial Motor Vehicle Operator's Registration Certificate (CVOR) and a Refusal to issue an Operating Licence ("the Refusals") pursuant to section 17 of the *Highway Traffic Act* and section 6 of the Truck Transportation Act R.S.O. 1990, chapter T.22 respectively. The granting of a CVOR is a prerequisite to the receipt of an Operating Licence. The Refusals are dated March 31, 2003. As is the standard procedure in such cases the Refusals were preceded by the issuance of Notices of the Refusals ("Notices") both dated March 13, 2003 and sent to the Applicant. In the Notices the Applicant was informed that it could make written submissions to the Deputy Registrar prior to March 28, 2003 to show cause why the Refusals should not issue. Such a submission was made by the Applicant's solicitor dated March 27, 2003. The submissions were unsuccessful in preventing the issuance of the Refusals.

An Operating Licence issued by the Ministry of Transportation ("the Ministry") is required to haul for compensation in Ontario (for-hire carriage). A CVOR is required to operate the vehicles involved. Without these the Applicant cannot carry on its proposed business in Ontario. The Applicant had submitted an application for both by a form dated March 5, 2003 and received by the Carrier Sanction and Investigative Office of the Ministry on March 10, 2003. The Applicant was incorporated on March 4, 2003 listing Paramjit Singh Sandhu as Director.

Two other companies are of significance in the present appeal. The first, Able Trucking Ontario Inc. ("Able Trucking") has one Rashpal Dhillon listed as president and is the employer of Mr. Sandhu. It carries on a haulage business in Ontario. The Ministry of Transportation has placed Able Trucking under a "Cautionary" safety rating due to a failed safety audit. The second, Able Carriers Inc. ("Able Carriers") had applied for a CVOR and was refused. The refusal was dated February 18, 2003 and was not appealed to this Tribunal. Able Carriers lists Mohinder Grewal as Director/Manager. Mr. Grewal also works at Able Trucking and is listed as the "contact person" of that company on Ministry correspondence.

EVIDENCE:

The Respondent entered into evidence the Notices of Refusal. The grounds upon which the Deputy Registrar refused to grant permission to the Applicant to operate commercial vehicles in Ontario were that after considering the Applicant's submission the Deputy registrar remained unconvinced that the Applicant would not do so safely. The Deputy Registrar based this assertion upon evidence that satisfied him that the Applicant was a stalking horse for the two existing companies, Able Trucking and Able Carriers. According to Mr. Miller a Ministry Carrier Safety Rating Administrator called by the Respondent it is not unknown to the Ministry that existing carriers with poor (cautionary) ratings will attempt to avoid the consequences of those ratings by operating under the corporate veil of a new and therefore unblemished company; a procedure Mr. Miller called "anti-avoidance".

Mr. Miller testified that poor safety ratings can result among other things in a carrier having difficulty acquiring insurance coverage without which carriage in Ontario is illegal. Mr. Miller is charged with carrying out integrity checks on new applicants for Operators Licences and CVORs. When a new application is received by the Ministry a preliminary scrutiny is done by clerks who are trained to spot a variety of anomalies in new applications. Among these are names similar to existing carriers with poor safety ratings as well as common employers and corporate officers. In the present case the name of the Applicant "Abest Carriers" was close enough to "Able Trucking" and "Able Carriers" to raise a flag; this along with the fact that "Able Carriers" had applied for and been refused a CVOR as at February 18, 2003. The Notice of the Refusal to Able Carriers was addressed to Mohinder Grewal at 13 Egypt Drive, Brampton. Mr. Grewal is the Manager/ Director of Able Carriers and is, as stated, an employee and contact person of Able Trucking. The Ministry felt that Able Trucking and Able Carriers were in fact related companies and that granting the latter a CVOR would be tantamount to granting it to the former. As well Mr. Grewal was shown by driver's licence reference to have had the same Brampton address as a Mr. Rashpal Dhillon, Director of Able Trucking in 1984. There was no appeal to this Tribunal from the Refusal sent to Able Carriers.

The Applicant's Director Mr. Sandhu was employed by the Able Trucking as a driver. The Deputy Registrar also noted that after his arrival in Canada in 1998 Mr. Sandhu lived under a lease with Mohinder Grewal the Director/Manager of Able Carriers at 13 Egypt Drive. Subsequently, in September 2001 the Applicant bought a residence at 38 Mainard Crescent , Brampton, the same address as appears on the Applicant Abest Carrier's corporate profile. Mr. Grewal was, as stated, also employed by Able Trucking, apparently running the day-to-day operations. The evidence of the Applicant was that he got his job at Able Trucking through Mr. Grewal.

These concerns of the Ministry were summarized in the Notices of Refusal sent to the Applicant:

- the failed MTO Facility Audit and safety record of Able Trucking Ont. An operator related to the Applicant
- the Refusal to Issue a Commercial Vehicle Registration certificate and Operating Licence to Able Carriers Inc. A company related to the Applicant
- I am of the opinion that Rashpal Dhillon, President of Able Trucking Ont Inc. directly or indirectly controls or manages or will control or manage the Applicant.
- I am of the opinion that Mohinder Grewal, Director/Manager of Able Carriers directly or indirectly controls or manages or will control or manage the Applicant.
- I am of the opinion that Mohinder Grewal, Director/Manager of Able Carriers directly or indirectly controls or manages or will control or manage the Applicant.

The Applicant made submissions to counter these concerns of the Deputy Registrar's through submissions in a letter by its solicitor Mr. Shvrtaj Zirvi dated March 27, 2003.

Through its solicitor the Applicant stated to the Ministry that:

“Other than the above Landlord and Tenant relationship they had during year 2000 and 2001, there is no other relationship between Paramjit Singh Sandhu and Mohinder Grewal. They both had been and have been working independently. Also 2023517 Ontario Inc. o/a Abest Carriers owned by Paramjit Singh Sandhu located at 38 Mainard Cres., Brampton, Ontario L6R 2V1 is an independent Carrier and has no relation at all with Mohinder Grewal of any kind and it has no relation at all with Able Trucking Ont Inc. as well.”

The Applicant was asked in cross examination why the only reference to a relationship with Grewal in the letter of submissions was with regard to that of landlord and tenant and said nothing about the fact that Grewal essentially ran his employer Able Trucking Ont. Inc and indeed had secured employment for him there. The Respondent found this particularly troubling in that the Deputy Registrar had specifically based his misgivings about the Applicant's application on the employment relationship between them and had transmitted that fact to the Applicant in the March 13 Notice of Refusal. The Applicant's reply was that as the solicitor had not asked specifically about the connection with Able Trucking and Able Carriers he did not inform him of it. The Respondent found this answer disingenuous and pressed the Applicant on the point about being forthright with the regulator particularly as there had been a specific concern on the point expressed by the regulator. The Applicant insisted the “Able” relationship was not being hidden from the regulator. The Respondent further argued on this point that if the Tribunal found there had been such a lack of candor that the fact of this bad faith should shift the evidentiary burden to the Applicant of showing affirmatively that the relationship of concern to the regulator did not exist.

The other areas of concern to the regulator were the apparent lack of a coherent business plan required by applicants or financing arrangements and the similarity in the name Abest Carriers to both Able Trucking and Able Carriers. Mr. Sandhu had no commercial vehicles registered to him. The Respondent put these facts forward as evidence of the Applicant's application not being the commencement of a serious business venture but rather being a ruse under which Able Trucking Ont Inc. or Able Carriers (Messrs Grewal and Dhillon) would carry on their business under the new Abest CVOR.

On the point of Able Trucking's safety record that company's “Operator Summary” and “Facility Audit Findings” were introduced by Mr. Miller. There were two audits carried out, one in May of 1999, the other in August of 2001. Mr. Miller explained that to achieve the necessary compliance with Ministry standards a carrier needs to reach 55% on the Vehicle and Driver portions of the audit failure to reach this standard results in a “Conditional” safety rating. As in any audit representative samples are looked at, in these cases vehicles and drivers. The results are combined into an overall score. In the 1999 audit an “Audit Compliance” of 27.8% was achieved and in 2001, 51.1%. The 2001 audit included an “exit interview” with both Rashpal Dhillon and Mohinder Grewal. It was noted in the later audit that Able Trucking has its power units registered in Saskatchewan but records are kept in Ontario. It was Mr. Miller's opinion that the

Saskatchewan registration may indicate difficulty insuring the rigs in Ontario. To get out of the "Conditional" category a carrier must request another audit.

The Operator Summary is a compilation by the Ministry of Transportation of the carrier's record in three categories, accidents, convictions and inspections. The data on these is entered from the field such as police reports into the Ministry's data banks. A level or "threshold" of acceptability is assigned and compared to the field input data. At various percentages of the threshold level there are interventions by the regulator. At 35% there is a warning, at 65% and above there are audits and interviews with the operator. Over 100% the sanction stage is reached. In the case of Able Trucking there was as at May of 2003 an overall percentage of 48.8%. Mr. Miller stated that this was "a bit high" but that it was the failed audit that resulted in the "Conditional" rating.

In response to this assertion the Applicant stated that while he did not yet have a business plan he would first get the authority to operate then begin by leasing two trucks and eventually wind up owning four. There was a difference between the application and the testimony between the proposed extra provincial scope of the carriage. As to the similarity in the names of his employer Able Trucking and Able Carriers controlled by Mr. Grewal the Applicant stated that the reason for choosing Abest Carriers was to attract attention in the Yellow Pages. It was submitted that the name would place the company's advertisements near the beginning of the "Trucking" section. Mr. Sandhu insisted that there was no intention to carry the goods of either Able Trucking or Able Carriers or to link up with those companies in any way.

The application form filed by the Applicant dated March 5, 2003 and signed by Paramjit Singh Sandhu, Director, contained a declaration that the commodities to be hauled were to be primarily household goods followed by auto parts and dry bulk. Under "Operational Data" the Applicant stated that it was his expectation to operate 4 Commercial vehicles which would travel 173,772 kilometers within Ontario and 347,544 kms. outside the province. This haulage was to be accomplished by the proposed eventual ownership of four commercial vehicles. No financial statements or business plan was presented or testimony called with regard to the plans for the Applicant company; for example how vehicles were to be acquired. Mr. Sandhu did state that contracts can be found on the internet.

The Applicant did provide some background material on Mr. Sandhu. His criminal record is clear and there were several good recommendations from former employers. As well there were certificates of post secondary education; all of which added to the uncontested fact that there did not appear any reason of character or past performance which would bar the Mr. Sandhu from running a haulage company in Ontario.

There was entered what appeared to be a statement of adjustments dated September 14, 2001 regarding the purchase of his residence at 38 Mainard Crescent showing a balance due on closing of \$290,529.69 from an unadjusted offer price of \$281,990.00. No testimony was elicited regarding Mr. Sandhu's personal finances. The business address of the Applicant company and Mr. Sandhu's residence are the same.

THE LAW:

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

16(2) No person shall drive or operate a commercial motor vehicle unless the operator is the holder of a CVOR certificate that is not under suspension.

17(3) The Registrar may refuse to issue a CVOR certificate to an applicant if the applicant is related to ...

(c) a person who the Registrar has reason to believe, having regard to the person's safety record and any other information that the Registrar considers relevant, will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety.

(4) an Applicant is related to a person for purposes of subsection (3) if...

(c) either the applicant or the person, directly or indirectly controls, or controlled or manages or managed the other; or

(d) the applicant and the person have or have had common officers and directors or they are or have been controlled, directly or indirectly, by the same shareholders

The *Truck Transportation Act* R.S.O.1990, c. T.22 provides

6(1) An operating licence shall not be issued or an operating authority granted unless the applicant demonstrates fitness to carry on the business of carrying goods for compensation as described in the application for the licence.

(3) Every applicant for an operating licence shall file with the Registrar, with respect to the business for which authority is sought, a description of the proposed transportation service and evidence that the applicant,

(c) holds a Commercial Vehicle Operator's Registration Certificate issued under the Highway Traffic Act that is not under suspension or subject to a fleet limitation.

APPLICATION OF FACTS TO THE LAW:

It is the position of the Applicant that its appeal should succeed and that the Tribunal should order the granting of CVOR certificate and Operator's Licence as there were no grounds for the Deputy Registrar to refuse its application. There is no evidence before the Tribunal of an individual past record of the Director Mr. Sandhu which would *prima facie* prohibit the issuance of the certificate and licence to operate a company under his control. Mr. Sandhu submits that there is no documentary or direct testimony to the effect that the control of the operation of the Applicant Abest would come under the legal control of either Able Trucking (Mr. Dhillon and Mr. Grewal) or Able Carriers (Mr.

Grewal). He further insisted that the closeness of the name Abest to the others is coincidence and is equally consistent as evidence to his explanation of desiring favorable placement in the Yellow Pages.

The position of the Respondent is that there is ample evidence both direct and circumstantial that the Registrar was within his legislative authority to refuse the Applicant's application for certificate and licence. Further the lack of forthrightness displayed by the Applicant in its submissions to the Registrar via the "show cause" letter proffered by its solicitor should shift the evidentiary onus to the Applicant to prove affirmatively the lack of corporate interconnectedness and thereby impugning the reasonableness of the Registrar's decision. Finally counsel submitted that the Tribunal should only interfere with the regulator's decision if it finds either the regulatory scheme unauthorized or its application unreasonable.

As in most regulated industries the Legislature, enables through regulation the establishment of a regulatory scheme, which endeavors to balance the requirements of the industry in question and the public interest; in this case private commercial carriage and public safety on the highway. Indeed, as Borins, J. A. stated in *Muscillo Transport Limited and Ontario (Registrar of Motor Vehicles)*, a decision of the Ontario Court of Appeal, referenced as (1988) Ont. C.A. 256:

"The purpose of a sanction under section 47(2) of the Highway Traffic Act is to improve, assist and encourage the licence holder to adhere to appropriate safety standards in order to ensure the safety of highway users and others."

The Ministry maintains this balance primarily through the requirement of commercial operators to acquire and maintain a CVOR certificate, without which they cannot engage in for-hire carriage in Ontario. In the case of existing carriers CVOR certificates can be cancelled or suspended; in the case of a new applicant as in the present instance the regulator can simply refuse to issue a CVOR certificate. In either case the regulator applies its safety audit, inspection and assessment scheme to the carrier's record and on the result applies if needed the appropriate sanction.

The Tribunal has before it evidence that the Ministry over the years has noted that some operators will attempt to avoid the consequences of a poor safety record by establishing a new corporate entity over which they have direct or indirect control and simply operate its existing business through it.

Such "corporate veil" questions are difficult particularly in the absence of direct evidence of a controlling mind of the company in question other than that appearing in the corporate documentation. In the present case however there was sufficient evidence of interconnectedness with the Applicant and a company with a bad safety record both personal and corporate to have justified the decision of the regulator. The evidence of the Applicant was unconvincing in allaying the concerns of the Ministry and the Tribunal finds that the Respondent has made out its case.

The Tribunal therefore confirms the Registrar's Refusal to Issue a Commercial Vehicle Operator's Registration Certificate and the Registrar's refusal to Issue an Operating Licence in the name of the Applicant.

LICENCE APPEAL TRIBUNAL

William McIntosh, Vice-Chair

RELEASED: July 23, 2003

Filename: 1633.cvor.Abest Carriers.doc

PREHEARING

BRANT TRUCK CORP.

IN THE MATTER OF an application by Brant Truck Corp., dated May 20, 2003 for a hearing before the Licence Appeal Tribunal pursuant to section 50(1) of the *Highway Traffic Act*, to consider the appeal of the Notice of Refusal to Issue an Operating Licence dated April 4, 2003 and the Notice of Refusal to Issue a Commercial Vehicle Operator's Registration Certificate dated March 7, 2003, as issued by the Registrar of Motor Vehicles;

AND IN THE MATTER OF the *Motor Vehicle Transport Act*, 1987, S.C. 1987, Chapter 35, as amended by R.S. 1989, Chapter 29 and the *Truck Transportation Act*, R.S.O. 1990, Chapter T.22 as amended;

AND IN THE MATTER of an Application for Licence by Brant Truck Corp;

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

AND IN THE MATTER of an application by Brant Truck Corp. for a Commercial Vehicle Operator's Registration Certificate;

TRIBUNAL: WILLIAM McINTOSH, Vice-Chair

APPEARANCES: PATRICK MOORE, Counsel for the Respondent (in person)
MICHAEL BICZ, the Applicant (by teleconference)

DATE OF
PRE-HEARING: August 18, 2003

Toronto

ORDER

Following the attendances of Patrick Moore, counsel for the Respondent (in person) and Michael Bicz, the Applicant (by teleconference) at a prehearing in Toronto August 18, 2003, the Tribunal makes the following Order:

1. The parties present at the prehearing recorded that there was no resolution of the issues in this matter at this time.
2. The hearing is scheduled for 9:30 a.m. Monday, October 20, 2003 at the Tribunal's chambers, 1 St. Clair Avenue West, 12th floor, Toronto, Ontario.
3. The parties were informed of the disclosure rules of the Tribunal.
4. Should the Applicant choose to have representation at the hearing, he shall inform the Tribunal in writing by October 10, 2003.

LICENCE APPEAL TRIBUNAL

William McIntosh, Vice-Chair

RELEASED: August 27, 2003

Filename: 1675.cvor.Brant Truck Corp.Pre.ord.doc

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



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

AND IN THE MATTER of the Commercial Vehicle Operator's Registration (CVOR)
Certificate 117-364-927 issued to 3042596 Canada Inc.;

AND IN THE MATTER OF the Notice of Suspension and Seizure issued to 3042596
Canada Inc.;

AND IN THE MATTER OF the safety record and record of 3042596 Canada Inc.;

AND IN THE MATTER OF an Appeal from the Deputy Registrar of Motor Vehicle's
Order dated May 5, 2003 pursuant to s. 50 (1) of the *Highway Traffic Act*, R.S.O. 1990,
Chapter H. 8 as amended.

BETWEEN:

3042596 CANADA INC. o/a PIERRE GAUMOND TRUCKING

Applicant

-and-

DEPUTY REGISTRAR OF MOTOR VEHICLES

Respondent

TRIBUNAL: MICHAEL H. TURK, Vice Chair

APPEARANCES: WAYNE CERVEN, Agent, representing the Applicant;
PATRICK MOORE, Counsel, representing the Respondent.

DATE OF
MOTION: July 15, 2003 Toronto

ORDER

THIS MOTION by the Respondent for an order permitting its witness, Don Gillette, to
testify by telephone and for an order that the hearing continue an additional hearing day
was heard by teleconference July 15, 2003 at Toronto.

WHEREAS, the Respondent submitted that its sole witness, Mr. Don Gillette, should be permitted to testify by telephone due primarily to the travel cost for this witness to attend the hearing in Thunder Bay.

AND WHEREAS, the Respondent advised the Tribunal that this matter scheduled for a one day hearing on Thursday July 17, 2003 would require one additional hearing day.

AND WHEREAS, the Applicant does not consent to Mr. Gillette giving evidence by telephone and requests his in person attendance for the purpose of providing testimony and cross- examination.

AND WHEREAS the Applicant agrees that the hearing will take more than the one scheduled day and has advised the Tribunal that the Applicant will be represented at the hearing by legal counsel who is unavailable on July 17, 2003. The Applicant therefore seeks an adjournment to dates provided to him by Counsel.

AND WHEREAS the Respondent has failed to provide the Tribunal with a compelling reason why the hearing of evidence should be divided between oral and electronic formats.

THEREFORE, upon hearing the submissions of Counsel for the Respondent and the Agent for the Applicant the Tribunal hereby orders:

1. The Respondent's motion for an order to permit Mr. Don Gillette to testify by telephone is dismissed and motion for an additional hearing day is granted, in part.
2. The Applicant's motion for an adjournment is granted.
3. The hearing scheduled for 9:30 a.m., Thursday, July 17, 2003 in Thunder Bay, Ontario is adjourned on consent of the parties to 9:30 a.m. on October 8, 9, and 10, 2003.
4. The adjournment to October 8, 9, and 10, 2003 is peremptory on all parties.

LICENCE APPEAL TRIBUNAL

Michael H. Turk,
Vice-Chair, Presiding

RELEASED: July 22, 2003

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



PREHEARING

GARCHA TRANSPORT INC.

APPEAL FROM A DECISION OF THE REGISTRAR OF MOTOR
VEHICLES TO REFUSE TO ISSUE A COMMERCIAL VEHICLE
OPERATOR'S REGISTRATION CERTIFICATE

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: GURPAL SINGH GARCHA, Agent, Representing
Garcha Transport Inc.

PATRICK MOORE, Counsel, representing the
Registrar of Motor Vehicles

DATE OF
PRE-HEARING: July 14, 2003

Toronto

ORDER

Following attendances on July 14, 2003 at a prehearing before this Tribunal of Gurpal Singh Garcha, Agent for Garcha Transport Inc. (the "Applicant") and Patrick S. Moore, Counsel for the Registrar of Motor Vehicles (the "Registrar").

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on September 22, 2003 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario:

1. The parties to the hearing are the Applicant and the Registrar.
2. The parties record that there has been no resolution of any of the issues in this matter.

3. The parties shall by no later than 4:30 p.m. on September 8, 2003 disclose to the other the existence of every document and thing that the party will refer to or tender in evidence at the hearing and shall deliver a copy of such document to the other party.
4. The Applicant anticipates that it will call to testify at the hearing 2 witnesses, one of which shall be Gurpal Singh Garcha.
5. The Registrar anticipates he will call to testify at the hearing 2 witnesses.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: July 16, 2003

Filename: 1719.cvor.Garcha Transport Inc.Order.doc



PREHEARING

QUICK SERVICE TRANSPORTATION LTD.

IN THE MATTER OF THE APPEAL TO A CANCELLATION AND SEIZURE ORDER ISSUED TO QUICK SERVICE TRANSPORTATION LTD.;

AND IN THE MATTER OF THE COMMERCIAL VEHICLE OPERATOR'S REGISTRATION (CVOR) CERTIFICATE (137-515-240) ISSUED TO QUICK SERVICE TRANSPORTATION LTD.;

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: J.F. (Jim) Lee, Agent, Representing
Quick Service Transportation Ltd.;

PATRICK MOORE, Counsel, representing the
Registrar of Motor Vehicles

DATE OF
PRE-HEARING: July 16, 2003

Toronto

ORDER

Following attendances on July 16, 2003 at a prehearing before this Tribunal of J.F. (Jim) Lee, Agent for Quick Service Transportation Ltd. (the "Applicant") and Patrick S. Moore, Counsel for the Registrar of Motor Vehicles (the "Registrar");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on September 2, 2003 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario and to continue, if necessary, at the Tribunal's said Chambers on September 3, 4, and 5, 2003;

1. The parties to the hearing are the Applicant and the Registrar.

2. The only facts or evidence agreed upon by the Parties are as follows:
 - (a) There is no dispute as to the correctness of information contained in the CVOR records of the Applicant dated April 22, 2003 and May 8, 2003.
 - (b) The Applicant concedes that the fax number, telephone numbers and physical addresses of the Applicant and Grand Pacific Transport Inc. are the same.
3. The only person that the Registrar intends to call to testify at the hearing is Ms. Bernadette McKenna, carrier safety rating administrator.
4. The only persons that the Applicant intends to call to testify at the hearing are
 - (a) Ms. Baljit Sandhu, Director and President of the Applicant, and
 - (b) Ms. Marie Andrews.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: July 22, 2003

Filename: 1725.cvor.Quick Service Transportation Ltd.Pre.Order.doc

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



PREHEARING

C & G FREIGHT SYSTEMS INC.

IN THE MATTER OF an application by C & G Freight Systems Inc. dated June 19, 2003 for a hearing before the Licence Appeal Tribunal pursuant to section 50(1) of the *Highway Traffic Act*, to consider the appeal of the Suspension and Seizure Order of the Deputy Registrar dated June 2, 2003;

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

AND IN THE MATTER of the Commercial Vehicle Operator's Registration CVOR certificate 143-265-411 issued to C & G Freight Systems Inc.;

AND IN THE MATTER of the Notice of Suspension and Seizure issued to C & G Freight Systems Inc. on the 15th day of April, 2003;

AND IN THE MATTER of the safety record of C & G Freight Systems Inc.;

TRIBUNAL: WILLIAM McINTOSH, Vice-Chair

APPEARANCES: PATRICK MOORE, Counsel for the Respondent

MARK REYNOLDS, Agent for the Applicant

DATE OF
PRE-HEARING: July 23, 2003

Toronto

ORDER

WHEREAS a pre-hearing was held on July 23, 2003 in Toronto at 1 St. Clair Avenue West, 12th Floor as set forth in the Tribunal's Pre-hearing Conference Notice dated July 2, 2003.

NOW THEREFORE The Tribunal makes the following Order respecting the hearing:

1. The hearing will commence at 9:30 a.m. September 24, 2003 and continue on September 25 and 26, 2003 at the Tribunal's chambers at 1 St. Clair Avenue West, 12th Floor, Toronto.
2. The parties to the hearing will be C & G Freight Systems Inc., Applicant and The Registrar of Motor Vehicles, Respondent.
3. The parties accept as accurate the data contained in the Commercial Vehicle Operator Summary for the Applicant, C & G Freight Systems Inc.
4. The parties shall fully comply with the Tribunal Rules of Practice.

LICENCE APPEAL TRIBUNAL

William McIntosh, Vice-Chair

RELEASED: August 6, 2003

File: 1766.cvor.C&G.Freight.pre.order.doc

GARCHA TRANSPORT INC

IN THE MATTER OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990
CHAPTER H. 8 AS AMENDED

AND IN THE MATTER OF AN APPLICATION BY GARCHA
TRANSPORT INC. FOR A HEARING BEFORE THE LICENCE
APPEAL TRIBUNAL PURSUANT TO SECTION 50(1) OF *THE
HIGHWAY TRAFFIC ACT* APPEALING A REFUSAL TO ISSUE A
COMMERCIAL VEHICLE OPERATOR'S REGISTRATION
CERTIFICATE

TRIBUNAL: WILLIAM MCINTOSH, Vice Chair

APPEARANCES: GURPAL SINGH GARCHA for the Applicant
PATRICK MOORE, Counsel, for the Registrar
of Motor Vehicles

DATE: September 22, 2003 Toronto

DECISION AND REASONS

BACKGROUND:

This is an appeal to the License Appeal Tribunal by Garcha Transport Inc from a decision of the Registrar of Motor Vehicles (the Registrar) dated May 16, 2003 refusing to issue to the Applicant a Commercial vehicle operator's registration certificate (CVOR).

The Applicant is a corporation located in Mississauga solely owned by Gurpal Singh Chandra. It was the intention of Mr Singh to enter the business of commercial haulage. Under the laws of Ontario he had to first apply to the Ministry of Transport for a Commercial Vehicle Operators Registration (CVOR). He did so and was refused. That refusal was preceded by a Notice of Refusal to issue a CVOR and Operating Certificate.

The Notice in a standard format states the grounds upon which the Refusal has been decided by the Registrar and gives the CVOR Applicant the opportunity to show cause why a CVOR should be granted. If the Registrar remains unconvinced of the Applicant's case as in this instance a formal Refusal is issued. An appeal from that decision comes before this Tribunal.

ISSUES:

The legislation gives the right to persons to operate a commercial transport business as long as they are issued a CVOR certificate. The issuance of an Operating License is coincident with the issuance of the CVOR certificate to complete the legal requirements for commercial carriage in Ontario. The legislation also gives the Registrar, as the regulator charged with highway safety, the right to refuse to issue a CVOR on certain grounds. The grounds in this case are that the Applicant's company is "related" to another, in fact run by his father. The father's company has had a poor safety audit and has been designated a "conditional" operator. It was asserted also that the son played an active role in the father's company.

It is the position of the Registrar that as the person charged with highway safety the son's company (the Applicant), if granted a CVOR will become a fiction with a clean safety record under which the father's company can continue to operate its assets with all that this entails from the point of view of insurance and its record with the regulator.

It is the position of the son that his company is unrelated to the father's and that it will run as such. His father has neither ownership nor operational control of his company. He should not be prohibited from entering the commercial transport business on the grounds that he happens to be the son of a person who operates a company with a poor safety record, despite the fact that there is historical data available to the regulator over the years that suggests such "fictional" relationships have occurred within other families. The son insists that before any regulatory body forecloses a person from pursuing the occupation of his choice that person should be faced with substantial direct evidence of the safety contingency that is of concern to the regulator. The refusal to issue a CVOR certificate is such a foreclosure.

EVIDENCE:

The case the Applicant had to meet on this appeal was essentially set forth in the Notice of Refusal to issue a CVOR certificate dated May 6, 2003. The Registrar notified the Applicant that he was:

“not satisfied that the Applicant will operate its commercial motor vehicles safely and in accordance with this Act, the regulations and other laws relating to highway safety, based on:

- (a) The safety record of 1126312 Ontario Inc. (the father's company)
- (b) I am of the opinion that Charan Jeet Garcha (the father) directly or indirectly controls or manages or will control or manage the Applicant

The safety record of 1126312 (the father's company) was introduced through Mr Frank Fabian a Facility Audit Administrator with the Ministry of Transport. In this position he is charged with the responsibility of overseeing the quality of the audits carried out on CVOR certificate holders in the province. The audits when completed give the regulator an overview of an operator's safety record and a safety rating is assigned. The Registrar as regulator has established a methodology for tracking a carrier's performance. This tracking consists of a measurement of the record of a specific carrier against carriers of the same scale of operation (adjusted fleet size). The data collected for this purpose are inserted into the carrier's record by way of weighted average under the headings: Accidents, Violations and Inspections. The grading is done by the assignment of points under each of the headings, weighted 2 x1 x 1 for the three categories respectively. When that grade is compared to the standard for the same size of carrier an overall score is obtained. At certain levels of safety shortfall stated as a percentage the regulator takes a series of administrative actions up to and including withdrawal of the operator's right to carry on commercial transportation within Ontario by cancellation of its CVOR.

The specific audit of concern was carried out on October 23 2002. Mr Fabian noted that the contact person for the father's company was Gurpal the son. He met the son at the company's premises and was greeted by Gurpal as general manager. Mr. Fabian testified that the son had considerable knowledge of the father's operation, for example his ability to locate items required for the audit. There was also evidence that Gurpal once he became a licensed mechanic with his own establishment late in 2002 did some repair and maintenance work on some of his father's vehicles. It appears from the testimony that Mr. Fabian concluded by these indicia that Gurpal was directly involved with the management of the father's company. As he was also president of his own company it was posited as reasonable that while there may not have been a de jure relationship between the two companies there would be a defacto one. There was also evidence that after charges were laid resulting from the audit that Gurpal showed up at the settlement of the proceedings along with the agent representing the father's company. This agent Mr. Doran was retained to assist the father's company in its dealings with the regulator.

As to (b) the evidence was of necessity largely circumstantial in that it dealt with the future possibility of use by the father of the Applicant Company should it be granted a CVOR.

The Respondent led evidence on the connection between the two companies from which the Tribunal was asked to draw the conclusion that the Registrar's opinion expressed in the Notice of Refusal was correct and a CVOR should not issue to the Applicant.

The evidence relied upon by the Regulator included the fact that the father and son lived at the same address and that this residential address was also that of the business.

There was evidence that the son helped out in his father's company. Mr. Fabian outlined his dealings with Gurpal during the audit of the 1126312. Gurpal was listed as the contact person. As well he communicated on behalf of his father due to the latter's language difficulty.

Additional evidence on the issue of the Registrar's fear that the father would wind up running the son's company (the Applicant) was led through Mr Donald Gillett a Safety Rating Administrator employed by the Ministry of Transport. His duties include screening applications for prospective CVOR holders. He will review issues such as relationships to existing CVOR holders and will flag and package matters of concern to be placed before the Deputy Registrar for review. His review relevant to this matter included, along with the matters stated, that there had been a prior application for a CVOR by the Applicant, which had been refused. This occurred in October 2002 and was followed by a Refusal by the regulator on the same grounds as are before the Tribunal in the instant case, namely the Applicant's affiliation with his father's company a "Conditional" carrier. The Applicant appealed the Refusal to this Tribunal. The Appeal was withdrawn and was dismissed.

Additionally Mr. Gillett informed the Tribunal that the Registrar issued a seven-day Suspension and Seizure order against the father's company to take effect March 28 2003. The requisite show cause hearing preceded this issuance. Mr. Gillett, the Applicant's father and Mr. Doran as his agent, attended that hearing held on February 12, 2003. The minutes of the hearing do not indicate the son as present but there is a reference to him as general manager and dispatcher. An appeal was launched to the Tribunal and a hearing was held on May 16 2003. At the commencement of the hearing the Appeal was abandoned.

Finally in the sequence set out by Mr Gillett is the second Application for a CVOR on behalf of the Applicant on April 23, 2003, which is the subject of this Appeal. It was the position of the regulator that the Applicant proceeded with the CVOR application when he knew the bad turn of fortune of the father's company. The Applicant set forth the same objections to this Refusal as the first, namely the fact that the Applicant Company should not be judged on the basis of the safety record of his father's company.

The evidence on behalf of the Applicant Company was introduced through Gurpal Singh Garcha. He stated that the fact that he and his father inhabited the

same household was not unusual in his culture and no inference of parental influence over his business affairs should be drawn from this fact.

He stated that he was married, has a child and is a licensed mechanic. He operates a repair shop and has done some work on his father's trucks commencing this year. Through his company, the Applicant also controls two trucks, which he subs out to fulfill a gravel contract. Part of the reason he wants a CVOR certificate of his own is to allow him to run the trucks himself. He denies that he was ever general manager or dispatcher or ever had any signing authority at the bank. The fact that he appeared at the audit and court appearances involving his father's company can be explained by both his father's absence and his difficulty with English. Further he was never paid for any of the managerial functions the regulator alleges he carried on in his father's company.

He claimed that the Tribunal should draw the conclusion, absent any direct evidence to the contrary, that as a mature man (mid twenties) with domestic responsibilities and professional qualifications he should not be denied the right to earn a living in the industry of his choosing. He seemed to be saying that it was an invalid conclusion by the regulator that because he or any other son helps out with his father's business it necessarily followed that his father would "run" his own transport company if his application for a CVOR were approved.

The Applicant stated that if the regulator was in doubt of his sincerity he could put restrictions upon any issued CVOR. Counsel for the Respondent informed the Tribunal that such an option was not open to the Registrar under the present legislation but that amendments to this end were in the offing.

THE LAW:

Section 16(2) of the *Highway Traffic Act* states:

No person shall drive or operate a commercial motor vehicle on a highway unless the operator is the holder of a CVOR certificate that is not under suspension.

Section 17 of the *Highway Traffic Act* states:

(1) The Registrar shall issue a CVOR certificate to every person who applies therefore in the prescribed form and meets the requirements of this Act and the regulations.

(2) The Registrar may refuse to issue a CVOR certificate to an Applicant if the Registrar has reason to believe, having regard to the Applicant's safety record and any other information that the Registrar considers relevant, that the Applicant will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety.

(3) The Registrar may refuse to issue a CVOR certificate to an Applicant if the Applicant is related to'

(a) A person whose CVOR certificate has been cancelled, is or has been under suspension or is or has been subject to a fleet limitation:

(4) An Applicant is related to a person for the purpose of subsection (3) if

(c) either the Applicant or the person, directly or indirectly, controls or controlled or manages or managed the other

Section 50 of the Highway Traffic Act states:

(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) may appeal the decision to the Tribunal.

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

APPLICATION OF THE LAW TO FACTS:

This is a case like many others in regulated industries where the laws of incorporation and public protection intersect. Unquestionably a person who has been granted articles of incorporation is entitled to carry on the business authorized by those articles. It is also true that if the enterprise permitted under the incorporating documents involves a regulated industry certain authority must be granted to the regulator to ensure the operation of entities under his jurisdiction comply with the governing legislation. In the case of commercial motor vehicle transportation one of the powers granted to the Registrar is the withholding of a carrier's CVOR without which it cannot operate legally within Ontario.

Experience has informed the regulator that operators with bad safety records will attempt to eliminate the burden placed upon their enterprise by such a record by incorporating a new corporation and operating the very same assets and personnel under it. In order to prevent this a watch is kept on applications for such attempts and CVORs are denied the new entity should the Registrar be convinced of improper motives behind the application.

There is no issue that the father's company is a company that has been under suspension and thereby falling within section 17(3)(c) of the Act. The remaining issue therefore becomes whether the evidence is more consistent with the Registrar's position that the Applicant's relationship with the father's company meets the test set forth in 17(4)(c) or whether it is more consistent with the Applicant's testimony. On the basis of the strength of this relationship the Tribunal is asked to affirm the regulator's belief that the father will be running the son's prospective business venture for his own ends. The consequences of upholding the regulator's surmise is the denial of the son to pursue his chosen livelihood, not on the basis of anything he has or has not done but on the basis of what someone else might do.

The Tribunal on the other hand must give some sway to the experience of the regulator, as the person charged with highway safety. As well the Tribunal finds that on the evidence the regulator had every right to assume the son had sufficient connection to the father's company to put him within section 17(4)(c). The question remaining is whether this assumption comports with the true situation between father and son.

The son (the Applicant) gave his evidence in a straightforward manner and asks the Tribunal to accept the evidence of the relationship as familial not corporate.

As there is no leeway in the legislation for a CVOR certificate to be issued subject to conditions, which would permit an oversight period, the Tribunal must decide whether the Regulator's case is of sufficient weight to justify the outright denial of a chosen occupation. There was a suggestion that the father's company could improve its safety record thereby removing the motive to insinuate that company's operation into the Applicant's.

While this may allay the fears of the Registrar it would not remove the father's company from the definition in 17(3)(a). The Applicant's attempt to operate a haulage business would still be under the same regulatory pall.

The evidence is more consistent with that of a familial relationship than one of control by the father over the son's company.

The Tribunal accepts the explanation of the son and orders that a CVOR certificate issue to the Applicant.

LICENCE APPEAL TRIBUNAL

William McIntosh, Vice Chair

Released: October 24, 2003

Filename: 1719.cvor.Garcha Transport Inc

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Divisional Court is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

QUICK SERVICE TRANSPORTATION LTD.

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

AND IN THE MATTER OF the Commercial Vehicle
Operator's Registration (CVOR) certificate 137-515-240
issued to Quick Service Transportation Ltd.;

AND IN THE MATTER OF an Application by Quick Service
Transportation Ltd. dated May 30, 2003, for a hearing before
the Licence Appeal Tribunal pursuant to section 50(1) of the
Highway Traffic Act appealing the Cancellation and Seizure
Order of the Registrar of Motor Vehicles dated May 23,
2003;

AND IN THE MATTER OF the plate portion of permits held
by Quick Service Transportation Ltd.;

AND IN THE MATTER OF the safety record of Quick
Service Transportation Ltd.

TRIBUNAL: JOHN ORT, Member

APPEARANCES: QUICK SERVICE TRANSPORTATION LTD., represented
by James F. Lee, Agent,
REGISTRAR OF MOTOR VEHICLES, represented by
Patrick Moore, Counsel.

DATES OF
HEARING: September 2, 3, and 4, 2003 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") by Quick Service Transportation Ltd. (the "Applicant") respecting a Cancellation and Seizure Order dated May 23, 2003, (the "Order"), issued by the Deputy Registrar of Motor Vehicles (the "Registrar") pursuant to sections 47 and 47.1 of the *Highway Traffic Act* (the "Act").

The Cancellation and Seizure Order, Exhibit 1, states the following:

AND WHEREAS I have considered your submissions and your safety record, I still remain concerned for highway safety.

AND WHEREAS I am still of the opinion that Jaljit and/or Dale Kooner directly or indirectly control or manage Quick Service Transportation Ltd.

NOW THEREFORE IT IS ORDERED that pursuant to Section 47 & 47.1 of the Highway Traffic Act that as of 3rd day of June, 2003 CVOR certificate # 137-515-240 and the plate portion of permits for all commercial motor vehicles and trailers issued to Quick Service Transportation Ltd. be cancelled and the plate portion of permits, or if issued by a jurisdiction other than Ontario, the permits, and the number plates be seized.

This cancellation and seizure will be effective the 3rd day of June, 2003 at 9:00 a.m. Eastern Standard Time.

Counsel for the Registrar also argued that the Applicant, Quick Service Transportation Ltd. is related to Grand Pacific Transport Inc., a corporation whose CVOR certificate was cancelled.

ISSUE:

- 1) Is Quick Service Transportation related to Grand Pacific Transport Inc., a company whose CVOR certificate was cancelled?
- 2) Is there a valid concern for highway safety based upon the Applicant's record?
- 3) Should the Tribunal confirm, modify or set aside the Registrar's order?

EXHIBITS:

Exhibit #1 - Cancellation and Seizure Order dated May 23, 2003, issued by the Deputy Registrar of Motor Vehicles;

Exhibit #2 - Notice of Appeal Form received at the Tribunal on May 30, 2003, filed by the Applicant;

Exhibit #3 - Respondent's Appeal Book;

Exhibit #4 - Commercial Vehicle Operator Record dated August 13, 2003, Carrier Control Performance Analysis Report dated August 31, 2003, and cover page, filed by the Respondent; and

Exhibit #5 - National Safety Code Quantifiable Audit, filed by the Respondent.

FACTS:

Bernadette McKenna testified on behalf of the Registrar, Ann Marie Andrews. Baljit Sandhu testified for the Applicant.

RESPONDENT'S EVIDENCE**Testimony of Bernadette McKenna:**

Ms. McKenna has worked for the Ministry of Transportation (the "Ministry") for twenty-six years. She is now a Carrier Safety Rating Administrator in the Carrier Safety and Enforcement Branch.

As set out at tab 28 of exhibit 3, the Commercial Vehicle Operator's Registration (CVOR) system follows the on-road safety performance of commercial vehicle operators. The CVOR system monitors reportable accidents, convictions, vehicle mechanical safety inspections, carrier information such as fleet size, and Ministry of Transportation interventions.

Reportable accidents involve personal injury and/or property damage over \$1,000 dollars. Points are assigned to accidents based on such factors as the presence of impropriety, charges, and the severity of damage, being property damage, personal injury, or fatal injury. An accident violation rate is calculated based on accident points per vehicle per month.

A conviction violation rate is calculated similarly based on safety-related conviction points per vehicle per month. Also, an inspection violation rate is calculated based on points on vehicle inspection per vehicle unit inspected.

The violation rates in each category are compared against applicable threshold values to determine the Percentage of Threshold. The accident violation rate is weighted at double the rate for convictions and inspections in combining the scores to determine the Overall Percentage of Threshold. Only one carrier in a thousand has an Overall Percentage of Threshold score that exceeds one hundred.

Drivers of the Applicant were involved in several accidents, as set out at tab 9 of exhibit 3 and summarized in the Applicant's CVOR record on page 13 of tab 6 of exhibit 3.

On March 4, 2002, the driver of a vehicle lost control due to fatigue and drove off the roadway. He was injured.

On April 12, 2002, property damage resulted when a fatigued driver lost control of his vehicle, crossed over two lanes, and ended up in a ditch.

In addition, on July 6, 2002, a driver was unable to stop and struck a preceding vehicle that had slowed down to avoid debris on the road.

As shown in the CVOR record dated April 22, 2003, tab 7 of exhibit 3, the Applicant's drivers were involved in 25 safety-related convictions from March 23, 2001, to March 22, 2003. The violations during that two-year period included 15 convictions for speeding. There were also three logbook violations related to hours of work.

Twelve safety inspections of the Applicant's vehicles resulted in a 50 % out-of-service rate, as summarized on page 16 and 17 of tab 7 of exhibit 3.

According to tab 8 of exhibit 3, from April 24, 2001, to April 23, 2003, the Overall Percentage of Threshold was 160.5, based on a corrected fleet size of five. For accidents the Percentage of Threshold was 206.0; for convictions it was 192.8; and for inspections the figure was 37.0. For the last six months of that period, the Overall Percentage of Threshold was 51.7; the Percentage of Threshold for accidents was 0; the percentage for convictions was 159.6; and the percentage for inspections was 47.2.

Quick Service Transportation Ltd., the Applicant, is related to Grand Pacific Transport Inc. ("Grand Pacific"). A Cancellation and Seizure Order concerning Grand Pacific was issued on February 11, 2002 and is still in effect.

Baljit Sandhu is the only officer of the Applicant. She is the sister of Jagjit Kooner, who was the president and director of Grand Pacific. In addition, Ms. Sandhu is the sister of Daljit Kooner, also known as Dale Kooner, who acted as the manager and dispatcher of Grand Pacific.

The telephone number of the Applicant, shown at tab 19 of exhibit 3, is the same as the telephone number for Grand Pacific shown on the letter dated February 4, 2002, at tab 14 of exhibit 3. The address of Grand Pacific shown on that letter is a former address of the Applicant.

As detailed at tab 22 of exhibit 3, many of the vehicles now owned by the Applicant were previously owned by Grand Pacific.

Some of the drivers that worked for Grand Pacific now work for the Applicant.

In a telephone conversation on March 6, 2003, Baljit Sandhu identified Dale Kooner as the manager of the Applicant. Ms. McKenna does not mention this in her description of the conversation at page 25 of tab 6 of exhibit 3. Instead, Dale Kooner is described there as the dispatcher of the Applicant.

A warning letter dated August 26, 2002, addressed to the Applicant, tab 10 of exhibit 3, was sent to a wrong address.

A show-cause meeting was held at the Ministry of Transportation on May 8, 2003. Baljit Sandhu, Marie Andrews, and James Lee attended on behalf of the Applicant.

APPLICANT'S EVIDENCE

Testimony of Ann Marie Andrews:

Ms. Andrews has worked for the Applicant since July 10, 2002. She first dealt with safety issues and recently has done payroll. Previously, she worked for a year with another trucking company. She successfully completed courses in British Columbia on compliance and hours of service; however, Ms. Andrews testified that she is not well trained in the safety code.

On August 1, 2003, the Applicant hired a new dispatcher, Kennie Adams, who has more experience with safety matters than Ms. Andrews.

The previous dispatcher, Darryl, had a habit of not showing up for work regularly. Ms. Andrews heard that Darryl forced drivers to work longer than is allowed.

Many of the Applicant's drivers think nothing of speeding tickets. They just pay them.

The Applicant is now developing a policy regarding offences. After a third offence, a driver may be terminated.

Some drivers were terminated. Ms. Andrews would like to fire more of them.

Drivers do not respect the rules on reporting accidents. The Applicant does not really enforce its rules. After a driver was involved in an accident in Ontario on June 2, 2003, Ms. Andrews was only advised weeks later. She spoke to the driver by telephone and told him that he must file an accident report. No report has been filed to date.

The Applicant did not achieve what it promised to the Ministry of Transportation at the show-cause meeting.

As shown in exhibit 4, the Overall Percentage of Threshold was 180.0 for July 14, 2001, to July 13, 2003. For February 1, 2003, to July 31, 2003, it was 98.1 and the Percentage of Threshold was 133.4 for accidents, 102.6 for convictions, and 22.8 for inspections.

Exhibit 5 presents results of a British Columbia National Safety Code Quantifiable Audit. As summarized on page 88 of the exhibit, the Applicant's overall score was unsatisfactory. Some driver abstracts were missing. Log book violations were discovered.

Baljit Sandhu is the owner of Quick Service Transportation Ltd. Ms. Sandhu signs the cheques. When employees have a problem that they cannot handle, they go to Ms. Sandhu.

Testimony of Baljit Sandhu:

Ms. Sandhu's maiden name is Kooner. Daljit, Jagjit, and Amarjit are her brothers.

Since February 2002, Ms. Sandhu is the president of the Applicant. She is the sole officer, director, and shareholder of the company. Although she may consult with her husband, she decides what assets the Applicant is to purchase.

Ms. Sandhu purchased Quick Service Transportation Ltd. and its operating authorities for \$5,000. She started at her house and later moved to the Holt Road premises previously occupied by Grand Pacific.

Ms. Sandhu was not a shareholder of Grand Pacific. She worked at that company for her brother Jagjit Kooner as an accountant for three years until the forced termination of the business. She then paid her brother Jagjit \$4,000 to \$4,500 for computers and computer programs. She did not pay for trucks purchased from Grand Pacific. She simply took over payments on eighteen to twenty of the trucks. In addition, she started paying rent for premises at Holt Road previously occupied by Grand Pacific. She also took over the telephone numbers of Grand Pacific. She left the numbers in the name of Grand Pacific, because the cost would be \$500 per telephone line to change them.

The Applicant also hired some former employees of Grand Pacific, including Darryl, the dispatcher. Darryl had a drug problem. Quite often he did not come to work. Ms. Sandhu then called her brother Daljit and he came and filled in as the dispatcher. Ms. Sandhu testified that Daljit is not a manager of the Applicant. She does not know what her brother Daljit does for a living.

Ms. Sandhu thinks that the Applicant's record is bad, but not too bad. Ms. Andrews tried to improve the Applicant's CVOR record, but it was not much improved. Thus, Ms. Sandhu hired Kennie Adams. She believes that things will improve with Mr. Adams.

LAW:

The *Highway Traffic Act*, Revised Statutes of Ontario, 1990, Chapter H.8, as amended states the following:

- 47.(1) Subject to section 47.1, the Registrar may suspend or cancel,
 - (a) the plate portion of a permit as defined in Part II;
 - (b) a driver's licence; or
 - (c) a CVOR certificate,

on the grounds of, ...

(f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or

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

(2.1) Subsection 17(4) applies, with necessary modifications, for the purpose of determining who are related parties under clause (1)(f).

17.4 An applicant is related to a person for the purpose of subsection (3) if,...

(c) either the applicant or the person, directly or indirectly, controls or controlled or manages or managed the other;...

47.1(1) Before taking any action under clause 47(1) (a) or (c) or subsection 47(2), the Registrar shall notify the person whose plate portion of a permit of CVOR certificate is to be affected by his or her proposed action.

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

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

205.(1) The Registrar shall,

(c) keep,

(i) a record of all motor vehicle accidents in Ontario, reported to him or her or concerning which he or she procures information,...

Regulation 424/97, as amended by regulation 197/99, made under the Act adds the following:

5.1(1) The safety record of an operator shall contain a record of the following information:

1. Any suspension or cancellation of the plate portion of the permit under clause 47(1)(a) of the Act.

2. Any suspension or cancellation of the operator's CVOR certificate under clause 47(1)(c) of the Act.

6. Any warning letters sent by, or interviews held with, Ministry officials relating to the operator's safety performance and practices.

7. Any conviction related to the operation of a commercial motor vehicle or a vehicle drawn by it, for an offence committed by an operator, its agents or employees,

i) under this Act or under any other Act of the Legislature or the Parliament of Canada or any regulation or order made under any of them, or

ii) for an offence under a municipal by-law regulating traffic on the highways, or orders made under any of them, except convictions for offences for standing or parking.

8. The particulars of any accident involving a commercial motor vehicle operated by the operator or a vehicle drawn by it.

9. The results of any inspection under section 82 or 82.1 of the Act or any similar inspection of a commercial motor vehicle operated by the operator, or a vehicle drawn by it.

10. The results of any investigation or inspection of the records of the operator,...

12. The results of any audits of the operator.

14. The operator's fleet size.

17. Any compilations or analyses of any of the information in paragraphs 1 to 16.

APPLICATION OF LAW TO FACTS:

1) Is Quick Service Transportation related to Grand Pacific Transport Inc., a company whose CVOR certificate was cancelled?

The Tribunal finds as a fact that Baljit Sandhu is the controlling mind of Quick Service Transportation Ltd. Ms. Andrews testified that employees come to Ms. Sandhu when they have a problem that they cannot handle. Ms. Sandhu signs the cheques. Although she may discuss asset purchases with her husband, Ms. Sandhu decides what to buy.

Ms. Sandhu and Ms. Andrews explained the presence of Dale Kooner. They stated that Darryl, the dispatcher, had a habit of not coming to work regularly. When Darryl did not show up, Ms. Sandhu called her brother Dale and he filled in as a dispatcher. There was no evidence that Dale had greater powers as a dispatcher than Darryl. The Tribunal does not find that Dale Kooner, directly or indirectly, controls or controlled or manages or managed Quick Service Transportation Inc.

Ms. Sandhu is the sole shareholder, director, and officer of the Applicant. At Grand Pacific she was merely an employee in accounting. Her brother Jagjit Kooner ran Grand Pacific. Jagjit is not involved in Quick Service Transportation Ltd. Thus, neither Dale Kooner nor Grand Pacific Transport Inc. are persons related to the Applicant pursuant to section 17(4) of the Act. The Tribunal finds that the Registrar does not have reason to believe in accordance with section 47(1)(f) of the Act, having regard to the safety record of a person related to the Applicant, that the Applicant will not operate a commercial motor vehicle safely or in accordance with the Act and regulations.

2) Is there a valid concern for highway safety based upon the Applicant's record?

Quick Service Transportation Ltd. has a poor safety record. The Commercial Vehicle Operator Record for the Applicant shows that from April 24, 2001 to April 23, 2003, there were 25 safety-related convictions, including speeding and logbook violations. It also shows three accidents resulting in points being assessed against the Applicant during that time. The logbook violations suggest that drivers worked longer than is allowed. Perhaps that is why two of the accidents involved driver fatigue. The CVOR also shows a 50% out-of-service rate for safety inspections. The Overall Percentage of Threshold was 160.5 for the two years. Ms. McKenna testified that only the worst .1% of commercial vehicle operators have an Overall Percentage of Threshold over 100.

There has not been sufficient recent improvement in the safety record of the Applicant. The Overall Percentage of Threshold for July 14, 2001, to July 13, 2003, was 180.0. From February 1, 2003, to July 31, 2003, it was 98.1.

The Act is a consumer protection statute. It is more important to ensure the safety of the public than to give the Applicant additional time to improve its safety record.

The Tribunal finds as a fact that, having regard to the safety record of the holder, there is reason to believe that the holder will not operate a commercial motor vehicle safely or in accordance with the Act and regulations and other laws relating to highway safety. Thus, the Registrar's order complies with section 47(1)(f) of the Act.

DECISION:

Accordingly, by virtue of the authority vested in it under section 50 of the *Highway Traffic Act*, the Tribunal confirms the Cancellation and Seizure Order of the Deputy Registrar dated May 23, 2003, and orders that the CVOR certificate numbered 137-515-240 and the plate portion of permits for all commercial motor vehicles and trailers issued to Quick Service Transportation Ltd. be cancelled and the plate portion of permits, or if issued by a jurisdiction other than Ontario, the permits, and the number plates be seized.

LICENCE APPEAL TRIBUNAL

John Ort, Member

Released: October 7, 2003

1725.cvor.Quick Service Transportation

THOMAS J. J. HERRIMAN

IN THE MATTER OF an application by Thomas J.J. Herriman dated June 4, 2003, for a hearing before the Licence Appeal Tribunal pursuant to section 50(1) of the *Highway Traffic Act*, to consider the appeal of the Suspension and Seizure Order of the Registrar of Motor Vehicles dated May 21st, 2003;

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

AND IN THE MATTER of the Commercial Vehicle Operator's Registration (CVOR) 036-220-565 issued to Thomas J. Herriman;

AND IN THE MATTER of the plate portion of permits issued to Thomas J. Herriman;

AND IN THE MATTER of a failed MTO Facility Audit by Thomas J. Herriman dated April 10, 2003.

TRIBUNAL: ELIZABETH SPROULE, Presiding Member

APPEARANCES: MURRAY FORBES, Counsel for the Respondent

THOMAS J. HERRIMAN, Applicant.

DATES OF HEARING: October 3, 2003 Hamilton

REASONS FOR DECISIONS

An oral hearing was held on October 3, 2003, at Hamilton, Ontario, to consider the Applicant's appeal pursuant to section 50.(1) of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Suspension and Seizure Order imposed by the Deputy Registrar pursuant to section 47(1) of the HTA.

BACKGROUND:

In January 2002, a Notice of Suspension and Seizure for 30 days, dated January 15, 2002, was issued and sent to the Applicant. This notice, Exhibit 3, tab 2, was based on the safety record of the Applicant. The Applicant was given an opportunity on February 5th, 2002, to meet with the Deputy Registrar of Motor Vehicles to show cause why the Suspension and Seizure Order should not be issued. As a result of this meeting the Notice of Suspension and Seizure was set-aside on two conditions:

- 1) that the Applicant successfully pass a Defensive Driving Course by April 12, 2002, and
- 2) that the Applicant successfully pass an MTO Facility Audit.

These conditions were set out in a notice (Exhibit 3, tab 7) dated February 6th, 2002, and sent to the Applicant by courier.

The Applicant successfully completed the required driving course but failed the Facility Audit on April 10, 2003. Following the failed audit a letter, (Exhibit 3, tab 10), dated April 23, 2003, was sent to the Applicant, by the Respondent, requiring a letter from him explaining what had been done to correct the issues brought up in the audit - this letter was to be received by the Respondent by May 15, 2003. The Applicant responded by letter dated May 9th, 2003, (Exhibit 3, tab 11). A Suspension and Seizure Order for 7 days was then issued May 21, 2003.

The Applicant indicates in his Notice of Appeal that he disagrees and wishes to appeal "the failing of a safety audit over 2 air lines touching (touching but in working condition) 12 pts were deducted out of 40 for this. The rest of my safety audit of vehicle was perfect. I take the mechanical safety and physical appearance of my truck seriously".

ISSUE:

Should the Tribunal confirm, modify or set aside the Registrar's order?

EXHIBITS:

Exhibit #1 - Suspension and Seizure Order dated May 21, 2003, issued by the Deputy Registrar of Motor Vehicles;

Exhibit #2 - Notice of Appeal Form received at the Tribunal June 16, 2003, filed by the Applicant;

Exhibit #3 - Respondent's Appeal Book, containing:

- tab 1 - Suspension and Seizure Order dated May 21, 2003,
- tab 2 - Notice of Suspension and Seizure dated January, 2002,
- tab 3 - Sanction Analysis,
- tab 4 - CVOR, search date January 10, 2002,

- tab 5 - police accident reports (3),
- tab 6 - notes of show cause meeting dated February 5, 2002,
- tab 7 - Notice of Set-Aside dated February 6, 2002,
- tab 8 - Confirmation of enrolment and payment for Defensive Driving Course,
- tab 9 - Facility Audit Findings,
- tab 10 - Letter advising of Audit failure dated April 23, 2003,
- tab 11 - Letter from Tom Herriman to MTO dated May 9, 2003,
- tab 12 - Summary of CVOR,
- tab 13 - CVOR dated July 24, 2003,
- tab 14 - Facility Audit Guide

Exhibit 4 - Appendix D, from the Commercial Vehicle Operator Registration System guide, Table of Threshold values;

Exhibit 5 - Accident Weighting Table

Exhibit 6 - Appendix E, Commercial Vehicle Operator Registration System guide, Motor Vehicle Accident Report Template

EVIDENCE OF THE RESPONDENT

Mr. Louis Janetos, an employee of the MTO for 18 years, was the Respondent's only witness. Mr. Janetos, a safety administrator, had not actually been involved with Mr. Herriman's file but stated he was familiar with the type of reports prepared and relied upon by the Respondent.

Mr. Janetos explained the documents contained in Exhibit 3, and in some detail explained the calculations found on the Sanction Analysis, (Exhibit 3, tab 3), which was enclosed with the original Notice of Suspension and Seizure sent to the Applicant. Mr. Janetos also reviewed and explained in some detail the Facility Audit Findings, (Exhibit 3, tab 9). Mr. Janetos explained the driver profile compliance rate was found to be 22.2%, the vehicle profile compliance rate was found to be 4.4%, and the Safety Programs and Training profile compliance rate was 37.5%. Mr. Janetos pointed out that the notes from the show cause meeting held on February 5, 2002, indicate that Mr. Herriman was given a self-audit guide at that time.

EVIDENCE OF THE APPLICANT

Mr. Herriman testified that he has been in business since 1993, that his background was construction, senior management positions and that he is very safety conscious.

The Applicant gave evidence concerning the accidents referred to in the Sanction Analysis (Exhibit 3, tab 3). He stated that he chose to take responsibility for the accident of October 20, 2001, involving an improper move causing property damage, rather than fight it, as the attending police officer told him that there would be no points deducted and he concluded it would cost more time and money to fight it than was worth it. He described this decision as a "poor management decision". The other accident, wherein he was also the driver, occurred on March 28, 2001, and involved property damage to a pick up truck and a conviction of following too close. Again Mr. Herriman took responsibility for the accident however he testified that no one was injured, that charges were laid against one of the other drivers and he was told that there would be a 6 point penalty. Mr. Herriman expressed his frustration that on the sanction analysis there were 12 points attributed to accidents which did not correspond with what he understood to be the points involved according to the police and he questioned that the MTO seemed to be overriding the law. The accident of December 27, 2000, involved a different driver, one Bruce Trunbull, and involved property damage only on private property - Mr. Herriman expressed his dismay as to why that was even mentioned.

The Applicant testified that he went to the show cause meeting understanding it to be a 'casual meeting'. At the meeting he agreed to take a course in defensive driving but he did not understand that it was a condition of the Notice of Suspension and Seizure being set aside. He also came away from the meeting with the understanding that there was a possibility of an audit being done, but again not that it was a condition.

With respect to the failed facility audit, Mr. Herriman explained some of the deficiencies in the Drivers profile, such as not identifying the driver by name rather indicating 'me'. He indicated that he drives his own truck thus the 'me' was of course himself. He confirmed that he had been only noting start times on his driver time records but not finish times. He indicated that he has kept complete time records with all required information from January 1, 2003, but that the records from October and November 2002 were the subject of the audit. With respect to records of maintenance it was Mr. Herriman's evidence that he did have maintenance records - not all had the odometer readings where required, however he suggested he did have the right information with respect to repairs but he simply did not organize them in the way the Respondent apparently required.

With respect to the truck inspection, Mr. Herriman testified that the inspection went on for over one and a half hours and the inspector discovered the touching airlines by feeling it with his hand on the third time looking under the truck. Mr. Herriman admitted that they were worn, but not worn out and argued that if the 'hose went' he would have "ample opportunity to get off the road", and that it wasn't a danger.

In cross-examination Mr. Herriman testified that he disagrees with the police account and diagram as to the position of the cars involved in the accident of March 28, 2001. The report indicates that there was an injury and that only he, Mr. Herriman, was charged.

Mr. Herriman reiterated that he was not aware of any injury relating to the accident and believed there was another driver charged based on the information provided to him at the time of the accident. Mr. Herriman stated that he had not challenged the police report as he had not looked at it until preparing for the hearing before the Tribunal.

When Mr. Herriman was questioned about the incomplete time records and logs he replied that it was not necessary for what he does to keep a daily log book.

Mr. Herriman was questioned as to why he was not aware of the conditions of the set-aside as the notes of the show cause hearing would suggest it was discussed and the Notice sent to him by courier dated February 6th, 2002, clearly states the 2 conditions. Mr. Herriman admitted that he was given a self-audit guide the day of the show cause hearing and that he might have received the Notice of February 6th, but it still was a surprise to him.

Mr. Herriman also stated in cross -examination that he did not realize that points were coming off his CVOR and that he doesn't "have full working knowledge of the MTO descriptions or thinking in some of these situations".

When asked if he was warned of the audit, Mr. Herriman stated that he had been called ahead of time and advised that it would be taking place.

THE LAW

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

47(1) Subject to section 47.1, the Registrar may suspend or cancel,

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

Section 12 of O.Reg. 4/93 under the H.T.A. states:

12. (1) a driver is not required to make a log on a day on which,

- (a) the driver is instructed to drive within a 160 kilometre radius of the place where he or she reports for work;

- (b) the driver returns to the place where he or she reports to work within fifteen hours of leaving it and immediately goes off duty; and
- (c) the driver's operator keeps records of the times the driver goes on and off duty and of the total time the driver is on duty.

Section 13 of the same regulation reads;

13. A driver who is ordinarily exempted by section 2 or 12 from making a daily log shall, when driving a commercial motor vehicle in a circumstance that requires him or her to make a daily log, make a log for the day and enter it in the total period of time that the driver was on duty in the preceding seven or thirteen consecutive days.

APPLICATION OF THE LAW TO THE FACTS

The Respondent, under s. 47 above, has the authority to Suspend or Cancel a CVOR or plate portion of a permit if there is reason to believe that the holder will not operate a commercial vehicle safely or in Accordance with the Act, the regulations or other laws relating to highway safety.

It was Mr. Herriman's safety record which lead to the initial Notice of Suspension but it is clear from the evidence that this was not the basis of the final Suspension Order, rather it was the failure of a facility audit. It is understandable and appropriate that the multiple accidents within a relatively short period of time would bring Mr. Herriman to the attention of the Respondent.

Mr. Herriman indicated in his testimony that he was not aware that it was a condition of the set-aside that he pass an audit. This was however clearly stated in the notice sent to him on February 6th, 2002, and he in fact was given a guide to do a self-audit on February 5, 2002. He confirmed he knew it was a possibility and that he was called before hand. The Tribunal cannot but find as a fact that Mr. Herriman knew he would be subjected to an audit, that every effort was made to bring to his attention the importance of it, that he was given fair warning as to what it would entail and time to prepare for it. The show cause meeting was in February 2002, and the audit was in April 2003.

In the audit guide given to Mr. Herriman it sets out in detail how he will be scored for each profile, driver, vehicle and safety programs and training. It is made clear that keeping accurate logs and/or time records are important. Mr. Herriman indicated in his testimony that he believed that he was exempt from keeping a daily log. That in fact might be the case **but the evidence before the Tribunal did not make this clear.** Section 12 of O.Reg. 4/93 above sets out the conditions when a driver will be exempt and it includes 3 conditions, one being that (c) the driver's operator keeps records of the times the driver goes on and off duty and of the total time the driver is on duty. Mr. Herriman did not do this, apparently, until January 1, 2003, thus he was not treated as exempt and therefore had a dismal compliance rate.

The audit guide makes reference to exemptions and gives directions on to how to get information to determine whether the exemption applies.

The audit guide book also indicates that the audit month will be a month selected from the previous 6 months. There was no evidence before the Tribunal to suggest that the dates reviewed were outside of the 6 month period and they were in fact at least 8 months after the show cause meeting where the audit information had been given to Mr. Herriman. Again, there is no evidence that Mr. Herriman was treated in an unfair manner with respect to the audit month selection.

Mr. Herriman also objects to the deduction of so many points for the defect found on his vehicle. The defect found by the inspectors was considered an out-of-service defect and as a result he scored 0 out of 30 for Vehicle defects. The audit guide indicates that this will be the outcome of an out-of-service defect. In Mr. Herriman's view the defect found was not as serious as it was made out to be. Unfortunately, there was no evidence before the Tribunal upon which to find that the inspectors had been in error and the damage to the air hose was not an out-of- service defect.

Mr. Herriman, in describing how the defect was discovered, seemed to suggest that it took extraordinary measures. The fact is it was discovered by a no-doubt thorough inspection which suggests that had Mr. Herriman subjected his vehicle to the same rigorous inspection it could have been discovered and repaired prior to the audit.

In his summation Mr. Herriman suggested that perhaps he hasn't kept up with the various requirements as he doesn't find them applicable and runs his business on a common sense basis.

Mr. Herriman is operating a business, however, in a highly regulated area and the role of the Respondent, among other things, is to ensure compliance. Commercial vehicle operators are expected to keep proper records whether they have one truck or a fleet.

Mr. Herriman stated in his evidence that he is the only driver of his truck, that is why he indicated 'me' in the name of driver space, however there was an accident on his record involving another driver. He also believes he is exempt with respect to daily logs but this conclusion could not be reached by the Respondent based on his records. It is not a matter of the Respondent being difficult - there are regulated requirements that are to be complied with.

The evidence before the Tribunal does not indicate that the Respondent has treated Mr. Herriman in an unfair manner or in error. The original Notice was set aside to give Mr. Herriman an opportunity to comply. Information was given to Mr. Herriman to assist him in being successful in complying with the regulations. The audit focused on a time 8 months from the show cause meeting. The onus was on Mr. Herriman to educate himself as to how his records should be kept, his vehicle maintained, and his CVOR monitored etc. in order to be in compliance with the industry regulations.

Mr. Herriman is no doubt an honest, decent, hardworking man, however, the testimony and evidence before the Tribunal suggests that he has been slow and somewhat reluctant to apprise himself of and comply with the numerous industry requirements. Mr. Herriman was told what he had to do to avoid the suspension. He complied in part and the Respondent in return reduced the period of suspension. The Tribunal finds that his failing to pass a facility audit gave the Respondent reason to believe that he would not operate his commercial vehicle in accordance with the HTA and its regulations thereby justifying a sanction.

In his closing remarks Mr. Herriman suggested that he thought that the suspension was harsh, but no evidence was put before the tribunal with respect to economic impact, or any other impact of the Suspension.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50(2) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the decision of the Registrar of Motor Vehicles to issue a suspension and seizure order to Thomas J. Herriman.

LICENCE APPEAL TRIBUNAL

Elizabeth Sproule, Presiding Member

RELEASED: October 20, 2003

Filename: 1740.cvor.Thomas Herriman

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Divisional Court is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.



SOUTH SHORE 83 INC.

Appeal under section 50.(1) of the *Highway Traffic Act* R.S.O. 1990, Chapter H.8 as amended (the "Act") from the Suspension and Seizure Order of the Deputy Registrar pursuant to section 47(1) of the Act.

TO APPEAL A SUSPENSION AND SEIZURE ORDER ISSUED BY THE DEPUTY REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: DEREK ISRAEL, Vice-chair

APPEARANCES: GEORGE GAGE, Counsel, for the Applicant

PATRICK MOORE, Counsel, for the Respondent

DATES OF HEARING: August 25 and 26, 2003 Toronto

REASONS FOR DECISIONS

An oral hearing was held on August 25 and 26, 2003 at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.(1) of the *Highway Traffic Act*, R.S.O., 1990, Chap, H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Suspension and Seizure Order imposed by the Deputy Registrar pursuant to section 47(1) of the HTA.

BACKGROUND:

This is an appeal under section 50.(1) of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Deputy Registrar of Motor Vehicles (the "Registrar") made a decision to issue a suspension and seizure order under section 47(1) of the Act.

The Applicant filed an appeal of this suspension and seizure order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 filing fee.

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

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

The hearing proceeded.

ISSUES:

Should the Tribunal confirm, modify or set aside the decision of the Registrar to issue a suspension and seizure order.

FACTS:

Exhibit #1 – Notice of Appeal Form received by the Tribunal on July 29, 2003.

Exhibit #2 – the Respondent's Appeal Book

Exhibit #3 – Corporate Profile Report of Lake Erie Iron & Metal Ltd.

Exhibit #4 – Suspension and Seizure Order dated July 25, 2003 issued by Deputy Registrar of Motor Vehicles against South Shore 83 Inc.

Exhibit #5 – Assumption of Contractual Obligations of 1541012 Ontario Limited dated March 20, 2003.

Exhibit #6 – Copy Certificate issued on November 29, 1991 to Daniel H. Beauregard under *The Trades Qualification and Apprenticeship Act*.

Exhibit #7 – Specimen of Trip Inspection Report

Exhibit #8 – Photocopy of CUSA decal #8742749.

Exhibit #9 – Photocopy of CUSA decal #8742750.

EVIDENCE:

The Registrar's ground for Suspension and Seizure are set forth in the Suspension and Seizure Order dated July 25, 2003 based upon:

- (a) the Safety Record Review of July 2003 and record of unpaid fines of South Shore 83 Inc. ("South Shore")

- (b) the Safety Record of Lake Erie Iron & Metal Works Ltd ("Lake Erie") , 1267463 Ontario Limited ("1267463") and South Shore
- (c) the unpaid fines of Lake Erie and 1267463
- (d) the opinion of the Registrar that Karon Bobo ("Karon"), Marc Bobo ("Marc") and /or Roger Bobo ("Roger") directly or indirectly control or manage or will control or manage South Shore
- (e) the opinion of the Registrar that Nancy Dixon ("Dixon") directly or indirectly controls or manages or will control or manage South Shore who also directly or indirectly controls or manages 1267463

The only witness for the Registrar was Louis Janetos whose evidence is summarized hereunder.

LOUIS JANETOS

Louis Janetos ("Janetos") stated that he is employed by the Ministry of Transportation as a Carrier Rating Safety Administrator which position he has held for the past five years. His duties include analysis and review of carrier files. In the course of his duties he observed that 1267463 made application for a CVOR certificate and that Karon was an officer of 1267463. He also observed that Karon was an officer of Lake Erie whose record indicated poor performance and outstanding fines. Pursuant to his observations and findings the Registrar issued a proposal to refuse to register 1267463. He also reviewed the file of Lake Erie which had been rated "conditional" and noted problems pursuant to which the Registrar issued a notice of suspension and seizure to Lake Erie and 1267463.

Janetos proceeded to deal with the history of Lake Erie and 1267463 as follows:

LAKE ERIE

According to various records Lake Erie is presently in bankruptcy and is not operating. Marc, his father Roger and Karon, his mother are officers of Lake Erie. Marc has filed for bankruptcy.

Lake Erie's CVOR certificate was issued in 1990 and it has been assigned a "conditional" safety rating. It failed the Ministry's audit. On May 5, 2003 a Notice of Suspension and Seizure was issued against Lake Erie and at a show cause meeting on May 21, 2003 the company indicated it was not operating and had filed for bankruptcy. On July 18, 2003 a Suspension and Seizure Order was issued against Lake Erie.

Recent convictions entered against Lake Erie were for operating an unsafe vehicle (section 84(1) of the Act) and operating a vehicle contrary to section 85(1) of the Act. Fines imposed were in the sum of \$6,250.00 and \$3,750.00 respectively.

Outstanding fines of Lake Erie, including the above fines, amount to \$27,350.00.

1267463

On May 21, 2003 a show cause meeting was heard regarding 1267463 and Lake Erie. At that meeting Dixon was present and she stated that the reason for her presence was to represent South Shore which company had leased 2/3 commercial vehicles from 1267463.

Dixon stated at the meeting she did not represent either 1267463 or Lake Erie and was not affiliated to either. Her interest in attending the meeting was to confirm that she, operating under South Shore's name, was leasing the 2/3 vehicles from 1267463. Janetos stated that in March 2003 an application was completed by 1267463 for a CVOR certificate. On that application (Exhibit #2, tab 12) it was indicated that Dixon was the General Manager and contact person for 1267463. Further, that the telephone number of 1267463 listed on its application, namely (519) 443-6466 is registered to Dixon according to www.411.ca. In addition, the telephone number for Lake Erie, namely (519) 443-4405 is answered by Dixon as "South Shore". Finally, 1267463 which was established to lease commercial motor vehicles, that were initially leased to Lake Erie and later to South Shore and other companies. 1267463, according to Dixon, has an arrangement with South Shore wherein South Shore operates from 1267463's premises but pays no rent for so doing. Janetos further stated that 1267463 had recently been convicted of contravening section 84(1) and 85(1) of the Act and was fined \$6,250.00 in respect of those offences. These fines are presently outstanding.

SOUTH SHORE

Janetos testified that the Ministry's records show that there are three commercial vehicles plated in South Shore's name and two vehicles leased from 1267463. That South Shore's CVOR certificate was originally issued on September 18, 2002. The operating record of South Shore indicates for the nine months period June 15, 2003 that South Shore suffered one conviction and had 2 inspections both resulting in "out of service" inspections which meant a 100% "out of service" rate.

Janetos testified as to how the CVOR rating system operates and how points are attributed to an infraction. This is set forth in the Ontario Carrier Safety Rating and Commercial Vehicle Operators Registration System Public Guideline. The CVOR rating system established a threshold limit by comparing the record of the CVOR holder with other operators of comparable fleet size. The adjusted fleet size of South Shore was twelve and the threshold limit was therefore adjusted to compare with operations of a fleet size of twelve commercial vehicles. On reaching 35% of the threshold a warning letter is sent to the holder; at 65% of the threshold the audit stage is reached; at 80% of the threshold the interview stage is reached while at 100% of threshold a proposal regarding seizure and submission is invoked. Janetos explained the point rating system for convictions and violations. The CVOR system monitors a two-year period but in the case of South Shore the period was adjusted to cover nine months only as South Shore was only operating for approximately that latter period.

The operating record of South Shore was updated after June 2003. A performance analysis as at August 12, 2003 indicates that for the period of 9.83 months of operation by South Shore its overall violation rate was 156.8%. This analysis showed that in the last six months of operations the overall violation rate was 228.7% (Exhibit #2, tab 7). Upon reaching a violation rate that exceeds 100% of the threshold sanctions are considered against the violator such as suspension. Of all operators in the province only some 5% exceed 35% of threshold while only 1% of operators exceed 100% of threshold. South Shore's violation rate indicates unsatisfactory compliance. One incident noted by Janetos occurred in June 2003 when part of a load dislodged from a South Shore truck and demolished a hydro pole. (Exhibit #2, tab 8). Additionally, all inspections of South Shore's tractor/trailers indicated more than one out-of-service defect and South Shore's rate of out-of-service was 100% as compared to 35% for the provincial average.

NANCY DIXON

In her testimony Dixon stated she is sole Shareholder, Officer and Director of South Shore.

In August 2001 she was hired as office manager of Lake Erie with general office duties and took instructions from Roger Bobo. Dixon had no cheque signing authority at Lake Erie which carried on business as a scrap dealer in Waterford, Ontario. In August 2002 Lake Erie was in "dire straights". On the bankruptcy of Lake Erie she arranged with its trustee to use the bankrupt's equipment in South Shore which she had by then incorporated. The telephone number of Lake Erie was transferred to her. She arranged with Roger Bobo to use his cell phone. Roger Bobo was brought on the payroll of South Shore and is "helping" the latter's drivers some of whom South Shore took over from Lake Erie. In the fall of 2002 South Shore commenced leasing a number of trailers from 1267463.

Dixon further stated that she attended the Lake Erie show cause meeting on May 21, 2003. She attended so as to "know where I stood". She represented South Shore at that meeting which was then leasing 2/3 vehicles from 1267463. South Shore was at that time operating such vehicles.

Dixon stated in her testimony that she completed the CVOR application dated March 12, 2003 for 1267463 which latter corporation is owned by Karon Bobo and from whose property South Shore has been operating free of charge since January 2003. Dixon's role as general manager of 1267463 has never ceased and continues at two days per week. She conceded that in 1267463's application for a CVOR she noted that she was the contact person for that corporation. Dixon stated that from January 2002 through 2003 South Shore used Lake Erie's telephone number. Marc Bobo told Dixon she was to accompany him to the May 21, 2003 show cause meeting.

FACTS FOUND PROVEN:

The following are the facts found to have been proven.

1. A Suspension and Seizure Order dated July 25, 2003 issued by the Deputy Registrar in terms of sections 47 and 47.1 of the *Highway Traffic Act* R.S.O. 1990 as amended was duly served on South Shore.
2. An unsatisfactory safety rating record was assigned to South Shore on July 18, 2003 by the Deputy Registrar in terms of section 17.1(1) of the *Highway Traffic Act*.
3. The operating record of South Shore for the period September 18, 2002 to June 15, 2003 indicated that South Shore had a 100% "out of service" record.
4. The record of outstanding fines due and owing by Lake Erie amounts to \$27,350.00 pursuant to convictions for contravening sections 84(1) and 85(1) of the *Highway Traffic Act*.
5. The record of outstanding fines due and owing by 1267463 amounts to \$6,250.00 pursuant to convictions for contravening sections 84(1) and 85(1) of the *Highway Traffic Act*.
6. Lake Erie is no longer operating and is bankrupt.
7. A Suspension and Seizure Order was issued against Lake Erie on July 18, 2003.
8. Lake Erie's corporate officers are Marc and Roger Bobo.
9. Karon Bobo is the sole corporate officer of 1267463 Ontario Limited.
10. Nancy Dixon is the sole corporate officer of South Shore which commenced operations in October 2002.
11. Dixon prior to commencing to operate South Shore, was appointed office manager of Lake Erie as of August 2001.
12. Roger Bobo works for South Shore where his duties are to hire and monitor South Shores drivers. Roger Bobo also trains the Applicant's drivers in pre-trip inspections as well as testing drivers of South Shore.

THE LAW:

- 17.(2) The Registrar may refuse to issue a CVOR certificate to an applicant if the Registrar has reason to believe, having regard to the applicant's safety record and any other information that the Registrar considers relevant, that the applicant will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety.
- (3) The Registrar may refuse to issue a CVOR certificate to an applicant if the applicant is related to,
- (a) a person whose CVOR certificate has been cancelled, is or has been under suspension or is or has been subject to a fleet limitation;
 - (b) a person whose CVOR certificate suspension, cancellation or fleet limitation is under appeal; or
 - (c) a person who the Registrar has reason to believe, having regard to the person's safety record and any other information that the Registrar considers relevant, will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety.
- (4) An applicant is related to a person for the purpose of subsection (3) if,
- (a) the applicant and the person are related individuals;
 - (b) either the applicant or the person is a partner of the other or was a partner of the other or they have or have had partners in common;
 - (c) either the applicant or the person, directly or indirectly, controls or controlled or manages or managed the other; or
 - (d) the applicant and the person have or have had common officers or directors or they are or have been controlled, directly or indirectly, by the same shareholders.
- 47(1) Subject to section 47.1, the Registrar may suspend or cancel,
- (a) the plate portion of a permit as defined in Part II;
 - (b) a driver's licence; or
 - (c) CVOR certificate, on the grounds of,
 - (d) misconduct for which the holder is responsible directly or indirectly, related to the operation or driving of a motor vehicle;
 - (e) conviction of the holder for an offence referred to in subsection 210(1) or (2); or
 - (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other

- information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d) , (e) or (f).

- (10) The Registrar may, at any time for misconduct or contravention of this Act, the Truck Transportation Act, the Public Vehicles Act or of any regulation hereunder by an owner or lessee of one or more motor vehicles or trailers for which permits have been issued by a jurisdiction or jurisdictions other than the Province of Ontario, order that the permit and number plates issued for the vehicle or vehicles be seized and any police officer or any officer appointed for carrying out this Act or the enforcement of the Public Vehicles Act or the Truck Transportation Act may seize the permit and number plates and deliver them to the Ministry which shall return them to the authority that issued them.

According to Section 22(e) HTA:

- 22(e) the Lieutenant Governor in Council may make regulations, governing the suspension or cancellation of CVOR certificates under subsection 47(1) or the imposition of a limitation on the fleet size operated under a CVOR certificate under subsection 47(2).

The maintenance requirements under the HTA are found, inter alia, at Regulation 575 (commercial motor vehicle inspections); Regulation 577 (covering of loads); Regulation 587 (re brake push rod travel); Regulation 597 (gross vehicle weights); Regulation 625 (tire standards and specifications); Regulation 762/91 (safety inspections); Regulation 614 (security of loads).

The appeal comes to this Tribunal by virtue of s. 50(1) of the HTA which provides:

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

Regulation 574, also addresses appeals to this Tribunal;

- 3(3) Upon receipt of a notice of appeal under subsection (1) the [Tribunal] shall forthwith notify the Minister or Registrar, as the case may be, and the person notified shall forthwith provide the [Tribunal] with all the relevant documents and other material in his or her possession.

- 3(6) At any hearing under this section, the person making the appeal has the right to attend and make representations and, subject to subsection (7), to adduce evidence respecting the appeal either personally or through counsel.
- 3(7) At any hearing under this section, the [Tribunal] shall hear only such evidence as was submitted to the Minister or the Registrar, as the case may be, respecting the matter in dispute.”

APPLICATION OF LAW TO FACTS

The onus of proof rests upon the Registrar to prove that the evidence presented to the Tribunal affords reasonable grounds for the Order requested by the Registrar dated July 25, 2003.

The Tribunal will deal with the evidence placed before it relative to the Order sought. The first ground upon which the Registrar bases his Suspension and Seizure Order against South Shore is;

THE SAFETY RECORD OF SOUTH SHORE

The period of time, some nine months, within which South Shore has been operating is short. The operating fleet size of South Shore is small, some twelve vehicles. During the nine months of operation, the operating record of South Shore indicates unsatisfactory performance in that there has been an accident that resulted in a crushed car then being transported by a South Shore vehicle, becoming dislodged from the latter vehicle and demolishing a hydro pole. In addition, South Shore has suffered a conviction under the Act and defects have been noted in four inspections of vehicles operated by South Shore. All four inspections revealed out-of-service defects which in and of themselves are major infractions under the Act. The out-of-service defects indicate a 100% rate whereas the provincial average is 35%. Apart from the out-of-service violation rate South Shore has an overall violation rate of over 150%. A point system used to assess performance of a truck operation is set out in “Ontario Carrier Safety Rating and Commercial Vehicle Operator’s Registration System Public Guideline” and the Ministry of Transportation in applying this rating system imposed sanctions under section 47 of the Act when as operator’s violation rate exceeds 100% of the threshold. Such is the case with South Shore.

Counsel for South Shore, in his final submissions, conceded that the safety record of South Shore warrants sanction. However, he submitted a suspension term of less than 30 days would be appropriate, more particularly, as South Shore had taken steps to improve its safety compliance rating by very recently hiring a “full-time licenced mechanic”. The Tribunal noted however that the mechanic recently hired by South Shore only works for the latter on Saturdays and is not employed “full-time”. There is no indication or evidence that South Shore’s safety compliance has improved or will likely improve by the hiring of a mechanic to work one day per week. Dixon conceded in her testimony that she herself is not able to deal with the aspect of the various vehicles’ safety compliance.

The Tribunal finds, having regard to the evidence placed before it, that South Shore's safety record justifies the conclusion drawn by the Registrar in that there is a serious and ongoing problem relative to the safety of the vehicles being operated by South Shore. Accordingly, a 30-day suspension of the CVOR certificate issued to South Shore and the suspension and seizure of the plate portion of the permits for all commercial vehicles and trailers registered in the name of South Shore is both reasonable and necessary.

THE QUESTION OF WHETHER OR NOT SOUTH SHORE IS RELATED TO LAKE ERIE AND/OR 1267463

This question relates to section 17.(4) of the Act and whether South Shore is related to Lake Erie and/or 1267463. It was not contested by South Shore's Counsel that the both Lake Erie and 1267463 have not inconsiderable outstanding fines pursuant to convictions under sections 84.(1) and 85.(1) of the Act. The total outstanding and unpaid fines due by Lake Erie amount to \$27,350.00 while the total outstanding and unpaid fines due by 1267463 amounts to \$6,250.00.

The safety record of Lake Erie, which was not contested by South Shore, indicates poor management, control and supervision. The record includes two failed audits, a conditional rating, and a 30-day CVOR suspension. The safety record of Lake Erie and its outstanding and unpaid fines of \$27,350.00 may well be relevant if Lake Erie and South Shore are related as contemplated by section 17.(4) of the Act as read with section 47.(1)(f) of the Act.

The evidence placed before the Tribunal indicates that Roger, Mark and Stephen Bobo are officers of the Lake Erie. The evidence does not show that Dixon held any office in Lake Erie. What is apparent is that Dixon was employed to work in Lake Erie's office. Her duties have not been shown to extend to either management or control of Lake Erie. She was not shown to exercise any authority relating to the financial affairs of Lake Erie. Her position was solely that of an employee of Lake Erie with no decision-making authority. Dixon was and is not a relative of the Bobo's. She was not shown to be a partner of Lake Erie nor was she to participate in profits, losses or management of that business. The fact that she may have the title of manager did not constitute her a partner with the Bobo's in Lake Erie. She merely oversaw the administration of Lake Erie with no control over that Corporation, either direct or indirect.

In so far as 1267463 is concerned Karon Bobo was and still appears to be President. As with Lake Erie, Dixon held no office in 1267463 and was not financially involved in that corporation. Although she may have been designated as general manager of 1267463 there was no evidence to show she managed or controlled the corporation, directly or indirectly. She was shown to be without authority and decision making power other than in the day-to-day operation of the corporation's office. Karon Bobo has not been shown to be a related person within the meaning of section 17.(4) in South Shore nor has she been shown to manage or control South Shore. She does not have a financial interest or shareholding in South Shore. The fact that Roger Bobo is now employed by South Shore

due to his connections in the scrap metal business does not constitute him as a related person in terms of section 17.(4) of the Act.

The fact that there are outstanding fines due to the Ministry of Transportation by Lake Erie and 1267463 cannot impinge upon or should not affect South Shore's registration unless it is shown that South Shore is a related person for purposes of section 17.(3) of the Act. This the Registrar has not shown or satisfactorily demonstrated to the Tribunal and accordingly the Tribunal finds that South Shore is not related to either Lake Erie or 1267463.

Specifically the Tribunal finds that South Shore and Lake Erie are not related individuals as contemplated in section 17.(4)(a) of the Act. The Tribunal also finds that South Shore and 1267463 are not related individuals as contemplated by section 17.(4)(a) of the Act.

Furthermore, the Tribunal finds that Dixon and/or South Shore are not or were not partners with Karon Bobo, Roger Bobo, Mark Bobo and Stephen Bobo in Lake Erie and/or 1267463 as contemplated by section 17.(4)(b) of the Act.

In addition, the Tribunal finds that Dixon and/or South Shore neither directly or indirectly controls, manages or controlled or managed Lake Erie and/or 1267463 as contemplated by section 17.(4)(c) of the Act.

And, in addition, the Tribunal finds that South Shore and Lake Erie or 1267463 have not had common officers or directors nor is South Shore and Lake Erie or 1267463 controlled, directly or indirectly, by the same shareholders as contemplated by section 17.(4)(d) of the Act.

While the Tribunal is cognizant of the decision in *Muscillo Transport Ltd. v. Ontario (LSAB)[1997] O.J. No. 3111 (General Division)* in which the Court held that the Tribunal may treat related corporations as one for the purposes of sanctioning, that decision does not apply in this instance as the Tribunal has found that South Shore and 1267463 are not "related persons". The fact that Lake Erie and 1267463 may well be related corporations, as has been demonstrated by the evidence, does not in any way mean that South Shore is related to either or both such corporations. The evidence before the Tribunal does not lead the Tribunal to believe that either Roger or Mark Bobo have positions of control or authority in South Shore. Rather, the evidence indicates that they are employees of South Shore who merely hold positions dealing with salespersons and drivers. These positions do not give them control or management in regards to South Shore. That South Shore may have taken over premises and employees previously used by Lake Erie does not establish that South Shore and Lake Erie are related in terms of section 17.(4) of the Act.

While the evidence of Dixon may have left a number of aspects not fully answered, the Tribunal does not find that her evidence should not be believed. Dixon left the Tribunal with a picture of an individual with no significant degree of business expertise or competence but with a determination to learn the business and succeed where possible.

In his opening statement, Counsel for South Shore stated that his client undertook to pay the fines registered against 1267463 within a period of 14 days. The amount of fines registered against 1267463 and outstanding at the commencement of this hearing was the sum of \$6,250.00. Accordingly, pursuant to the undertaking the Tribunal incorporates that undertaking in its undermentioned order.

DECISION

For all the reasons stated above the Tribunal:

1. Confirms the Suspension and Seizure Order of the Deputy Registrar dated July 25, 2003 in which the CVOR certificate #143-381-723 and plate portion of permits for all commercial motor vehicles and trailers issued to South Shore 83 Inc. be suspended for 30 days.
2. Orders that the plate portions of permits, or if issued by a jurisdiction other than Ontario, the permits and the number plates be seized.
3. Sets aside the indefinite Suspension and Seizure Order of the Deputy Registrar dated July 25, 2003 of the CVOR certificate issued to South Shore 83 Inc. pending the payment of fines of Lake Erie Iron and Metal Ltd. and 1267463 Ontario Limited.
4. Orders South Shore 83 Inc, within 14 days of this order, to pay to the Ministry of Transportation the sum of \$6,250.00 representing the fines registered against 1267463 Ontario Limited and which fines South Shore 83 Inc. has undertaken to pay to the Ministry of Transportation.

LICENCE APPEAL TRIBUNAL

DEREK ISRAEL, Vice-Chair

Released: October 2, 2003

File no.: 1866.cvor.SouthShore

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice or Divisional Court is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

KEVIN HYATT TRUCKING LTD.

IN THE MATTER OF the Appeal by Kevin Hyatt Trucking Ltd.
under section 50.(1) of the *Highway Traffic Act* R.S.O. 1990,
Chapter H.8 as amended (the "Act")

AND IN THE MATTER OF the Suspension and Seizure Order
of the Deputy Registrar of Motor Vehicles dated February 26,
2003 made pursuant to section 47(1) of the Act.

AND IN THE MATTER OF the Commercial Vehicle Operator's
Registration ("CVOR") certificate #044-227-738 and the plate
portion of permits issued to Kevin Hyatt Trucking Ltd.

TRIBUNAL: E. ALAN GARBE, VICE-CHAIR
BRUCE E. WRIGHT, MEMBER

APPEARANCES: KEVIN HYATT
Agent for the Applicant

DAVID MILLER
Counsel for the Respondent

DATES OF HEARING: JULY 9, 2003 Toronto

REASONS FOR DECISION

BACKGROUND:

This is an appeal to the License Appeal Tribunal (the "Tribunal") by Kevin Hyatt Trucking Ltd. (the "Applicant") of the decision of the Deputy Registrar of Motor Vehicles (the "Registrar") dated February 26, 2003 to suspend CVOR Certificate #044-227-738 and to seize the plate portion of permits for all commercial motor vehicles and trailers issued to the Applicant until such time as payment is made to the Courts for unpaid fines.

The Suspension and Seizure order was made pursuant to section 47(1) of the Act.

The Applicant filed an appeal of the Suspension and Seizure order with the Tribunal by notice of appeal dated April 23, 2003.

The hearing was conducted by way of conference call with counsel representing the Registrar and the witness for the Registrar being present before the Tribunal and Mr. Kevin Hyatt being present by telephone. The Tribunal confirmed at the commencement of the hearing that Mr. Hyatt could hear and be heard by all parties .

ISSUE:

The issue before the Tribunal is should the Tribunal confirm, modify or set aside the decision of the Registrar to issue a suspension and seizure order against the Applicant for such time until payment is made to the Court by the Applicant of all unpaid fines.

EVIDENCE:

The only witness called by the Registrar was Don Gillett ("Gillett") who testified that he is employed by the Ministry of Transportation and part of his job responsibilities is the review and analysis of files with respect to commercial vehicle operators. Mr. Gillett made reference to the document appearing at Tab 12 of the Respondent's Appeal Book which is a National Safety Code Audit conducted on October 11, 1992 and made particular reference to the notation contained on the 5th page of the audit under the heading "Remarks" which indicated that there were outstanding fines which were paid during the audit.

The Tribunal was referred to Tab 11 of the Respondent's documents which contained a Commercial Vehicle Operator Interview sheet with respect to an interview with the Applicant conducted on November 10, 1997. Reference was made to the action plan accompanying the document which indicated that the Applicant had provided a cheque in the amount of \$6,000.00 plus a post-dated cheque in the amount of \$5,375.00 to satisfy the balance of then outstanding fines as shown on an attached confirmation from the court.

Tab 10 of the Respondent's documents is a Facility Audit Findings form with respect to an audit carried out on June 24, 2002 and particular reference was made to the entry that required the "Operator to reconcile fines in the amount of \$18,674.00 with District Court."

Tab 8 contains a copy of a letter addressed to the Applicant from Kathy Dellaire, Supervisor, Provincial Offences, City of Thunder Bay, a copy of which was sent to the Ministry of Transport, CVOR Section, in which the Applicant was advised that the City of Thunder Bay was prepared to accept a payment plan to reduce the outstanding fines of \$18,674.00 by payment of the sum of \$500.00 per month commencing on August 20, 2002. Part of this plan required the Applicant to pay fines totalling \$1,345.00 by August 20, 2002.

The witness drew the Tribunal's attention to the ICON Inquiry Subsystem Payments Update printout made as at January 24, 2003, at Tab 4 of the Respondent's Documents which indicates that no payments were made pursuant to the payment plan proposed by the City of Thunder Bay to reduce the amount of outstanding fines which at the time of that report totalled \$21,052.00. An updated version of the same report made as of June 18, 2003 contained at Tab 5 of the Respondent's Appeal Book indicates that the amount outstanding is \$21,097.00.

The witness testified that he had had conversations with the Applicant but that the fines remained outstanding with the result that the Registrar proceeded to issue the Suspension and Seizure order.

Mr. Hyatt testified that in August 2002 he did not have money to meet the provisions of the payment plan offered by the City of Thunder Bay as he had lost a small contract which he had in Eastern Ontario and that he was caught in the crunch between the decline in lumber revenues and the increase in fuel prices. The Applicant hoped to sell one of his trucks thereby reducing his fleet and pay off some of his obligations, however, such sale had not yet taken place.

The witness stated that the majority of the charges giving rise to the unpaid fines were laid during a fourteen month period when Leonard Lachance, who was to buy the Applicant's business, operated the business using his own employees. When it became apparent to Mr. Hyatt that Leonard Lachance did not have the money required to complete the purchase, Mr. Hyatt took back control of the business. Unfortunately, by the time Mr. Hyatt resumed operations, the trucks were in terrible condition and the business of the Applicant was in bad shape.

Mr. Hyatt testified that the fines against the Applicant were greater because it was not a member of the Northern Ontario Loggers and Truckers Association (NOLTA). However it became apparent that membership in this association would not have had a great impact on the record of convictions and fines confronting the Applicant.

Mr. Hyatt acknowledge that none of the convictions were presently under appeal.

FACTS FOUND PROVEN:

1. The Applicant had outstanding fines under the Act totaling \$21,052.00 as of January 24, 2003
2. At the time that the Suspension and Seizure order dated February 26, 2003, was issued, there were outstanding fines against the Applicant in the amount of \$21,052.00.
3. The amount of fines outstanding against the Applicant as of June 18, 2003 was \$21,097.00.

4. The outstanding fines owing by the Applicant have not been reduced in the period between the issuance of the Suspension and Seizure order and the date of hearing.
5. There are no outstanding appeals against any of the convictions giving rise to the fines imposed.
6. The Applicant has failed to make payment of the amount of the fines, despite numerous opportunities to do so.

LAW:

- 47(1) Subject to section 47.1, the Registrar may suspend or cancel,
- (a) the plate portion of a permit as defined in Part II;
 - (b) a driver's licence; or
 - (c) CVOR certificate, on the grounds of,
 - (d) misconduct for which the holder is responsible directly or indirectly, related to the operation or driving of a motor vehicle;
 - (e) conviction of the holder for an offence referred to in subsection 210(1) or (2); or
 - (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
 - (g) any other sufficient reason not referred to in clause (d), (e) or (f).
- (10) The Registrar may, at any time for misconduct or contravention of this Act, the Truck Transportation Act, the Public Vehicles Act or of any regulation thereunder by an owner or lessee of one or more motor vehicles or trailers for which permits have been issued by a jurisdiction or jurisdictions other than the Province of Ontario, order that the permit and number plates issued for the vehicle or vehicles be seized and any police officer or any officer appointed for carrying out this Act or the enforcement of the Public Vehicles Act or the Truck Transportation Act may seize the permit and number plates and deliver them to the Ministry which shall return them to the authority that issued them.

According to Section 22(e) HTA:

- 22(e) the Lieutenant Governor in Council may make regulations, governing the suspension or cancellation of CVOR certificates under subsection 47(1) or the imposition of a limitation on the fleet size operated under a CVOR certificate under subsection 47(2).

The appeal comes to this Tribunal by virtue of s. 50(1) of the HTA which provides:

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

Registrar.

Regulation 574, also addresses appeals to this Tribunal;

- 3(3) Upon receipt of a notice of appeal under subsection (1) the [Tribunal] shall forthwith notify the Minister or Registrar, as the case may be, and the person notified shall forthwith provide the [Tribunal] with all the relevant documents and other material in his or her possession.
- 3(6) At any hearing under this section, the person making the appeal has the right to attend and make representations and, subject to subsection (7), to adduce evidence respecting the appeal either personally or through counsel.
- 3(7) At any hearing under this section, the [Tribunal] shall hear only such evidence as was submitted to the Minister or the Registrar, as the case may be, respecting the matter in dispute."

APPLICATION OF FACTS TO THE LAW:

Although one can sympathize with the position of the Applicant being in a branch of the trucking industry that has been buffeted by problems in the lumber sector and high fuel prices, it is clear that there is a pattern of unpaid fines stretching back from 1992 to date.

The Applicant has since 1999 been convicted of approximately 39 offences relating to the operation of commercial motor vehicles and has not paid any of the fines imposed as a result of those convictions. The aborted sale of the Applicant's trucking business to Leonard Lachance and the alleged operation of the Applicant's business by Mr. Lachance over a period of 14 months cannot, excuse the Applicant's failure to pay the fines or accept the terms of the payment plan offered to the Applicant. The Applicant has a record of leaving fines unpaid until forced to do so by threat of action on the part of the Registrar.

The Tribunal therefore finds that by failing to pay the outstanding fines the Applicant has engaged in misconduct relating to the operation of a motor vehicle, contrary to subsection 47(1) of the Act thereby justifying the Registrar in seizing the permit and number plates of the Applicant in accordance with subsection 47(10) of the Act.

DECISION:

Accordingly, for reasons stated above, the Tribunal confirms the Suspension and Seizure order of the Registrar dated February 26, 2003 that the CVOR Certificate #044-227-738 and the plate portion of permits for all commercial motor vehicles and trailers issued to the Applicant be suspended until such time as payment is made to the Courts for all unpaid fines imposed upon the Applicant.

The Tribunal further confirms the Registrar's order that the plate portion of permits or, if issued by a jurisdiction other than Ontario, the permits and the plates be seized and that

the Applicant not transfer any commercial motor vehicles or trailers for which a permit has been issued in Ontario without the consent of the Registrar.

LICENCE APPEAL TRIBUNAL

E. Alan Garbe, Presiding Member

Released: October 1, 2003

Filename: 1635.cvor.Kevin Hyatt Trucking

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Divisional Court is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

LOAD CHAUFFEUR TRANSPORT LTD.

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

AND IN THE MATTER OF the Commercial Vehicle
Operator's Registration (CVOR) certificate 134-867-424
issued to Load Chauffeur Transport Ltd.;

AND IN THE MATTER OF an Application by Load Chauffeur
Transport Ltd. dated July 22, 2003, for a hearing before the
Licence Appeal Tribunal pursuant to section 50(1) of the
Highway Traffic Act appealing the Suspension and Seizure
Order of the Registrar of Motor Vehicles dated July 18, 2003;

AND IN THE MATTER OF the plate portion of permits for all
commercial motor vehicles and trailers registered in the
name of Load Chauffeur Transport Ltd.;

AND IN THE MATTER OF the safety record of Load
Chauffeur Transport Ltd.

TRIBUNAL: JOHN ORT, Member

APPEARANCES: LOAD CHAUFFEUR TRANSPORT LTD., represented by
Mark Reynolds, Agent,
REGISTRAR OF MOTOR VEHICLES, represented by
Patrick Moore, Counsel.

DATE OF
HEARING: October 3, 2003 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") by Load
Chauffeur Transport Ltd. (the "Applicant") respecting a Suspension and Seizure
Order dated July 18, 2003, issued by the Deputy Registrar of Motor Vehicles (the
"Respondent" or "the Registrar") pursuant to sections 47 and 47.1 of the *Highway
Traffic Act* (the "Act").

The Suspension and Seizure Order, exhibit 1, states the following:

AND WHEREAS I have considered your submissions and your safety record including your record of convictions, accidents, vehicle inspections, vehicle out of service rates and I remain concerned for highway safety;

NOW THEREFORE IT IS ORDERED THAT PURSUANT TO section 47 & 47.1 of the Highway Traffic Act that as of July 31, 2003 CVOR certificate 134-867-424 and plate portion of permits for all commercial motor vehicles and trailers issued to LOAD CHAUFFEUR TRANSPORT LTD. be suspended for 30 days and the plate portion of permits, or if issued by a jurisdiction other than Ontario, the permits, and the number plates be seized.

This Suspension and Seizure will be effective July 31 2003 at 9:00 a.m. Eastern Standard Time to August 29, 2003 at 8:59 a.m.

ISSUE:

Should the Tribunal confirm, modify or set aside the Registrar's order?

EXHIBITS:

Exhibit #1 - Suspension and Seizure Order dated July 18, 2003, issued by the Deputy Registrar of Motor Vehicles;

Exhibit #2 - Notice of Appeal Form received at the Tribunal on July 22, 2003, filed by the Applicant;

Exhibit #3 - Respondent's Appeal Book;

FACTS:

Sherry Atallah testified on behalf of the Registrar. No-one testified for the Applicant.

RESPONDENT'S EVIDENCE

Testimony of Sherry Atallah:

Ms. Atallah has been a Carrier Safety Rating Administrator in the Carrier Safety and Enforcement Branch of the Ministry of Transportation (the "Ministry") for over two years. She monitored the Applicant and performed various analyses of its record.

The original CVOR certificate was issued to the Applicant on March 30, 2000. An initial Notice of Suspension and Seizure was issued on January 30, 2002. See tab 9 of exhibit 3. The first show-cause meeting followed on February 20, 2002. After consideration of an analysis based on updated fleet-size information and other factors, the initial Notice of Suspension and Seizure was set aside on June 17, 2002, as set out at tab 16 of exhibit 3.

A second Notice of Suspension and Seizure was issued on June 13, 2003. See tab 2 of exhibit 3. A second show-cause meeting was held on July 16, 2003, as detailed at tab 17 of exhibit 3. The Applicant is appealing the Suspension and Seizure Order dated July 18, 2003, that followed. (See exhibit 1,)

As set out at tab 28 of exhibit 3, the Commercial Vehicle Operator's Registration (CVOR) system follows the on-road safety performance of commercial vehicle operators. The CVOR system monitors reportable accidents, convictions, vehicle mechanical safety inspections, carrier information such as fleet size, and Ministry of Transportation interventions.

Reportable accidents involve personal injury and/or property damage over \$1,000. Points are assigned to such accidents based on factors such as the presence of impropriety, charges, and the severity of damage, being property damage, personal injury, or fatal injury. An accident violation rate is then calculated based on accident points per vehicle per month.

A conviction violation rate is also calculated based on safety-related conviction points per vehicle per month. An inspection violation rate is also calculated based on points on vehicle inspection per vehicle unit inspected.

The violation rates in each category are then compared against applicable threshold values to determine the Percentage of Threshold. The accident violation rate is weighted at double the rate for convictions and inspections in combining the scores to determine the Overall Percentage of Threshold. Only one carrier in a thousand has an Overall Percentage of Threshold score that exceeds one hundred.

A carrier, such as the Applicant, can get a copy of its CVOR record from the Ministry's office or from its website.

The Applicant's drivers were involved in 57 safety-related convictions from May 7, 2001, to May 6, 2003. These included 30 speeding, 2 following-too-close, and 2 careless-driving convictions. 25 of the 57 convictions occurred after June 17, 2002, the date when the initial Notice of Suspension and Seizure Order was set aside. See the CVOR record, tab 4 of exhibit 3.

The Applicant's drivers were also involved in various accidents. Three of those accidents had points assigned to them. This is summarized on pages 10 and 11 of the CVOR record at tab 4 of exhibit 3. Accident reports are provided at pages 48, 51, and 52 of tab 7 in exhibit 3.

Ms. Atallah performed several analyses of the Applicant's operating record. An initial analysis for May 7, 2001, to May 6, 2003, calculated an Overall Percentage of Threshold of 117.9. See page 9 of exhibit 3. A revised analysis using monthly fleet size figures provided by the Applicant yielded an Accident Percentage of Threshold of 76.49, a Conviction Percentage of Threshold of 248.96, and an Inspection Percentage of Threshold of 29.02, resulting in an Overall Percentage of Threshold of 107.743. See tab 6 of exhibit 3.

An additional analysis appears at page 11 of tab 3 of exhibit 3. Since the setting aside of the initial Notice of Suspension and Seizure, from June 17, 2002, to May 6, 2003, the Accident Percentage of Threshold was 63.7, the Conviction Percentage of Threshold was 223.6, the Inspection Percentage of Threshold was 17.9, and the Overall Percentage of Threshold was 92.0.

The Applicant's safety rating in the U.S.A. is conditional. See page 110 of tab 21 of exhibit 3. The Applicant received conditional status on a recent audit in British Columbia, as set out at page 101 of tab 18 of exhibit 3.

At the July 17, 2003, show-cause meeting the Applicant provided a list of drivers terminated due to excessive violations. See tab 20 of exhibit 3. At least six of those drivers appear not to have been terminated. See tab 23 of exhibit 3. Those drivers were involved in inspections in the U.S.A. or violations in British Columbia.

LAW:

The *Highway Traffic Act*, Revised Statutes of Ontario, 1990, Chapter H.8, as amended states the following:

- 47.(1) Subject to section 47.1, the Registrar may suspend or cancel,
 - (a) the plate portion of a permit as defined in Part II;
 - (b) a driver's licence; or
 - (c) a CVOR certificate,
 on the grounds of, ...
 - (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor

vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or

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

(2.1) Subsection 17(4) applies, with necessary modifications, for the purpose of determining who are related parties under clause (1)(f).

(8.1) If the plate portion of a permit is suspended or cancelled under clause (1)(a), the Registrar may order that the plate portion of the permit or the number plates issued in connection with the plate portion of the permit be seized and any police officer or officer appointed for carrying out this Act may seize the plate portion of the permit and the number plates and deliver them to the Ministry.

(10) The Registrar may, at any time for misconduct or contravention of this Act, ... or any regulation thereunder by an owner or lessee of one or more motor vehicles or trailers for which permits have been issued by a jurisdiction or jurisdictions other than the Province of Ontario, order that the permit and number plates issued for the vehicle or vehicles be seized and any police officer or any officer appointed for carrying out this Act or the enforcement of the *Public Vehicles Act* or the *Truck Transportation Act* may seize the permit and number plates and deliver them to the Ministry which shall return them to the authority that issued them.

47.1(1) Before taking any action under clause 47(1) (a) or (c) or subsection 47(2), the Registrar shall notify the person whose plate portion of a permit of CVOR certificate is to be affected by his or her proposed action.

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

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

Regulation 424/97, as amended by regulation 197/99, made under the Act adds the following:

5.1(1) The safety record of an operator shall contain a record of the following information:

5. Any notice sent to the operator under section 47.1 of the Act.

6. Any warning letters sent by, or interviews held with, Ministry officials relating to the operator's safety performance and practices.

7. Any conviction related to the operation of a commercial motor vehicle or a vehicle drawn by it, for an offence committed by an operator, its agents or employees,

i) under this Act or under any other Act of the Legislature or the Parliament of Canada or any regulation or order made under any of them, or

ii) for an offence under a municipal by-law regulating traffic on the highways, or orders made under any of them, except convictions for offences for standing or parking.

8. The particulars of any accident involving a commercial motor vehicle operated by the operator or a vehicle drawn by it.

9. The results of any inspection under section 82 or 82.1 of the Act or any similar inspection of a commercial motor vehicle operated by the operator, or a vehicle drawn by it.

12. The results of any audits of the operator.

13. Any record from another jurisdiction in respect of the operator that is comparable to that described in paragraphs 1 to 12.

14. The operator's fleet size.

15. The total number of kilometers travelled in the previous 12 months by all the commercial motor vehicles operated by the operator in Ontario.

17. Any compilations or analyses of any of the information in paragraphs 1 to 16.

FINDINGS OF FACT

The Tribunal has carefully reviewed the evidence and finds as a fact:

- 1) Load Chauffeur Transport Ltd. has a poor safety record. Its Commercial Vehicle Operator Record shows that for May 7, 2001, to May 6, 2003, there were 57 safety-related convictions. These included 30 speeding, 2 following-too-close, and 2 careless-driving convictions. 25 of the convictions occurred after June 17, 2002, the date when the initial Notice of Suspension and Seizure order was set aside. The drivers of the Applicant were also involved in three reportable accidents that had points assigned to them. The Overall Percentage of Threshold for the two years was 107.743.
- 2) Ms. Atallah testified that only the worst .1% of commercial vehicle operators has an Overall Percentage of Threshold over 100.
- 3) There has not been sufficient recent improvement in the safety record of the Applicant. The Overall Percentage of Threshold for June 17, 2002, to May 6, 2003, was 92.0. The Conviction Percentage of Threshold was an unacceptably high 223.6.
- 4) The Applicant appears to have misled the Ministry. At the July 17, 2003, show-cause meeting it provided a list of drivers terminated due to excessive violations. At least six of those drivers were later involved in inspections or violations on the road.
- 5) The Applicant received conditional status on a recent audit in British Columbia. In the U.S.A., the Applicant's safety rating is conditional.

APPLICATION OF LAW TO FACTS:

As a result of the Applicant's poor safety record the Tribunal finds as a fact that there is reason to believe that it will not operate a commercial motor vehicle safely or in accordance with the Act and regulations and other laws relating to highway safety.

DECISION:

Accordingly, by virtue of the authority vested in it under section 50 of the *Highway Traffic Act*, the Tribunal confirms the Suspension and Seizure Order of the Deputy Registrar of Motor Vehicles dated July 18, 2003, and orders that as of December 1, 2003, at 9:00 a.m. the CVOR certificate numbered 137-515-240 and the plate portion of permits for all commercial motor vehicles and trailers issued to Load Chauffeur Transport Ltd. be suspended for 30 days and the plate portion of permits, or if issued by a jurisdiction other than Ontario, the permits, and the number plates be seized.

LICENCE APPEAL TRIBUNAL

John Ort, Member

Released: November 4, 2003

Filename: 1855.cvor.Load Chauffeur Transport Ltd.

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Divisional Court is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

BRANT TRUCK CORP.

AND IN THE MATTER OF THE REFUSAL BY THE REGISTRAR OF MOTOR
VEHICLES TO ISSUE A COMMERCIAL VEHICLE OPERATOR"
REGISTRATION CERTIFICATE

ORDER EFFECTIVE APRIL 4TH, 2003

TRIBUNAL: MARJORIE L. HILEY, Vice Chair

APPEARANCES: MICHAEL BICZ
Agent representing the Applicant, Brant Truck Corp.

PATRICK MOORE
Counsel for the Respondent

DATES OF HEARING: October 20, 2003

Toronto

REASONS FOR DECISIONS AND ORDER

Background:

The Registrar of Motor Vehicles issued a notice of refusal to issue a commercial vehicle operator's registration certificate on March 7, 2003 to the Applicant, Brant Truck Corp. The Applicant provided a written submission dated March 20, 2003. By an order dated April 4, 2003 the Deputy Registrar of Motor Vehicles refused to issue an operating licence to the Applicant pursuant to section 7(2) of the *Truck Transportation Act*. The Applicant filed a Notice of Appeal dated May 20, 2003 requesting a hearing before the Licence appeal Tribunal. The prehearing by the parties did not lead to any resolution of the issues. The hearing took place on October 20, 2003,

Issue:

Was the Registrar of Motor Vehicles justified in refusing to issue a CVOR certificate to Brant Truck Corp.?

Evidence:**Opening statement of Registrar, Motor Vehicles:**

Counsel for the Registrar, Motor Vehicles, stated that the only issue is the CVOR certificate refusal. There is not an issue of obtaining a licence under the *Truck Transportation Act*. Counsel referred to section 17 (3) (c) and 17 (2) of the *Highway Traffic Act*. Counsel stated that the relationship of Brant Truck Corp. to Bicz Transport Corp. is a relevant piece of information under section 17 (2). Michael Bicz, the officer and director of Brant Truck Corp. was a driver for Bicz Transport Corp. Brant Truck Corp. provided mechanical services to Bicz Transport Corp.

Testimony of John William Miller:

Mr. Miller is a carrier safety rating administrator with the Sanctions and Investigation Branch of the Ministry of Transportation. He has held that position for three years. He deals with integrity checks of CVOR records, which involves looking at such records as the number of accidents and outstanding fines. He does interviews and interventions. He checks on the facility audits and is involved with the filing of Proposals. He presents his findings to the Deputy Registrar who makes the final decision on sanctions.

Mr. Miller had previously held positions as a CVOR analyst, a facility auditor and a scales supervisor.

In considering a related company rating Mr. Miller reviews such information as its corporate officers, the safety ratings and the results of audits. He considers its safety rating and past records of unsatisfactory or poor highway performance and whether the related company has been previously sanctioned by the Deputy Registrar of Motor Vehicles.

Mr. Miller explained that under Ontario's Carrier Safety Rating system there are five possible safety ratings: Excellent; Satisfactory; Satisfactory-unaudited; Conditional; and Unsatisfactory. He explained that an unsatisfactory rating means that there is a one hundred per cent violation rate. Usually the Ministry will sanction such a carrier by placing it under suspension. Once the sanction period has been served then the carrier is given a conditional rating. Mr. Miller explained that in reviewing performance levels he looks at the fleet size of the carrier and the percentage of travel done within Ontario and that done outside of Ontario. The Ministry compiles the performance rate of all operators with the same fleet size. In considering the violation rate the Ministry looks at the accidents (property damage/injuries), the convictions (driver's performance) and inspections. Accidents are rated as at fault or not at fault. If an accident is a not at fault one there are zero points allocated. If the conviction is a non safety related one such as failure to produce the vehicle registration there are zero points allocated.

Mr. Miller testified that inspections are done at the truck inspection stations using the

commercial vehicle safety alliance standards. A vehicle is allowed two out of service repair defects under these standards. Some defects are not considered as out of service defects, for example a crack in the frame. No points are assigned for this type of defect.

Mr. Miller testified that the Ministry uses an accident weighing table to assign accident points. The Ministry considers the accident points plus the conviction points plus the inspection points when arriving at the overall violation rate.

Mr. Miller explained that the Ministry in determining the violation rate considers the driver profile, that being the driver's license and class of license and hours of work, as well as the vehicle profile, that being the maintenance statement, the CVSA inspections, the annual inspections and the pre trip inspections.

A conditional rating means that the violation rate is over 65% and/or the carrier has failed a facility audit. When the violation rate for a carrier goes over 100% that will trigger a review by the Ministry of the CVOR record of that carrier.

Mr. Miller stated that there are 97,600 carriers operating in Ontario. Of those 2750 carriers or 3% have a conditional rating and 115 carriers have a threshold violation rating over 100%. He stated that the safety rating is public knowledge and is used by insurance companies to set their insurance rates or to refuse to insure carriers. The Ministry feels there is a problem when one carrier is considered related to a carrier with a conditional rating.

Mr. Miller stated that the CVOR application by the Applicant, Brant Truck Corp., which was signed on February 20, 2003, shows an address of 14 Adams Road, Brantford, Ontario. That is the same address as for Bicz Transport Corp. which is a carrier with a conditional rating. Both Brant Truck Corp. and Bicz Transport Corp. have the same fax number, that being 519-754-1916. On some documentation the companies list the same telephone number.

Mr. Miller testified that Michael Bicz listed on the articles of incorporation for Brant Truck Corp as a director and president. There is no history of Michael Bicz being an officer or director for another company that has a CVOR.

Mr. Miller had completed a summary of the ratings for Bicz Transport Corp. He did that because the President of Bicz Transport Corp., Janusz Bicz, is the father of Michael Bicz. Mr. Miller found that Michael Bicz had been a driver for Bicz Transport Corp. and that a vehicle owned by Michael Bicz had been leased to Bicz Transport Corp. The overall violation rate for Bicz Transport Corp. was 104.2%. As the violation rate is over 100% the Ministry would have reviewed Bicz Transport Corp. and considered whether to sanction this carrier.

Mr. Miller stated that a new analysis of Bicz Transport Corp. using a fleet size of 3 would have resulted in a violation rate of 95%. Such a violation rate is considered a stage 3

intervention (being between 80 to 100%) and the Ministry would require an interview with this carrier. At the interview the Ministry would be trying to get commitment from the carrier to improve its violation rating.

In his analysis of the record of Bicz Transport Corp. Mr. Miller stated that this carrier failed the facility audit of July 8, 1999 as the driver profile was less than 55%. By the time of the second facility audit on June 6, 2002 the company's record had worsened. There were 18 charges laid against it and both the driver profile and the vehicle profile were under 55%. A warning letter is sent regarding the CVOR record if the violations exceed 35% of the overall threshold rate. Mr. Miller stated that Bicz Transport Corp had a conditional safety rating prior to 2001 and that type of rating was still on its record. In order to change the rating from a conditional one to a satisfactory one the carrier has to pass a facility audit.

Mr. Miller testified that as of September 30, 2003 Bicz Transport had outstanding fines of \$1280.00.

The vehicle owned by Michael Bicz had been leased to Bicz Transport Corp. until at least the end of February, 2003. The invoices provided by Michael Bicz showed that Brant Truck Corp. did the maintenance work for Bicz Transport Corp. The search of driver's records found that Michael Bicz and Janusz Bicz lived at the same address.

The analysis of the CVOR for Bicz Transport Corp. showed that for every OOS inspection at least two defects were recorded. The out of service rate for Bicz Transport Corp. exceeded the standard rate for similar size fleets in Ontario. The Bicz Transport Corp. rating of 77% was not considered a good rating.

The audit of June, 1999 showed the driver's profile rating for Bicz Transport Corp. was 22.2%. This was the result of infractions dealing with the logs and the time records. Michael Bicz driver's profile showed a history of violations concerning the 13/15 hour rule. But the audit of June, 1999 had no problems with the vehicle maintenance rating.

The June 2002 audit showed the same driver profile rate of 22.2% but now it also showed a poor vehicle maintenance rating. There were out of service defects and problems with the maintenance records. The service invoices provided by Michael Bicz for the maintenance work by Brant Truck Corp. on the vehicles of Bicz Transport Corp. had no odometer readings recorded on them. The Ministry of Transportation requires odometer readings on all maintenance records.

Mr. Miller stated that when Michael Bicz provided a letter of explanation to the Ministry in March of 2003 a number of invoices had been attached to it. Those invoices showed that Brant Truck Corp. did service work for Bicz Transport Corp. There were no odometer readings or dates of service recorded on these invoices. These invoices do not identify which truck or trailer owned by Bicz Transport Corp. was being repaired by Brant Truck Corp. They did show that Brant Truck Corp. was doing brokerage work for Bicz Transport

Corp. But the particulars of this brokerage work were not given on these invoices. Mr. Miller stated that a broker can work for a company using the broker's truck and the CVOR of that company or the broker can use his own truck and his own CVOR. It is not clear from the invoices provided by Michael Bicz how Brant Truck Corp. was doing its brokerage work for Bicz Transport Corp.

These invoices did not specify what trucks were being serviced by Brant Truck Corp or what were the nature of the repairs. Mr. Miller stated that the cost of the repair work as stated on the invoices led him to believe that Brant Truck Corp. was doing work on several trucks per invoice.

During the time that Brant Truck Corp. was doing this service work for Bicz Transport Corp. there was a number of inspections done by the Ministry which showed out of service defects on the vehicles of Bicz Transport Corp. In April, 2002 the power unit was out of service. In July 2002 the power unit and trailer were out of service. In November 2002 the trailer was out of service. In the opinion of Mr. Miller there was not a good maintenance record during the time when Brant Truck Corp. was servicing Bicz Transport Corp. vehicles.

Testimony of Michael Bicz:

Mr. Bicz stated that he was representing the Applicant, Brant Truck Corp. as there was no money to hire a lawyer. He stated that his father was not registered as an officer or director for Brant Truck Corp. His father was in poor health and did not remember anything due to a nervous breakdown. His father would not be running Brant Truck Corp. due to these health problems.

Mr. Bicz testified that he had lied a bit when he was a driver for Bicz Transport Corp. He would drive extra hours in order to get home and not register them on his driver's records.

He stated that he has a maintenance business repairing trucks.

Mr. Bicz stated that he does not see how the Ministry can judge his registration based on his father's company.

Under cross examination Mr. Bicz admitted that he did not put mileage or dates on his services invoices for the repair work on vehicles of Bicz Transport Corp. but that information was stored in the computer. He stated that Brant Truck Corp. was a different company from Bicz Transport Corp. and that those in charge of Bicz Transport Corp. could not tell him what to do with his own company.

Mr. Bicz described Bicz Transport Corp. as a van and refrigerated products company. It travelled to 48 states in the United States. It had ten units and ran its business out of Brantford at 14 Adams Road. Mr. Bicz stated that this location was a farm which had room

for parking and had a shop which could store two trucks and two trailers. He had used that location since 1995. The last time he drove for Bicz Transport Corp. was in December 2002. He had stopped driving trucks after that time. He would broker the loads out to different companies. These arrangements were made by his brother Karl. His father had suffered his health problems since the middle of 2002.

Their mother also had poor health and had given her shares in Brant Truck Corp. to him now. This company, Brant Truck Corp., had been incorporated in 1999. From 1999 to 2002 he had driven for others. As he was losing money doing this he had started his application for his own CVOR in February, 2003.

Mr. Bicz stated that he had four demerit points from following too close. When he did the false logs that was because he had not realized that you had to count the refuelling time in the log.

Mr. Bicz stated that he owned three new trailers in Brant Truck Corp. These had been bought recently. He leased two trailers and two trucks to Bicz Transport Corp.

He did the maintenance of trucks and trailers owned by Bicz Transport Corp. That had started in 2001. He was not a mechanic but had learnt in Europe how to do tire and oil changes on trucks. Prior to that time his brother had done the maintenance. In the past two years Michael Bicz had arranged loans for Bicz Transport Corp.

Mr. Bicz stated that Brant Truck Corp. would do the same type of business as Bicz Transport Corp. Everyone knew the business telephone of Bicz Transport Corp. so he kept that telephone number for Brant Truck Corp.

Mr. Bicz testified that his father had nothing to do with Brant Truck Corp. and his mother had just returned from a visit to Poland.

Mr. Bicz agreed that from 2001 to 2003 there had been inspections where a number of out of service defects had been discovered. There had been problems with getting the repairs done on the older trucks. He agreed that he did not have documentation to show that Bicz Transport Corp. had paid the invoices of Brant Truck Corp. for the repair work or brokerage work.

Mr. Bicz stated that he was getting new equipment. He had hired someone who was a licensed mechanic to help with the business. This person was working three days per week. He would hire drivers for Brant Truck Corp. and it would be his responsibility to discipline these drivers. As the fines were getting bigger he would have to improve on how he supervised the drivers.

Closing Statements:

Counsel for the Registrar referred to section 17 (3) (c) of the *Highway Traffic Act*. Under section 17 (4) Counsel stated that Bicz Transport Corp. and Brant Truck Corp. met the definition of related companies. Brant Truck Corp. was doing brokerage work for Bicz Transport Corp.

Bicz Transport Corp. had an over 100% violation rate and had a conditional rating with the Ministry. Its most recent audit was worse than its first audit. It supposedly ceased operation in January, 2003 and then in February 2003 there is the application of Brant Truck Corp. for its own CVOR.

Counsel stated that in the alternative under section 17 (2) of the *Highway Traffic Act* the participation of Michael Bicz in the operation of Bicz Transport Corp. is relevant information. Within this time frame of Brant Truck Corp. doing maintenance work for Bicz Transport Corp. there had been serious problems with the safety rating of Bicz Transport Corp. When Michael Bicz was providing the mechanical services Bicz Transport Corp. had a poor CVOR record. In the opinion of Counsel Michael Bicz had not provided a satisfactory explanation on how the CVOR rating for Brant Truck Corp. would be any different from that achieved by Bicz Transport Corp. Counsel stated that Michael Bicz had not shown any appreciation of the need to supervise the drivers and ensure there were no driver's violations. Under section 16 (1) of the *Highway Traffic Act* the operator of a CVOR has responsibility for the conduct of drivers working under that CVOR.

Legislation:

The relevant legislation is found under the *Highway Traffic Act*.

Section 16 (1)

"CVOR certificate" means a Commercial Vehicle Operator's Registration Certificate issued under this Act.

"Operator" means the person directly or indirectly responsible for the operation of a commercial motor vehicle including the conduct of the driver of, and the carriage of goods or passengers, if any, in the vehicle or combination of vehicles.

"owner-driver authority" means an owner-driver authority issued under the *Truck Transportation Act*

"safety record" means the safety record of an operator determined in accordance with the regulations.

(2) No person shall drive or operate a commercial motor vehicle on a highway unless the operator is the holder of a CVOR certificate that is not under suspension.

Section 17 (1) The Registrar shall issue a CVOR certificate to every person who applies therefor in the prescribed form and meets the requirements of this Act and the regulations.

(2) The Registrar may refuse to issue a CVOR certificate to an applicant if the Registrar has reason to believe, having regard to the applicant's safety record and any other information that the Registrar considers relevant, that the applicant will not operate a commercial motor vehicle safely or in accordance with this Act, the

regulations and other laws relating to highway safety.

- (3) The Registrar may refuse to issue a CVOR certificate to an applicant if the applicant is related to,
 - (a) a person whose CVOR certificate has been cancelled, is or has been under suspension or is or has been subject to a fleet limitation;
 - (b) a person whose CVOR certificate suspension, cancellation or fleet limitation is under appeal; or a person who the Registrar has reason to believe, having regard to the person's safety record and any other information that the Registrar considers relevant, will not operate a commercial motor
 - (c) vehicle safely, or in accordance with this Act, the regulations and other laws relating to highway safety.
- (4) An applicant is related to a person for the purpose of subsection (3) if,
 - (a) the applicant and the person are related individuals;
 - (b) either the applicant or the person is a partner of the other or was a partner of the other or they have or have had partners in common;
 - (c) either the applicant or the person, directly or indirectly, controls or controlled or manages or managed the other; or
 - (d) the applicant and the person have or have had common officers or directors or they are or have been controlled, directly or indirectly, by the same shareholders.
- (5) The Registrar may issue a CVOR certificate subject to any terms or conditions set out in the regulations that the Registrar considers appropriate.
- (6) No person, alone or in partnership, is entitled to hold more than one CVOR certificate.
- (7) A CVOR certificate is not transferable.

Section 17.1

- (1) The Registrar shall assign a safety rating to every operator in accordance with the regulations.

Section 50

- (1) Every person aggrieved by a decision of the Minister under subclause 32 (12) (b) (i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or Registrar.
- (3) Every person aggrieved by a decision of the Tribunal with respect to a decision of the Minister under subclause 32 (12) (b) (i) or a decision of the Registrar under clause 47(1) (b) may, within 30 days after a notice of the decision is sent to the person's latest address as recorded with the tribunal, appeal the decision of the Tribunal to a judge of the Superior Court of Justice.
- (3.1) Every person aggrieved by a decision of the Tribunal with respect to a decision of the Registrar under section 17 or 47, other than a decision under clause 47 (1) (b), may, within 30 days after a notice of the decision is sent to the person's latest address as recorded with the Tribunal, appeal the decision of the Tribunal to the Divisional Court.
- (3.2) Despite the *Statutory Powers Procedure Act*, the filing of an appeal under subsection (3.1) does not stay the decision of the Tribunal being appealed, unless the Divisional Court orders a stay.
- (4) The judge may confirm, modify or set aside the decision of the Tribunal.
- (5) Section 55 does not apply to the suspension or cancellation of a licence or permit under section 47.

Analysis:

The Registry wishes to deny the Applicant, Brant Truck Corp., a commercial vehicle operator's registration certificate or CVOR based on the Applicant being related to Bicz Transport Corp. The evidence is clear that Bicz Transport Corp. is a CVOR operator with problems.

The facility audits in 1999 and again in 2002 indicate that Bicz Transport Corp. has a problematic violation rating. Currently it has a conditional safety rating, which is only one level above an unsatisfactory rating which could lead the Ministry to sanction the carrier and suspend its operation. The Tribunal appreciates the concerns of the Registrar regarding Bicz Transport Corp. In particular it is a matter of considerable concern to the Tribunal that Bicz Transport Corp. has a recent history of numerous out of service repairs arising from inspections by personnel of the Ministry of Transportation during 2002. The Tribunal, as does the Registrar, *Highway Traffic Act*, has a duty to protect the public from the hazards that can be caused by commercial vehicles which have dangerous safety problems.

But in this case the Registrar has not made a case to convince the Tribunal that Brant Truck Corp. is related to Bicz Transport Corp. in accordance with the definition found in subsection 4 of section 17 of the *Highway Traffic Act*.

Michael Bicz is the son of Janusz Bicz. Janusz Bicz is the president and director of Bicz Transport Corp. The only other name mentioned in the search of the corporate records for Bicz Transport Corp. is Alexander Bicz. It would appear that Alexander Bicz is the middle name of Janusz Bicz. In the corporate records search for Brant Truck Corp. the names of Michael Bicz as director and President and Danuta Bicz as director and treasurer/secretary appear. There is no crossover between Michael Bicz and Janusz Bicz for corporate directors or officers in either Bicz Transport Corp. On This basis there is no finding of relationship between subsection 4 (a), (b) or (d) of section 17.

The Registrar states that the relationship is found under subsection 4 (c) of section 17, that being direct or indirect control or management of each other's company. The only evidence put forward in support of that proposition comes from the evidence of Michael Bicz having been a driver for Bicz Transport Corp. from 1999 to 2002. Verification of this is found in the Facility Audit findings for June 28, 1999 of the Ministry of Transportation wherein Michael Bicz is one of the drivers whose profile was picked for this audit. His name is not found in the drivers profile for the June 11, 2002 facility audit. As well Michael Bicz did testify that he was a driver for Bicz Transport Corp. for the four years and that he leased vehicles to that company. Michael Bicz stated that he was not in control of Bicz Transport Corp. but he helped with arrangement of loans. He stated that his father had been active with Bicz Transport Corp. until ill health occurred in mid 2002. His father has substantive mental health issues and is under the care of a physician. Janusz Bicz has

been found to be a disabled person under the Canada Pension Plan as of July, 2003. Michael Bicz stated that his brother, Karl, made the arrangements for the brokerage shipments for Bicz Transport Corp. He stated that his mother, Danuta Bicz, was no longer active with Brant Truck Corp. and that she had recently given her shares in that company to him. This evidence does not convince the Tribunal either Michael Bicz is indirectly or directly controlling or managing Bicz Transport Corp. or that Janusz Bicz is indirectly or directly controlling or managing Brant Truck Corp.

In the alternative the Registrar wished to refuse to issue the CVOR to Brant Truck Corp. under subsection 2 of section 17 of the *Highway Traffic Act* on the basis that there is other information that the Registrar considers relevant to have reason to believe that Brant Truck Corp. will not operate a commercial motor vehicle safely or in accordance with the law. The Tribunal agrees with the refusal of the CVOR certificate on this basis.

There is evidence before the Tribunal that Michael Bicz had failed to obey the law and regulations regarding the keeping of a driver's log when he was driving for Bicz Transport Corp. He admits that he failed to keep a proper log. He gives two explanations for this failure. One is that he wanted to get home quickly.

The other one offered during his cross examination is that he did not realize that he had to record the time when he was refueling in his log. The findings of the 1999 facility audit show a consistent pattern of failing to enter driving hours into the log and driving over the 13/15 hour rule. The Tribunal does not accept the second explanation of Michael Bicz and finds that he deliberately falsified his driver's log in order to work more hours and get home as quickly as possible. In so doing he put the public in jeopardy in that he could have caused an accident through driver error due to being over tired.

But more importantly the Tribunal found the out of service defects of Bicz Transport Corp. in 2002 to be an extremely relevant piece of information. Between the 1999 facility audit and the 2002 facility audit Bicz Transport Corp. deteriorated in safety rating. In the 2002 facility audit Bicz Transport failed on its vehicle compliance rate as well as on its drivers compliance rate. This was at a time when Michael Bicz acknowledged that he and his company, Brant Truck Corp., had been in charge of maintenance for Bicz Transport Corp. In his testimony Michael Bicz stated that he took over from his brother as the person in charge of maintenance in 2001 despite not having any formal training as a truck mechanic. The invoices produced by Michael Bicz confirm that Brant Truck Corp. did the service repair work for Bicz Transport Corp. These invoices were in violation of the standards set in the *Highway Traffic Act* and its regulations. There was insufficient information as to which trucks or trailers were being serviced and for what reason. Odometer readings and the date of service were not provided on these invoices. If Michael Bicz had this information in a computer it was his responsibility to provide the proper and accurate information to the Ministry of Transportation.

The failure of Michael Bicz to obey the law as a driver and the failure of his company, Brant Truck Corp., of which he is the controlling person and now solely in charge of managing it, to both comply with the legislation and to effectively service the trucks and trailers of Bicz Transport Corp. are relevant pieces of information under section 17 (2) of the Act upon which the Registrar does have reason to believe that the application for a CVOR certificate to Brant Truck Corp. should be refused. The Registrar has sufficient reason to believe that Brant Truck Corp. will not operate a commercial motor vehicle safely when Bicz Transport Corp. has a conditional safety rating due to violations of compliance rates for drivers and vehicles as found in the June 11, 2002 facility audit.

If Michael Bicz and Brant Truck Corp. cannot provide satisfactory repair service for the vehicles of Bicz Transport Corp. as demonstrated by the recent history of serious and numerous out of service repair defects then it is reasonable to believe that the same situation could occur with Brant Truck Corp. if it should be issued a CVOR certificate. Michael Bicz and Brant Truck Corp. have failed to show that they would meet the requirements of the *Highway Traffic Act* and its regulations.

Order:

In accordance with section 50 of the *Highway Traffic Act* the Tribunal orders the Registrar to refuse to issue a CVOR certificate to Brant Truck Corp.

LICENCE APPEAL TRIBUNAL

Marjorie Hiley, Presiding Member

RELEASED: December 9, 2003

FILE NAME: 1675.cvor.Brant Truck Corp

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



3042596 CANADA INC.

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

AND IN THE MATTER of the Commercial Vehicle Operator's Registration (CVOR)
Certificate 117-364-927 issued to 3042596 CANADA INC.;

AND IN THE MATTER OF the Notice of Suspension and Seizure issued to 3042596
CANADA INC.;

AND IN THE MATTER OF the safety record and record of 3042596 CANADA INC.;

AND IN THE MATTER OF an Appeal from the Deputy Registrar of Motor Vehicle's
Order dated May 5, 2003 pursuant to s. 50 (1) of the *Highway Traffic Act*, R.S.O. 1990,
Chapter H. 8 as amend.

B E T W E E N:

3042596 CANADA INC.

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

TRIBUNAL: MICHAEL H. TURK, Vice-Chair

APPEARANCES:

EDWARD R. VAN VOORT, Counsel representing the Applicant
PATRICK MOORE, Counsel, representing the Respondent

DATE OF
HEARING: October 8, 9 and 10, 2003

Thunder Bay

REASONS FOR DECISION AND ORDER

BACKGROUND:

The Applicant appeals to the Licence Appeal Tribunal from an Order of the Deputy Registrar of Motor Vehicles dated May 5, 2003 issued pursuant to Section 47 & 47 (1) of the *Highway Traffic Act*.

On April 7, 2003 the Deputy Registrar ordered a Suspension and Seizure Order for thirty (30) days of CVOR certificate 117-364-927 and plate portion of permits for all commercial motor vehicles and trailers issued to 3042596 Canada Inc. and that the plate portion of permits be seized.

On April 30, 2003 a show cause meeting took place and on May 5, 2003 the Deputy Registrar issued a decision wherein he states that "I have considered your submissions, your payment of fines, and your safety record including your record of convictions, accidents and vehicle inspections, I remain concerned for highway safety".

On the basis of the show cause meeting the Deputy Registrar Ordered that the Applicant's CVOR be suspended for 7 days. This Order had the effect of reducing the original suspension from 30 days to 7 days.

It is this Order that is the subject of this Appeal.

Motion to Admit Current Record

Mr. Moore submits that the Tribunal should not permit the introduction of a more current CVOR on the grounds that the Tribunal should only look at the statistics contained in the CVOR contained at Tab 5 of Exhibit Number 4, as this was the CVOR used in connection with the Order that is being appealed.

Mr. Van Voort submits that the updated CVOR is relevant and should be admitted.

The Tribunal relied upon previous cases of the Tribunal in the case of *Transport Provost Inc./Provost Bulk Transport Inc. v. Deputy Registrar of Motor Vehicles*, and *Star Van Systems and Andres-Van Es v. Deputy Registrar of Motor Vehicles* whereby it was held that evidence of current conduct was relevant for the purpose of determining whether the sanction was appropriate. The Tribunal ruled that the current CVOR of the Applicant shall be admitted for the purpose of determining whether the sanction was appropriate.

On the basis of this ruling a CVOR from the period of August 30, 2001 to August 30, 2003 was entered and marked as Exhibit Number 5. It was acknowledged that the overall rating for the purpose of this Exhibit was 95%.

Donald Gillette

Donald Gillette, a carrier sanction and investigations officer with the Ministry of Transportation was the Respondent's first and only witness.

Donald Gillette testified about the CVOR system and that when an operator reaches 35% of threshold a series of interventions are triggered. Donald Gillette referred to Tab 16 of Exhibit Number 4, which is the Ontario Carrier Safety Rating and Commercial Vehicle Operator's Registration System Public Guideline. Page 190 of Exhibit Number 4 identifies Ministry interventions as follows:

- 1) A warning letter is triggered if a carrier's violation rate exceeds 35% of its overall CVOR threshold;
- 2) An audit is triggered if a carrier's overall violation rate exceeds 65% of its overall CVOR threshold;
- 3) An interview is triggered if a carrier's overall violation rate exceeds 80% of its overall CVOR threshold;
- 4) A sanction is triggered if a carrier's overall violation rate reaches 100% of its overall CVOR threshold.

Donald Gillette testified that Ministry statistics provide that of the 77,000 current CVOR holders 2,710 carriers or 3% exceed the 35% threshold and that 105 carriers or 1% are over the 100% threshold.

Donald Gillette referred to his analysis report of the Applicant from March 2003, which is contained at Tab 4 of Exhibit Number 4. As it relates to this analysis, Donald Gillette testified that the Applicant's CVOR was issued on July 12, 1994 and 3 warning letters were issued on September 17, 1995, January 21, 1999 and October 10, 2000, respectively, a facility audit was conducted on November 2, 2000, a conditional safety rating was assigned to the Applicant on January 29, 2001 and his performance analysis show that the Applicant has an overall violation rate of 105.1%.

Mr. Gillette testified that the Respondent's calculations were based upon a fleet size of 14 and that this became an issue after the show cause meeting. Mr. Gillette testified that following further investigation he determined that the adjusted fleet size for the Applicant should be 24 and that when a fleet size of 24 is used, the Applicant's overall violation rate is reduced to 95.5 %.

Mr. Gillette continued by testifying about the Applicant's record of convictions, accidents and out of service and that there may be a 3-month gap from when an accident or conviction takes place and appears on the CVOR.

The Show Cause Meeting

Mr. Gillette testified that the Show Cause Meeting was held on April 30, 2003 the notes from which are contained at Tab 13 of Exhibit Number 4.

Mr. Gillette testified that at the Show Cause Meeting the Applicant presented a driver selection and training plan, an action plan and a preventative maintenance program.

The driver selection and training plan provided for the following:

- (a) hiring only of drivers who have a minimum of 3 years experience driving in the bush with AZ license & improved driver screening;
- (b) defensive driving courses for new drivers;
- (c) pull driver abstracts every 6 months or when problems are suspected;
- (d) safety consultant to conduct driver training and track driver compliance.

The action plan provided for the following:

- (a) development of a safety and hiring policy;
- (b) safety consultant to hold training courses on hours of work, trip inspection, road security, defensive driving, optional training on air brake adjustment and tire changing certification;
- (c) accident prevention program - all accidents to be investigated by Wayne Cerven, safety consultant or Pierre Gaumond, principal of the Applicant;
- (d) install vehicle speed governors set to 95 kms per hour;
- (e) install 5th wheel scales or portable scales to reduce overweight violations;
- (f) change method of paying drivers from a percentage to flat rate;

The preventative maintenance program provided as follows:

- (a) own shop with 4 mechanics and 1 road service truck;
- (b) drivers to have all defects found in pre-trip inspections repaired prior to leaving the yard;
- (c) tractors and trailers to be inspected and serviced weekly.

As it relates to the foregoing plans, Mr. Gillette testified that whereas all of the policies had not yet been implemented the Respondent does not disagree with any of the initiatives, that they are excellent initiatives if they are followed and that the installation of governors on the engines is very good.

Mr. Gillette's testimony concluded with him stating that after the show cause, he reviewed the documents, verified fleet size and that since the Applicant had taken steps and followed through, a reduction of the suspension from 30 days to 7 days was more than fair.

On cross-examination by Mr. Van Voort, Mr. Gillette acknowledged that there was a discussion that once the Applicant's fleet size was adjusted it may resolve the issue of the sanction.

Mr. Gillette further acknowledged that aside from the warning letters of 1995, 1999, 2000 and audit of 2000, the Applicant was not contacted by the Respondent and that he could not answer why the Respondent had not taken any steps since 2000 other than that the Respondent lacks sufficient resources in Northern Ontario.

The remainder of Mr. Van Voort's cross-examination did not disclose any significant facts nor did Mr. Moore's re-examination of Mr. Gillette.

Nadine Tremblay

The Applicant's first witness was Nadine Tremblay, an employee of the Applicant since 1994.

Ms. Tremblay testified that she was present at the audit that was conducted by Mr. Love in 2000 and that she was not advised that the Applicant's record was substandard nor was she advised whether the Applicant had passed or failed the audit. Ms. Tremblay testified that the Respondent had not contacted the Applicant since the audit and not prior to its issuance of the Notice of Suspension and Seizure Order.

Ms. Tremblay testified that the Applicant's business is driving on bush roads and that the nature of these roads results in damage to the Applicant's vehicles.

Ms. Tremblay continued by testifying that she was also present at the April 30, 2003 show cause meeting and was advised at the meeting that the increased fleet size to 24 would improve the Applicant's threshold and that there would be no problems.

On cross-examination by Mr. Moore, Ms. Tremblay testified about the Applicant's hiring of Wayne Cervin as a safety consultant. Ms. Tremblay testified that Wayne Cervin was hired in April 2003 on a full time basis and that in 1999 Wayne Cervin provided driver training and defensive driving courses every 6 months.

Ms. Tremblay continued by testifying that Wayne Cervin has set up a program to assist in driver interviews prior to hiring, conducts accident investigations and that she did not hire Wayne Cervin as a result of the Notice of Suspension and Seizure Order.

Ms. Tremblay reiterated her testimony that she was not aware of the results of the 2000 audit, that she only obtained a copy of the CVOR at the request of her insurer and that she didn't believe that after 3 years of silence, the Ministry would take her plates away. Ms. Tremblay's cross-examination was concluded with her testifying that if the Applicant is successful on this Appeal, the Applicant will continue with Wayne Cervin and not go back to the way they were doing business before Wayne Cervin.

Mr. Van Voort's re-examination did not disclose any significant facts.

Wayne Cervin

Wayne Cervin, a safety adviser was the Applicant's second and final witness.

Wayne Cervin testified that he has 20 years of experience in the logging trucking industry where he has worked as a loader and hauler, a licenced mechanic, conducted inspections and that for the past 6 years he provides consulting services to management with respect to all facets of the trucking industry.

Wayne Cervin testified about the road conditions that the Applicant encounters on a daily basis and that he was first contacted by the Applicant in 2000 at a time when it was being audited by the Respondent.

Wayne Cervin testified that in 2000 he started to develop a joint health and safety committee and that he tried to work on driver training, monitoring of log books, the development of a preventative maintenance program and that he returned to the Applicant 2 more times that year.

Wayne Cervin testified that he was re-contacted by the Applicant during the week of April 22, 2003 and implemented the following changes:

- 1) screening of driver applications including the review of driver abstracts, CVOR and requirement of 3 years of driving experience;
- 2) driver training regarding the *Highway Traffic Act* and on load security;
- 3) driver training on the transportation of dangerous goods;
- 4) driver training on pre-trip inspections and hours of work;
- 5) wheel service and brake adjustment program.

Wayne Cervin testified that he is striving for 2 goals: to obtain an excellent rating and establish a WSIB Audit Committee within 6-12 months with the goal of being Occupational Work Place Safety certified.

Wayne Cervin testified that he has reviewed the CVOR with the Applicant and has instituted the following policies for the Applicant:

- 1) pay employees per load rather than by gross weight;
- 2) classroom training to ensure load security is maintained (Wayne Cervin is a certified instructor by the Ontario Forestry Safety Workplace Association);
- 3) training on pre-trip inspections;
- 4) road test of drivers every 3 months;
- 5) hours of work training;
- 6) institute driver tracking system;
- 7) documentation of all violations;
- 8) driver incentive program;
- 9) defensive driving courses;
- 10) accident prevention program;
- 11) review brake performance;
- 12) review & updating of driver manuals;
- 13) zero tolerance for substance abuse;
- 14) disciplinary action plan;
- 15) video-tapes for driver assistance;
- 16) driver training for illness & fatigue, negotiating curves, passing, right of way, loads, safe driving recognition, tire inflation, lighting;
- 17) implementation of policies for: hazards, warnings, hours of work, work refusal, 2 way radios, outside inspections, rules of the road;

18) random spot checks;

19) air brake adjustment course;

20) membership in NOLTA, the Northern Ontario Logging Transportation Association

Wayne Cervin testified that in his view the procedures and policies that he has implemented have worked and that in the last 6 months the Applicant's performance is above average and that his policies are now in place.

On cross-examination by Mr. Moore, Wayne Cervin testified that he has been a consultant for 6 years and operates a consulting business called Safety First Consulting and currently has 6 clients.

Wayne Cervin testified that he provides occupational health and safety advice, sets up preventative maintenance programs and that he is on call 24 hours per day in the event of an accident and referred to Tab 1 of Exhibit Number 3, his 44 page health & safety truck driver policy.

Wayne Cervin testified about his role with the Applicant in 2000, that he thought that the Applicant had passed the audit and recounted the programs and policies referred to in his examination in chief.

In response to Mr. Moore's review of the driving record of 2 drivers, Wayne Cervin acknowledged that apart from the issuance of a warning letter, the discipline policy has not been enforced but that the policy will now be implemented and enforced.

In response to Mr. Moore's question about whether the driver certification performed by the Applicant could have been completed in one day, Wayne Cervin acknowledged that it was a lot of material and perhaps too much material to cover in one day but denied that the certification was done for the purpose of the Tribunal hearing.

Wayne Cervin testified that his goal is to educate the drivers, improve violation rates and to improve the Applicant's rating.

Mr. Van Voort's re-examination of Wayne Cervin did not disclose any significant or additional facts.

Submissions

The Respondent submits that the Registrar did not err in issuing the Order based upon the Applicant's record of accidents, convictions and inspections with an overall violation

rate of 95% and that the Registrar reduced the suspension from 30 days to 7 days due to the fact that the Applicant's proposals and policies were effective.

The Applicant submits that the Respondent did not provide any warning letters, conduct an audit or an interview since 2000 while it continued to monitor the Applicant and note its increasing violation rate. The Applicant submits that the Respondent's failure to provide a warning letter, audit or interview should prohibit it from imposing a sanction at this time.

The Applicant submits further that Wayne Cervin became employed by the Applicant in April 2003 with the goal of bringing the Applicant to an excellent standard and that Wayne Cervin has implemented 43 policies and procedures, which the Respondent agrees are positive.

ISSUES:

There is one issue.

Was the decision of the Respondent in error.

THE LAW:

The relevant sections of the *Highway Traffic Act* are as follows:

- 47. (1) Subject to section 47.1, the Registrar may suspend or cancel,
 - (a) the plate portion of a permit as defined in Part II;
 - (b) a driver's licence; or
 - (c) CVOR certificate, on the grounds of,...
 - (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or...

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

APPLICATION OF THE LAW TO THE FACTS:

Tab16 of Exhibit Number 4 contains a document prepared by the Ministry of Transportation entitled Ontario's Carrier Safety Rating and Commercial Vehicle Operator's Registration System Public Guideline.

Page 190 of this Tab discusses violation rates and what may happen with an unacceptable violation rate and states: "The following disciplinary interventions and sanctions will be triggered by the CVOR System when a carrier's violation rate rises to an unacceptable level. However, this does not preclude the Registrar from intervening earlier if action is considered appropriate."

The document continues by outlining a process that responds to various triggering events. A warning letter will be sent if a carrier's violation rate exceeds 35% of its overall CVOR threshold, a facility audit will be conducted if a carrier's overall violation rate exceeds 65% of its overall CVOR threshold, an interview will be conducted if a carrier's overall violation rate exceeds 80% of its overall CVOR threshold and a sanction will be applicable if a carrier's overall violation rate reaches 100% of its overall CVOR threshold.

The Tribunal heard testimony from Mr. Gillette that whereas the Respondent sent three warning letters up to and including the year 2000 and conducted a facility audit in the same year, the Respondent did not subsequently send any further warning letters, did not conduct a further audit, nor did it require the Applicant to attend for an interview as referred to in the above paragraph and in accordance with the Respondent's published guidelines.

Mr. Gillette was candid in his testimony when he acknowledged that he did not have an answer as to why the Respondent had not intervened in the past three years other than that the interventions did not place due to constraints within the Respondent and the Applicant carries on business in northern Ontario.

The Tribunal did not hear satisfactory evidence from the Respondent regarding its failure to send a warning letter, conduct a facility audit or an interview in the past three years nor did it hear evidence from the Respondent that would have justified the Respondent in foregoing these three phases of intervention and proceeding immediately to a sanction.

It is the further view of this Tribunal that as it relates to this Applicant, the Respondent's failure to send a warning letter, conduct a facility audit or an interview for a three year period is crucial to the Respondent's ability to evaluate the Applicant and determine what, if any course of action should be instituted and whether the imposition of a sanction was appropriate.

At the time when the Respondent proceeded with a sanction, the Applicant's CVOR showed a violation rate of 105.1%. This violation rate was based upon an incorrect fleet size and when Mr. Gillette adjusted for the correct fleet size, the violation rate was

reduced to 95% and the parties agreed for the purpose of the hearing that the Applicant's violation rate was 95%. The Tribunal notes that by its own guidelines, a violation rate of 95% does not in and of itself lead to a sanction being considered and/or imposed.

This Tribunal heard evidence from Wayne Cervin with respect to the action plan, implementation thereof and all steps that the Applicant has undertaken to improve its CVOR.

Mr. Gillette testified that he agreed that that the action plan presented by the Applicant was a good one and did not suggest any revisions or amendments to the action plan.

The Tribunal notes that at the time of this hearing the Applicant had implemented the proposed action plan and had taken the necessary steps to improve its CVOR record.

It is the view of this Tribunal that the steps taken by the Applicant as of the date of this hearing are positive, that these steps were not rejected or contradicted by the Respondent and that these steps are wholly consistent with the ultimate goal of ensuring highway safety.

Based upon the totality of the foregoing, it is this Tribunal's finding that the Deputy Registrar was in error in concluding that he had reasonable grounds to remain concerned for highway safety and that a sanction was warranted.

ORDER

The Tribunal does hereby orders as follows:

1. The Suspension and Seizure Order of the Respondent dated May 5, 2003 suspending CVOR certificate 117-364-927 and plate portion of permits for all commercial vehicles and trailers of 3042596 Canada Inc. for a period of 7 days be and the same is hereby set aside.

LICENCE APPEAL TRIBUNAL

Michael Turk, Vice-Chair

RELEASED: December 16, 2003

FILE NAME: 1692.cvor.Gaumont

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice or Divisional Court is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.



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1536-ADLS-ASTHMA

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

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

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

APPEARANCES: ADELAIDE PINDER
Representative for the Registrar of Motor Vehicles

Solicitor for Applicant

DATE OF
HEARING: April 16, 2003

DECISION
RELEASED: April 22, 2003

Toronto

REASONS FOR DECISION

A hearing was held on April 16, 2003, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on April 22, 2003, with Reasons to follow.

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

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated March 26, 2003, and was received by the Tribunal on March 31, 2003, together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

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

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

Preliminary Matters

As the witness for the Respondent arrived late, the Respondent's Representative asked for a five-minute recess in order to confer with the witness. The Respondent's Representative's request was granted.

Solicitor #1, appearing on behalf of the Applicant, agreed to proceed with the hearing, in spite of the Applicant's absence. Solicitor #1 advised the Tribunal that the Applicant's whereabouts were unknown at this time.

Submissions of Written Material

By the Applicant:

Exhibit # 1 Suspension Reminder Notice dated February 6, 2003 – issued by the Registrar of Motor Vehicles.

Exhibit # 2 Notice of Appeal Form – received February 18, 2003.

By the Respondent:

Exhibit # 3 Ministry of Transportation submissions – received April 11, 2003

ISSUE:

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

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

LAW:

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

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

The HTA states under Section 50.1(4):

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

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

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

who is the subject of the report from providing a breath or blood sample including the results of any related tests.

- (3) The report shall be signed by the medical practitioner.”

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

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

FACTS:

The Applicant’s Driver’s Licence was suspended “2003/02/06” as per Notice of Appeal, filed as exhibit # 2.

Applicant’s Evidence

In lieu of Page 2 of the Notice of Appeal, which does not form part of the Applicant’s submissions, the Applicant submitted a typewritten and a handwritten note from himself, and a letter from his physician of “...over fourteen years...”.

In a letter, addressed to the Tribunal, dated February 14, 2003, the Applicant writes: “...*temperatures dipped to –20 degrees Celsius and the wind chill factor was close to –35 Celsius, these temperatures played havoc on my asthmatic condition. I have great difficulty breathing in these temperatures...*”.

By handwritten letter of March 19th, 2003, the Applicant complains about police actions and suggests that a blood sample should have been taken.

The Applicant’s physician, Physician #1 confirms in a letter dated March 31, 2003, addressed to Solicitor #1, that the Applicant: “...*suffers from moderately severe asthma ...would make it difficult, at times for him to perform a forcible expiration (such as is required for a breathalyzer test)...*”

The Tribunal asked the Applicant’s counsel, if he had any idea as to why page two of the Notice of Appeal was missing from the record. Solicitor #1 stated that he did not. At the hearing, the Applicant’s counsel opted to rely on the documentary evidence submitted and offered no further evidence.

In his closing remarks the Applicant’s counsel, Solicitor #1, referred to the Applicant’s letter dated February 14th, 2003. Solicitor #1 re-iterated the statements made by the Applicant and pointed out that the temperature was “...*much lower ...colder...*” than the temperature of –6 degrees Celsius, suggested by the officer.

The Applicant states in one of his letters, that not only did he have a puffer on him, he required the use of the puffer “...*to assist him in breathing and providing a sample of his breath...*”. Solicitor #1 continued by reminding the Tribunal that Officer #1 was not able to

find the medication, nor did he recall seeing the medication. Yet, the inhaler was named in the list of contents, of all the items, found on the Applicant.

Reading from the Applicant's letter dated March 19th, 2003, and from Physician #1's letter Solicitor #1 paraphrased statements contained therein.

Concluding his remarks, Solicitor #1, emphasized that this Tribunal is not a Court of Law. As such the Tribunal is not bound by rules governing criminal proceedings "...*where there has to be proof beyond a reasonable doubt...*". Solicitor #1 asked the Tribunal to find that based on the evidence presented, and on the balance of probabilities, the Applicant did his best to provide a breath sample but was unable to do so, due to a medical reason.

Respondent's Evidence

The Respondent provided the following Documents:

1. Certified Copy Notice to the Registrar, sealed April 7, 2003
2. Certified Copy Driving Record of the Applicant, sealed April 3, 2003
3. Certified Copy of Vehicle Record, sealed April 7, 2003

The Respondent's Representative called Officer #1, a police officer with the York Regional Police, as a witness.

Officer #1 testified that he has been a police officer since "...*September of 2000...*" He described the events that led to the Applicant being approached and subsequently arrested. The Applicant was driven to the Richmond Hill station where he was demanded a breath sample.

Officer #1 did not administer the breathalyzer test but was present throughout the session. During the time he spent with the Applicant Officer #1 did not observe the Applicant exhibiting any signs of respiratory distress. The Applicant asked for neither medication, not medical assistance.

Under cross-examination by Solicitor #1, Officer #1 related the events that took place immediately prior his approaching the Applicant's vehicle. He testified that the temperature was approximately -6 degrees Celsius and that the car was not running at the time he approached the Applicant.

Upon conducting a preliminary search of the contents of the Applicant's pockets, Officer #1 asserted that he did not find a "puffer" in the Applicant's jacket pockets. As a puffer was listed to be inside of the bag where the Applicant's belongings were placed by the Staff Sergeant at the Station, Officer #1 admitted that he had not seen it.

Officer #2 of the Durham Regional Police, was called as a witness. Officer #2 began his testimony by confirming that he has been a Police Officer "...*since August of 1997...*" and a qualified breath technician since "...*October 2000...*".

Officer #2 described the Applicant's demeanour after the Applicant entered the breath room. Reading from his notes, Officer #2 recited the procedural questions asked prior to a breathalyzer, as well as the answers obtained from the Applicant. In response to Officer #2's question as to whether he was ill, the Applicant replied "No". Ascertaining that the Applicant used a "Ventolin" inhaler, Officer #2 asked the Applicant what time he had taken the last dosage. According to Officer #2 the Applicant's reply was "eight o'clock".

As the Applicant was asked to blow into the breathalyzer, Officer #2 noticed that the Applicant was blowing the air "...around..." the mouthpiece rather than blowing into the mouthpiece. The Applicant was allowed a total of approximately fifteen opportunities to provide a breath sample but either failed or refused to comply.

During the breathalyzer test session, Officer #2 did not notice the Applicant showing any signs of breathing difficulties. Officer #2 confirmed the Applicant did not request the use Ventolin, nor did the Applicant ask for medication or medical assistance. In cross-examination Officer #2 answered Solicitor #1's questions pertaining to the usage and checking of the breathalyzer device.

In closing, the Respondent's Representative stressed that the Applicant's medical records do not adhere to the requirements of Section 15 subsection (1) of Ontario Regulation 574. The report provides none of the information required as to history of the condition, nor does the doctor actually indicate that he is aware of the purpose of the report.

The Respondent's Representative stated that it is the Registrar's submissions that the Applicant had no intention to provide a breath sample, and that his failure to do so, had nothing to do with a medical condition. Officer #2's testimony supports the Registrar's position, in that Officer #2 observed the Applicant blow air around the mouthpiece, and noticed absolutely nothing wrong with the Applicant at the time of the breathalyzer.

The Respondent's Representative concluded by asking the Tribunal to uphold the decision of the Registrar.

APPLICATION OF THE LAW TO FACTS:

Although the totality of the evidence presented was considered, the preceding notes reflect a summary of the proceedings. Evidence introduced not directly germane to the issue was not transcribed.

Solicitor #1 suggested that this Tribunal as a quasi-judicial body, rather than a Court of Law, is not required to establish proof beyond a reasonable doubt, but may simply weight the matter on a balance of probabilities. The Tribunal is fully aware of this premise, and will render a decision accordingly.

In his closing remarks, Solicitor #1 proposes that the Applicant's medical condition, combined with the fact that on the surface, there appears to be minor inconsistencies

between the written statements of the Applicant and the viva voce evidence of the officers, constitutes an adequate foundation to set aside the Registrar's decision.

Prior to setting out the reasons for the decision, the Tribunal will address one of the concerns raised by the Applicant and by Solicitor #1.

The Tribunal does not challenge, that the temperature out doors was below zero when demand for a breath sample was made. The Tribunal acknowledges and accepts the fact that cold temperatures are a known cause of aggravation for individuals with respiratory illnesses. Nonetheless, the Tribunal notes that the Applicant was not asked to provide a breath sample by the side of the road. The Applicant was driven to the police station for processing. Thus, the discrepancy in evidence between the Applicant and Officer #1 as to the actual temperature, is of no consequence.

The Applicant has appealed under Section 50.1 (2) (b) of the Highway Traffic Act, which prescribes:

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

The Tribunal does not dispute that the Applicant suffers from "...*moderately severe asthma*..." as diagnosed by the Applicant's physician, Physician #1. However, it is not the intent of Section 50.1 (2) (b) of the Highway Traffic Act to imply that any one with a medical condition, can be exempt from providing or exonerated for failure to provide a breath sample. The question that must be addressed by this Tribunal is, how did the Applicant's condition, at the time of the breath demand, prevent the Applicant from failing to provide an adequate breath sample.

No viva voce evidence from the Applicant was heard, as the Applicant was not present at the hearing. The Tribunal must weigh the evidence of the Applicant, which consists of: two letters written by the Applicant together with a letter from the Applicant's family physician, Physician #1; vs the evidence of the Registrar, which consists of eyewitness testimony of the two officers involved.

To substantiate the appeal on medical grounds, the Applicant opted to submit a letter from his physician, Physician #1, in lieu of having page 2 of the Notice of Appeal completed by Physician #1. Solicitor #1, the Applicant's counsel, asked that the Tribunal consider Physician #1's letter as medical evidence to support the Applicant's appeal on medical grounds.

The Respondent's Representative contends that Physician #1 provides insufficient information in his letter to allow the Tribunal to rule in favour of the Applicant. According to the Respondent's Representative, Physician #1's note must be viewed pursuant to the criteria of applicable legislation, more particularly, Section 15 of Ontario Regulation 574.

The Tribunal is in agreement. Section 15 of Ontario Regulation 574 is explicit as to the history which must form part of a medical report. Hereinafter, the Tribunal will discuss the shortcomings found in Physician #1's report.

The Respondent's Representative maintains that Physician #1's note, does not meet the requirements set out in Section 15 of Regulation 574, in that it provides none of the details required, such as the Applicant's medical history.

Sections 15 (1) (a) (b) (c) (d) and 15 (2) of Regulation 574 prescribe as follows:

15 (1)

"A report of a legally qualified medical practitioner that is submitted in evidence shall clearly state:

a) the name, telephone number and address, with postal code, of the medical practitioner;

b) the name, date of birth and address of the person who is the subject of the report;

(c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the Tribunal from the suspension of a driver's license under section 50.1 of the Act."

(d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;

15 (2):

The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath sample including the results of any related tests."

Physician #1's letter complies with the requirement of Section 15 1(a) but not with Section 15(1)(b), which requires the Applicant's complete information, i.e. address and birth date.

Physician #1's remark "...expiration (such as is required for a breathalyzer test)..." seems to indicate that he may have been aware of the purpose of his report, therefore Section 15 1(c) is met. However, as Physician #1 offers no information as to the details of the Applicant's last visit, Section 15 (1)(d) of Regulation 574 is not met.

Section 15 (2) of Regulation 574 is, perhaps, the most relevant. The essence of this clause requires that the physician offer support to establish that there is a relationship between the medical condition and the incapacity to provide a breath sample. This clause relates specifically to the detailed information required on page 2 of the Notice of Appeal, which serves as a valuable guideline to the Tribunal, as it is designed to provide pertinent details of the Applicant's condition, such as:

- Details and diagnosis of the patient's present condition;
- History of condition;
- Type of Measurements or recent test taken with (date indicated): (Reference to any pathology test (e.g.: PTF represent important corroboration of your medication opinion)).
- Relevant details of last visit and when ...patient was last seen

The Tribunal finds as a fact that Physician #1's report fails to meet the test of establishing the grounds for appeal under section 50.1.

Furthermore, Physician #1 opines that the Applicant's condition: "...would make it difficult, at times for him to perform a forcible expiration (such as is required for a breathalyzer test)..." The Respondent's Representative maintains that Physician #1 opinion is nebulous. With all due respect to Physician #1, the Tribunal finds the words "... at times..." do render the report imprecise.

Physician #1 was not present at the breathalyzer session, therefore, he is not in a position to establish the severity of the Applicant's condition, at the time of the demand for a breath sample. Thus, the Tribunal prefers the evidence of the two eyewitnesses involved, Officer #1 and Officer #2.

There are certain unmistakable indicators of respiratory impairment that are visible even to an untrained person. There is absolutely no evidence that the Applicant was experiencing any of the symptoms commonly associated with asthma, such as shortness of breath, wheezing or coughing, at the time of the breathalyzer. This finding is corroborated by the evidence of Officer #1 and Officer #2, who were in direct proximity to the Applicant. Neither officer noticed, at any time, the Applicant suffering from any type of respiratory distress.

In his unsworn written statement, the Applicant claims that he was denied the use of the inhaler. The Tribunal has now heard the sworn testimony of Officer #1 and Officer #2 that at no time did the Applicant request medication or medical assistance. The Tribunal finds that the evidence, given under oath, of two law enforcements officers has greater weight. The Tribunal, therefore, prefers the sworn testimony of Officer #1 and Officer #2 to that of the Applicant.

Lastly, the Tribunal points out that the Applicant submitted no pulmonary function test results or any other report from a physician specializing in respiratory ailments.

The onus being on the Applicant to establish the merits of the appeal, the Tribunal finds that the Applicant's unsworn submissions through his agent fail to substantiate the basis for an appeal on medical grounds. Thus, the Tribunal finds that the Applicant does not meet the criteria of Section 50.1 (2) (b), in that the Applicant was not able to demonstrate that during the breathalyzer, he was exhibiting the symptoms of a medical condition, i.e. asthma, which would have precluded the provision of an adequate breath sample.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated February 6, 2003 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

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

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: *April 25, 2003*



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Decisions under Highway Traffic Act

Section 82.1 - Commercial Vehicle Impoundment and Suspension Order - (CVIS)

Fiscal Year 2003 - 2004

LAT Decisions are exempt from translation under Ontario regulation 411/97 of the French Language Services Act

>> [BAKKE'S TRUCKING LTD.](#)



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**Licence
Tribunal
Appeal**

**Tribunal
d'appel en
matière de permis**

BAKKE'S TRUCKING LTD.

Appeal under Section 50.3 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from an Order of the Registrar of Motor Vehicles pursuant to Section 82.1 of that Act.

TO APPEAL AN ORDER TO SUSPEND AND
IMPOUND A COMMERCIAL MOTOR
VEHICLE OR TRAILER

TRIBUNAL: MICHAEL H. TURK, Vice-Chair

APPEARANCES: RON GARLICK, Agent for the Applicant
PATRICK MOORE, Solicitor for Respondent

DATE OF
HEARING: April 28, 2003

Ottawa

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by Bakke's Trucking Ltd. (the "Applicant") respecting an Order of the Registrar of Motor Vehicles (the "Respondent") pursuant to sections 50.3 and 82.1 respectively of the Highway Traffic Act (Ontario), R.S.O. 1990, Chap. H.8 as amended.

EXHIBITS:

Exhibit #1: Order to Impound and Suspend dated March 18th, 2003, issued by the Registrar of Motor Vehicles.

Exhibit #2: Notice of Appeal Form received at the Tribunal March 25th, 2003, filed by the Applicant.

Exhibit #3: Applicant's Record Book.

Exhibit #4: Respondent's Record Book.

Exhibit #5: Additional page of notes from Officer Reina Lyons.

Exhibit #6: Four receipts submitted by the Applicant.

PRELIMINARY MATTERS:

There was one preliminary matter raised at this hearing.

The Applicant advised the Tribunal that it did not receive the Respondent's documents within the 10-day period required by Rule 6.3 of the Rules of Practice of the Tribunal and objected to the Tribunal accepting the documents and admitting them into evidence. It was acknowledged by the Respondent that the Applicant did not receive its Book of Documents within 10 days prior to the hearing.

Following questions by the Tribunal, the Applicant acknowledged that its primary objection was technical in nature and related simply to the issue of timeliness. In response to the Tribunal's question as to whether the Applicant had suffered any prejudice by the late delivery of documents, the Applicant stated that it may have wished to submit further documents.

The Tribunal suggested that the Applicant would not be precluded from submitting any additional documents not previously delivered to the Respondent provided that the Respondent consented, in the absence of which the Tribunal would consider granting the Applicant a brief adjournment.

With the consent of the Respondent to the Applicant submitting any further documents that it wished, the Applicant acknowledged that on the basis of the foregoing it would not suffer any prejudice and that it did not require an adjournment. On that basis, the Respondent's Book of Documents was accepted and marked as Exhibit Number 4 and the hearing proceeded.

FACTS:

Evidence for the Respondent:

The Respondent's witnesses at this hearing were MTO Transportation Enforcement Officer David Hopewell, and MTO Transportation Enforcement Officer Reina Lyons.

Officer David Hopewell testified that on March 18, 2003 he was stationed at the Casselman truck inspection station and that on this day all traffic was put through the weigh scale lane. He conducted a visual inspection of the wheels and brakes of a

vehicle as it rolled by and he noticed that the push rods were extending too far at the number 4 and 5 axels and advised the driver that the vehicle would require a full inspection and requested production of all necessary vehicular documentation.

As part of the CVSA inspection, the brakes on the vehicle were checked accordingly. The impounded vehicle was a 1997 Lode King Trailer equipped with two axels and air brakes. The air braking system for the two rear axels were equipped with clamp type 30 regular type brake chambers, which are the most common type of system in use.

Officer Hopewell testified that with the vehicle's wheels blocked, he instructed the driver, Mr. James Dewar, to apply pressure to the brakes and hold until instructed to release. The brake system air pressure gauge in the cab was observed by Officer Hopewell to indicate that the pressure was at 98 psi, the proper level for the system's operation. With the brakes fully applied, and then released, Officer Hopewell measured the push rod travel for each of the four air brake actuator chambers by marking the clevis six inches (6") from the chamber with a pencil and measuring the travel difference with a steel tape measure. Officer Hopewell further testified that his marks on the clevis were made in such a way that there was no space between the end of the mark and the face of the chamber thereby giving the best possible accuracy.

Officer Hopewell found that three of the four brakes on the vehicle had push rod travel at 2 ¼" (Exhibit #3, page 4). Officer Hopewell determined that the number of brakes having a critical defect was in excess of the 50% as per Regulation 512/97, section 7.(2) and called another MTO Enforcement officer, Reina Lyons to the scene to verify his measurements. The driver was given a Notice and a ticket, and the Applicant was subsequently informed that the vehicle was to be impounded.

Officer Hopewell testified that he spoke to Ron Garlick of the Applicant and informed him that the brake defects would have to be rectified before the trailer goes to impound or it would have to be floated to the pound and that the lumber would have to be offloaded.

Officer Hopewell concluded his testimony by stating that Gilbert Seguin, a licenced mechanic, subsequently attended and performed the necessary brake adjustments.

On cross-examination by Ron Garlick, Officer Hopewell testified that he is certified in the area of critical defects, that he noticed the problems with the 4th and 5th axels during a drive by and that all other features of the brakes and the tractor were fine.

As it relates to the type and method of measurement, Officer Hopewell testified that there is no prescribed method of measurement and that he preferred to measure from a fixed point or mark and that he confirmed that his measurement from the chamber plate was not interfered or impeded in any way.

Officer Hopewell further testified that his vision was not obscured and that he had no reason to question the accuracy of his tape measure.

Mr. Garlick questioned Officer Hopewell regarding the need to have the brakes fixed and load removed forthwith, whether it could be resolved the following morning as it was late in the day as Applicant's place of business was 5 hours away.

In response to the above questions, Officer Hopewell testified that he was aware that the 2 hour time limit was not practical, that he required a definitive answer from Mr. Garlick as to what the Applicant proposed and that this was not forthcoming from the Applicant.

On re-examination by Mr. Moore, Officer Hopewell testified that he did not recall being advised by the Applicant that it wanted to conduct an independent inspection of the brakes and that he does not recall why the Applicant requested that the Ministry wait until the next morning

Officer Hopewell, both in cross-examination and in providing testimony in chief, testified that the driver of the vehicle in question failed to produce full and complete records. The Tribunal noted that these issues were not relevant to the issue of the defective brakes, did not form part of the reasons for the impoundment and therefore places no weight on these facts.

Officer Reina Lyons testified that she verified Officer Hopewell's original measurements of the air brake's push rod travel with her own measurements. She confirmed that the marks on the push rods were satisfactory and the air pressure in the braking system was adequate for the test. Officer Lyons further testified that three of the push rod travel measured at 2¼" (Exhibit #3 page 4) and that the measurement for the left brake on the fifth axle was 2" rather than the 1 7/8" found by Officer Hopewell. Officer Lyons testified that her measurements were slightly higher but she gives the operator the benefit of the doubt by rounding down the measurements.

On cross examination by Mr. Garlick, Officer Lyons testified that she used the same markings as Officer Hopewell and that she had no reason to believe that her method of measurement was not accurate.

Evidence for the Applicant:

Ron Garlick, risk manager of the Applicant gave evidence on behalf of the Applicant. Mr. Garlick relied upon the documents in Exhibit Number 3 in support of the position that the trailer in question was maintained properly. Mr. Garlick made specific reference to Tab 9 of Exhibit Number 3 as evidence that the trailer in question was safety certified as recently as March 1, 2003 and that at Tab 5 of Exhibit Number 3, new brakes were installed on this trailer on September 14, 2002.

Ron Garlick recounted with precision his telephone conversations on the night of the impoundment with Officer Hopewell. Mr. Garlick expressed extreme frustration with a process that required him to have the trailer offloaded and brakes fixed prior to the

vehicle being impounded or face the prospect of having the trailer floated to the pound at significant cost to the Applicant.

Mr. Garlick further expressed his view that for practical purposes, the Applicant should have been afforded the opportunity to defer the resolution of this matter to the following morning as this would have provided the Applicant with the opportunity to conduct an independent inspection dispatching its own mechanic from Thunder Bay to effect any necessary repairs.

Ron Garlick challenged the use of a metal tape measure and pencil marking on the clevis to measure the push rod travel. He argued that the use of a steel tape measure is imperfect and therefore a brake push rod travel measurement at 2¼" could have possibly been inaccurately measured by the slightest amount either way. This would have a less drastic result, and would not have resulted in a critical defect so that the trailer would not have been impounded.

As noted previously, Mr. Garlick referred to several work orders contained in Exhibit Number 3 which listed various repairs that had been done to the impounded trailer over the previous year. He testified that the maintenance records are wholly inconsistent with a trailer that suffers from critical defects, which require impoundment.

Mr. Garlick concluded his testimony by referring to invoices in the sum of \$217.52 & \$1,005.80 from Herb's Towing with respect to the brake adjustment work and impound & towing charges; an invoice from C.P. Spencer Inc. in the sum of \$561.75 for off loading the trailer and an invoice in the sum of \$321.00 from an unidentified party to float the trailer back to North Bay. These invoices were accepted and marked collectively as Exhibit Number 6.

Mr. Garlick submits that as the impoundment was improper, the Applicant is entitled to be reimbursed the sum total of the above referenced invoices.

ISSUES:

1. What is the critical defect alleged in this matter?
2. Should the order of the Registrar to impound and suspend the Applicant's commercial motor vehicle or trailer be confirmed or set aside?

LAW:

Section 50.3 of the *Highway Traffic Act* states as follows:

- (1) The owner of a commercial motor vehicle or trailer that is subject to an order to impound and suspend under section 82.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

Grounds for appeal:

- (3) The only ground on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound and suspend are:
 - (a) that the commercial motor vehicle or trailer that is subject to the order was stolen at the time the order was made;
 - or
 - (b) that the commercial motor vehicle or trailer had no critical defects at the time of the inspection under section 82.1

Powers of Tribunal:

- (5) The Tribunal may confirm or set aside the order to impound and suspend.

Section 82.1(37) provides that:

The Lieutenant Governor in Council may make regulations,
prescribing what constitutes a critical defect;

Regulation 512/97 of the *Highway Traffic Act* states:

**PART II
CRITICAL DEFECTS**

INTERPRETATION

- 5.(1) In this Part,

“broken”, when used to refer to a vehicle component, means that the component or any of its sub-components is split into more than one part;

“cracked”, when used to refer to a vehicle component, means that the component is not broken but has a split that penetrates completely through the component or any of its sub-components;

“steering axle” means any axle of a commercial motor vehicle that is controlled by the driver to provide direction to the motor vehicle.

- (2) For the purposes of an inspection for critical defects under section 82.1 of the Act,
 - (a) a liftable axle, being an axle that is designed to be adjusted vertically and to lift its tires from contact with the surface of the highway when in a raised position, shall be considered part of a vehicle;
- a conversion unit shall be considered part of the vehicle that it converts; and

a trailer converter dolly, if carrying a trailer, shall be considered part of that trailer.

BRAKES

6. In sections 7 and 8, "rotor" includes a disc.

AIR BRAKES

- 7.(1) In this section, the measurement of travel of a push rod out of a service brake chamber shall be taken with the vehicle engine turned off, the air system pressure between 90 and 100 psi (620 and 690 kPa), the park brakes released and the service brake actuator fully applied.
- (2) A commercial motor vehicle or trailer, if the trailer is required by subsection 64 (5) of the Act to have brakes, equipped with an air brake system other than an air-over-hydraulic brake system has a critical defect for the purposes of section 82.1 of the Act if one or more of the following defects is present on more than 50 percent of the wheel brakes of the vehicle:
1. A drum or rotor is cracked, broken or missing.
 2. A chamber housing, chamber support, chamber push rod, slack adjuster, camshaft, or camshaft support bracket is broken or missing.
 3. A shoe, shoe lining, shoe block, pad, pad lining or pad block is missing.
 4. The push rod travel out of the service brake chamber is 1/4 inch (6.3 mm) or more beyond the measurement listed in Column 2 of Schedule 1 for the type of chamber listed in Column 1 of Schedule 1 if the brake is cam or disc type.

Schedule 1

COLUMN 1		COLUMN 2
Service Brake Chambers		Push Rod Travel
Clamp Type Brake Chamber Data		
Type	Outside Diameter	
6	4 1/2" (114.3mm)	1 1/4" (31.75mm)
9	5 1/4" (133.35mm)	1 3/8" (34.93mm)

12	5 11/16" (144.46mm)	1 3/8" (34.93mm)
12 Long Stroke	5 11/16" (144.46mm)	1 3/4" (44.45mm)
16	6 3/8" (161.93mm)	1 3/4" (44.45mm)
16 Long Stroke	6 3/8" (161.93mm)	2" (50.8mm)
20	6 25/32" (172.24mm)	1 3/4" (44.45mm)
20 Long Stroke	6 25/32" (172.24mm)	2" (50.8mm)
24	7 7/32" (183.36mm)	1 3/4" (44.45mm)
24 Long Stroke	7 7/32" (183.36mm)	2" (50.8mm)
24 Long Stroke with Square Inlet Port or With Square Raised Emboss- Ment on Lid . . .	7 7/32" (183.36mm)	2 1/2" (63.5mm)
30	8 3/32" (205.58mm)	2" (50.8mm)
30 Long Stroke with Square Inlet Port or With Square Raised Emboss- ment on Lid . . .	8 3/32" (205.58mm)	2 1/2" (63.5mm)
36	9" (228.6mm)	2 1/4" (57.15mm)

Bolt Type Chamber Data		
Type	Outside Diameter	
A	6 15/16" (176.21mm)	1 3/8" (34.93mm)
B	9 3/16" (233.36mm)	1 3/4" (44.45mm)
C	8 1/16" (204.79mm)	1 3/4" (44.45mm)
D	5 1/4" (133.35mm)	1 1/4" (31.75mm)
E	6 3/16" (157.16mm)	1 3/8" (34.93mm)
F	11" (279.4mm)	2 1/4" (57.15mm)
G	9 7/8" (250.83mm)	2" (50.8mm)
Rotochamber Type Chamber Data		
Type	Outside Diameter	
9	4 9/32" (108.74mm)	1 1/2" (38.1mm)
12	4 13/16" (122.23mm)	1 1/2" (38.1mm)
16	5 13/32" (137.32mm)	2" (50.8mm)
20	5 15/16" (150.81mm)	2" (50.8mm)
24	6 13/32" (162.72mm)	2" (50.8mm)
30	7 1/16" (179.39mm)	2 1/4" (57.15mm)
36	7 5/8" (193.68mm)	2 3/4" (69.85mm)

50	8 7/8" (225.43mm)	3" (76.2mm)
Tie Rod Piston Type Chamber Data		
Type	Outside Diameter	
30 Long Stroke with Square Inlet Port	6 1/2" (165.1mm)	2 1/2" (63.5mm)
DD-3 Type Chamber Data		
Type	Outside Diameter	
30	8 1/8" (206.37mm)	2 1/4" (57.15mm)

Schedule 2

COLUMN 1	COLUMN 2
Steering Wheel Diameter	Free movement
Less than 16 inches (40.6cm)	8 inches (20.3cm)
16 inches (40.6cm) and larger but less than 18 inches (45.7cm)	9 inches (22.8cm)
18 inches (45.7cm) and larger but less than 19 inches (48.2cm)	10 inches (25.4cm)
19 inches (48.2cm) and larger but less than 20 inches (50.8cm)	11 inches (29.7cm)
20 inches (50.8 cm) and larger but less than 21 inches (53.3cm)	12 inches (30.4cm)
21 inches (53.3cm) and larger but less than 22 inches (55.8cm)	13 inches (33cm)
22 inches and larger (55.8cm)	14 inches (35.5cm)

APPLICATION OF THE LAW TO FACTS:

Schedule 1 of Regulation 512/97 of section 7(2) of the Act requires that clamp type 30 brake chambers have a push rod travel of a maximum of 2".

Section 7(2) of the Act indicates that a critical defect occurs if push rod travel out of the service brake chamber is $\frac{1}{4}$ inch or more beyond (in this case 2") in more than 50% of the wheel brakes of the vehicle.

The Tribunal heard uncontradicted evidence from the Respondent's witnesses, namely Officer David Hopewell and Officer Reina Lyons that 75% of the clamp type 30 brake chamber brake push rods travel measurement was $2\frac{1}{4}$ " on the vehicle and that this conclusively established that the vehicle suffered from a critical defect, which therefore was determinative of this impoundment.

This exceeds the standard of 50% prescribed by regulation 512/97, section 7(2) and constitutes a critical defect.

The Applicant contends that the tools and method of measurement of the push rods lacked the absolute precision required to make such a determination. The Tribunal finds that the undisputed testimony of the Officers, was that the 3 push rods were found to be at $2\frac{1}{4}$ " of travel, and were clearly and without any doubt at that measure. This was confirmed by the two Officers, with each taking independent measurements for themselves.

The Tribunal notes that testimony of the witnesses for the Respondent that the vehicle had 75% or more of its brakes out of adjustment, was not challenged in any significant way by the Applicant as the Applicant did not call any witness or provide any expert evidence that would enable the Tribunal to conclude that the measurements were not accurate.

As a result of the veracity of the Officers' testimony, the Tribunal finds as a fact that 75% of the brake push rod travel was $2\frac{1}{4}$ ". The Tribunal further finds that the vehicle did in fact have sufficient critical defects to its air braking system at the time of the impoundment, contrary to Regulation 512/97, section 7(2)(4) of the *Highway Traffic Act*.

DECISION:

Upon the application by the Applicant, Bakke's Trucking Ltd. to appeal the order to impound and suspend dated March 18th, 2003 of the Respondent, the Registrar of Motor Vehicles to impound and suspend a commercial motor vehicle or trailer pursuant to Section 50.3 of the Highway Traffic Act ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Respondent and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL that the Order of the Respondent to impound and suspend the commercial motor vehicle or trailer of the Applicant be and the same is hereby confirmed.

LICENCE APPEAL TRIBUNAL

Michael H. Turk,
Vice-Chair, Presiding

RELEASED: June 6, 2003

FILE NAME: 1585.cvis.Bakkes.doc.

Licence
Tribunal
Appeal

Tribunal
d'appel en
matière de permis



DANSWAY INTERNATIONAL TRANSPORT LTD.

Appeal under Section 50.3 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from an Order of the Registrar of Motor Vehicles pursuant to Section 82.1 of that Act.

TO APPEAL AN ORDER TO SUSPEND AND
IMPOUND A COMMERCIAL MOTOR VEHICLE
OR TRAILER

TRIBUNAL: RICHARD C. DELANEY, Presiding Member

APPEARANCES: RANDALL BURCH, Agent for Applicant

DAVID MILNER, Solicitor for Respondent

DATE OF
HEARING: October 7, 2003

Hamilton

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by Dansway International Transport Ltd. (the "Applicant") respecting an Order of the Registrar of Motor Vehicles (the "Respondent") pursuant to sections 50.3 and 82.1 respectively of the *Highway Traffic Act* (Ontario), R.S.O. 1990, Chap. H.8 as amended.

EXHIBITS

Both oral and documentary evidence was presented. The exhibits are as follows:

1. Order to Impound;
2. Notice of Appeal;
3. Respondent's Appeal Book (5 Tabs);
4. Copy of Page 86 of "Practical Airbrakes" booklet;

5. Copy of digitape instructions;
6. Top view of airbrake assembly;
7. Illustration of brake assembly.

PRELIMINARY MATTERS:

The Applicant proffered the resume and testimony of Alexander Cazin as an expert. There was no report filed as required by the rules and the notice regarding the expert witness was not received until the day before the hearing.

Notwithstanding this non-compliance with the rules, the Tribunal received the testimony of the witness on condition that an adjournment is permitted should the Respondent deem it necessary to call reply witnesses.

Counsel for the Respondent questioned the value and appropriateness of the potential expert evidence to be received from Mr. Cazin. The Applicant wished to adduce evidence from the expert to impugn the methodology employed by the Ministry Officers in taking linear measurements on the push rod and yoke apparatus.

The Respondent's counsel was concerned that the Tribunal need not hear evidence from an expert on the proper way to read a tape measure or ruler. The Tribunal agreed that this was not an area in which the assistance of an expert was required to add probative understanding.

However, it was agreed that Mr. Cazin, being a Forensic Engineer and having some experience in the trucking industry, be allowed to testify to provide the Tribunal with additional knowledge regarding the workings of the braking system being measured by the MTO officers.

The Respondent elected not to call reply witnesses to answer the evidence provided by the expert witness.

FACTS:

Respondent's Evidence:

Officer Joe Curran:

The witness is an MTO officer with a certificate in Critical Defect inspections. He has a 310-T designation as a truck and coach mechanic for the last five years. He has been employed by the MTO for the last three years. Prior to that time he was employed as a mechanic in London, Ontario.

He has had both practical and College training in the push-rod element of an air brake assembly. He has also had MTO training on push rod assemblies. In his employment, he estimated he has encountered push rod workings on a daily basis over the last five years. This experience and training has made him familiar with the workings and problem diagnosis with air brake systems. He does primarily air brake systems and encounters the issues associated with measuring and adjusting brakes multiple times a day.

Although he is a qualified mechanic, he now only measures brake elements in his employment function with the MTO. He no longer effects repairs on those systems.

The stroke on a push rod can be measured using two main methods:

- a) observe the apparatus visually to determine if a problem requiring adjustment is readily apparent. This approach requires no ruler for measurement;
- b) utilize a ruler or tape measure to obtain numeric results. Normally, the witness uses a six-inch, MTO-issued metal ruler. He also uses a digital tape measure that generates both a digital distance reading and a rule result.

His MTO level one inspection on the subject vehicle was typical. However, upon speaking to the driver he was told that the vehicle had been pulled over numerous times of late. As a result, the witness went straight to the brakes for a review. He observed the brakes on the trailer to be out of adjustment as the rig entered the scale pad in front of the window at the weigh station.

The witness indicated that he had the driver apply the brakes by engaging a red light. Once the driver steps on the brake the slack adjuster is engaged. This is often visible from the window. It is also possible to observe the push rod indicators on some trucks. If visible, excessive push rod stroke is an indication the brakes are not in proper adjustment.

On the subject vehicle, he was watching the slack rod adjusters. He observed movement that he thought was more than two inches.

There are two types of slack adjusters: manual and automatic. This system had a manual slack adjuster. This type of slack adjuster will typically render consistent measurements when tested.

When the witness prepares a Commercial Vehicle Inspection Report (CVIR) four copies are made. One is for the driver/owner. The second is for the Officer to retain. The third is retained in MTO files for audit purposes. The final copy is sent to the Ministry head office for processing.

At all times during his inspection the witness endeavoured to be thorough and accurate.

In conducting his ruler measurement, the witness does the following:

- a) the system air pressure is determined to be between 90 and 100 psi;
- b) the brakes are released;
- c) the vehicle is off during this test;
- d) he goes under the vehicle to mark the push rod position with soapstone at the point of exit from the brake chamber;

The push rod is typically 5/8 inch thick and extends directly out of the brake chamber. They can be up to ten inches in length. The thickness of the soapstone used is not relevant as he measures from the inside of the mark.

He then has the driver apply the brakes as hard as possible and he repeats the process above. The push rod travel is the difference between the two measurements.

He observed the following results after measuring with his six-inch steel ruler:

Axle	Left Side	Right Side
4 th Axle	2.5 inches	2.5 inches
5 th Axle	2 3/8 inches	2 3/8 inches

He observed the brake chamber to be a type S Cam (or short), regular stroke brake chamber. He stated that this type of brake chamber has a maximum allowable push rod travel of 2 inches. A Critical Defect under the statute arises if there is a push rod travel of 2.25 inches on three or four out of four brakes.

He testified that all four of the trailer axles on the first measurement to be more than ¼ inch over the two-inch threshold.

Once it was determined that that a critical defect was possible a verification process is undertaken. This is done in part by using a certified air pressure gauge. This gauge is attached between the rig and trailer at the glad hands to ensure that the pressure is between 90 and 100 psi between the glad hands.

The push rod travel is then tested again with a second MTO officer present to verify the measurements and procedure. A digital measuring tape is used in this process. He and the additional officer observe the driver applying the brakes to simulate an emergency stop. They get them to push as hard as possible to simulate a full brake application. If the driver were to let up or release the brakes the officers would be able to hear the release.

Under these circumstances, the maximum psi that can be achieved is 100 psi. The officers try to test at this level.

The witness advised that the Clevis pin connects the push rod to the brake. When they are testing they measure from the outer edge of the Clevis pin to the face of the brake chamber. They handle the Clevis pin to make sure it is secure. Then they measure with the brakes off and the brakes on. The digital tape measure is then used to acquire the horizontal push rod travel.

When the digital measurements were taken the following results were observed:

Axle	Left Side	Right Side
4 th Axle	2.5 inches	2.5 inches
5 th Axle	2 3/8 inches	2 7/16 inches

The only difference from the first test results was 1/16-inch additional travel on the right side of the fifth axle.

During the second test, the witness verified the recordings and measurements of the second officer. Officer Nation was the second officer and he held the ruler.

The digital tape measure was used for the second set of tests. The visual observance of the tape measure distance was identical to the digital output for all four of the test results.

The inspections were done between 10:30 and 11:20 a.m. on July 30, 2003. Kevin Doolittle was the driver of the truck that was hauling eight crushed cars from New York State. Dansway International was the CVOR and plate holder of the trailer.

The witness stated that the orange tape indicator installed by the manufacturer was fully exposed on these brakes. This orange tape demarcates the 2-inch point of travel on the push rod. It exists as an additional point of safety reference for the drivers. It is not something upon which the MTO officers rely upon for measurements. It should be readily apparent if exposed on a routine trip inspection.

The brake chamber was measured using the Chamber mate to confirm size. There were several unrelated other problems observed on the truck in the Officer's report of the inspection.

The subject trailer had been inspected on October 18, 2002 for its annual safety inspection. The witness stated that brakes have to be tested more than annually for safety.

When conducting this type of Critical Defect test the weather and temperature are not factors. The officers are usually within a foot of the tape measure or ruler when they are observing and recording their results. The angle of their view is not a factor in obtaining the readings. The measure is usually touching the push rod or within an inch of the assembly when the measures are taken.

Callipers and micrometers are not suitable for these types of tests. They are not designed for these purposes.

On cross-examination, the witness confirmed that this was a standard situation where the weigh station highway lights were on and signalled this driver to enter the station. There had been no accident or event. The truck was able to stop in the station according to the direction of the lights.

Usually, there is only one lane open in front of the scale house. When the red light is engaged, the officer notes the brake operation of the truck. The officers in the scale house are anywhere from 6 to 14 feet away from the trucks they are observing. Depending upon the brake configuration, the officers are usually able to see both sides of the truck brake system from the scale house.

The trucks do not have to come to a complete stop to be weighed. They are usually only stopped to conduct the brake test.

In the case of the subject trailer it was the slack adjusters, which attracted the attention of the witness. He may also look for drum and shoe operation or push rod position. He can tell there is a problem at a glance by observing the operation of the slack adjusters.

He observed the orange manufacturer bands when the vehicle was stopped and he was underneath.

His steel rule measures to 64ths as the smallest increments.

The slack adjuster movement is similar to the push rod movement. If the movement of the push rod is excessive then the slack adjuster will push past 90 degrees and be indicative of maladjustment. Whether or not the slack adjuster is at 90 degrees is an indicator of push rod travel. Beyond 90 degrees indicates excessive push rod travel.

The maximum push rod stroke is 2 ½ inches. Two inches is the maximum allowed and is an industry standard.

Once the slack adjuster is beyond 90 degrees the mechanical advantage of the lever starts to be lost.

The Clevis pin was the reference point for the second set of measurements with the digitape. When they measure they lock the tape and then remove to observe and record the results. The tape is then set back to zero before the next set of measurements is taken.

Both Officers uses creepers to go under the rig and make their measurements. Creepers allow the officers to be on their backs under the truck. The officer did not recall observing

any dirt or debris under the trailer.

The witness has received some MTO training on how to use the Starrett brand of digitape. In fact, he had the instructions with him and has previously read them.

He explained that he “zeroes-out” the tape before each use to ensure an accurate measurement. He does this by pulling out the spring tape and letting it pull back to a zero setting. He then sets the digital reading to zero.

The witness uses a certified air gauge when testing the air pressure. It is connected between the glad airline and the other glad hands on the truck. The reading on the trailer using the certified gauge was 100 psi. The second officer was present when this test was conducted.

Both the witness and Officer Nation were on creepers when conducting the under-trailer inspection. They were head to head at the time while checking the brake chamber. He thought he was lying flat on the creeper when doing the work.

The officers typically wear safety glasses when conducting these tests. The witness could not recall if he had his glasses on. He could not recall if the tape measure was clean or had debris on the surface.

The witness noted that the truck is off during these tests. When the truck is off the air compressor is off. The maximum air pressure that can be achieved with the compressor off is 100 psi.

He checked the Clevis pin for stability by pushing it firmly to observe movement along the plane being measured. No movement was noted.

The witness had made note of an air leak on the truck. He could not recall where the leak was or if it was noticed as audible. However, he was of the opinion that an air leak in the system would have the effect of decreasing push rod travel.

The yoke on the slack adjuster is a solid piece of steel. There is a pin inserted and it was noted that excessive use on the pin could cause it to move.

He noted that the maximum push had been reached at 2 ½ inches of push rod travel on the brake. The maximum extension indicated that no more force was being applied to the brake apparatus. When the slack adjuster is past 90 degrees you start to lose the benefit of the lever action.

The ability to stop in the weigh station at low speeds is not indicative of the ability to effect an emergency stop with the same brakes. Drivers are able to use the engine brakes to slow down and stop when they see the flashing highway lights.

The witness was unaware of any manufacturer's warranties that such brake systems will stop even at or after push rod travel of 2 ½ inches.

Officer Rick Nation

Officer Nation is Provincial Offences Officer. He has a Critical Defect Certificate. He also has CVSA and CVIC training. He has been an MTO officer since 1998.

At Tab 2 of Exhibit 3 are his notes in respect of this trailer. The document is entitled "Vehicle Impoundment Confirming Officer Notes". He makes these notes at the time of the incident and they are intended to refresh his future memory of the event.

His notes indicate that the trailer had a manual slack adjuster.

He was summoned by Officer Curran that there might be an impound. He obtained his digital tape measure, certified air gauge and Chamber mate. He checked the psi with his certified gauge and observed the readings in the truck cabin. Both showed air pressure at 100 psi. He used the digital tape to make measurements. The push rod travel was taken by measuring from the face of the brake chamber to the outside edge of the Clevis pin. He compares the measurements when the brakes are and are not engaged in order to obtain the difference. His notes reveal the following measurements:

Axle	Left Side	Right Side
4 th Axle	2.5 inches	2.5 inches
5 th Axle	2 3/8 inches	2 7/16 inches

Officer Curran was beneath the trailer at all times to confirm the readings and measurements taken. He zeroes out his tape prior to each measurement being taken.

On cross-examination, Officer Nation stated that he was not a licensed mechanic. He ran the tape measure during the second set of measurements and held the tape.

He was not sure if the head of the Clevis pin was rounded. He was about a foot away from the tape as he observed the distances as measured. He was on a slight angle.

He was issued his own digitape. He read the instructions when it was issued but not in the last five years. He has never dropped the tape.

Applicant's Evidence:

Alexander Cazin

As mentioned above, Mr. Cazin was accepted as a forensic engineer to provide expert testimony on the function of the air brake apparatus.

He noted that there are different methods of measurement for push rod travel. The one accepted by the industry for many years is to mark the travel of the push rod with soapstone. This was the first method used by Officer Curran. This was the better of the two approaches effected by the Officers.

The method using the Clevis pin could introduce errors. For example, the manner of installation and adjustment of the slack adjuster/Clevis pin apparatus can have errors.

As well, he did not feel that the measuring from the edge of the Clevis pin was useful. The Clevis pin is typically rounded and the head of the Clevis pin is circular and large in diameter for strength. The circular surface of the pin introduces possible inaccuracies when it used for measurement.

He also alluded to the possible errors caused by parallax.

Mr. Cazin advised that errors could also occur with the certified air pressure gauge if not applied properly. The air leak noted by the Officer could have an effect on the psi test results. He did not feel that a test should have been conducted on the air pressure system where an air leak was suspected. He also stated that an accepted scientific process with the test data would have required three measurements and takes an average to ensure accuracy.

It was his opinion that the trailer in this case would still have been able to stop despite the observed issues.

He described the digitape as a construction-use tape. The digital aspect is just a gimmick. He also demonstrated how, if used sharply and harshly, the length of the tape extended would be inconsistent with the digital measurement of the same reading.

The accumulation of errors in the measuring processes he observed could have amounted to a difference of 1/16 to 1/8 of an inch.

On cross-examination, the witness indicated that he knew nothing specific of the slack adjuster construction on this trailer. However, the manufacturer installs it and, even if improperly installed, it will have no effect on the measurement of push rod travel.

There is always movement in a Clevis pin. However, it may be imperceptible except by measurement with a magnetic dial gauge. However, one way to test is to simply grab and shake the slack adjuster. This is a reliable approach if other factors are not considered.

The witness stated that the two methods of testing push rod travel in the "Practical Air Brake Study Guide" created by the Ontario Trucking Association and the MTO were the product of a lack of research and knowledge. Engineers do not accept these two approaches.

Although he had prepared no calculations to support his conclusions, he was confident that 3 of the 4 trailer brakes would have passed the test if proper test techniques had been employed. He was unable to say for sure whether the air leak would increase or decrease air pressure.

He was asked how he accounted for the similar test results obtained by the two officers using the different measuring techniques. He concluded coincidence was the explanation.

The Tribunal appreciated Mr. Cazin's testimony on the workings and function of the brake apparatus and makes the following findings based on his evidence:

1. The soapstone and ruler method of measurement is a better test process than the digitape process used by the Officers;
2. The Clevis pin was tested properly for movement by the officers;
3. Both test methods employed by the Officers may yield reliable measurements;
4. The Clevis pin was fixed when the officers measured for push rod travel.

The Tribunal notes that the witness did not have any specific information or calculations in respect of the so-called accumulation of errors in the measuring process. While it may be that testing processes can render uncertain results, there was nothing to suggest that the processes followed by the officers were anything but deliberate and careful. It was not helpful to the Tribunal to simply state that there could have been structural issues, parallax or dirt interfering with the test results and their accuracy. Many things are possible but the concerns of Mr. Cazin were not established as being probable in this case.

ISSUES:

Should the order of the Registrar to impound and suspend the Applicant's commercial motor vehicle or trailer be confirmed or set aside?

LAW:

Section 50.3 of the *Highway Traffic Act* states as follows:

- (1) The owner of a commercial motor vehicle or trailer that is subject to an order to

impound and suspend under section 82.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

Grounds for appeal:

- (3) The only ground on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound and suspend are:
 - (a) that the commercial motor vehicle or trailer that is subject to the order was stolen at the time the order was made;
 - or
 - (b) that the commercial motor vehicle or trailer had no critical defects at the time of the inspection under section 82.1

Powers of Tribunal:

- (5) The Tribunal may confirm or set aside the order to impound and suspend.

Section 82.1(37) provides that:

- (37) The Lieutenant Governor in Counsel may make regulations,
 - (a) prescribing what constitutes a critical defect;

Regulation 512/97 of the *Highway Traffic Act* states:

**PART II
CRITICAL DEFECTS**

BRAKES

- 6. In sections 7 and 8, “rotor” includes a disc.

AIR BRAKES

- 7.(1) In this section, the measurement of travel of a push rod out of a service brake chamber shall be taken with the vehicle engine turned off, the air system pressure between 90 and 100 psi (620 and 690 kPa), the park brakes released and the service brake actuator fully applied.
- (2) A commercial motor vehicle or trailer, if the trailer is required by subsection 64 (5) of the Act to have brakes, equipped with an air brake system other than an air-over-hydraulic brake system has a critical defect for the purposes of section 82.1 of the Act if one or more of the following defects is present on more than 50 percent of the wheel brakes of the vehicle:
 - 1. A drum or rotor is cracked, broken or missing.

2. A chamber housing, chamber support, chamber push rod, slack adjuster, cam shaft, or cam shaft support bracket is broken or missing.
3. A shoe, shoe lining, shoe block, pad, pad lining or pad block is missing.
4. The push rod travel out of the service brake chamber is 1/4 inch (6.3 mm) or more beyond the measurement listed in Column 2 of Schedule 1 for the type of chamber listed in Column 1 of Schedule 1 if the brake is cam or disc type.

HYDRAULIC BRAKES

- 8.(1) A commercial motor vehicle or trailer, if the trailer is required by subsection 64(5) of the Act to have brakes, equipped with hydraulic or air-over-hydraulic brakes has a critical defect for the purposes of section 82.1 of the Act if two or more of the following defects are present on the vehicle:
1. Brake fluid can be seen coming out of any location in the system upon full brake application with the vehicle engine turned on or the depth of hydraulic brake fluid in any reservoir of the master cylinder is less than 1/4 inch (6.3 mm) at its deepest point.
 2. A brake drum or rotor is cracked, broken or missing.
 3. The actuator, linkages or cables of the parking brake system are broken or missing or any cables are seized such that there is no movement of the cables to both rear wheel brakes when the brake actuator is applied.
- (2) If a commercial motor vehicle or trailer has two or more defects of the type described in paragraph 2 of subsection (1), the two or more defects under that paragraph constitute a critical defect for the purpose of section 82.1 of the Act.

Schedule 1

COLUMN 1		COLUMN 2
Service Brake Chambers		Push Rod Travel
Clamp Type Brake Chamber Data		
Type	Outside Diameter	
6	4 1/2" (114.3mm)	1 1/4" (31.75mm)
9	5 1/4" (133.35mm)	1 3/8" (34.93mm)

12	5 11/16" (144.46mm)	1 3/8" (34.93mm)
12 Long Stroke	5 11/16" (144.46mm)	1 3/4" (44.45mm)
16	6 3/8" (161.93mm)	1 3/4" (44.45mm)
16 Long Stroke	6 3/8" (161.93mm)	2" (50.8mm)
20	6 25/32" (172.24mm)	1 3/4" (44.45mm)
20 Long Stroke	6 25/32" (172.24mm)	2" (50.8mm)
24	7 7/32" (183.36mm)	1 3/4" (44.45mm)
24 Long Stroke	7 7/32" (183.36mm)	2" (50.8mm)
24 Long Stroke with Square Inlet Port or With Square Raised Emboss- ment on Lid . . .	7 7/32" (183.36mm)	2 1/2" (63.5mm)
30	8 3/32" (205.58mm)	2" (50.8mm)
30 Long Stroke with Square Inlet Port or With Square Raised Emboss- ment on Lid . . .	8 3/32" (205.58mm)	2 1/2" (63.5mm)
36	9" (228.6mm)	2 1/4" (57.15mm)

APPLICATION OF THE LAW TO FACTS:

The Tribunal finds the following to have been established as a fact in respect of the Respondent's case:

1. Officer Curran and Officer Nation conducted the tests with care for accuracy and, as a result, the test results were reliable;
2. The measurement of travel of the push rods out of the service brake chamber was taken with the vehicle engine turned off, the air system pressure between 90 and 100 psi (620 and 690 kPa), the park brakes released and the service brake actuator fully applied as required by the Regulation 512/97;
3. Schedule 1 to the Regulations, copied above, establishes a critical defect in a 30 Type Chamber when the push rod travel equals or exceeds $\frac{1}{4}$ inch past 2 inches (relevant section of Regulation 512/97 emphasized in bold above);
4. It was established by Officer Curran that this vehicle had a 30 clamp type brake chamber and, on two separate tests, the push rod travel on four out of four brakes on this trailer were in excess of 2 $\frac{1}{4}$ inches;
5. Where there was a different test result on the second test from the first, the Tribunal finds that the measurement that favours the Applicant was the observed measurement;
6. Both Officer Nation and Officer Curran were certified to conduct Critical Defect testing. Officer Nation conducted the testing initially and obtained results that, standing alone, established the presence of a critical defect.
7. The second officer using a different measuring approach obtained virtually identical results.
8. There was no evidence except that the officers were careful and professional in conducting the measurements. The Tribunal cannot accept Mr. Cazin's explanation that the two results were a mere coincidence. A better conclusion, based on the facts presented, was that the tests were done carefully with a full attempt to be as accurate as possible and acceptable results were obtained.

The Tribunal therefore finds as a fact that the Respondent has established a Critical Defect on the subject trailer based upon the test results of the officers in that the push rod travel of the 30 short service brake chamber was at or exceeded 2.25 inches on all four of the brakes, contrary to Regulation 512/97 of the *Highway Traffic Act*.

DECISION:

Upon the application by Dansway International Transport Ltd. (the "Applicant") to appeal the order to impound and suspend dated July 30, 2003 of the Registrar of Motor Vehicles ("Registrar") to impound and suspend a commercial motor vehicle or trailer pursuant to Section 50.3 of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL that the Order of the Registrar to impound and suspend the commercial motor vehicle or trailer of the Applicant be confirmed.

LICENCE APPEAL TRIBUNAL

Richard C. Delaney
Presiding Member

RELEASED: October 28, 2003

FILE NAME: 1893.cvis.Dansway

Licence
Tribunal
Appeal

Tribunal
d'appel en
matière de permis



PROVINCIAL CAPITAL CORP.

Appeal under Section 50.3 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from an Order of the Registrar of Motor Vehicles pursuant to Section 82.1 of that Act.

TO APPEAL AN ORDER TO SUSPEND AND
IMPOUND A COMMERCIAL MOTOR VEHICLE
OR TRAILER

TRIBUNAL: ELIZABETH L. SPROULE, Member

APPEARANCES: CAROLE McAFEE WALLACE Solicitor for Applicant

PATRICK MOORE, Solicitor for Respondent

DATE OF
HEARING: November 21, 2003

Hamilton

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by Provincial Capital Corp. (the "Applicant") respecting an Order of the Registrar of Motor Vehicles (the "Respondent") pursuant to sections 50.3 and 82.1 respectively of the *Highway Traffic Act* (Ontario), R.S.O. 1990, Chap. H.8 as amended.

EXHIBITS:

Exhibit #1: Order to Impound and Suspend dated September 24, 2003, issued by the Registrar of Motor Vehicles.

Exhibit #2: Notice of Appeal Form received at the Tribunal October 1, 2003, filed by the Applicant.

Exhibit #3: Respondent's Appeal Book.

Exhibit #4: Applicant's Book of Documents.

Exhibit #5: Copy of hand written notes of Jim Balla.

PRELIMINARY MATTERS:

There were no preliminary matters.

FACTS:

Evidence for the Respondent

The Respondent's witnesses at this hearing were MTO Transportation Enforcement Officer Robert Leadlay and MTO Transportation Enforcement Officer Rick Nation.

Officer Leadlay testified that on September 24, 2003, he was stationed at the Vineland inspection station. Officer Leadlay explained that as vehicles go over the scale plate a cursory inspection is done. In particular, he watches the slack adjuster on the rear axle as this visual inspection can reveal whether a vehicle is within adjustment. As a result of his observations he decided to inspect the trailer of the Applicant.

Officer Leadlay found the Applicant's trailer to have 3 axles, 6 wheel brakes, of clamp type 30, regular stroke. He carried out a level 1 inspection of the vehicle, including an inspection of the brakes with the assistance of the driver, Mr. D. Rigby. The vehicle was parked in the inspection lane, tires chalked and blocked, the air pressure was brought up to 100 p.s.i. on the cab gauge(s), and then the engine was turned off. Two measurements of the push rod were then taken, one when the brakes were released and then when the service brake was fully applied. Officer Leadlay explained that before the brake application he had made a mark on the push rod at the face of the brake chamber using soapstone to serve as a base line. Then he measured the push rod travel using a metal ruler held tight against the face of the chamber, parallel to the push rod. Officer Leadlay wrote each measurement down while under the trailer, these notes were included in Exhibit 3, tab 2, page 4.

Officer Leadlay reviewed his initial measurements and concluded that the trailer had a critical defect as more than 50% of the brakes (4 out of the 6 brakes) were out of adjustment.

It was Officer Leadlay's evidence that he notified his shift leader, Officer Nation, of the critical defect concerning the brakes but did not provide the details of his measurements to Officer Nation.

Officer Leadlay testified that he attended while Officer Nation re-measured the push rod travel to verify his findings. Officer Nation used a calibrated air gauge, (a copy of the Certificate of Calibration was included in Exhibit 3, tab 5, page 27) which was connected to the air supply. This calibrated air gauge provided a constant measurement of air pressure. It was Officer Leadlay's evidence that there was a difference between the reading on the calibrated air gauge and the cab air gauge(s). When asked what the difference was Officer Leadlay stated, "I think it was 14 p.s.i." It was Officer Leadlay's evidence that during the verification measurements carried out by Officer Nation the air pressure was at 96 p.s.i. according to calibrated gauge.

Officer Leadlay also testified that the measuring tool used by Officer Nation was a digital tape measure and that the measurements were taken using the clevis pin as a point of measurement. Officer Leadlay stated that he watched Officer Nation do the measurements and observed the readings on the tape measure.

Officer Leadlay confirmed that the measurements taken by Officer Nation indicated a critical defect and that some of the measurements were greater than his initial measurements. His explanation for this was that the second inspection had been conducted with higher air pressure and the higher the air pressure the larger the push rod travel.

After the second inspection Officer Leadlay directed the driver to pull the vehicle ahead, out of the inspection lane, and Mr. Rigby was advised of a critical defect and impoundment. Officer Leadlay observed Mr. Rigby making a phone call and shortly thereafter Mr. Balla, the service manager of Doug Coleman Trucking, arrived. The evidence of Officer Leadlay was that Mr. Balla came in the office with 2 mechanics and made a request for a copy of the Commercial Vehicle Inspection Report, (Exhibit 3, tab 2, pg. 5), which was given and requested a re-inspection, which was refused.

On cross-examination Officer Leadlay stated that during the inspection of the brakes by Officer Nation the reading on the calibrated air gauge was 96 p.s.i. and he believed the cab reading to be 110 p.s.i. although he did not make a note of it. He also confirmed that Mr. Balla and the 2 mechanics invited him (and Officer Nation) to come out and watch them measure the brakes but that 'we declined'.

The Respondent's second witness, Officer Rick Nation, testified that on September 24th, 2003, Officer Leadlay advised him of the critical defect involving the brakes on the trailer of the Applicant but did not advise him of his specific findings. Officer Nation confirmed that he attached a calibrated air gauge to the supply line and that the reading on the gauge at the time of his measuring was 96 p.s.i. He testified that both the gauges in the cab read 110 p.s.i. A copy of the 'Vehicle Impound Confirming Officer Notes' form completed by

Officer Nation contemporaneously, setting out these gauge readings, was included in Exhibit 3, tab 2, page 9. Officer Nation took his measurements using a digital tape measure. He testified that he activated the tape measure and verified that it was working by extending the tape and confirming that the digital reading corresponded with the tape measure reading. Officer Nation describe his method of measuring which involved measuring the distance from the face of the brake chamber to the clevis pin first while the brakes were released and then again with the brakes fully applied. His measurements indicated a greater push rod travel for all the brakes than what was found by Officer Leadlay, however, the same 4 brakes were found beyond tolerance.

Officer Nation confirmed that a copy of the CVIR (which set out Officer Leadlay's measurements) was given to the individuals from Doug Coleman Trucking and that he made it clear that 2 measurements had been taken and that he was not going to re-measure. It was Officer Nation's evidence that Mr. Balla indicated to him that he and the mechanics were going to check the measurements but that he was not given the results of this third measuring.

In cross-examination when asked why he did not go out when requested by Mr. Balla, Officer Nation indicated that it was his thinking that "we have done it twice, we had a lot to do".

Evidence for the Applicant

The Applicant called 4 witnesses. The first witness was Mr. Balla, the manager of the Hamilton office of Doug Coleman Trucking. Mr. Balla testified that on September 24th, 2003, he received a phone call from Mr. Rigby, one of his drivers, saying he had been pulled over for inspection and that there were problems. Mr. Balla testified that he couldn't believe the brakes could be out like that. When he was informed of the impoundment he made arrangements for Mr. P. King and Mr. D. Edwards to go the Vineland Inspection station and he proceeded there himself.

Mr. Balla testified that when the two mechanics arrived he, the mechanics and Mr. Rigby proceeded into the office where the two officers were. Mr. Balla testified that he expressed his amazement about the brakes and indicated that he wanted 2 separate opinions. He offered/invited the officers to come out to observe but they did not.

In his evidence Mr. Balla described the procedure followed in taking the new measurements. Mr. Rigby got into the truck and brought the pressure up to 95 p.s.i. Mr. Balla indicated that he played the role of a spectator and that the mechanics directed Mr. Rigby as to what to do but he recalled Mr. Rigby saying a number with respect to the air pressure and the mechanic saying 'perfect'. Mr. Balla testified that he was positioned kneeling on the ground beside the wheels as the measurements were being taken and wrote down what the measurements were as the mechanics called them out. It was Mr. Balla's evidence that after the measurements were completed he went back into the office

and spoke primarily to Officer Leadlay and told him "our measurements were different" and indicated to the Officer that "we are going to dispute this".

In cross-examination Mr. Balla was questioned as to what the air pressure reading was at the time of the measurements being taken which he replied, "I can't remember, 95 or 100, I know it was brought to the proper pressure". He also testified that Mr. Edwards' (one of the independent mechanics) gauge was reading the same.

The Applicant's second witness was Mr. King, a mechanic with 6 years experience. Mr. King assisted in taking the push rod measurements. Mr. King confirmed that the driver, Mr. Rigby, was inside the truck. Mr. King testified that he thought the air pressure was at 120 p.s.i. He also testified as to how the measurements were taken, using a standard tape measure and measuring from the back of the brake chamber to the clevis pin. Mr. King testified that both he and Mr. Edwards were under the truck and that he read the tape himself, and that the results were called out and recorded by Mr. Balla. Mr. King also confirmed that an air gauge was hooked up to the air supply and that a difference in the cab gauge reading was noted.

The Applicant's third witness was Mr. D. Edwards, a mechanic of 20 years. Mr. Edwards confirmed the method used to measure the push rod travel: he instructed the driver to take the pressure down to 90 to 95 p.s.i., he used a standard steel tape measure which was held to the face of the chamber then to the clevis pin. He confirmed that initial measurements were taken before the brakes were applied and then again afterwards. He stated the brakes "definitely needed adjusting", and "3 were seriously out". He also confirmed that the gauge in the tractor was "12 to 14 p.s.i. out" according to his gauge which he described as a regular 'off the shelf' gauge.

In cross-examination Mr. Edwards gave evidence as to the impact of air pressure on push rod travel stating that the more pressure the more travel. He was also asked about the affect of the tractor gauge reading being 12 to 14 p.s.i. higher than his gauge and his evidence suggested that the actual pressure being applied would be lower than the tractor gauge indicated, around 85 p.s.i. He testified that "we wanted to check it by the tractor gauge". When asked why, when he knew that the tractor gauge was out, he did not measure again and he responded, "we were not asked to do it again."

The Applicant's final witness was Mr. Rigby, the driver. Mr. Rigby testified that the procedure for measuring the brakes was the same each time. He testified that he was asked to bring the air pressure to 100 p.s.i. during the measurements taken by Officer Leadlay. It was also his evidence that during the 2nd measurement, involving Officer Nation, he was also told 100 p.s.i. He also recalled being told that his gauge was out. When asked was there was a change in air pressure between the first two tests he stated, "I don't believe so". In cross examination Mr. Rigby again stated he remembered the pressure being 100 for all three measurements taken, including that by Officer Nation, and he did not remember anyone saying it was to be higher.

ISSUES:

1. Was there a critical defect?
2. Should the order of the Registrar to impound and suspend the Applicant's commercial motor vehicle or trailer be confirmed or set aside?

LAW:

Section 50.3 of the *Highway Traffic Act* states as follows:

- (1) The owner of a commercial motor vehicle or trailer that is subject to an order to impound and suspend under section 82.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

Grounds for appeal:

- (3) The only ground on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound and suspend are:
 - (a) that the commercial motor vehicle or trailer that is subject to the order was stolen at the time the order was made;
 - or
 - (b) that the commercial motor vehicle or trailer had no critical defects at the time of the inspection under section 82.1

Powers of Tribunal:

- (5) The Tribunal may confirm or set aside the order to impound and suspend.

Section 82.1(37) provides that:

- (37) The Lieutenant Governor in Council may make regulations,
 - (a) prescribing what constitutes a critical defect;

Regulation 512/97 of the *Highway Traffic Act* states:

**PART II
CRITICAL DEFECTS**

INTERPRETATION

- 5.(1) In this Part,

“broken”, when used to refer to a vehicle component, means that the component or any of its sub-components is split into more than one part;

“cracked”, when used to refer to a vehicle component, means that the component is not broken but has a split that penetrates completely through the component or any of its sub-components;

“steering axle” means any axle of a commercial motor vehicle that is controlled by the driver to provide direction to the motor vehicle.

- (2) For the purposes of an inspection for critical defects under section 82.1 of the Act,
- (a) a liftable axle, being an axle that is designed to be adjusted vertically and to lift its tires from contact with the surface of the highway when in a raised position, shall be considered part of a vehicle;
 - (b) a conversion unit shall be considered part of the vehicle that it converts; and
 - (c) a trailer converter dolly, if carrying a trailer, shall be considered part of that trailer.

BRAKES

6. In sections 7 and 8, “rotor” includes a disc.

AIR BRAKES

- 7.(1) In this section, the measurement of travel of a push rod out of a service brake chamber shall be taken with the vehicle engine turned off, the air system pressure between 90 and 100 psi (620 and 690 kPa), the park brakes released and the service brake actuator fully applied.
- (2) A commercial motor vehicle or trailer, if the trailer is required by subsection 64 (5) of the Act to have brakes, equipped with an air brake system other than an air-over-hydraulic brake system has a critical defect for the purposes of section 82.1 of the Act if one or more of the following defects is present on more than 50 percent of the wheel brakes of the vehicle:
- 1. A drum or rotor is cracked, broken or missing.
 - 2. A chamber housing, chamber support, chamber push rod, slack adjuster, cam shaft, or cam shaft support bracket is broken or missing.
 - 3. A shoe, shoe lining, shoe block, pad, pad lining or pad block is missing.
 - 4. The push rod travel out of the service brake chamber is 1/4 inch (6.3 mm) or more beyond the measurement listed in Column 2 of Schedule 1 for the type of chamber listed in Column 1 of Schedule 1 if the brake is cam or disc type.

Schedule 1

COLUMN 1		COLUMN 2
Service Brake Chambers		Push Rod Travel
Clamp Type Brake Chamber Data		
Type	Outside Diameter	
6	4 1/2" (114.3mm)	1 1/4" (31.75mm)
9	5 1/4" (133.35mm)	1 3/8" (34.93mm)
12	5 11/16" (144.46mm)	1 3/8" (34.93mm)
12 Long Stroke	5 11/16" (144.46mm)	1 3/4" (44.45mm)
16	6 3/8" (161.93mm)	1 3/4" (44.45mm)
16 Long Stroke	6 3/8" (161.93mm)	2" (50.8mm)
20	6 25/32" (172.24mm)	1 3/4" (44.45mm)
20 Long Stroke	6 25/32" (172.24mm)	2" (50.8mm)
24	7 7/32" (183.36mm)	1 3/4" (44.45mm)
24 Long Stroke	7 7/32" (183.36mm)	2" (50.8mm)
24 Long Stroke with Square Inlet Port or With Square Raised Emboss- Ment on Lid . . .	7 7/32" (183.36mm)	2 1/2" (63.5mm)
30	8 3/32" (205.58mm)	2" (50.8mm)

30 Long Stroke with Square Inlet Port or With Square Raised Emboss- ment on Lid . . .	8 3/32" (205.58mm)	2 1/2" (63.5mm)
36	9" (228.6mm)	2 1/4" (57.15mm)

Bolt Type Chamber Data		
Type	Outside Diameter	
A	6 15/16" (176.21mm)	1 3/8" (34.93mm)
B	9 3/16" (233.36mm)	1 3/4" (44.45mm)
C	8 1/16" (204.79mm)	1 3/4" (44.45mm)
D	5 1/4" (133.35mm)	1 1/4" (31.75mm)
E	6 3/16" (157.16mm)	1 3/8" (34.93mm)
F	11" (279.4mm)	2 1/4" (57.15mm)
G	9 7/8" (250.83mm)	2" (50.8mm)
Rotochamber Type Chamber Data		
Type	Outside Diameter	
9	4 9/32" (108.74mm)	1 1/2" (38.1mm)
12	4 13/16" (122.23mm)	1 1/2"

		(38.1mm)
16	5 13/32" (137.32mm)	2" (50.8mm)
20	5 15/16" (150.81mm)	2" (50.8mm)
24	6 13/32" (162.72mm)	2" (50.8mm)
30	7 1/16" (179.39mm)	2 1/4" (57.15mm)
36	7 5/8" (193.68mm)	2 3/4" (69.85mm)
50	8 7/8" (225.43mm)	3" (76.2mm)
Tie Rod Piston Type Chamber Data		
Type	Outside Diameter	
30 Long Stroke with Square Inlet Port	6 1/2" (165.1mm)	2 1/2" (63.5mm)
DD-3 Type Chamber Data		
Type	Outside Diameter	
30	8 1/8" (206.37mm)	2 1/4" (57.15mm)

APPLICATION OF THE LAW TO FACTS:

The undisputed evidence before the Tribunal has established that the Applicant's trailer is equipped with 6 air brakes, clamp type 30, regular stroke and pursuant to Section 7(2) of Regulation 512/97 for there to be a critical defect there would have to be push rod travel of 2 1/4 inches or more on more than 50% of the brakes, or at least 4 out of the 6 brakes.

The push rod travel was measured and recorded 3 times on the day of the impoundment. The results are summarized below. The brakes found to be out of adjustment are indicated with an asterisk:

Right side of trailer:	Measurement By:		
	Officer Leadlay	Applicant	Officer Nation
4 th Axle	2 ¼ *	2	2 3/8 *
5 th Axle	2 ¼ *	2 3/8 *	2 3/8 *
6 th Axle	1 3/8	1 5/8	1 9/16

Left side of trailer:

4 th Axle	1 7/8	1 7/8	2
5 th Axle	2 ¼ *	2 3/8 *	2 ½ *
6 th Axle	2 3/8 *	2 ½ *	2 3/8 *

Although the measurements vary, all three agree with respect to three of the brakes being out of adjustment, namely the right 5th axle, the left 5th axle and the left 6th axle. Although both Officer Leadlay and Officer Nation found the right 4th axle to be out of adjustment the Applicant's evidence indicates that the push rod travel was only 2 inches. This measurement varies 3/8 of an inch from Officer Nation's, which is somewhat surprising in that all the other measurements indicated as the Applicant's were within 1/8 of an inch of Officer Nation's findings and both Officer Nation and Mr. Edwards used the clevis pin method.

Counsel for the Applicant, relying on the decision in Liquiterminals Ltd. V. Registrar of Motor Vehicles (1999, LSAB) argued that the onus of proof is on the Registrar to provide clear and convincing proof, based upon cogent evidence that a critical defect existed in the impounded vehicle at the time of inspection. It has failed to meet this onus, it was argued, by the fact that 3 sets of measurements were taken and they were all different.

The fact that three different sets of measurements were taken, and were not in agreement, does not in the Tribunal's opinion mean that none of them should be given preference or relied upon. There is clear evidence before the Tribunal that explains why the measurements were different.

The undisputed evidence before the Tribunal is that the air pressure gauge(s) in the cab of the truck was inaccurate. Officer Nation's evidence was that he did not rely upon the cab gauge but on a certified air gauge: the air pressure was at 96 p.s.i. according to the certified gauge and 110 p.s.i. according to the cab gauge at the time of his measurements. His written notes made at the time support this.

The Applicant, relying on the evidence of Mr. Rigby, takes the position that the air pressure for all 3 recorded measurements was the same: 100 p.s.i. according to the cab gauge. Aside from conflicting with Officer Nation's evidence that the air pressure was at 110 according to the cab gauge(s) during his measurement, the evidence of the Applicants' other witnesses bring into question the reliability of Mr. Rigby's evidence. During the measurements by Mr. Edwards, Mr. Balla testified he thought the pressure was at 95 p.s.i.,

but wasn't sure, Mr. King thought it was 120 p.s.i. and Mr. Edwards testified that he instructed Mr. Rigby to get the pressure down to 90 -95 p.s.i. None of these witnesses agree with Mr. Rigby, in particular Mr. Edwards, who testified he was instructing the driver with respect to the air pressure during the measurement. Mr. Rigby's evidence was solely based on recall and the Tribunal prefers and accepts Officer Nation's verbal and written evidence and finds as a fact that the air pressure applied during Officer Nation's verify measurement was 96 p.s.i. according to the certified gauge and 110 according to the cab gauge(s). The Tribunal therefore concludes that Officer Nation's measurements were the only measurements carried out with the air pressure as required by regulation 512/87, s.7 (1).

Aside from challenging the cab gauge reading at the time of measurement, the method Officer Nation used to measure the push rod travel was not disputed and was, the Tribunal finds, in accordance with Section 7(a) of Regulation 512/97. Counsel for the Applicant argued that the electronic tape measure used by Office Nation should be calibrated but there was no evidence before the Tribunal to suggest that it was an inaccurate tool of measurement. The Tribunal is satisfied that cogent evidence was provided as to the accuracy of Officer Nation's measurements.

Counsel for the Applicant also argued that the Respondent's failing to provide the measurements of Officer Nation, which were included in the Notice to the Registrar of Critical Defect Inspection, and the lack of willingness to participate, assist, or even watch the measurements done by Mr. Edwards and Mr. King amounted to a lack of administrative fairness. Reference was made to the decision of Terrence S. Fulton v. Registrar of Motor Vehicles (2000, LSAB), wherein the Board concluded that administrative justice had not been provided to the Appellant in the matter of his trailer impoundment where evidence, in the form of original notes, had been destroyed so they could not be verified and the Appellant was not given an opportunity to obtain independent measurements.

In the matter before the Tribunal the evidence is that the Respondent did not interfere in anyway with the Applicant taking a third and independent set of measurements. The Respondent provided a copy of the CVIR setting out the measurements of Officer Leadlay. The Applicant knew what brakes had been found out of adjustment. The Tribunal fails to see how the Applicant was treated unfairly by not having Officer Nation's precise measurements - it did not prevent it from taking accurate independent measurements of the brakes in question.

Counsel for the Applicant in summation explained that the Coleman mechanics continued to rely on the cab gauge(s), notwithstanding its inaccuracy, as they were trying to replicate what they believed the Respondent did and, it was argued, they had no knowledge that the Respondent had not relied on the cab gauge or of how the measurements had been taken. The required air pressure to be applied in measuring push rod travel is set out in regulation 512/97. The Coleman mechanics knew how to measure push rod travel and they knew they were relying on a faulting gauge therefore they must have know their measurements would not be carried out in accordance with the regulation which after all is

the standard to be met. It was not reasonable for the Coleman representatives and mechanics to make the assumption that a critical defect would be based on or challenged by measurements not made in accordance with the regulations.

The Tribunal is satisfied, based on the facts, that administrative fairness was provided to the Applicant in this matter. The Applicant knew what the alleged critical defect was. The Applicant was provided with an opportunity to take independent measurements; the Respondent did not need to participate in taking those measurements. The Applicant simply failed to take measurements in accordance with regulated procedure and therefore these measurements cannot be relied upon as evidence that there was not a critical defect.

The Tribunal finds that the measurements of Officer Nation to be accurate and to be clear and convincing proof that more than 50% of the wheel brakes had push rod travel of 2¼ inches or more, constituting a critical defect, at the time of impoundment.

DECISION:

Upon the application by Provincial Capital Corp. (the "Applicant") to appeal the order to impound and suspend dated September 24, 2003 of the Registrar of Motor Vehicles ("Registrar") to impound and suspend a commercial motor vehicle or trailer pursuant to Section 50.3 of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL that the Order of the Registrar to impound and suspend the commercial motor vehicle or trailer of the Applicant be confirmed.

LICENCE APPEAL TRIBUNAL

Elizabeth Sproule
Presiding Member

RELEASED: December 10, 2003

FILE NAME: 1982.CVIS.ProvincialCapital.doc



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Decisions under Highway Traffic Act

Section 95(1) - Motor Vehicle Inspection Licence - (GARAGE)

Fiscal Year 2003 - 2004

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>> [1146775 ONTARIO Inc. DBA GARY'S AUTO REPAIR AND GARY ALBRECHT](#)



>> [MOHAMMAD QURESHI dba ASH'S AUTO SALES AND SERVICE AND
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PREHEARING

1146775 ONTARIO Inc. DBA GARY'S AUTO REPAIR AND GARY ALBRECHT

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

TO REVOKE MOTOR VEHICLE INSPECTION STATION
LICENCE No. 23-38858 ISSUED TO 1146775 ONTARIO Inc.
DBA GARY'S AUTO REPAIR, AND TO REVOKE GARY
ALBRECHT'S REGISTRATION AS A MOTOR VEHICLE
INSPECTION MECHANIC WHOSE APPLICATION BEARS
TRADE CERTIFICATE NO'S 310S-334011 AND 310T-334011

TRIBUNAL: STUART CORK, Member

APPEARANCES: GARY ALBRECHT, Applicant, and agent for Gary's Auto
Repair

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

DATE OF
PRE-HEARING: September 17, 2003, Toronto

ORDER

Following attendances on September 17th, 2003 at a pre-hearing before this Tribunal of Gary Albrecht, the "Applicant" and Patrick Moore, Counsel, on behalf of the Director of Vehicle Inspection Standards ("the Director");

The Tribunal makes the following Order respecting the hearing scheduled to commence at the Cindy Jones Verbatim Reporting Service, 1 King Street West, Suite 1504, Hamilton, Ontario; at 9:30 a.m. on October 28th, 2003, and continuing if necessary at 9:30 a.m. on October 29th, 2003.

1. The Parties to the hearing are
 - (a) 1146775 DBA Gary's Auto Repair;
 - (b) Gary Albrecht; and
 - (c) The Director of Vehicle Inspection Standards
2. The Respondent will present testimony and evidence from two witnesses, MTO Inspectors: Officer Larry Grimaldi, and Officer Mark Horton. Each witness will testify regarding vehicle safety standards, vehicle inspections, and facility inspections that led to convictions or cautions against the Applicant. The Respondent's witness will rely upon notes, Field Inspection Reports, and MTO records from the Ministry computerized data base.
3. The Applicant will call two witnesses: Mr. Gary Albrecht, owner of Gary's Auto Repair, and his wife Carol Albrecht, the company's administrator. The Applicants' witnesses will testify that the circumstances of this case are not appropriate for the revocation of Gary's Auto Repair licences as a motor vehicle inspection station and the revocation of the registration of Gary Albrecht as a motor vehicle inspection mechanic.
4. At issue for the Applicants is that the revocation of the licences would result in the closure of the business, as vehicle inspections are a large portion of the company's activities. The Applicant will also argue that the operations of the business have improved such that it is currently being run in an appropriate manner and is meeting the requirements for an inspection facility under the Act.

The Applicants do not dispute the Respondent's evidence pertaining to the Applicant's prior guilty pleas resulting in convictions.

The Respondent's position is that the body of evidence is sufficient for the revocation, and that the Applicant has had a regular pattern of offences and convictions.

5. The parties present at the pre hearing recorded that there was no resolution of the issues between them.
6. It was confirmed at the Pre-hearing Conference that the Director has issued a Notice to Revoke 1146775 DBA Gary's Auto Repair's licence as a Motor Vehicle Inspection Station pursuant to clause 91(8)(e) and paragraph 93(c) of the *Highway Traffic Act* (the "Act") and Gary Albrecht's registration as a Motor Vehicle Inspection Mechanic, twenty one days after issuance of a Notice to Revoke being dated June 13, 2003.

7. All submissions and documents shall be filed by the parties **on or before Monday October 20th, 2003.**

Each party shall file one copy with the Tribunal and deliver one copy to all parties. It was confirmed that the Tribunal requires full disclosure 10 days prior to the hearing.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Member

RELEASED: October 3, 2003

File name: 1816.gar.Gary's Auto Repair

PREHEARING

MOHAMMAD QURESHI dba ASH'S AUTO SALES AND SERVICE AND
MOHAMMAD QURESHI

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

TO REVOKE MOTOR VEHICLE INSPECTION STATION
LICENCE No. 25-39287 ISSUED TO MOHAMMAD QURESHI
dba ASH'S AUTO SALES AND SERVICE, AND TO REVOKE
MOHAMMAD QURESHI'S REGISTRATION AS A MOTOR
VEHICLE INSPECTION MECHANIC WHOSE APPLICATION
BEARS TRADE CERTIFICATE NO. 310A-073229

TRIBUNAL: WILLIAM McINTOSH, Vice-Chair

APPEARANCES: MOHAMMAD QURESHI, Applicant, and agent for
MOHAMMAD QURESHI dba ASH'S AUTO SALES AND
SERVICE

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

DATE OF
PRE-HEARING: November 19, 2003 Toronto

ORDER

A pre-hearing between the attendees was held on November 19, 2003 in Toronto at
1 St. Clair Avenue West, 12th Floor, Toronto.

The Tribunal makes the following Order:

1. The hearing of the matter will be held at the Tribunal's Chambers at St. Clair Avenue West, 12th Floor, Toronto commencing at 9:30 a.m. on Wednesday, January 7, 2004;
2. The Parties to the hearing will be those set forth in the Notice of the Director, Vehicle Inspection Standards, dated September 10, 2003;
3. The Parties are to fully abide by the disclosure Rules as set out in the Tribunal's Rules of Practice;
4. As there was no narrowing of the issues the matter will proceed on the record as filed.

LICENCE APPEAL TRIBUNAL

William McIntosh, Vice-Chair

RELEASED: November 25, 2003

File name: 1992.gar.Ashs.pre



Licence Appeal Tribunal

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Decisions under Highway Traffic Act

Section 55.1(3) - Motor Vehicle Impoundment - (MVIA)

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PERFECT ACOUSTIC & DRYWALL CO. LTD.

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

AND IN THE MATTER of a motion by Perfect
Acoustic & Drywall Co. Ltd. to seek an extension
of the time to commence an appeal from an
impoundment order of the Registrar under
Section 55.1 of the *Highway Traffic Act*;

AND IN THE MATTER of

PERFECT ACOUSTIC & DRYWALL CO. LTD.

APPLICANT

-and-

REGISTRAR OF MOTOR VEHICLES

RESPONDENT

TRIBUNAL: DEREK ISRAEL, VICE-CHAIR

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

DEBORAH PIANE, Applicant by teleconference

DATE OF
MOTION: April 4, 2003 ***By teleconference***

ORDER

A motion was heard by teleconference on April 4, 2003, at Toronto, Ontario, to consider the request of Perfect Acoustic & Drywall Co. Ltd. (the "Applicant") for an extension of time to appeal the impoundment order of the Registrar affecting the Applicant's motor vehicle. The motion is brought pursuant to Section 20(7) of Ontario Regulation 632/98 amending Regulation 574 of the Revised Regulations of Ontario, 1990 made under the *Highway Traffic Act*, R.S.O. 1990. c.H.8 amended ("HTA").

SUBMISSIONS OF WRITTEN MATERIAL:

The Applicant submitted the following documents:

1. Copy of Impound Order dated December 12, 2002, relating to the impoundment of the motor vehicle for 45 days. (Exhibit # 1)
2. Original Notice of Appeal, including Applicant's position on Appeal, dated February 24, 2003, received by the Tribunal on February 27, 2003. (Exhibit # 2)
3. Notice completed by Police Officer Stan Street re. Impound.
4. Letter from Deborah Piane to the Tribunal dated February 18, 2003.
5. Letter from Dr. D. Miller, family physician dated March 24, 2003.
6. Letter to the Tribunal dated March 13, 2003 from Deborah Piane.

THE FACTS:

The Applicant is the owner of a motor vehicle impounded for a period of 45 days pursuant to section 55.1 of the *Highway Traffic Act*. Wolfgang Dostalek is the sole shareholder and director of the Applicant.

The motor vehicle was ordered impounded on December 10, 2002 while being driven by Richard Gingras, whose driver's licence was under suspension at the time of the impoundment. The Applicant stated that Mr. Gingras with his knowledge took the vehicle but without his consent. He tried to stop Mr. Gingras taking the vehicle but was not able to do so.

The fifteen-day deadline for filing an appeal with the Tribunal was December 27, 2002. The Tribunal received the Applicant's Notice of Appeal on February 27, 2003, sixty-two days past the appeal deadline date. The Notice of Appeal was dated February 24, 2003 and was received by the Tribunal on February 27, 2003.

Ms. Piane testified that she is the daughter of Dostalek who is 70 years of age and is the sole shareholder and director of the Applicant. For about two years prior to the impoundment of the vehicle Ms. Piane had no contact with her father who resided together with Gingras in a rented home at 7 Gailgrove Drive in Brampton.

In recent years Dostalek had become ill and on January 22, 2003 he was removed to the Peel Memorial Hospital in Brampton. On admission to that hospital he was diagnosed with diabetes, hypertension and hypothermia. Prior to Dostalek's admission to hospital he had been visited by home care on December 17, 2002 when it did a general assessment. After his admission to the Peel Memorial Hospital on January 22, 2003 he was, on February 19, 2003 transferred to continuing care at Georgetown Hospital Campus from where he was discharged on March 1, 2003. He now resides in a retirement home in Richmond Hill. The medical condition of Dostalek, when he was admitted to Hospital and today, is that he

suffers depression, has difficulty in walking and was and is in pain. He now tries walking with a walker.

Ms. Piane further stated that Gingras informed her father of the vehicle's impoundment. During the first week of February 2003 Dostalek told her that the vehicle was "in the pond". By that she understood the vehicle was submerged in some pond but later came to understand that her father meant the vehicle was "in the pound". She then instituted inquiries and after some delay found that the police had impounded the vehicle. While her father was ill in hospital, his landlord cleared out her father's clothes and personal papers and she never saw the impound order. In fact, her father had not been at the address in the impound order for the past two years and has not been in business for the last two years. Ms. Paine stated that she never received the impound order as she had left the address to which the order had been sent some two years ago.

THE LAW:

Section 20(1) of Regulation 632/98 states:

20. (1) An appeal to the Tribunal under section 50.2 of the Act shall be commenced by filing a notice of appeal with the Tribunal within 15 days of the issuance of the order to impound, together with a fee of \$100 payable to the Minister of Finance.

Section 20(7) of Regulation 632/98 states:

20. (7) Despite subsection (1), the Tribunal may extend the time for commencing an appeal if the owner establishes that the owner, acting in good faith, was unable through accident, illness, or other cause beyond the owner's control to bring the appeal within the prescribed 15 days.

Section 7 of the Licence Appeal Tribunal Act, 1999 states:

7. Despite any limitation of time fixed by or under any Act for the giving of any notice requiring a hearing by the Tribunal or an appeal from a decision or order of the Tribunal under section 11 or any other Act, if the Tribunal is satisfied that there are reasonable grounds for applying for the extension and for granting relief, it may,

- (a) extend the time for giving the notice either before or after the expiration of the limitation of time so limited; and
- (b) give the directions that it considers proper as a result of extending the time.

APPLICATION OF LAW TO FACTS:

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

The evidence of Dostalek's daughter is that her father was and still is ill. He suffers from

diabetes and hypertension. This has been confirmed by Dr. Millar (Exhibit5). During the critical 15 days within which an appeal should have been filed, Dostalek was clearly ill and was receiving home care visits. Thereafter, he was in hospital from January 22, 2003 until March 1, 2003. Clearly he was, during the period December 17, 2002 until his discharge from hospital on March 1, 2003, a very ill person. His medical condition was such that it was beyond his control to bring the appeal within the 15 days prescribed in section 20(7) of Regulation 631/98. In addition, the Tribunal accepts that he did not receive the impound order dated December 12, 2002 that was sent to him at 4848, Mayfield Road, Brampton for he had not been at that address for the previous two years.

Quite apart from the Applicant having met the test set forth in section 20(7) of the above regulation, the Tribunal finds that in terms of section 7 of the *Licence Appeal Tribunal Act* there are reasonable grounds for the granting of an extension of time within which to require a hearing by the Tribunal.

For the above reasons the Tribunal is satisfied that the evidence before it shows that the Applicant was unable through a cause beyond Dostalek's control to bring the appeal within 15 days as prescribed. The evidence presented does establish that the delay in appealing the order impounding the vehicle under section 55.1 of the Act was the result of the illness of Dostalek.

ORDER:

Accordingly, the Motion of the Applicant requesting an extension of time within which to appeal, pursuant to section 20(7) of Ontario Regulation 632/98 amending Regulation 574, R.R.O. 1990, is granted.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice Chair

RELEASED: April 8, 2003

File name:1547.mvia.perfect.extension

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



REBECCA MATHERS

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

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

TRIBUNAL: KENNETH KOPROWSKI
Presiding member

APPEARANCES: LUBA NEUWIRTH
Representative for the Registrar of Motor Vehicles

REBECCA MATHERS, Applicant
By written submissions only

DATE OF
WRITTEN HEARING: March 26, 2003

DECISION RELEASED: April 3, 2003

Toronto

REASONS FOR DECISION

A hearing was held on March 26, at Toronto, Ontario, by way of written hearing to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

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

BACKGROUND:

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

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. The owner has appealed that order. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Rebecca Mathers (the "Applicant")
Motor Vehicle:	NISS PUH, plate 6242LH (the "vehicle")
Date of Appeal:	February 26, 2003

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

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

This matter came before this Tribunal on March 26, 2003 and proceeded as written hearing.

ISSUE:

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

I'm filing an appeal to have my vehicle released from the compound at Ross Services in London. I need this vehicle to go to work and cannot afford to have this vehicle in the compound for 45 days. The person driving the vehicle did not have consent.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

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

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Winston R. Mathers;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of dangerous driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until December 17, 2003.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must

demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant, under section 50.2(3) of the Act, is permitted to appeal the decision of the Registrar on only four grounds, outlined earlier in these Reasons. The Applicant has chosen to appeal on the ground of exceptional hardship.

In her Notice of Appeal, the Applicant sets out what this Tribunal considers to be three different submissions in making this appeal. These are:

- 1) Inconvenience - she needs the vehicle to go to work.
- 2) Financial - she cannot afford to have the vehicle in the compound for 45 days
- 3) Consent - the person driving the vehicle did not have consent.

In order for the Applicant to succeed on the ground that the impoundment order will result in exceptional hardship, she must prove, first, that there was no alternative available to the impounded vehicle, as required by section 22(1) of Regulation 574 R.R.O. 1990, as amended by Ontario regulation 632/98 (the "Regulation"). The Applicant in her evidence fails to address this issue. There is no evidence filed with the Tribunal that deals with whether or not the Applicant has access to an alternative motor vehicle, or made reasonable inquiries to obtain another motor vehicle.

Since there is absolutely no evidence before the Tribunal on the issue of an alternative to the impounded motor vehicle, the Tribunal cannot consider inconvenience, financial or economic loss, loss of employment or loss of training under Subsection 22(2) of Regulation 574 R.R.O. 1990. As a result, the Applicant has failed to establish exceptional hardship as a ground for his appeal.

Even if the Applicant did, in fact, prove that there was no alternative available, that same section requires that she prove that the impoundment will result in a threat to the health or safety of any person ordinarily transported by the motor vehicle. There is no such evidence before the Tribunal.

As a result of the application of subsection 22(2) of the Regulation, this Tribunal cannot consider whether or not the impoundment will result in inconvenience to the Applicant.

It also cannot consider the following three matters; that is:

1. financial or economic loss to any person;
2. whether the impoundment will result in loss of employment or employment opportunity to any person; or

3. whether the impoundment will result in a loss of education or training or of an opportunity for same.

However, the Tribunal may consider the above three last-mentioned matters if the Applicant can prove all four of the following circumstances; namely:

1. if there is no available alternative to the impounded vehicle;
2. if the loss will be immediate, significant and lasting;
3. if the loss will be suffered by the person ordinarily transported by the vehicle; and
4. if the result of the loss does not have an impact on the driver whose licence had been suspended and whose driving of the motor vehicle in question had resulted in the impoundment.

Section 22(4) provides that, to prove there was no alternative to the impounded vehicle, the Applicant would have to prove that every reasonable option had been considered and inquired into to eliminate or mitigate any threat or loss to her, including using another vehicle or making arrangements to do without the impounded vehicle during the impound period.

There is unfortunately no evidence before the Tribunal on this issue, and as a result, the Applicant's submission on this issue fails.

CONSENT

This Tribunal will now deal, with the Applicant's submissions, starting with the third submission first, namely, that the person driving the vehicle did not have consent.

The Regulations, above cited, do not permit this Tribunal to enter into an examination of this issue in this case. The Applicant appealed on the ground of exceptional hardship. Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, does not include the presence or absence of consent among the various criteria that this Tribunal must consider in making a decision as to whether or not exceptional hardship is proved.

The absence of consent may be an issue if this Tribunal were to consider whether the vehicle in question had been stolen. This is a separate ground of appeal. However, the Applicant did not choose that ground of appeal, with the result that the Registrar did not make any submissions on that issue. To consider that issue now would be highly prejudicial to the Registrar, and would, in effect, be the consideration of a ground of appeal that was not even selected by the Applicant and is therefore not before the Tribunal.

This Tribunal cannot consider matters, which are outside the matters that the legislation has specifically authorized this Tribunal to consider in section 22, in an appeal on the ground of exceptional hardship. Absence or presence of consent is not one of those matters.

Therefore, the lack of consent is not a matter that this Tribunal can consider in this particular appeal dealing with exceptional hardship.

Consequently, the Applicant's submission on the basis of lack of consent fails.

INCONVENIENCE

This Tribunal will deal, now, with the first submission, that the Applicant needs the vehicle to go to work. Stated in those terms, without more, this submission would seem to indicate that the loss of the vehicle is an inconvenience to the Applicant. However, by virtue of section 22(2)(a), this Tribunal cannot consider such a matter in determining whether the Applicant is experiencing exceptional hardship as a result of the impoundment.

This statement of the Applicant does not even permit consideration of section 22(1), for there cannot be read into that statement any notion that the impoundment will result in a threat to the health or safety of a person or of the public, or to the environment or property of a community in whose service the motor vehicle is ordinarily used, as is required by that section. There is simply no evidence submitted by the Applicant on those matters.

On this submission, therefore, the appeal of the Applicant must also fail.

FINANCIAL

Finally, the Applicant states that she cannot afford to have the vehicle in the compound for 45 days. The Applicant provides no details as to what she means by that. Such a statement might require a consideration of any of the criteria listed in section 22(2)(b), (c), or (d). However, even before this Tribunal can consider those matters, the Applicant must prove, among other things, and by virtue of section 22(3), that no alternative to the impounded vehicle is available. Unfortunately, for the Applicant, there is absolutely no evidence whatsoever before this Tribunal that no alternative is available to the Applicant. Therefore, this Tribunal cannot come to any conclusion on this submission in the absence of such evidence.

Therefore, this submission must also fail.

In an appeal of this nature, it is the Applicant who has the onus of proving her case on a balance of probabilities. This Tribunal must agree with the submissions of the Registrar, Exhibit 3, that the Applicant has presented no evidence on any of the matters that this Tribunal can consider in determining whether the impoundment of the Applicant's motor vehicle has resulted in exceptional hardship.

The Applicant's appeal, therefore, must fail.

DECISION:

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

LICENCE APPEAL TRIBUNAL

Kenneth Koprowski
Presiding Member

RELEASED: April 3, 2003

FILE NAME: 1549.mvia.Mathers.doc.

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis

VIRGINIA BELL

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

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

TRIBUNAL: BARBARA FRASER
Presiding member

APPEARANCES: ADELAIDE PINDER
Representative for the Registrar of Motor Vehicles

VIRGINIA BELL, Applicant
unrepresented

DATE OF HEARING: APRIL 2, 2003

DECISION RELEASED: APRIL 14, 2003 TORONTO

REASONS FOR DECISION

A hearing was held on April 2, 2003, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

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

BACKGROUND:

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

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. The owner has appealed that order. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Virginia Bell (the "Applicant")
Motor Vehicle:	BUICK SKYLARK, plate AJNP 853 (the "vehicle")
Date of Appeal:	March 4, 2003

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

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

This matter came before this Tribunal on April 2, 2003 and proceeded as a written hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing. There being none, the hearing proceeded.

ISSUE:

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

1. I was not driving the car when it was impounded. My son's license was fine in January when his license was renewed for 2003.

I was not aware & am not aware now of what charges he has for driving.

I have attached a letter.

I would like a written appeal because I work & would miss time off work & because it was not me but my son who is responsible for all of this & he will be going to court.

2. I am requesting an Appeal that my vehicle may be released from being impounded.

I was not driving my car at the time it was impounded, my son Nicholas Menard was. I did not know my car had been impounded until I received a notice in the mail. I asked my son where my car was several times and he said it was at a friend's house. Since then, I have asked him why it was impounded and all he would tell me was because of the current incident. I have asked Nicholas to show me the papers for his charge, but he has not.

My son's birthday is January 20, and as a present I had paid for his license renewal fee. There was no problem then, and that was just a short while ago. If he has another charge or has lost his license, I have not been informed.

I would like my car back on the grounds that I was not aware of any reason my son should not be driving and last month I know his license was fine. Also, I have not done anything. If you allow me to have my car back, Nicholas Menard will not be driving it, I can guarantee that.

The Applicant stated that she was unaware that her son, Nicholas Menard, who had borrowed her car, had his licence suspended at that time. She alleged that she gave him the money to renew his licence and that his record was in good order, and that there were no problems, as of January, 2003.

The Applicant related her quest regarding the location of her vehicle and the exact cause of its absence.

She further submitted that her son was not forthcoming in reply to her enquiry. The Applicant stated that if the impoundment is lifted, she will see to it that her son, will never drive her car again.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

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

- 41630. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
- 41631. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Nicholas Roger Menard;
- 41632. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
- 41633. Copy of the Ministry of Transportation records indicating that the driver at the time of the impoundment had been convicted of the offence of driving with more than 80 mgs. alcohol in his blood contrary to the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until January 16, 2004.

The Registrar's evidence reveals that the driver has a driving offense record dating back to March 12, 2001.

Nicholas Roger Menard, a 24-year old driver, has accumulated a very significant driving offence record comprising some seven (7) convictions in only two years. Of particular note is the offence of FAIL TO PRODUCE DRIVERS LICENCE dated January 16, 2002.

The extended driver record search indicates that his licence is currently suspended. It was suspended for an unpaid fine November 20, 2001 expiring November 29, 2001. An additional Administrative Driver's Licence Suspension provides that the licence is suspended until March 24, 2003. It was subsequently suspended until January 16, 2004 for DRIVING WITH MORE THAN 80 MGS ALCOHOL IN BLOOD, offence date December 24, 2002.

All of this indicates that it should have been obvious to Nicholas Roger Menard that his driver's licence was under suspension and that he should not be applying for a renewal, or driving until the suspensions were completed.

A conviction entered March 16, 2003 for BLOOD/ALCOHOL CONTENT IN EXCESS OF .08 contrary to the Criminal Code of Canada results in the suspension of this driver's licence until January 16, 2004.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

APPLICATION OF LAW TO FACTS:

Section 50.2(30 (c) of the *Highway Traffic Act* requires the owner of a motor vehicle to establish that due diligence was exercised in attempting to determine that the driver's licence of the motor vehicle was not under suspension.

Diligence requires careful attention to detail. Due diligence requires reasonable and prudent action.

The Applicant is the owner of the vehicle, which her son was driving while under suspension and which resulted in the impoundment. The Tribunal notes that in Exhibit 1, the Applicant and her son Nicholas Bell reside at the same address, to wit, 482 Hilson Avenue, Ottawa, Ontario.

The Tribunal finds it difficult to understand therefore that the Applicant was not aware of her son's driving record, or of his behaviour.

The Tribunal understands and sympathizes with the Applicant's position, in that as a mother, she would want to trust and believe in her son. It further appreciates that it is somewhat awkward to ask a close adult family member each time that they wish to borrow the vehicle, to prove the validity of their licence. The Tribunal suggests that had diligent enquiries been made, the present situation would not have occurred.

Unfortunately, it would appear that this driver betrayed the Applicant's trust. He not only drove the vehicle while his licence was under suspension, but it appears he deceived his own mother, the Applicant as to its whereabouts.

Due diligence requires that an Applicant take positive steps to confirm the validity of a driver's licence. This requires that an individual contact the Ontario Ministry of Transportation with the driver's name and driver's licence number at 1-900-565-6555 for automated service, or obtain a driver's abstract at a local MTO Driver Vehicle Licence issuing Office, or Service Ontario Kiosk at a local mall, or access the MTO website at www.mto.gov.on.ca. Such a diligent inquiry will provide the public with accurate information concerning the validity of the driver's licence.

It is of note that subsection 55.1(21) of the *Highway Traffic Act* provides the Applicant owner with a claim against the suspended driver for her financial loss:

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

DECISION:

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

LICENCE APPEAL TRIBUNAL

Barbara Fraser, Presiding Member

RELEASED: April 14, 2003

FILE NAME: mvia.1555.Bell.doc.

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



CINDY DUBOIS

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

AND IN THE MATTER of a motion by Cindy
Dubois seeking an extension of time to
commence an appeal from an impoundment
order of the Registrar under Section 55.1 of the
Highway Traffic Act;

CINDY DUBOIS

APPLICANT

-and-

THE REGISTRAR OF MOTOR VEHICLES

RESPONDENT

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

APPEARANCES: LYNDA DUNBAR,
Representative for the Registrar of Motor Vehicles

CINDY DUBOIS, Applicant

**DATE OF
MOTION:** April 2, 2003

By teleconference

ORDER

A motion was heard, by way of teleconference, on April 2nd, 2003, at Toronto, Ontario, to consider the Applicant's request for an extension of time to appeal the impoundment order of the Registrar regarding the Applicant's motor vehicle. The motion is brought pursuant to Subsection 20(7) of Ontario Regulation 632/98 amending Regulation 574 of the Revised Regulations of Ontario, 1990 made under the *Highway Traffic Act*, R.S.O. 1990. c.H.8 amended ("HTA").

The Tribunal **grants** the extension of time requested by the Applicant to commence an appeal for the reasons set out below.

SUBMISSIONS OF WRITTEN MATERIAL:

The Applicant submitted the following documents:

1. Order to Impound dated January 6th, 2003, issued by the Ministry of Transportation;
2. Original Notice of Appeal, including Applicant's position on Appeal, dated February 7, 2003 received by the Tribunal on March 6th, 2003;
3. Notice of Motion received at the Tribunal March 17th, 2003.

THE FACTS:

The Notice of Motion filed by the Applicant specifies the grounds for seeking an extension as follow:

- a) Financial Disability
- b) Did not understand what 15 days, did not know about
- c) MTO run around with 1- 800...
- d) No direction from OPP's, or Legal Aid, my M.P. Caroline Dicocco

At the hearing the Respondent's Representative, Ms Lynda Dunbar, established that the Applicant's vehicle had been impounded on January 6th, 2003, and that the Applicant filed an appeal on February 7th, 2003, outside of the 15 day time period.

The Respondent's Representative referred to Subsection 20(7) of Regulation 632/98 emphasizing that in order to grant the extension, the Tribunal must be satisfied that the owner "...*acting in good faith was unable through accident, illness, or other cause beyond the owner's control to bring the appeal within the prescribed 15 days*".

Ms. Dunbar continued by reading the Applicant's reasons for requesting an extension as set out by the Applicant's Notice of Motion.

Ms. Dunbar, on behalf of the Registrar contends the Applicant's explanations do not meet the requirements of Subsection 20(7) of Regulation 632/98.

The Applicant states that she had difficulty obtaining information on how to appeal. The Applicant was unable to pay the prescribed fee for appeal, as she was also encumbered by financial hardship. It was only after receiving her tax refund that the Applicant was able to submit the \$100.00 fee.

In cross-examination, the Applicant admitted to having received a document, which told her where the vehicle was impounded. Under further questioning by Ms. Dunbar the Applicant attested that she did not recall having read the back of the Notice of Impoundment, which contained information on how to appeal.

According to the Applicant she called an "800 number", and was given another number to call where she obtained no answer. Finally by the end of January, the Applicant called "Driver Control", and was able to obtain some information. The Applicant was not able to call the Licence Appeal Tribunal until the end of January, beginning of February.

In her closing remarks, Ms. Dunbar argued that the onus is on the Applicant to read the information on the back of the Notice of Impoundment. Furthermore, had the Applicant contacted Driver Control, or the Appeal Tribunal, earlier she would have received the proper information.

There is no evidence that the Applicant was ill or unable to submit her appeal within the 15 days.

In her closing remarks, the Applicant re-iterated the fact that she needs the vehicle and that she did not file on time due to a lack of understanding of the process and lack of funds.

THE LAW:

Section 20(1) of Regulation 632/98 states:

20. (1) An appeal to the Tribunal under section 50.2 of the Act shall be commenced by filing a notice of appeal with the Tribunal within 15 days of the issuance of the order to impound, together with a fee of \$100 payable to the Minister of Finance.

Section 20(7) of Regulation 632/98 states:

20. (7) Despite subsection (1), the Tribunal may extend the time for commencing an appeal if the owner establishes that the owner, acting in good faith, was unable through accident, illness, or other cause beyond the owner's control to bring the appeal within the prescribed 15 days.

Section 7 of the *Licence Appeal Tribunal Act*, 1999 states:

7. Despite any limitation of time fixed by or under any Act for the giving of any notice requiring a hearing by the Tribunal or an appeal from a decision or order of the Tribunal under section 11 or any other Act, if the Tribunal is satisfied that there are reasonable grounds for applying for the extension and for granting relief, it may,

(a) extend the time for giving the notice either before or after the expiration of the limitation of time so limited; and

(b) give the directions that it considers proper as a result of extending the time.

APPLICATION OF LAW TO FACTS:

This hearing was convened for the purposes of hearing a request to extend the time of the appeal. During her testimony the Applicant alluded to the grounds for appeal which, do not form part of these proceedings, and will therefore, not be addressed by the Tribunal at this time.

Subsection 20(7) of Regulation 632/98, provides the Applicant with the specific criteria required to satisfy the Tribunal to obtain an extension of the time for commencing an appeal. Where as here, the Registrar does not consent to the commencement of the appeal brought after the expiry time. The Applicant must establish that acting in good faith, the Applicant was unable, through accident, illness or other cause beyond the Applicant's control, to bring the appeal within the prescribed 15 days. The Tribunal is precluded from considering other factors not arising from or directly related to these criteria.

The Tribunal found the Applicant to be credible. Having no reason to believe that the Applicant was acting in any manner other than in "good faith, the Tribunal accepts the Applicant's evidence. The Tribunal agrees with the Respondent's representative that the onus is on the Applicant to read the information contained on the back of the Notice of Impoundment.

At issue is whether the delay was beyond the Applicant's control. The Applicant testified that she did not understand what was meant by the "15 days", and that when she attempted to obtain information she encountered difficulty with the 800 number she used. Another, and perhaps more compelling reason, as to why the Tribunal cannot deny the Applicant's motion for an extension follows. The law is not designed to serve only those with means. The Tribunal accepts the Applicant's assertion that she lacked the funds required to immediately file the appeal upon obtaining information on how to proceed. The Tribunal therefore finds that the Applicant's difficulties with the 1-800 number coupled with her limited financial means satisfy the Tribunal that there are reasonable grounds to grant the extension, pursuant to section 7 of the Act, for the reason that the Applicant has established that she was unable to bring the Appeal for reasons that were beyond her control pursuant to subsection 20(7) of Regulation 632/98.

It would be most inhumane and lacking in compassion for this Tribunal not to consider favourably the Applicant's request for an extension.

The Tribunal further finds, that the evidence presented establishes that the Applicant's delay in appealing the order impounding the vehicle under Section 55.1 of the *Highway Traffic Act* was the result of a situation beyond the Applicant's control.

ORDER:

For the reasons set out above, the motion herein of the Applicant requesting an extension of time to appeal, pursuant to subsection 20(7) of Ontario Regulation 632/98 amending Regulation 574, R.R.O. 1990, is **granted**.

The Tribunal orders the Applicant to file all materials with the Tribunal Office setting out the grounds of her appeal, all documents in support including any witness statements by no later than 4:00 p.m. Friday April 18, 2003.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

Barbara Prouse,
Member

RELEASED: APRIL 10, 2003

File name: 1559.mvia.Cindy Dubois.Motion

GLOBAL CAR & TRUCK RENTALS

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

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

TRIBUNAL: BARBARA FRASER
Presiding Member

APPEARANCES: ADELAIDE PINDER
Representative for the Registrar of Motor Vehicles

WILLIAM HYRSKI
Representative for the Applicant, Global Car & Truck Rentals

DATE OF
HEARING: March 27, 2003 *by teleconference*

DECISION
RELEASED: April 1, 2003

REASONS FOR DECISION

A hearing was held on March 27, 2003, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA" or the "Act").

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

BACKGROUND:

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

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Global Car & Truck Rentals (the "Applicant")
Motor Vehicle:	2002 KIA Sportage, plate # AMBS 635 (the "vehicle")
Date of Appeal:	March 7, 2003 (Perfecting - March 11, 2003)

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

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

This matter came before this Tribunal on March 27, 2003 and proceeded as an electronic hearing.

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

There were no submissions prior to the hearing nor were there any preliminary matters, therefore, the Hearing proceeded.

ISSUE:

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

March 5, 2003.

To Whom It May Concern;

GLOBAL CAR AND TRUCK RENTAL had rented a vehicle to Peter Basic On February 17th, 2003. It was a KIA Sportage plate # AMBS 635 vin # KNDJA723825126291. The renter had shown us his licence and another valid piece of identification to get the rental. The KIA Sportage was stopped on February 19th, 2003 by a police officer for a traffic violation. The police at the call center had notified us that our vehicle was being towed to Oakville, to be impounded for DWI V.I.P.. It was then towed to CHR Towing compound. I am writing to you to request that the vehicle be returned to our establishment, as the customer Peter Basic is not the owner of the vehicle he had only rented it from our business. If you are able to assist me in recovering our vehicle it would be greatly appreciated.

Please feel free to contact me at Global Car & Truck Rentals between the hours of 8am-6pm Monday through Friday, so we can get this situation rectified. Thank you For Your Time.

Sincerely,
William R. Hyrski
General Manager
(905) 547-4844

Mr. William R. Hyrski (Applicant) affirmed that he is the General Manager for Global Car & Truck Rentals, a small business that rents out approximately twenty-three vehicles a week. He stated that the policy is to ask for a valid credit card and licence, that it is company policy to ensure that the person renting a vehicle is twenty-three years of age or older. He said that the employee who approved of the vehicle rental to Mr. Petar Basic (driver) was new at the time. The Applicant said that the driver had rented the vehicle for five days and that it was on the third day of the rental that he was caught by police with an invalid licence.

The Applicant, when cross-examined, admitted that he did not know that it is possible to check on the validity of a driver's licence. He appeared to be confused when asked the expiry date of the driver's licence. He replied that it was 05 79 01, which is clearly the driver's birth date. He repeated the driver's birth date when asked to look again and to check the expiry date. He further asked the Registrar's representative if all licences have to be verified.

The Applicant asked that the impoundment be lifted because every day that the vehicle remains impounded, he is losing revenue.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

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

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Petar Basic;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until June 4, 2003.

Ms. Adelaide Pinder, representing the Registrar, reviewed the documents tendered by the Registrar as evidence. She informed the Applicant that there is a difference between the birth date on a licence and the licence expiration date. She emphasized that employees must learn where to look on the licence to ascertain the expiry date, and that they learn the importance of doing so. Ms. Pinder stated that there is no evidence to show that due diligence was exercised to verify the status of the driver's licence. She requested that the 45 day impoundment order stand.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98 provides that the prescribed period, referred to above, is two years.

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

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

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

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

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

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

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

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

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

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

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

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

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

APPLICATION OF LAW TO FACTS:

Section 50.2(3)(c) of the *Highway Traffic Act* requires the owner of a motor vehicle to establish that due diligence was exercised in attempting to determine that the driver's licence of the motor vehicle was not under suspension.

Diligence requires careful attention to detail. Due diligence requires reasonable and prudent action.

Mr. William R. Hyrski, the company's General Manager, represented the owner, Global Car & Truck Rentals. His testimony established that there was no company policy or established practice to independently verify the validity of a driver's licence. The Tribunal notes that there appeared to be confusion in locating the driver's birthday and licence expiration date on the driver's licence.

The evidence before the Tribunal was that the Applicant made no independent inquiries to determine whether or not the driver's licence was still valid. No concrete steps were taken to determine whether or not the driver had a valid driver's licence. Merely accepting a driver's licence as valid, is not enough to show due diligence.

Due diligence requires that the Applicant take positive steps to confirm the validity of the driver's licence. This requires that an individual contact the Ontario Ministry of Transportation with the driver's name and driver's licence number at 1-900-565-6555 for automated service, or obtaining a driver's abstract of licence at a local MTO Driver Vehicle Licence Issuing Office, or Service Ontario Kiosk at a local mall, or accessing the MTO website at www.mto.gov.on.ca.

It is recommended that the General Manager and employees of Global Car & Truck Rentals familiarize themselves with the operation of the Act and an appropriate method to verify the validity of a driver's licence.

The Tribunal notes that the Applicant does have a claim against the suspended driver for its financial loss and expenses pursuant to subsection 55.1(21) of the *Highway Traffic Act*:

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

DECISION:

The Applicant has failed to establish that due diligence was applied in this case as required by Section 50.2(3)(c) of the *Highway Traffic Act*. The owner of the vehicle did not exercise due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension.

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

LICENCE APPEAL TRIBUNAL

Barbara Fraser
Presiding Member

RELEASED: April 1, 2003

FILE NAME: 1561.mvia.Global Car & Truck Rentals.doc

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



CHRIS A. WARREN

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

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

TRIBUNAL: STUART CORK, Presiding member
 BILL SETTATREE, Member

APPEARANCES: Lynda Dunbar, Hearings Officer
 Representative for the Registrar of Motor Vehicles

Chris Warren, Applicant
unrepresented

DATE OF HEARING: April 1, 2003 By teleconference

DECISION RELEASED: April 14, 2003

REASONS FOR DECISION

A hearing was held on April 1, 2003, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

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

BACKGROUND:

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

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. The owner has appealed that order. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Chris A. Warren (the “Applicant”)
Motor Vehicle:	OLDS SUL, plate ANSP 044 (the “vehicle”)
Date of Appeal:	March 5, 2003

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

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

This matter came before this Tribunal on April 1, 2003 and proceeded as an electronic hearing.

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

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

ISSUE:

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant’s evidence follows.

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

It was never my intention to lend my vehicle to a suspended driver.

The day that Mr. Chad Roberts borrowed my vehicle, I requested that he show me his Drivers License to ensure that it was valid and that he had one and had it with him. As Chad had his driver's license and stated to me that he was licensed to drive, I thought everything was okay.

As it turns out, Chad was stopped by police and the car was impounded. Apparently Chad had been charged with Drinking and Driving in the province of Quebec in the summer of 2002, which he did not tell me about. The reason he now states for not telling me is that he thought he was only suspended from driving in the Province of Quebec.

The main issue with the vehicle being impounded is that it is going to cause me great hardship financially, as I am currently unemployed and my wife, Karen, is the only one working in the house. She works at Renfrew's seniors home (Bonnechere Manor) and as we live in the Country, she must drive to and from work. Without transportation she will loose her job and this will cause us great hardship. She does not have any co-workers who live close by.

We have two children and want to provide the best for them if possibly, but to loose our jobs and vehicle is something we just may never recover from.

I would ask that the Tribunal understand that I did try to ensure Chad was licensed to the best of my ability. He stated that he was licensed and did have a driver's license with him and he lye to me about his status. I would ask that you have understanding and leniency towards myself and release our case to us.(sic)

In expanding on his written submission at the hearing, Mr. Warren testified that his wife had not missed work, was able to utilize taxis or other means, that his mother was available if needed with a vehicle. He also confirmed that his employment was not affected because he was not employed during the winter although indicated he had recently been offered work but could not get there without his car, as it was some distance away. He did not present specific confirmation to verify this offer of employment. In fact, he indicated that the offer was still open to him when he is available to accept it. There was no hardship as far as the children's education was concerned because a bus picked them up and returned them home each day.

In his evidence Mr. Warren elaborated on his written submission regarding the Driver's license of the vehicle driver Chad Roberts. His evidence was that the license was waved at him from across the room and he did not check beyond that.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

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

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Chad Roberts;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of driving with more than 80 mgs. alcohol in blood under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until December 9, 2003.

The Respondent for the Ministry of Transportation summarized the evidence submitted by the Ministry and certified it was correct. She discussed matters with the Applicant relating to a second vehicle licensed by him. Mr. Warren replied that this vehicle, a 1978 truck, was out of service because it needed a new engine.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

APPLICATION OF LAW TO FACTS:

The Applicant has appealed this impoundment on the ground of exceptional hardship, in accordance with subsection 55.2(3)(d) of the Act. Section 22 of Regulation 632/98 provides the Applicant with the specific criteria to establish that exceptional hardship has resulted from the impoundment.

In his testimony, the Applicant has established that there are a number of alternative modes of transportation available to the impounded motor vehicle. His wife is able to use taxis, catch rides from other people and his mother is available if needed. A school bus picks up the children at the door and drops them off each day.

The Applicant and his wife have been able to maintain their daily activities through the use of various alternatives at their disposal. The Tribunal recognizes that the Applicant has been inconvenienced by the loss of his vehicle, however no evidence was heard that would support a finding of exceptional hardship, nor a loss that was significant or lasting, as required by the Act.

Since there are alternatives to the impounded motor vehicle, subsection 22(1) (threat to health and safety) does not apply. Subsection 22(2) does not permit the Tribunal to consider inconvenience.

Furthermore, financial or economic loss, and loss of employment, or employment opportunity cannot be considered under s. 22(2)(c) and (d) when as here, there is an alternative to the impounded vehicle.

The Tribunal may consider economic loss only if no alternative to the impounded vehicle is available, which as stated is not the case here. (See subsection 22(3)(a) of that Regulation).

After reviewing all of the evidence, the Tribunal finds that the Applicant has failed to establish exceptional hardship as defined in the Act.

In future to avoid the situation where a suspended driver operates another's car, before granting permission to drive their motor vehicle, individuals should ensure that the driver's licence of the proposed driver is valid by contacting the Ontario Ministry of Transportation at 1-900-565-6555 for automated service, or access the website at www.mto.gov.on.ca or obtain a driver's abstract at a local MTO Driver Licence Issuing Office or Service Ontario Kiosk.

The Tribunal notes that the Applicant does have a claim against the suspended driver for his financial loss and expenses pursuant to subsection 55.1(21) of the *Highway Traffic Act*:

“The owner of a motor vehicle that is subject to an order to impound under this section may bring an action against the driver of the

motor vehicle at the time the order was made to recover any costs or other losses incurred by the owner in connection with the order”.

DECISION:

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

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

Bill Settatree, Member

RELEASED: April 14, 2003

FILE NAME: mvia.1569.Warren.doc.

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



MOHINDER SINGH

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

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

TRIBUNAL: MALCOLM FEALING, Presiding Member
BARBARA PROUSE, Member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

JASON HUANG, Agent for the Applicant

DATE OF HEARING: April 4, 2003

DECISION RELEASED: April 16, 2003 *by teleconference*

REASONS FOR DECISION

A hearing was held on April 4, 2003, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

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

BACKGROUND:

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

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Mohinder Singh (the “Applicant”)
Motor Vehicle:	1991 Acura EL, plate APLT 920 (the “vehicle”)
Date of Appeal:	March 17, 2003

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

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

This matter came before this Tribunal on April 4, 2003 and proceeded as an oral hearing.

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

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

The hearing proceeded.

ISSUE:

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

Our firm is retained by the family to proceed with this appeal. The owner, Mr. Mohinder Singn and his family are of limited financial ability and could not speak fluent English. We have been instructed to request a written appeal.

Dear Members of the Tribunal:

Mr. Singn is the owner of the vehicle impounded on March 4, 2003. The car was impounded because of his son, Mr. Jaswinder Brar's driving under suspension charge. Our client has no prior knowledge that his son's license has been suspended as such information was withheld from him. In fact, our client was only notified as to his son's HTA violations after he received the notice of impoundment.

Our client is the regular user of the vehicle. The impoundment of our client's vehicle has caused tremendous disruption and hardship to our client's life. Our client suffers from a back injury sustained in a slip and fall accident on December 15, 2002. At the time, he was diagnosed and treated by his family physician, Dr. Jairath and referred to the Promed Rehabilitation Centre in North York (See Attached). The loss of the use of vehicle has prevented our client from continuing his treatment. In addition, the loss of the use of the car has caused difficulties in our client's everyday activities, and our client is unable to conduct everyday chores such as grocery shopping and refill of his medication. Our client has no alternative transportation other than the vehicle impounded. His health condition prohibited him from utilizing the public transportation system. In addition, Mr. Singn's wife is the sole provider of the family and worked at a 24 hour bakery. Her shift starts at 11:00 PM and at that hour, there was no public transportation service in her area. As a result, Mrs. Singn have missed a number of days from work and this has a substantial financial impacted on the family.

Under the circumstance, we are of the position that the impoundment of the vehicle should be overturned because the impoundment has threatened the health and safety of both Mr. Singn and his wife and that the financial and economic loss due to the loss of the vehicle are immediate, significant and lasting. Mr. Singn and his wife are both adversely impacted by the impoundment through no fault of their own and we ask that the Tribunal set aside the Ministry's impoundment order.

Jason Huang

"Jason Huang"

(sic)

I would like to request that I would like to get my vehical back. First and formost I need to have my vehical in order to get to therapy since the other car that I have broke down. I also need to drop my wife to work, and pick her up as well. Secondly I need to do everyday things such as getting the grocery, getting my medication and as well as going to my "*illegible* disorder" physiotherapist since I have back problems. I need the car in order to do the above. I can't take the bus because I have to wait to long in the cold, which it effects my back, and also I can't stand up for a long period of time in the bus.

Sincerly
"Mohinder Singh"
March/13/2003

(sic)

This is a letter in request to getting my husband's car back. I strongly urge if the car can be returned to my husband. I have a difficult time getting to work because I start work at 11:00 pm, and at that time there is no transportation service, so I need someone to drop me off at work and pick me up as well. Due to that I also have missed a few days at work.

Sincerely
"Amayit Kaur"

(sic)

Mr. Huang advised the Tribunal that Mr. Singh normally goes for physiotherapy once or twice per week. He also sees his family physician regularly. He has not been to physiotherapy or to his doctor's office since the day of the impoundment.

The family has been severely financially impacted, because Mrs. Singh starts work at 11.00 p.m. and cannot find public transit at that hour. Mr. Huang was not able to provide the address of the bakery where Mrs. Singh works. According to Mr. Huang, Mrs. Singh cannot afford to take a taxi to work, and has missed work since March 2, 2003.

Mr. Singh owns another automobile, a 1989 Ford Aerostar. The Tribunal was advised that this automobile needs repairs. Mr. Huang thought the transmission was gone, but was not able to verify that. He was also not able to provide evidence that an attempt had been made to fix the automobile.

In response to further questioning, Mr. Huang advised that Mr. Singh has to refill his prescription every two weeks, and that he has been able to do this with the help of his son who goes to the pharmacy by public transit.

Apparently father and son are not communicating since the impoundment, and the son has been asked to move out of the house. He is therefore unable to assist his parents either practically or financially.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

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

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Jaswinder Brar;

3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving with More Than 80 mgs Alcohol in Blood under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until December 10, 2003.

The Respondent stated that under Section 632/98 of the Highway Traffic Act, the Applicant must demonstrate the allegation of potential threat to the health and safety of an individual. No direct evidence had been provided to show that neither Mr. nor Mrs. Singh could take a taxi to his appointments, or she to her place of employment. At the very least they could use the money saved as a result of not having to purchase gas for the car to get around.

The Respondent added that no evidence was produced to show that an attempt had been made to ascertain the cost to fix the other vehicle. Since the Tribunal was not provided with the location of the bakery it was not possible to assess how far Mrs. Singh had to travel to work, or whether she could in fact use public transport.

Mrs. Singh had apparently not lost her job. She appears to be on a voluntary temporary lay-off. Her employer had advised her that he would find a replacement until she was able to return to work. The family's financial hardship would not be immediate, permanent and lasting.

The Respondent further indicated that it had not been demonstrated that not having the automobile constituted a threat to the health and safety of anyone, and lastly, the Respondent could see no reason why Mr. Brar, the son, could not be asked to assist his parents.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

APPLICATION OF LAW TO FACTS:

In order for the Applicant to succeed on the ground that the impoundment order will result in exceptional hardship, he must first prove that there was no alternative available to the impounded vehicle, as required by section 22(1) of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98 (the "Regulation").

The Tribunal finds that there is evidence that indicates the Applicant has access to an alternative motor vehicle, although the cost of repair has not been investigated. It is furthermore not clear why the Applicant's wife could not take a taxi to and from work or make alternate arrangements for transportation, such as traveling to work with a co-worker, or obtain assistance from family or friends.

The Tribunal further finds that Mr. Singh did not make a concerted effort to find other means of transportation to either see his doctor and physiotherapist or ensure that his wife could get to work. The Tribunal was not able to assess Mrs. Singh's ability to use public transit to go to and from work, because the location of the bakery had not been provided.

The Tribunal further finds that every reasonable option has not been considered to obtain access to another motor vehicle, for example the cost of a short term vehicle rental relative to the income earned, or efforts made by the Applicant or his wife to borrow a car, from family, or for her to obtain transportation to and from work.

Based on the evidence before the Tribunal of other possible means of alternative transportation, which have not been adequately investigated, the Tribunal cannot consider inconvenience, financial or economic loss, loss of employment or loss of training under Subsection 22(2) of Regulation 574 R.R.O. 1990.

As a result, the Tribunal finds that the Applicant has failed to establish exceptional hardship as a ground for his appeal.

The Applicant does have a claim against the suspended driver for his financial loss and expenses pursuant to subsection 55.1 (21) of the *Highway Traffic Act*:

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

DECISION:

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

LICENCE APPEAL TRIBUNAL

Malcolm Fealing, Presiding Member

Barbara Prouse, Member

RELEASED: April 16, 2003

FILE NAME: 1573.mvia.Singh

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



MADINA OMAR

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

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

TRIBUNAL:

JEAN-MARC LEFEBVRE, Q.C.
Presiding member

ELAINE ARGUE
Member

APPEARANCES:

KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

MADINA OMAR, Applicant
unrepresented

DATE OF HEARING:

April 3, 2003

DECISION RELEASED:

April 22, 2003

Ottawa

REASONS FOR DECISION

A hearing was held On April 3, 2003, at Ottawa, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

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

BACKGROUND:

This is an appeal under section 50.2 of the H.T.A.

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Omar, Madina, Mohamed (the “Applicant”)

Motor Vehicle: 1991 Ford TPL
Plate ANNR 351 (the “vehicle”)

Date of Appeal: March 14, 2003

The Applicant filed an appeal (Exhibit 1) of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The registered owner namely, Omar, Madina, Mohamed is registered along with Hassan, Mohamoud, Hersi. She appeals on the basis that the driver's licence was not under suspension and that the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(b) and (d) of the Act.

This matter came before this Tribunal on April 3, 2003 and proceeded as an oral hearing.

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

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

The hearing proceeded.

ISSUE:

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

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

I Madina Omar the sole owner of the ford car which has the V.I.N. IFABP35X5MK201193., visited my friend Fosia Hassan, who resides at 1604-1512 Alta Vista Rd. on March 2, I parked my car at the parking lot at 3 p.m. I came out around 11 p.m. to drive my car, having with me somebody to drive the car for me at night. I noticed that my car was not there. I contacted the building authority and asked them whether they towed my car. They checked their records and told me that they didn't tow it. They advised me that I should contact the Ottawa Police. I contacted the Ottawa Police and they told me that it is impounded. When I questioned them why it is impounded, they told me that Mohamoud Hassan whose driving licence is suspended was driving, that is why it is impounded. Mohamoud Hassan is a friend of mine, who I asked him to do a favour for me. When I bought my car, I asked him to register the car with me so I can afford to pay the monthly required insurance premium, which if I register by myself I couldn't afford to pay the insurance. He, Mohamoud Hassan has no access for my car, he don't have any copy of my car's keys. How he can drive my car, when he don't have access for it.

Moreover, if he was driving my car why the Police didn't arrest him. The Police neither arrested him or charged him. That tells me that the police some how just came over my car, checked the plate number, then towed it. I think the Police misused their power and I ask you to over turn it.

I am a recipient of Ontario works and I can't afford to pay the charges of the impoundment of my car as the charges were told me it is over a thousand dollars. It will be hard for me to stand on my feet again without my car.

The evidence of the Appellant is entirely consistent with her representations to the Tribunal as outlined above, however, she admits that she was not the driver of the motor vehicle at the time it was intercepted by the police officer who filed the notice to Registrar of the impoundment of the vehicle on the day in question. The registered owner namely, Omar, Madina, Mohamed is registered along with Hassan, Mohamoud, Hersi. She appeals on the basis that the driver's licence was not under suspension and that the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(b) and (d) of the Act. She admitted that she knew of Mohamed Hersi Hassan's convictions under the Criminal Code of Canada and of his license suspension for offences involving alcohol. She was very convincing that the cost of retrieving the impounded vehicle would be beyond her means. She provided evidence that she is only working part-time, that she uses subsidized daycare for her two children within walking distance, however she is late in retrieving them, as she uses various buses with transfers from the remote locations of her babysitting and homecare employment throughout the area.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

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

1. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle; (Exhibit # 2);
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mohamoud Hersi Hassan; (Exhibit # 3);
3. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of driving with more than 80 mgs. alcohol in blood under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until October 2, 2005. (Exhibit # 4)
4. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner. (Exhibit # 5)

Constable Matthew Clarke of the Ottawa Police service testified that he intercepted the driver of the motor vehicle in question. He ascertained his identity from various reliable sources as being Mohamoud Hersi Hassan, although he was unable to serve the driver in question with the notice to Registrar of vehicle impoundment, as he fled the scene and has not been seen since. Constable Clarke testified that he had a subsequent conversation by telephone with Mr. Hassan and that his interlocutor hung up on him after being advised that he would be charged with offences arising from his driving of the motor vehicle. The Registrar of Motor Vehicles has provided this Tribunal with sufficient evidence of Mr. Hassan's Criminal Code convictions for alcohol related offences which authorized the impoundment of the vehicle.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

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

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

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

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

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

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

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

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

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

Where a police officer or officer appointed for carrying out the provisions of this Act is satisfied that a person was driving a motor vehicle on a highway while his or her driver's licence is under suspension under section 41 or 42 or 43, even if it is under suspension at the same time for any other reason, the officer shall,

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

Section 41 of the H.T.A. identifies the type of appeals for which a licence is suspended in sections 41(1)(a), (b), (c), (d), and (e) and 41(7) and 42(1) and 42(5) as follows:

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

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

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

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

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

- (4) This section applies in the same manner as if a person were convicted of an offence if the person pleads guilty to or is found guilty of an offence referred to in subsection (1) and,
 - (a) an order directing that the accused be discharged is made under section 730 of the Criminal Code (Canada) or under a provision that is enacted by a state of the United States of America and that is designated by the regulations; or
 - (b) a disposition is made under section 20 or sections 28 to 32 of the *Young Offenders Act* (Canada), including a confirmation or variation of the disposition. R.S.O. 1990, c.H.8, s.42 (1-4).

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

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

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

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

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

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

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

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

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

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

APPLICATION OF LAW TO FACTS:

As to the first issue filed by the Applicant: "her driver's licence was not under suspension", the Tribunal accepts the testimony of Constable Matthew Clarke and finds that the driver of the motor vehicle at the relevant time was not the Applicant, but rather a different driver, whose licence was, under suspension, who happens to be shown as the "other owner" namely HASSAN, MOHAMOUD, HERSI.

As to the second reason submitted by the Applicant in her appeal notice: "the loss of the vehicle will result in exceptional hardship", the Applicant has not provided evidence to discharge the onus upon her, to establish to the satisfaction of the Tribunal, that the cumulative impact of the impoundment upon her constitutes "exceptional hardship". The evidence is that she has alternatives. In fact, she has utilized other reasonable options to get around namely public transit. Since there is an alternative to the impounded motor

vehicle, the Tribunal cannot consider section 22(2)(b) financial loss, 22(2)(c) loss of employment or 22(2)(d) loss of education. While the Applicant may have experienced hardship, it is not exceptional hardship as contemplated by the legislation. In the Tribunal's view the further severe hardship which she faces is the inability to pay the impoundment costs to retrieve her vehicle. This additional hardship, however, does not meet the criteria for setting aside an order to impound.

DECISION:

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

LICENCE APPEAL TRIBUNAL

Jean-Marc Lefebvre, Q.C.,
Presiding Member

Elaine Argue
Member

RELEASED: April 22, 2003

FILE NAME: 1575.mvia.Omar.doc.

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



MARTIN W. PHILBRICK

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

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

TRIBUNAL: JOSEPH HEWITT
Presiding Member

APPEARANCES: KYLE M. BIEL
Representative for the Registrar of Motor Vehicles
by written submissions only

MARTIN W. PHILBRICK, Applicant
by written submissions only

DATE OF
HEARING: April 15, 2003

DECISION
RELEASED: April 17, 2003 Written Hearing

REASONS FOR DECISION

A written hearing was held on April 15, 2003, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA" or the "Act").

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

BACKGROUND:

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

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Martin W. Philbrick (the “Applicant”)
Motor Vehicle: GMC 2002, plate 219 5KW (the “vehicle”)
Date of Appeal: March 19, 2003

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

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

This matter came before the Tribunal on April 15, 2003 and proceeded as a written hearing.

ISSUE:

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant’s evidence follows.

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

The nature of my [husband’s] business is a self-employed plumber. That the truck is used to transport materials to job sites, and help with the families (sic) transportation needs. That without the vehicle, exceptional hardship would result in the loss of contracts, loss of income, and possible loss of the business.

That he drove the vehicle across the border in order to get passengers home. That I (Marty)

had only two weeks longer to get my licence back. That I made a grave error, one that has affected my family. That this vehicle is very essential to our business, and providing income for my family and employment for myself.

*Note – The Applicant's letter is unsigned and it would appear that it has been written by more than one person.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Martin W. Philbrick;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of impaired driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until April 5, 2003.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

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

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

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98 provides that the prescribed period, referred to above, is two years.

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

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

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar.

The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

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

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

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

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

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

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

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or

circumstance; severe toil or suffering; extreme privation.

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

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

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

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

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

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

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

APPLICATION OF LAW TO FACTS:

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

The Applicant has appealed on the ground of exceptional hardship, in accordance with subsection 50.2(3)(d) of the Act. Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the specific criteria the Applicant must meet to determine if exceptional hardship under the Act will result from the impoundment.

The Tribunal is precluded from considering other factors not arising from or directly related to the impoundment itself. This includes the fact that the Applicant drove his vehicle across the border into Canada for whatever reason.

In order for the Applicant's claim to be considered under subsections 22(2)(a) (inconvenience), (b) (financial loss) and (c) (loss of employment), he must have demonstrated that all of subsection 22(3) has been met. Subsection 22(3) requires that the Applicant demonstrate that no alternative to the impounded vehicle is available. This has not been done here. Furthermore, subsection 22(4) of the Regulation provides that the Applicant demonstrate that every reasonable option has been considered for an alternative to the vehicle. Again, there is no evidence to support this. The Applicant has made no specific claims of exceptional hardship as described by subsections 22(1)(a) or (b).

The Applicant's written evidence lacks sufficient documentary corroboration, and fails to demonstrate that he cannot afford an alternative to the impounded vehicle. The Tribunal finds the Applicant's evidence insufficient in meeting the onus of proof required by subsection 22(4) of the Regulation.

The Applicant has not shown he has suffered any loss of employment as a result of the impoundment. Furthermore, the Applicant has not presented the Tribunal with sufficient evidence that would indicate that the loss of this vehicle would be immediate, significant and lasting as required by subsection 22(3)(b) of the Regulation.

The Tribunal further finds that the Applicant has failed to meet the onus under subsections

22(3) and 22(4) of the Regulation, and the Tribunal is therefore precluded from considering the Applicant's claim of exceptional hardship under subsection 22(2) of the Regulation.

DECISION:

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

LICENCE APPEAL TRIBUNAL

Joseph Hewitt
Presiding Member

RELEASED: April 17, 2003

FILE NAME: 1577.mvia.philbrick.doc

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



ANNA DUKIC

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

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

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

APPEARANCES: LYNDA DUNBAR
Representative for the Registrar of Motor Vehicles

ANNA DUKIC, Applicant
unrepresented

DATE OF
HEARING: April 4, 2003

DECISION
RELEASED: April 9, 2003

Windsor

REASONS FOR DECISION

A hearing was held on April 4, 2003, at Windsor, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

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

BACKGROUND:

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

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	ANNA DUKIC (the "Applicant")
Motor Vehicle:	1993 CHEV – CRV -WAGON (the "vehicle")
Date of Appeal:	March 18, 2003

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

The owner appeals on two grounds: first, on the basis of exceptional hardship, section 50.2(3)(d) and secondly, on the basis that the motor vehicle was stolen at the time it was being driven as provided in section 50.2(3)(a) of the Act.

This matter came before this Tribunal on April 4, 2003 and proceeded as an oral hearing.

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

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

PRELIMINARY MATTER

Prior to the commencement of the hearing, the Respondent's Representative referred to a letter dated March 24, 2003, addressed to the Tribunal, wherein the Respondent quoted Section 50.2(4) of the highway Traffic Act:

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

It is the Respondent's position, that since the Applicant's vehicle was previously impounded by Order to Impound effective August 8, 2001, the ground of appeal under "*Exceptional Hardship*" is not available to the Applicant.

The Applicant confirmed this prior impoundment, and the appeal hearing proceeded solely on the ground that the vehicle had been stolen at the time of impoundment.

ISSUE:

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's sworn testimony follows.

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

***"1) My car was taken with out (sic) permission
2) I'm 64 yeas old and live on disability"***

At the hearing, the Applicant testified that the car had been taken by her son on a previous occasion, without her knowledge, and returned safely.

Both in her testimony in chief and in cross-examination, the Applicant confirmed that the car was taken by her son, during the night, without her consent.

The Applicant noticed the car missing in the morning, when she awoke. The vehicle was not reported stolen by the Applicant, as she did not wish to compound her son's difficulties with the law.

In closing the Applicant, re-iterated the comments made under oath and emphasized her need for the vehicle. She was aware that his license was suspended, and did not want him to drive her car.

Evidence of the Registrar

The Respondent provided the following Documents for the hearing:

1. Notice to Registrar, certified on March 19, 2003
2. Driving Record of Dukic, Bryan, Pete, certified on March 20, 2003
3. Vehicle Record as of Impoundment date, certified on March 20, 2003
4. Order to impound #1503806 - V.I.N.#1G1JC8146P198895, March 19, 2003
5. Additional vehicle plate APLM 582, March 20, 2003

The Respondent's Representative offered no viva voce evidence at the hearing, relying only on information previously submitted to the Tribunal. The Notice to Registrar indicates that the Applicant's son was stopped by police at 00:35 hours on March 9, 2003, and the vehicle impounded since he was driving under suspension.

At the hearing the Respondent emphasized the fact that the onus is on the Applicant to prove the grounds for the appeal. The Registrar contends that the evidence proffered by the Applicant is insufficient to corroborate that the vehicle was stolen, as she did not file a stolen vehicle report.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The *Criminal Code (Canada)* R.S.C. 1985, Chap. C-46 provides guidance.

Section 1 of the Code states:

“steal” means to commit theft...

Section 332(1) of the Code states:

322. (1) Every one commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his use or the use of another person, anything, whether animate or inanimate, with intent,
- (a) to deprive, temporarily or absolutely, the owner of it, or a person who has a special property or interest in it, of the thing or of his property or interest in it;
 - (b) to pledge or deposit it as security;
 - (c) to part with it under a condition with respect to its return that the person who parts with it may be unable to perform; or
 - (d) to deal with it in such a manner that it cannot be restored in the condition in which it was at the time it was taken or converted.

- (2) A person commits theft when, with intent to steal anything, he moves it or causes it to move or to be moved, or begins to cause it to become movable.
- (3) A taking or conversion of anything may be fraudulent notwithstanding that it is effected without secrecy or attempt at concealment.
- (4) For the purposes of this Act, the question whether anything that is converted is taken for the purpose of conversion, or whether it is, at the time it is converted, in the lawful possession of the person who converts it is not material.
- (5) For the purposes of this section, a person who has a wild living creature in captivity shall be deemed to have a special property or interest in it while it is in captivity and after it has escaped from captivity.

The Divisional Court held in *Marshall v. Registrar of Motor Vehicles* that the Tribunal should not limit the meaning of “stolen” only to an intention to take the vehicle permanently. The Court held that the term “stolen” could also apply to an intention to take the vehicle temporarily. The Court reviewed the circumstances of that case and stated:

“In our opinion a vehicle is ‘stolen’ in this context when it is taken without the owner’s consent and when the perpetrator intends to deprive the owner of it, whether permanently or temporarily.”

APPLICATION OF LAW TO FACTS:

Although all evidence was considered, the preceding reflects a summary of the hearing. Evidence introduced not directly germane to the issue was not transcribed.

The Applicant has appealed on the grounds that the vehicle was stolen at the time of impoundment, in accordance with section 50.2(3)(a) of the Act. The onus is on the Applicant to establish the merits of the grounds for the appeal.

In order to decide whether the vehicle was stolen at the time of impoundment, the Tribunal must consider the meaning of the word “stolen”. As the Highway Traffic Act offers no definition, the Tribunal looked to Black’s Law Dictionary for reference as to what is commonly accepted by the judiciary as constituting theft.

According to Black’s Law Dictionary, “*stolen*” is defined as follows:

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

The Applicant’s testimony establishes that the vehicle was taken without her consent.

Black’s Law Directory defines stolen as requiring, “the *intent to deprive the owner of the benefit of ownership (or possession) permanently.*”

The Tribunal notes that the words “stolen” and “theft” referred to in the Shorter Oxford Dictionary, are used interchangeably, and do not speak of a temporary or permanent deprivation. Moreover, the Tribunal notes that “theft” as defined in subsection 322 (1) (a) of the Criminal Code requires only the intent “to deprive temporarily”.

The Applicant’s sworn testimony clearly establishes that her son did not have her permission to drive. He took her motor vehicle in the middle of the night, when she was asleep. This is not a case of tacit consent. He did not have her permission because she knew that he was a suspended driver. She learned after the fact that her son told his brother that “he was taking the car and don’t tell mother”. This occurred while she was asleep.

The Tribunal finds that the son’s actions in taking her car keys and driving her motor vehicle without his mother’s permission is clear evidence of his intent to deprive her of the temporary use of her property.

It is not for the Tribunal to impose the requirement that a conviction for theft be laid against the driver, or that he be found guilty of theft as a prerequisite to the setting aside of a motor vehicle impoundment. Subsection 50.2(3)(a) of the Act only requires “that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made.”

Indeed, it was open to the police to lay a charge of Theft, contrary to section 322 of the Criminal Code, or even lay a charge of Take Motor Vehicle Without Consent, contrary to section 335 of the Criminal Code. No doubt, their reluctance to do so was due to the relationship between the mother and her son, and the absence of serious consequences, such as a motor vehicle collision and personal injury.

The Tribunal finds that the Applicant’s son took the motor vehicle without the Applicant’s consent. Therefore, since the Applicant was deprived of the temporary use of the motor vehicle, the Tribunal finds that the motor vehicle was in fact stolen.

As the Respondent’s Representative pointed out, the Applicant, albeit for personal reasons, chose not to report the vehicle as stolen, nor to lay a charge of theft against her son.

As a result, the Tribunal finds that the Applicant has established that the motor vehicle that is the subject of the order of impoundment was stolen at the time in respect of which the order was made.

Accordingly, since the Applicant has established this ground of appeal under section 50.2(3)(a) of the Act, the order impounding her motor vehicle is set aside.

DECISION:

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

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D., Presiding Member

Susanna Stark, Member

RELEASED: April 9, 2003

FILE NAME: 1579.mvia.Dukic

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



CAROL ADAMS

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

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

TRIBUNAL: CHARLES SANDIFORD
Presiding member

APPEARANCES: ADELAIDE PINDER
Representative for the Registrar of Motor Vehicles

CAROL ADAMS, Applicant
unrepresented

DATE OF HEARING: APRIL 7, 2003 TORONTO

REASONS FOR DECISION

A hearing was held on April 7, 2003, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

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

BACKGROUND:

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

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. The owner has appealed that order. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Carol Adams (the “Applicant”)
Motor Vehicle:	Chrysler 2000 Neon, plate 147 WB2 (the “vehicle”)
Date of Appeal:	March 20, 2003

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

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

This matter came before this Tribunal on April 7, 2003 and proceeded as an electronic hearing.

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

The hearing proceeded.

ISSUE:

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant’s evidence follows:

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

" MY HUSBAND IS THE ONE BEING SUSPENDED. HE DOESN'T NEED THE CAR FOR WORK AS HE WALKS BUT I WORK 42 KMS AWAY AND HAVE NO OTHER WAY OF GETTING THERE. THERE IS NO PUBLIC TRANSPORT FROM FOREST TO SARNIA. I AM THE PRIMARY EARNER AND PROVIDER IN THE FAMILY AND I HAVE TO SUPPORT MY 5 YEAR OLD SON. WE HAVE NO MONEY OR CREDIT TO PAY FOR A RENTAL VEHICLE."

The Applicant Carol Adams is a Physiotherapist at a hospital in Sarnia, Ontario, and some 42KMS from her home in Forest, Ontario. She has been at her job four years and earns upward of \$30 per hour. She and her husband are buying their home and pay \$700 per month on their mortgage. In addition to this expense they have other debt for another \$940 monthly. It is a struggle for her to make these payments in fact she is behind with her current mortgage payment and 'maxed out', on all available credit facilities. Apparently her husband has an alcohol problem works only casually as a cook at a local golf course, which is closed at this time. At best he contributes \$200 to \$300 monthly to the family income. Apparently he has other debt that she did not detail, which accounted for his limited contribution to the family income. According to her testimony his irresponsible behaviour has caused endless family problems throughout their five-year relationship.

Currently she has the use of a rental car courtesy of her mother in law until April 12th when other arrangements will have to be considered so that she may continue to get to her work in Sarnia. She has a good relationship with her mother in law who also helps with the care of their five-year-old son. In fact before the rental agreement was made she took the Applicant to and from work.

In response to the Registrar's questions she could not find any public transportation to Sarnia and found car-pooling at odds with her work hours. She testified that she was asleep when her husband took the car but the impression was left that this was not an uncommon experience for her.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

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

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Andrew J. Pearson;

3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving with more than 80 mgs alcohol in the blood under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until September 24, 2003.

In the review conducted by the registrar the Applicant Carol Adams testified that her father in law was a pipeline inspector and traveled extensively by air to do his work. His custom was to park his car at the airport in Detroit until his return days later after his work was completed. It was this information that lead to the conclusion that Andrew J. Pearson the suspended driver's parents had two cars.

There was no evidence that the parents of the suspended driver Andrew J. Pearson would not continue to help.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98 provides that the prescribed period, referred to above, is two years.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

APPLICATION OF LAW TO FACTS

The Applicant has appealed under 50.2(3)(d) of the Act on the basis that the impoundment of her vehicle will result and has resulted in exceptional hardship. Section 22 of the Regulation 632/98 is very specific and provides the Tribunal with clear criteria that must be met by the Applicant in order to establish exceptional hardship as a result of the impoundment. The Tribunal cannot consider any other factors arising from or directly related to the impoundment itself.

Under section 22(2) of Regulation 632/98 the Tribunal cannot consider financial or economic loss or loss of employment or employment opportunity unless the Applicant demonstrates that all criteria set out in section 22(3) apply. One of those criteria is that no other alternative vehicle is available.

In this case the Applicant was provided with a rental car by her mother-in-law until April 12 2003. Testimony from the Applicant did not preclude the possibility that the mother-in-law would not continue to supply a rental car. Furthermore with very little planning one of the two cars in the mother in laws family could be made available to the Applicant until the release of her car from impoundment.

As no evidence has been submitted that would indicate no substitute vehicle was available the first test under section 22(2) of Regulation 632/98 has not been met.

DECISION:

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

LICENCE APPEAL TRIBUNAL

Charles Sandiford, Presiding Member

RELEASED: April 15, 2003

FILE NAME: 1582.mvia.adams

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



LISA LANDER

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

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

TRIBUNAL: CHARLES SANDIFORD
Presiding member

APPEARANCES: LUBA NEUWIRTH
Representative for the Registrar of Motor Vehicles

LISA LANDER, Applicant
unrepresented

DATE OF HEARING: April 16, 2003 Kitchener

REASONS FOR DECISION

A hearing was held on April 16, 2003, at Kitchener, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

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

BACKGROUND:

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

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Lisa Lander (the “Applicant”)
Motor Vehicle: 1993 Honda Civic, plate ANPM 501 (the “vehicle”)
Date of Appeal: April 2, 2003

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

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

This matter came before this Tribunal on April 16, 2003 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing. As there were none, the hearing proceeded.

ISSUE:

The Applicant’s Notice of Appeal filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant’s appeal.

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant’s evidence follows:

Applicant’s written submission filed with the Tribunal as Exhibit #2 in support of appeal states:

RE: IMPOUNDMENT/LISA LANDER 3/2/03

Loss of vehicle will result in hardship I currently owe 3 months car payments and just resently (sic) another on the 1st of April total 1,200.00 I owe the bank money for my car. I also have other bills but the longer the car is impounded the more expensive it becomes. I live in New Hamburg and work in Kitchener, Cambridge, Waterloo. My job is on the line right now because I am paying for a cab everyday and I work full time but when the monies run out so will my job if I can get my car back I can go to work and pay off my bills and car payments as

a result loose my car my last pay check (sic) was \$573.00 I do not live at home so I have rent also to pay. On the 31st of March after my car got impounded I couldn't keep myself together reason I knew I would loose my job and car so I went to get some advise and 1 weeks worth of medicine to help. This is devastating to me I have been with my job for 1 ½ year and I don't want to loose it.(sic)

The Applicant first revealed that she had cleared her common law husband's driver's licence with him before she allowed him to drive. She testified that Shawn McBride had told her that he had resolved his licence problems and was now allowed to drive. The Tribunal finds as a fact that this driver has a very serious driving record, and would have been well aware of his inability to drive. The Extended Driver Record Search reveals that Shawn Robert McBride's licence expired February 23, 2000, and that he was driving while under suspension at the time of the impoundment. The Tribunal notes this driver had six previous convictions for Driving while Disqualified, contrary to the *Criminal Code of Canada*, and two prior convictions for Driving under Suspension, contrary to the *Highway Traffic Act*. The Tribunal notes that two of the driving infractions took place while the couple were together. As a result the Tribunal has great difficulty with the evidence of this Applicant. It believes that this information would have been known to her and finds her not to be a credible witness.

The Applicant, Lisa Lander is from a broken home. Her father lives in Stratford where he was recently released from jail for some alcohol related offence. He owns a 4 by 4 which the Applicant Lisa Lander used while he was incarcerated. Although he has been released, he is now out of work and the Applicant states that he needs his vehicle to look for a job. As a result, the Applicant testifies that she does not have access to this vehicle as an alternative to her impounded vehicle. The Applicant testifies, as well, that her father is in much debt and may lose his home. She therefore cannot rely on him for financial assistance, i.e. to provide her with a rental vehicle, or another means of transportation. The Applicant states that her own mother is a hopeless alcoholic and does not work. Again, it appears that the Applicant cannot rely upon her either for financial or other assistance by means of an alternative to her impounded vehicle.

The Applicant submitted a Canada Employment separation slip from her employer that she had been dismissed from her employment as a receptionist at a tanning salon for arriving late on five separate occasions. She had been employed there for the past one and a half years.

The Applicant is in serious financial difficulty. She is three months in arrears to the bank on her car loan. She and her partner are having trouble paying the rent and don't know how they will pay the storage cost of impoundment to recover her car. She claims no replacement car is available to them and they have no means to rent a car. The driver's income according to her testimony is used to pay his legal costs and fines.

Lisa Lander also testified that she had overdosed on a prescription drug this past Monday of this week. Fortunately, she appears to have recovered.

Evidence for the Respondent

A summary of the Registrar's evidence follows:

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were entered jointly as Exhibit 1, as follows:

1. Copy of the correspondence and submissions of the Registrar from the Ministry of Transportation.
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Shawn R. McBride.
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until August 4, 2004.

The Applicant was cross-examined by the Respondent and testified that the Driver's mother (her mother-in-law) worked as a baker at a Tim Horton's. Since she requires her car, believed to be a Ford Probe to arrive at work at 7a.m., the Applicant did not see how she could use this vehicle, as the driver's mother needed it. Although the driver's mother's job is in Kitchener where good public transportation exists, when it was suggested the Applicant seek work at the same Tim Horton's she informed the Tribunal that she had been dismissed by Tim Horton's and didn't think they would rehire her.

During her testimony it was determined that the Applicant had only recently regained her driver's licence, which had also been suspended. No cause was revealed for the suspension.

The Respondent then produced a vehicle search which identified Shawn R McBride and Joan A Weaver as lessees of a "93 Ford Hatchback. The Applicant claimed that she had no knowledge of this but suggested it may have been done to reduce insurance costs. Since the Applicant's common-law husband and his mother jointly owned a motor vehicle, it would appear that it could be made available to her as an alternative to the impounded motor vehicle. The Tribunal notes that the Applicant testified that she had access to her mother-in-law's motor vehicle in the past.

The Respondent submits that the hardship suffered by this Applicant pre-existed the impoundment and that any order confirming the impoundment would therefore not result in exceptional hardship.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98 provides that the prescribed period, referred to above, is two years.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

APPLICATION OF LAW TO FACTS:

The Applicant has appealed under section 50.2(3)(d) of the Act on the basis that the order to impound her vehicle will result in exceptional hardship. Section 22 of the Regulation 632/98 is very specific and provides the Tribunal with clear criteria that must be met by the Applicant in order to establish exceptional hardship as a result of the impoundment. The Tribunal cannot consider any other factors arising from or directly related to the impoundment itself.

Under section 22(2) of Regulation 632/98 the Tribunal cannot consider financial or economic loss or loss of employment or employment opportunity unless the Applicant demonstrates that all criteria set out in section 22(3) apply. One of those criteria is that no alternative to the impounded motor vehicle is available.

The Tribunal finds that the Applicant could have access to an alternative to the impounded motor vehicle. It is not satisfied that the Applicant has testified with candor since she had access to her mother-in-law's motor vehicle in the past and could very well obtain access again, if even on a temporary basis. The Tribunal does not believe the Applicant when she testified that her mother-in-law could not make her motor vehicle available to her, when she

has had access in the past.

Moreover, there is a second matter to be considered, which has not been proven to the satisfaction of the Tribunal. The Applicant has not established that she considered or inquired into every reasonable option to eliminate or mitigate any threat of loss as required by subsection 22(4) including doing without the impounded motor vehicle. As a result the Tribunal finds that the Applicant has not established exceptional hardship.

The Tribunal has very carefully considered all of the evidence in arriving at this decision. It genuinely sympathizes with the difficult situation in which the Applicant finds herself. The Tribunal understands that this decision will present a real challenge to her. It encourages her to seek counseling and the moral and spiritual support and guidance of others in her community. No doubt there are many organizations that would be able to help her through.

The Tribunal sincerely hopes that she considers this as an opportunity to seek other employment, perhaps with a golf club. Or return to school to upgrade her education. For example, she testified that she had completed a bar tending course. No doubt she could use this skill and her previous work experience to earn an income and significant gratuities in the hospitality field.

Now is the time for her to turn the page and to put this event behind her and to learn from this experience. Lisa Lander is an individual with real potential that should set her goals high since she has much to offer to society and much to gain in return.

DECISION:

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

LICENCE APPEAL TRIBUNAL

Charles Sandiford,
Presiding Member

RELEASED: April 25, 2003

FILE NAME: 1599.mvia.lander



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Decisions under Motor Vehicle Dealers Act

Fiscal Year 2003 - 2004

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>> [SOU MEN DEB](#)



>> [EDWIN ROBERT HOOLANS](#)



>> [JOHN R. BEYEA](#)



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SOUMEN DEB

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
MOTOR VEHICLE DEALERS ACT

TO REFUSE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

SOUMEN DEB, appearing on his own behalf

A. MICHAEL ROTHE, Counsel, appearing on behalf of the
Registrar under the *Motor Vehicle Dealers Act*

DATES OF
HEARING:

April 15, 2003

Toronto

DECISION AND ORDER

BACKGROUND:

This hearing arises from a written Notice of Proposal dated December 20, 2002 (the "Proposal") issued by the Registrar under the *Motor Vehicle Dealers Act* (the "Registrar" and the "Act" respectively) to refuse registration of Soumen Deb ("Deb") as a motor vehicle salesperson under the provisions of the Act.

The reasons for the Registrar's Notice of Proposal are:

The intention and objective of the Act is to protect the public interest. The requirements of the Act include that Registrants be financially responsible in the conduct of business and that Registrants carry on business in accordance with the law and with integrity and honesty. The Applicant's past conduct is inconsistent with the intention and objective of the Act, and therefore warrants disentitlement to registration under the Act. Therefore the Registrar is unwilling to register Soumen Deb under the *Motor Vehicle Dealers Act*.

In support of his Notice of Proposal to refuse the registration of Deb, the Registrar has furnished particulars, which read as follows:

The reasons for this proposal are:

- 1) The Applicant applied for registration as a motor vehicle salesperson on or about November 25, 2002. He proposes to work for Rowland on Eglinton Ford Lincoln Ltd.
- 2) On the application to become a registered salesperson question 9 asks:

"Have you ever been found guilty or convicted of an offence under any law or are any charges pending? (This includes those instances where a conditional or absolute discharge has been ordered).
- 3) A criminal record search found that the Applicant engaged in conduct that resulted in the following conviction:

October 1, 2002:

Attempt Theft Over \$5000

THE EVIDENCE:

The evidence introduced at the hearing consisted of the oral testimony of Louise Gingras who testified for the Registrar. The Applicant testified thereafter. In addition to the testimony there was documentary evidence introduced.

Louise Gingras ("Gingras") testified that she is the senior inspector with the Ontario Motor Vehicle Industry Council ("OMVIC") where she has been employed for the past five and one half years.

Gingras stated that OMVIC was created in 1997 and it was designated to administer the Act and ensure compliance with the Act and its Regulations by all motor vehicle salespersons and dealers. She is familiar with the application by Deb for registration as a motor vehicle salesperson and reviewed for the Tribunal the written application Deb filed with the Registrar. (Exhibit 3, Tab 3) She noted that question 9 in the Application asked the following question.

Have you ever been convicted or found guilty of an offence under any law or are any charges pending? (This includes those instances where a conditional or absolute discharge has been ordered). If yes, list all charges and/or convictions, and the circumstances surrounding each (attach additional sheets is necessary).

Note: applicants are subject to background and criminal record searches. Submitting a false or incomplete disclosure is an offence under the MVDA and will result in disqualification. Do not assume that convictions are automatically deleted from your record. If you have any questions about the information you must disclose please call OMVIC.

Gingras noted that the answer given by Deb to this question was "No".

Gingras went on to state that after receipt of Deb's application, as is the practice of the Registrar, a criminal background check was done. In response to such background check

the Registrar was informed by the Ontario Provincial Police that on October 1, 2002, Deb was convicted on a charge of "attempt theft over \$5,000.00" and received a conditional discharge with probation for 18 months and was ordered to make restitution of \$2,223.60. Subsequent to receipt of this information from the police, the Registrar wrote, on December 10, 2002, to the then employer of Deb, Rowland on Eglinton Ford Lincoln Ltd., asking them to review with Deb the information received from the police and to have Deb explain why the above information was not disclosed by him in his application for registration. Deb, by letter dated December 17, 2002, responded to the Registrar's request of December 10, 2002. In that letter Deb stated as follows:

I am writing this letter in response to the Cancellation of Conditional Registration, dated December 10, 2002. I hereby confirm that a conviction is recorded under my name. I would like to take this opportunity to explain the circumstances surrounding my conviction, and appeal to the O.M.V.I.C. to grant my registration. The reason I failed to disclose this information regarding my conviction earlier is because the result of the court proceeding was a Conditional Discharge, and I was under the impression that this meant that I would not have a record on file. After reading The Council's letter and a discussion with my attorney today, I have found that my impression was incorrect.

I have been through a very difficult period in life in which I was strongly addicted to ecstasy, crack-cocaine, and marijuana. I was a chronic daily user, spending between \$200 and \$500 per day to support my habit. At one point, I even found myself homeless and living in a broken down car. Desperate for more drugs, I robbed my employer, an ESSO service station, of \$2200. I then became a fugitive for several weeks. As a fugitive, I attempted another theft and failed, and continued hiding from the law. Approximately two weeks later, the burden of guilt became too much to bear, and I turned myself in to the police. Since this was the first time I had been in trouble with the law, the Provincial Court tried my charges together, Theft Under \$5000 and Attempt Theft Under \$5000. Upon pleading guilty, I received one universal conviction and sentence, which took into account my substance abuse issue. My sentence was a Conditional Discharge with 18 months of probation. I am meeting with a probation officer once a month. The other part of my sentence was to abstain from the use of non-prescription drugs and enroll in a drug treatment program, both of which I have done.

After receipt of Deb's letter of December 17, 2002 the Registrar resolved to issue and did issue a proposal to refuse Deb's application for registration.

Gingras further stated that the Registrar views an application for registration as the first test of the honesty and integrity of an applicant and relies on the truth of the information given by an applicant. Deb failed this first test by failing to disclose his criminal record. This non disclosure of a material fact reflected adversely on Deb's honesty and integrity. In addition to the non-disclosure by Deb, the Registrar was disturbed by the fact that the conviction itself indicated that there was a recent economic crime committed and that it was not in the public interest to allow a person so convicted to be registered as a salesperson when that person will be dealing with money both of members of the public and of the employer.

In response to the testimony of Gingras, Deb stated in his testimony that, as pointed out in his letter of December 17, 2002 addressed to OMVIC, when he committed the offence for which he was convicted he was under the influence of drugs and that he is now no longer taking drugs and is complying with his probation order. Insofar as the non-disclosure of his conviction was concerned Deb stated that he did not believe that he had a criminal

conviction due to the fact that he had received a conditional discharge and therefore that he did not have a criminal record.

Under cross examination Deb stated that he completed three years at university where he had been enrolled in a Bachelor of Commerce degree course. He did not complete the course due to financial pressure. He stated that he had then worked for Coca-Cola where he dealt with contracts, thereafter with IBM as a salesperson, taking inbound calls from customers and finally at Esso where he worked as a cashier at one of their gas outlets.

Deb conceded that he completed and signed the application form for registration as a salesperson. Further, that he knew the Registrar would rely on the information he supplied in that form. He also stated that he left the employ of IBM as he had been "fired" and that the reason given in his application for registration for his leaving IBM was not true or correct. He also conceded that when he left Coca Cola's employment in 1998 he was already developing a drug problem and that he was then at the point of losing his employment due to that problem. He further conceded that when applying for his position at Rowland on Eglinton Ford Lincoln Ltd. he did not disclose his criminal conviction and the latter firm only learned of his conviction when the December 10, 2002 letter from OMVIC was received by that dealership. In conclusion Deb stated that he attends a drug counselling meeting once a month and has made thus far restitution of \$100.00 under the order made by Court.

FACTS FOUND PROVEN:

The following are the facts found to have been proven.

1. Deb completed and signed the written application dated November 11, 2002 for registration as a motor vehicle salesperson.
2. In that application for registration Deb failed to answer correctly or truthfully question 9 therein in that he did not disclose to the Registrar that he had been charged with and convicted of attempted theft over \$5,000.00 and had consequently been sentenced to time served and received a conditional discharge and 18 months probation together with an order for restitution of \$2,223.60.
3. In that aforesaid application for registration Deb additionally failed to disclose and answer correctly or truthfully that he had been dismissed from his employment with IBM.

THE LAW:

The *Motor Vehicle Dealers Act*, Section 5.(1)(a),(b), (c)(i) and (ii) and (d) state as follows:

- (1) An applicant is entitled to registration or renewal of registration by the Registrar, except where,

- (a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
- (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or
- (c) the applicant is a corporation and,
 - (i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, or
 - (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or
- (d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

Section 7(4) of the aforesaid Act states as follows:

- (4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

DECISION AND REASONS:

The onus of proof in this matter rests upon the Registrar to prove that the past conduct of Deb affords the Registrar reasonable grounds for belief that Deb will not carry on business in accordance with law and with honesty and integrity.

Two issues arise in this matter for consideration by the Tribunal. The first issue is the criminal conviction registered against Deb and the second issue is the question of his non-disclosure of that conviction and other material information in his application for registration as a motor vehicle salesperson.

Insofar as the conviction is concerned Deb admitted that he was convicted of attempted theft over \$5,000.00 and received a conditional discharge together with probation for 18 months. The criminal charge arose from Deb's employment as a cashier at an Esso service station. The conduct of Deb that gave rise to the criminal charge involved dishonesty and deceit. The conviction itself is recent in time, having taken place on October 1, 2002. At the time of his conviction Deb conceded that he was in the throes of a drug problem and had been involved in drugs since 1998.

The criminal charge brought against Deb directly related to deceit and dishonesty. Worse yet, was the fact that the charge and conviction arose directly out of Deb's employment which in and of itself is indicative of his lack of honesty and integrity.

Insofar as the non-disclosure of his conviction is concerned, there is no doubt in the Tribunal's mind that Deb deliberately withheld such information from the Registrar for fear

of the latter refusing to grant him registration. His application for registration was dated November 11, 2002 some six weeks after his conviction. It would be in the realm of fantasy to believe that Deb would have overlooked or forgotten such a recent conviction. Deb impressed the Tribunal with his command of the English language and his fluency of speech and expression. He did not contend that he did not understand question 9 on his application for registration. Indeed, the question is both straightforward and easily understood. For Deb to have contended that he did not have to disclose his conviction is both disingenuous and without merit for the question posed clearly indicates that he was required to disclose whether he had ever been found guilty or convicted of an offence and "this includes those instances where a conditional or absolute discharge has been ordered." (The underlining is that of the Tribunal.)

Deb conceded and admitted, under cross examination, that he had not truthfully answered a further question in his application which related to the reason for his having left his employment with IBM Canada Ltd. In answer to that question he had stated that he left IBM to "travel" which he conceded was false and that he left as he was terminated due to his drug problem and failure to take note of warnings issued to him by his employer.

Furthermore, under cross examination Deb conceded that when he applied for a position as salesperson at Rowland on Eglinton Ford Lincoln Ltd. he did not disclose to them that he had recently been convicted on a criminal charge and it was only when that employer received OMVIC's letter to them of December 10, 2002 that he confessed to them that he had fallen foul of the law.

The recent general conduct of Deb is one of repeated deception, concealment and dishonesty. This conduct has been ongoing for some time and does not consist of one isolated instance and as such it gives the Tribunal, at this stage, little or no confidence in his ability to now, or in the near future, act in accordance with the law and with integrity and honesty. The Registrar has a statutory duty imposed upon him to ensure to the best of his ability that the public is not in jeopardy when dealing with motor vehicle salespersons and dealers. He would be derelict in his duty if, having regard to the recent, repeated and admitted material non disclosures both to the Registrar and the motor dealer with whom he was so recently employed, were he not to have issued his proposal to refuse registration to Deb.

The Tribunal is not altogether without sympathy towards Deb who is clearly an intelligent, well spoken and presentable young person who given time may yet get his life in order. However, he has exhibited no reformation in his conduct and accordingly whatever sympathy the Tribunal may feel for Deb must be sublimated to the overriding duty that the Registrar has to protect the public in their dealings with motor vehicle salesperson. The Tribunal believes that the Registrar's decision as evidenced by his proposal to refuse registration to Deb is correct and should not be interfered with by this Tribunal.

DECISION:

By virtue of the authority vested in it under Section 7(4) of the *Motor Vehicle Dealers Act* the Tribunal directs the Registrar to carry out his proposal dated December 20, 2002 to refuse the registration of Soumen Deb as a motor vehicle salesperson under the Act.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: April 24, 2003

Filename:1474.mvda.Deb

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice or Divisional Court is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.



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

IN THE MATTER OF
EDWIN ROBERT HOOLANS

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATION
- Proposal dated: January 9, 2003

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

EDWIN ROBERT HOOLANS

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on April 17, 2003;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against all parties* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Monday, June 2, 2003.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: April 15, 2003

file name: 1492.mvda.Hoolans.adj

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

IN THE MATTER OF
JOHN R. BEYEA

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: February 27, 2003

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

JOHN R. BEYEA

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

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

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

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

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: April 3, 2003

File: 1567.mvda.Beyea.consent

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
789 Don Mills Road, Suite 800
Toronto, ON M3C 1T5

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

FROM: John Robert Beyea
9004 Woodbine Ave.
Markham, ON L3R 0J7

Pursuant to subsection 5(2) of the *Motor Vehicle Dealers Act* John Robert Beyea (hereinafter referred to as "the Salesperson") and the Registrar, *Motor Vehicle Dealers Act*, (hereinafter referred to as "the Registrar"), in accordance with section 4.1 of the *Statutory Powers Procedure Act*, do hereby waive the requirements of a hearing and consent to an Order of the Licence Appeal Tribunal based upon the following Terms and Conditions:

1. The Salesperson agrees not to transfer his registration as a salesperson under the *Motor Vehicle Dealers Act* to another dealer without the prior written consent of the Registrar.
2. The Salesperson shall not be an officer, director, owner or partner in a dealership.
3. The Salesperson agrees to provide proof, within 90 days of the date of this order, that satisfactory repayment arrangements have been made with regards to the outstanding judgment in favour of the Royal Bank of Canada, court file number 99-CV-181712.
4. The Salesperson agrees to provide proof, within 90 days of the date of this order, that satisfactory repayment arrangements have been made with regards to the outstanding judgment in favour of the Manheim Automotive Financial Services Limited, court file number 99-CV-174996.
5. The Salesperson agrees to honour any outstanding judgements against the Salesperson or Automotive Marketing Limited.
6. The Salesperson agrees to repay the Motor Vehicle Dealers Compensation Fund (MVDCF), within 10 days of receiving notice from the MVDCF of any claims being paid out with respect to Automotive Marketing Limited.
7. The Salesperson shall successfully complete the OMVIC certification course within 60 days.
8. The Salesperson agrees not to invite the public to deal at a place other than his employer's registered premises.
9. The Salesperson agrees not to be involved in the process of buying, selling or leasing motor vehicles without the benefit of registration.
10. The Salesperson acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.

11. The Salesperson acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.

12. The Salesperson agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, or if he is convicted under the *Criminal Code* or convicted under any law of an industry-specific offence, the Registrar is directed to and shall carry out the proposal.

13. The Salesperson will provide a copy of this order to his employer forthwith.

14. The Salesperson hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.

15. The Salesperson hereby withdraws his appeal to the Licence Appeal Tribunal.

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

Signed in the City of _____ this day _____ of 2003.

John Robert Beyea (signature)

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

Date:

Carl Compton
Registrar
Motor Vehicle Dealers Act



Decisions under Ontario New Home Warranties Plan Act

Fiscal Year 2003 - 2004

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- » [RENAUD HOMES INC](#) 
- » [ESSEX CONDOMINIUM CORPORATION NO. 62](#) 
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CAPITAL BUILDERS INC. AND
DALLAS HOMES & DEVELOPMENTS INC.

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

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: MICHAEL H. TURK, Vice-Chair

APPEARANCES:

Jean G. Legault, Counsel, representing the Ontario New
Home Warranty Respondent, Respondent

DATE OF
HEARING:

April 10, 2003

Ottawa

REASONS FOR DECISION AND ORDER

Whereas this hearing was scheduled to commence on this day, and whereas Jean G. Legault, Counsel for the Respondent, was the only party who appeared this day and advised the Tribunal that on April 9, 2003, the Respondent agreed to the request for an adjournment by Counsel for the Applicants, Brian M. Campbell on terms referred to in a letter from Mr. Legault to Mr. Campbell save and except the issue of costs. This correspondence was entered and marked as Exhibit Number 3.

And Whereas the Tribunal has reviewed Exhibit Number 3 and finds that the parties agreement, although reached on the eve of the scheduled hearing was bona fide, would substantially reduce the hearing itself if this matter proceeds and therefore granted the Applicants' request for an adjournment of this hearing to 9:30 pompon April 22, 2003 on the following terms:

1. The Applicant Capital Builders Inc. shall before 5:00 p.m. on April 14, 2003 deliver:

- (a) written withdrawal of its request for a hearing to the Tribunal and to the Respondent;
 - (b) Written withdrawal of its application for renewal to the Respondent.
- 2. Upon receipt of the written withdrawal of the request for hearing the Respondent shall withdraw the Proposal dated December 4, 2002 against the Applicant Capital Builders Inc. and Capital Builder Inc.'s registration shall be deemed to expire effective immediately and the Tribunal's proceeding as it relates to Capital Builders Inc. shall be terminated.
- 3. The Applicant Dallas Homes and Developments Inc. (hereinafter "Dallas") shall deliver to the Respondent before 5:00 p.m. on April 14, 2003:
 - (a) An original signed Personal Net Worth Statement for "T. Costanzo" stating the full first name of this individual;
 - (b) A signed Indemnity Agreement in the Respondent's standard form without modification from "T" Costanzo;
 - (c) Documents to substantiate the assets of "T" Costanzo;
 - (d) A certified cheque in the sum of \$3,000.00 payable to the Respondent in full and final satisfaction of the unpaid invoices listed in Schedule A to the Notice of Proposal dated December 4, 2003;
 - (e) A certified cheque in the sum of \$57.50 payable to the Respondent in full satisfaction of the unpaid enrolment fee set out in paragraph 1 (d) of the Supplemental Notice of Proposal dated March 12, 2003.
- 4. Following receipt of the documents in paragraph (a) & (b) above the Respondent shall conduct an assessment of the Applicant Dallas and will advise Dallas on or before 4:00 p.m. on April 16, 2003 whether it will renew its registration subject to terms and conditions and if so, Dallas will be required to sign a term and condition letter before noon on April 17, 2003.
- 5. In the event that the terms referred to in paragraph 3 above are complied with, the Respondent shall withdraw its Notice of Proposal and notify Dallas and the Tribunal on or before 3:00 p.m. on April 17, 2003 that the within Application is withdrawn.
- 6. In the event that Dallas fails to comply with the terms contained in paragraph 3 hereof, the hearing of this matter shall proceed in Ottawa at 9:30 a.m. on April 22, 2003 and the Respondent shall be entitled to rely upon Dallas' failure under the terms of this Order in addition to or as an alternative to the grounds set out in

the Notice of Proposal dated March 4, 2002 and the Supplementary Notice of Proposal dated March 12, 2003.

7. In the event that following the risk assessment referred to in paragraph 4 the Respondent determines that Dallas' registration should not be renewed it shall notify Dallas and the Tribunal of its decision before 3:00 p.m on April 17, 2003 and the hearing shall proceed at 9:30 a.m. on April 22, 2003.
8. In the event that this matter proceeds to hearing on April 22, 2003, the Respondent shall be entitled to object to the timing of the Applicant Dallas' documentary disclosure on the basis that the hearing had commenced on April 10, 2003.
9. This adjournment is peremptory on all parties.

As it relates to the issue of costs, in Exhibit Number 3 the Respondent asks for costs in the sum of \$800.00 from the Applicants Capital Builders Inc. and the sum of \$800.00 from the Applicants Dallas Homes and Developments Inc. The Applicants dispute the Respondent's claim for costs and provided the Tribunal with written submissions, which were entered and marked as Exhibit Number 4.

Counsel for the Respondent submitted that the Applicants failed to attend this day and failed to act in a timely manner thereby entitling the Respondent to costs. As it relates to the issue of quantum, the Respondent submits that in accordance with Rule 14.4 (3) (b) of the Rules of the Tribunal, where the hearing has commenced, the sum of \$800.00 per day is appropriate.

Counsel for the Applicants in written submissions objects to the Respondent's claim for costs on the grounds that the Applicants have not acted frivolously, exatioulsy or in bad faith, that although there are two Applicants, the allegations are the same for both and that no additional work or preparation is required by the Respondent, and that the proper quantum for costs is \$400.00 in accordance with the Rules of the Tribunal.

The ability of the Tribunal to award costs is governed by Rule 14 of the Rules of the Practice and in this regard the following applies.

Firstly, as it relates to the issue of the quantum of costs, the Tribunal finds that as an adjournment had been agreed to by the parties prior to the attendance of this day the hearing had not commenced and therefore the amount of costs at issue is limited to a maximum of \$400.00 in accordance with Rule 14.4 (3) (a).

Secondly, whereas prior to the Applicants' retaining Mr. Campbell as counsel in March 2003, they neglected to provide the Respondent with the requested disclosure, Mr. Campbell has made every effort to provide disclosure and resolve this matter in a timely fashion. This is evident through the submissions of counsel and the negotiated terms of the adjournment, which have simplified the issues and will reduce the time required for

hearing in the event that the same proceeds on April 22, 2003. Based upon the foregoing, the Tribunal does not find that the Applicants have acted unreasonably, frivolously, vexatiously or in bad faith and therefore dismisses the Respondent's claim for costs.

LICENCE APPEAL TRIBUNAL

Michael H. Turk, Vice-Chair,
Presiding

Released: April 16, 2003.

File: 1445.nhw.dallas homes

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice or Divisional Court is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.



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

IN THE MATTER OF
RENAUD HOMES INC.

AND IN THE MATTER OF PROPOSAL by
the Registrar, *Ontario New Home Warranties Plan Act*
TO REFUSE TO RENEW REGISTRATION
- Proposal dated: December 6, 2002

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

RENAUD HOMES INC.

- Applicant

- and -

REGISTRAR, *ONTARIO NEW HOME WARRANTIES PLAN ACT*

- Respondent

CONSENT ORDER

Upon the application to the Tribunal by, Renaud Homes Inc., Applicant, and the Registrar under the *Ontario New Home Warranties Plan Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Ontario New Home Warranties Plan Act* as to the disposition of this proceeding which is filed and attached hereto as Schedule "A";

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

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: April 14, 2003

file name: 1448.Renaud.consent.



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

IN THE MATTER OF a CLAIM by
ESSEX CONDOMINIUM CORPORATION NO. 62

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

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

ESSEX CONDOMINIUM CORPORATION NO. 62

Applicant

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

RIVARD PARK INC.

Added Party

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter
on April 22, 23 and 24, 2003;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing
peremptory against all parties to commence at the Holiday Inn Select, 1855 Huron
Church Road, Maiden "A" Room, Windsor, Ontario, at 9:30 a.m., on Monday, Tuesday
and Wednesday, April 28, 29 and 30, 2003.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: April 1, 2003

Licence **Tribunal**
Appeal **d'appel en**
Tribunal **matière de permis**

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

IN THE MATTER OF a CLAIM by
GIUSEPPE AND ROSA MAZZA

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

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

GIUSEPPE AND ROSA MAZZA

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

CHANTAL GLADE HOLDING CORP.

Added Party

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter on May 5, 6 and 7, 2003;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against all parties* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Monday, July 7, 2003 and to continue Tuesday, July 8 and Wednesday July 9, 2003, if necessary.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: April 28, 2003

file name: 1472.nhw.Mazza.adj

PREHEARING

WAYNE AND PATRICIA FYFE

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

TO ALLOW A CLAIM

TRIBUNAL: VICTOR DREVNIG
Presiding Vice-Chair

APPEARANCES: PAUL G. LEWIS, Counsel representing the Applicants
KAREN JONES, Counsel and ROGER HICKS,
Warranty Representative, representing the Ontario
New Home Warranty Program
ERIC WIENS, Agent for the Added Party
Eric Wiens Construction Limited

DATE OF PREHEARING: April 7, 2003 Toronto

ORDER

Following the attendances at a Pre-Hearing before this Tribunal on April 7, 2003 of Paul G. Lewis, Counsel, on behalf of Wayne and Patricia Fyfe (the "Applicants"), and Carrie Jones, Counsel and Roger Hicks, Warranty Representative, on behalf of the Registrar, Ontario New Home Warranty Program (the "Respondent") and Eric Wiens, Agent on behalf of Eric Wiens Construction Limited (the "Added Party").

The Tribunal makes the following Order:

1. The Parties to the hearing are the Applicants, the Respondent and the Added Party.
2. The Parties agree that the sole issue in dispute is the alleged leakage in the southwest corner of the Applicants' basement. The Parties were unable to arrive at an agreed statement of facts, or at the settlement of any other issues.
3. The Parties have agreed to adjourn the hearing of this matter until after ground frost has ceased so that the Applicants' expert can access the ground and provide a report.

4. The Applicants shall notify the Tribunal as soon as possible of the availability of the expert's report including the expert's name, and the date of delivery of the report.
5. The Respondent, if so advised may after reviewing the Applicants' expert report shall have the opportunity to attend for an inspection with it's own expert at the Applicants' residence.
6. The Applicants will require two full days for their evidence and one day for their expert, if required. The Program will have two witnesses and if they require an expert witness, will confirm with the tribunal the additional time required, if any.
7. The Parties agree to inform each other of the witnesses they intend to call including experts prior to the hearing in accordance with the disclosure provisions of the Tribunal's Rules of Practice.
8. The Parties will provide the Tribunal by no later than 4:00 p.m. Friday April 25, 2003 with a list of available hearing dates for the completion of the hearing in the last two weeks of June 2003.

LICENCE APPEAL TRIBUNAL

Victor Drevnig
Presiding Vice-Chair

Released: April 17, 2003

File name: 1514.nhw.fyfe.pre

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



OLIMPIA SILVA SANTOS

MOTION TO CONSIDER AN APPLICATION
FOR EXTENSION OF TIME

TRIBUNAL: TERENCE A. WARDROP Q.C., Vice Chair

APPEARANCES: MEL S. ARONOFF, Counsel, on behalf of Olimpia Silva Santos
NETANUS RUTHERFORD, Counsel, on behalf of the Ontario New
Home Warranty Program, Respondent

DATE OF
HEARING: April 4, 2003

Via Teleconference

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an application to the Licence Appeal Tribunal under Section 7 of the *Licence Appeal Tribunal Act, 1999*, (herein referred to as "the Act") to extend the time for Olimpia Silva Santos, (herein referred to as "the Applicant"), to file an appeal from a decision letter dated January 30, 2003, (herein referred to as "the Decision Letter") of the Ontario New Home Warranty Program (herein referred to as "the Program"), pursuant to Section 16(2) of the *Ontario New Home Warranties Plan Act, R.S.O. 1990, Ch. O. 31*. A Notice of Appeal dated February 20, 2003, was filed by the Applicant and received by the Licence Appeal Tribunal on February 20, 2003, (herein referred to as "the Notice of Appeal").

The hearing of this Motion proceeded on the consent of both Parties as an electronic hearing. The Tribunal was provided with a facsimile copy of a Notice of Motion for an extension of time from the Applicant and a facsimile copy of an affidavit of Louisa Santos, the daughter of the Applicant, in support of the Motion. The Program provided to the Tribunal facsimile copies of the affidavit of Carol Metcalfe and of the affidavit of Filomena Cece. Carol Metcalfe was also in attendance at the hearing. The Tribunal marked the Decision Letter of the Program, the Notice of Appeal, the Notice of Motion and the foregoing noted affidavits as Exhibits to the hearing.

Subsections (1) and (2) of Section 16 of the *Ontario New Home Warranties Plan Act* is as follows:

16. (1) Where the Corporation makes a decision under section 14, it shall serve notice of the decision, together with written reasons therefor, on the person or owner affected.
- (2) A notice under subsection (1) shall state that the person or owner served is entitled to a hearing by the Tribunal if the person or owner mails or delivers, within fifteen days after service of the notice under subsection (1), notice in writing requiring a hearing to the Corporation and the Tribunal.

ISSUES AND THE LAW:

The sole issue before the Tribunal at this time is whether it should exercise its discretion under Section 7 of the *Licence Appeal Tribunal Act, 1999*. Section 7 is as follows:

- "7. Despite any limitation of time fixed by or under any Act for the giving of any notice requiring a hearing by the Tribunal or an appeal from a decision or order of the Tribunal under section 11 or any other Act, if the Tribunal is satisfied that there are reasonable grounds for applying for the extension and for granting relief, it may,
- (a) extend the time for giving the notice either before or after the expiration of the limitation of time so limited; and
 - (b) give the directions that it considers proper as a result of extending the time."

The criteria which the Tribunal has adopted in considering its discretion under Section 7 was laid down in the case of *In Re Bilodeau and Ontario New Home Warranty Program (1994)*, 26 CRAT 930 and restated in the case of *Douglas and Marie Freeman and Ontario New Home Warranty Program, 2001 L.A.T.* and many other more recent cases since. The four criteria are as follows:

- (1) That there was an intention to appeal within the time limited;
- (2) That the reason the notice of appeal was not served on time is such that the Applicants should be excused for not doing so and allowed to do later if they did so as soon as the true situation was apprehended;
- (3) That there is not some overriding prejudice to the Respondent in allowing the application;
- (4) That there is a substantial point in issue and the Applicants have some reasonable chance of success.

DECISION AND EVIDENCE:

The evidence presented by the Applicant in this case fails to establish the necessary facts to support the use by this Tribunal of its discretion with respect to the first two of the criteria stated.

The Applicant urged upon the Tribunal that she should be excused for not serving the notice of appeal within the time required due to her daughter's understanding that "there was a five day grace period" allowed to file an appeal beyond the fifteen days allowed. There was no evidence as to the source of this understanding nor the date of such understanding. The Applicant gave no evidence to support her intention to appeal within the time limited nor the reason the Notice of Appeal was not served within such time.

The Tribunal therefore finds as a fact that the Applicant did not have the intention to appeal the Decision Letter within the time limited and that there is no reason for not doing so which should be excused by this Tribunal and therefore granting the relief sought by the Applicant.

Notwithstanding that the Program conceded that there was not any overriding prejudice to the Respondent and the Tribunal heard argument respecting the issue to be determined and its possible or probable chances of success, it is unnecessary to deal with the remaining criteria noted above.

DECISION AND ORDER:

Accordingly, pursuant to the authority vested in it by the *Licence Appeal Tribunal Act*, the Tribunal refuses the Applicant's request for an extension of time within which to appeal the Decision Letter.

LICENCE APPEAL TRIBUNAL

Terence A. Wardrop Q.C, Vice-Chair

Released: April 17, 2003

file name: 1540.nhw.Santos.extension

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice or Divisional Court is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.



SAMSUDIN TJOKRO

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

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

MOTION TO CONSIDER an Application for
Extension of Time.

TRIBUNAL: Terence A. Wardrop Q.C., Vice Chair.

APPEARANCES: James Kurniawan, Agent
on behalf of Samsudin Tjokro

Netanus Rutherford, Counsel, representing
the Ontario New Home Warranty Program,

DATE OF
HEARING: April 14, 2003

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an application to the Licence Appeal Tribunal under Section 7 of the *Licence Appeal Tribunal Act*, 1999, (herein referred to as "the Act") to extend the time for Samsudin Tjokro, (herein referred to as "the Applicant"), to file an appeal from a decision letter dated January 30, 2003, (herein referred to as "the Decision Letter") of the Ontario New Home Warranty Program (herein referred to as "the Program"), pursuant to Section 16(2) of the *Ontario New Home Warranties Plan Act*. R.S.O. 1990, Ch. O. 31. A Notice of Appeal dated February 19, 2003, was filed by the Applicant and received by the Licence Appeal Tribunal on February 21, 2003, (herein referred to as "the Notice of Appeal").

The hearing of this Motion proceeded on the consent of both Parties as an electronic hearing. The Tribunal was provided with a facsimile copy of a Notice of Motion for an extension of time from the Applicant. The Program provided to the Tribunal facsimile copies of the affidavit of Charles Spillane and of the affidavit of Filomena Cece. The Tribunal marked the Decision Letter, the Notice of Appeal, the Notice of Motion and the foregoing noted affidavits as Exhibits to the hearing.

Subsections (1) and (2) of Section 16 of the Ontario New Home Warranties Act is as follows:

- 16(1) Where the Corporation makes a decision under Section 14, it shall serve notice of the decision, together with written reasons therefor, on the person or owner affected.
- (2) A notice under subsection (1) shall state that the person or owner served is entitled to a hearing by the Tribunal if the person or owner mails or delivers, within fifteen days after service of the notice under subsection (1), notice in writing requiring a hearing to the Corporation and the Tribunal.

ISSUES AND THE LAW:

The sole issue before the Tribunal at this time is whether it should exercise its discretion under Section 7 of the Act, for an extension of time within which to deliver a notice under subsection (2) of Section 16 of the Ontario New Home Warranties Act. Section 7 of the Act, is as follows:

- 7. Despite any limitations of time fixed by or under any Act for the giving of any notice requiring a hearing by the Tribunal or from a decision or order of the Tribunal under Section 11 or any other Act, if the Tribunal is satisfied that there are reasonable grounds for applying for the extension and for granting relief, it may,
 - (a) extend the time for giving the notice either before or after the expiration of the limitation of time so limited; and
 - (b) give the directions that it considers proper as a result of extending the time."

The criteria which the Tribunal has adopted in considering its discretion under Section 7 was laid down in the case of *In Re Bilodeau and Ontario New Home Warranty Program* (1994), 26 CRAT 930 and restated in the case of *Douglas and Marie Freeman and Ontario New Home Warranty Program* and many other more recent cases since. The four criteria are as follows:

- (1) That there was an intention to appeal within the time limited;
- (2) That the reason the notice of appeal was not served on time is such that the Applicants should be excused for not doing so and allowed to do later if they did so as soon as the true situation was apprehended;

- (3) That there is not some overriding prejudice to the Respondent in allowing the application; and
- (4) That there is a substantial point in issue and the Applicants have some reasonable chance of success.

DECISION AND EVIDENCE:

The evidence presented by the Applicant in this case fails to establish the necessary facts to support the use by this Tribunal of its discretion with respect to the first two of the criteria stated.

The Applicant urged upon the Tribunal that he should be excused for not serving the Notice of Appeal within the time required but gave no evidence or reasons to support this contention. The Applicant gave no evidence to support his intention to appeal within the time limited nor the reason the Notice of Appeal was not served within such time.

The Tribunal therefore finds as a fact that the Applicant did not have the intention to appeal the Decision Letter within the time limited and that there are no reasonable grounds for not doing so which should be excused by this Tribunal and therefore granting the relief sought by the Applicant.

Notwithstanding that the Program conceded that there was not any overriding prejudice to the Respondent and the Tribunal heard argument respecting the issue to be determined and its possible or probable chances of success, it is unnecessary to deal with the remaining criteria note above.

ORDER:

Accordingly, pursuant to the authority vested in it by the Licence Appeal Tribunal Act, the Tribunal refuses the Applicant's request for an extension of time within which to appeal the Decision Letter.

LICENCE APPEAL TRIBUNAL

Terence A. Wardrop Q.C.
Vice Chair

Released: April 30, 2003



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

IN THE MATTER OF a CLAIM by
KEN McKINLAY AND DIANE SEGUIN

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

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

KEN McKINLAY AND DIANE SEGUIN

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

DUOCAN CONTRACTING GUELPH LTD.

Added Party

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter on June 17, 18, 19 and 20, 2003;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing peremptory against all parties to commence at the Holiday Inn Select, 1855 Huron Church Road, Amherstburg Room, Windsor, Ontario, at 9:30 a.m., on Tuesday, Wednesday, Thursday and Friday June 24, 25, 26 and 27, 2003.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: April 24, 2003

Licence Appeal Tribunal

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There has been no decision released under this Act, yet, as there was no appeal filed with the Tribunal.

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PREHEARING

LESBURN G. McBEAN

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: VICTOR DREVNIG, VICE CHAIR

APPEARANCES: LESBURN G. McBEAN, appearing on his own behalf
BRIAN SCHLOTZHAUER, Assistant Registrar and
GEORGE P. DRAMETU, Counsel, representing the Registrar,
Real Estate and Business Brokers Act

DATE OF
PRE-HEARING: March 28, 2003 Toronto

ORDER

Following attendances on March 28, 2003 at a prehearing before this Tribunal of Lesburn G. McBean, (the "Applicant"), appearing on his own behalf and Brian Schlotzhauer, Assistant Registrar and George P. Drametu, Counsel appearing on behalf of the Registrar, *Real Estate and Business Brokers Act* (the "Registrar");

The Tribunal makes the following order respecting the hearing scheduled to commence at 9:30 a.m. on Tuesday, April 29, 2003 (and thereafter if necessary to continue at 9:30 a.m. on Wednesday, April 30, 2003) at the Tribunal's Chambers, 1 St. Clair, Avenue West, 12th Floor, Toronto, Ontario;

1. The Parties to the hearing are the Applicant and the Registrar.
2. The parties reported that there has been no resolution of any of the issues in this matter.

3. The issues to be dealt with at the hearing are set out in the Proposal of the Registrar.
4. The Applicant proposes to call only himself as a witness to testify at the hearing of this matter. The Applicant shall consider whether or not he will present other witnesses, such as character witnesses or expert witness report. He expects to give evidence for approximately thirty minutes.
5. The Applicant is encouraged to attend with legal counsel prepared to proceed on the hearing dates, and may wish to apply for Legal Aid.
6. The Registrar proposes to call approximately seven witnesses who will testify at the hearing of this matter and expects to require the entire first day of the hearing for the presentation of the Registrar's evidence.
7. Both parties to the hearing shall comply with the disclosure requirements set out in Rule 6.3 of the Rules of Practice of this Tribunal. Notwithstanding the aforesaid, both parties undertake at this time to disclose every document or thing now in their possession or under their control that they will refer to or tender in evidence at the hearing and to deliver a copy of such document to the other party. The Applicant having until the 10th day of April 2003 to comply with disclosure.

LICENCE APPEAL TRIBUNAL

Victor Drevnig, Vice-Chair

Released: April 8, 2003

File name: 1512.rebba.McBean.pre.hrg.doc



The Registrar bases the Proposal upon Section 8(2) of the Act whereby the Registrar may revoke the registration of the Applicant as a salesperson in circumstances which would disentitle the Applicant to such registration if the Applicant were an applicant for

such registration. It is the opinion of the Registrar, as stated in the Proposal, that the Applicant cannot reasonably be expected to be financially responsible in the conduct of business having regard to his financial position and that the past conduct of the Applicant affords reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty as required by Section 6(1)(b) of the Act.

The Applicant in his Notice of Appeal states that the resulting decision emanating from this opinion of the Registrar is based not only on an incomplete understanding by the Registrar of the particular circumstances of the facts relied upon by the Registrar, but also without regard to the remedial efforts made by the Applicant following such circumstances to rectify any errors in judgement on the part of the Applicant which gave rise to such opinion and decision.

EVIDENCE:

Winnie Yap, a Registration Officer of the Real Estate Council of Ontario, was called as a witness by the Registrar and gave evidence as to the documentary evidence which was relied upon by the Registrar in reaching the opinion of the Registrar as contained in the Proposal. She also made reference to an interview between the Applicant and Brian Schlotzhauer, the Assistant Registrar, and the notes which she made of such interview, at which she was also present, during which interview the aforesaid issues were discussed. Such notes were included in the documentary evidence filed as an exhibit at the hearing.

Brian Schlotzhauer, the Assistant Registrar as aforesaid, also gave evidence as to the documentary evidence together with his assessment of the circumstances of the allegations set forth in the Proposal with particular regard to the facts or events which lead to the opinion and decision of the Registrar. He also made reference to the said interview of the Applicant which he conducted in the presence of Winnie Yap. He stated in evidence that he had considered whether or not to recommend the imposition of some terms or conditions upon the Applicant's continuing registration as a salesperson instead of the revocation contained in the Proposal, but decided that not only were any such terms and conditions impractical in the Applicant's case, but also it would be impossible to monitor any such terms or conditions imposed upon the Applicant's continuing registration as a salesperson.

The evidence discloses that a criminal charge was laid against the Applicant to which the Applicant entered a plea of guilty at the trial thereof. The transcript of the proceedings of such trial included a statement of facts admitted by the Applicant, the submissions by both Counsel and the sentence imposed by the Court together with the Court's remarks thereon. It was thus that the Applicant had accepted the factual statement read into the record by the prosecution at the time of his guilty plea before the Honourable Justice N. Bennett of the Ontario Court of Justice on June 11, 2002.

The Notice of Appeal makes reference to some facts and certain remedial actions taken by the Applicant, but due to the absence of the Applicant at the hearing before this Tribunal, no evidence was given which would substantiate these references.

THE FACTS:

From all of the evidence given at the hearing, this Tribunal finds as facts the following:

1. The Applicant at the date of the Proposal was and is registered as a salesperson under the Act, and as such is a Registrant within the meaning of section 9 of the Act;
2. The alleged Registration History of the Applicant as set out in Section C of the Proposal, Paragraphs 1 to 5, inclusive, are true as set out therein;
3. The alleged Conviction of the Applicant as set out in Section C of the Proposal, Paragraphs 6 to 21, inclusive, are true as set out therein;
4. The alleged facts respecting the Applicant's financial position as set out in Section C of the Proposal, Paragraphs 22 to 26, inclusive, are true as set out therein;
5. The alleged facts respecting Non-Disclosure by the Applicant as set out in Section C of the Proposal, Paragraphs 27 to 40, inclusive, are true as set out therein;
6. The Registrar served a Notice of the Proposal on the Applicant as a registrant on January 15, 2003, stating that the Registrar proposes to revoke the registration of the Applicant as a salesperson based upon the opinion of the Registrar that the Applicant cannot reasonably be expected to be financially responsible in the conduct of business and that the past conduct affords reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.

THE LAW:

Pursuant to section 8(2) of the Act, the Registrar may revoke the registration of the Applicant as a salesperson for any reason that would disentitle the Applicant to registration under section 6 of the Act:

- 8(2) Subject to section 9, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under

section 6 or 7 if the registrant were an applicant or where the registrant is in breach of a term or condition of registration.

Pursuant to section 6(1)(b) of the Act, the Applicant is entitled to registration or renewal of registration by the Registrar, inter alia as a salesperson, except where the past conduct of the Applicant affords reasonable grounds for belief that the Applicant will not carry on business lawfully and with integrity and honesty:

6(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

(a) ...;

or

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty;

Based upon the above noted facts, the Registrar has reached the decision that there is reasonable grounds for belief that the Applicant cannot reasonably be expected to be financially responsible in the conduct of business and will not carry on business in a lawful manner and with integrity and honesty, and pursuant to section 9 (1) and (2) is required to serve a notice on the Applicant:

9. (1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the Registrar shall serve notice of the proposal, together with written reasons therefor, on the applicant or registrant.
- (2) A notice under subsection (1) shall state that the applicant or registrant is entitled to a hearing by the Tribunal if the applicant or registrant mails or delivers, within fifteen days after service of the notice under subsection (1), notice in writing requiring a hearing to the Registrar and the Tribunal.

The appeal comes to this Tribunal by virtue of section 9(4) of the Act, which provides:

9. (4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

DECISION AND ORDER:

Applying the statutory provisions of the Act to the facts of this particular case, the only question to be determined by this Tribunal is whether or not the Applicant cannot reasonably be expected to be financially responsible in the conduct of business due to

his financial position and the past conduct of the Applicant affords reasonable grounds for belief that the Applicant will not *in the future* carry on business as a salesperson in accordance with the law and with honesty and integrity. Such an opinion requires an examination into the particular circumstances of the past conduct of the Applicant and the likelihood that such conduct will be repeated by the Applicant in the future or some other equivalent conduct or unlawful act. In the opinion of this Tribunal, it is not sufficient to base such an opinion solely upon the conviction of the Applicant to a crime, particularly in this instance to an admission of guilt by the Applicant's plea.

The onus of proof that the Proposal is correct lies with the Registrar, and this Tribunal finds that this onus has been discharged in the face of all of the evidence given at the hearing and for the reasons hereinbefore stated. Accordingly, this Tribunal, pursuant to the authority vested in it by section 9(4) of the Act, directs the Registrar to carry out the Proposal to revoke the registration of the Applicant as a salesperson under the Act.

LICENCE APPEAL TRIBUNAL

Terence A. Wardrop Q.C., Vice Chair

RELEASED: June 23, 2003.

File 1512.Rebba.McBean.doc.

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice or Divisional Court is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.



PREHEARING

JANICE M. RAVEN

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: VICTOR DREVNIG, VICE CHAIR

APPEARANCES: JANICE M. RAVEN, Applicant, unrepresented

ANITA JOHN AND GEORGE DRAMETU, Counsel representing
BRIAN SCHLOTZHAUER, Assistant Registrar and the Registrar,
Real Estate and Business Brokers Act

DATE OF
PRE-HEARING: July 21, 2003

Toronto

ORDER

Following attendances on July 21st at a Prehearing before this Tribunal of Janice M. Raven appearing on her own behalf ("the Applicant"), and Anita John and George Drametu, Counsel for the Registrar and Brian Schlotzhauer, Assistant Registrar, *Real Estate and Business Brokers Act* (the "Registrar");

WHEREAS the Applicant by letter dated May 21, 2003 advised the Tribunal of her request for an adjournment of the hearing to a date at least six months from the date of her letter;

AND WHEREAS the Applicant did not bring a motion before the Tribunal seeking an adjournment;

AND WHEREAS at the Prehearing of July 21, 2003, the Tribunal considered the Applicant's request for an adjournment to early 2004 and the Respondent's position

refusing such a long adjournment but consenting to an adjournment to a date in the Fall of 2003 to permit the Applicant further time to prepare her case, which date was refused by the Applicant;

AND WHEREAS at the close of the Prehearing on July 21, 2003, the Applicant advised the Tribunal of her intention to withdraw her appeal;

AND WHEREAS the Applicant confirmed by letter dated July 21, 2003 that she is abandoning her appeal and withdrawing her application for reinstatement of her real estate licence.

AND WHEREAS the Applicant's counsel, Bruce Simpson of Swanick and Associates confirmed by letter dated July 23, 2003 that the Applicant is abandoning her appeal and withdrawing her application for reinstatement.

NOW THEREFORE the Tribunal makes the following order respecting the hearing scheduled to commence at 9:30 a.m. Thursday September 4, 2003 and to continue on Friday September 5, 2003, at the Tribunal Chambers at 1 St. Clair Ave. West, 12th Floor, Toronto, Ontario;

1. The Parties to the hearing are the Applicant and the Registrar.
2. The Applicant's appeal is marked as abandoned and is withdrawn at the Applicant's request.
3. The hearing dates scheduled for September 4 and 5, 2003 are cancelled.
4. The proceedings are disposed of without a hearing and this matter is now concluded.

LICENCE APPEAL TRIBUNAL

Victor Drevnig, Vice-Chair

Released: July 30, 2003

File name: 1705.rebba.Raven.pre

ROBERT JESSIMAN

APPEAL FROM A NOTICE OF PROPOSAL ISSUED
BY THE REGISTRAR, REAL ESTATE AND
BUSINESS BROKERS ACT

TO REVOKE REGISTRATION

TRIBUNAL: MICHAEL H. TURK, Vice-Chair

APPEARANCES:

ROBERT JESSIMAN, the Applicant

DANIEL V. GUNN, Counsel for the Applicant

GEORGE DRAMETU, Counsel, representing the
Registrar of Real Estate and Business Brokers,
Respondent

DATE OF
HEARING: July 2 and 3, 2003 Toronto

REASONS FOR DECISION AND ORDER

The Applicant, Robert Jessiman appeals to the Licence Appeal Tribunal from a Notice of Proposal to Revoke Registration issued by the Registrar of the *Real Estate and Business Brokers Act* on December 16, 2002.

BACKGROUND:

The Applicant was first registered as a salesperson under the provisions of the *Real Estate and Business Brokers Act* (hereinafter, the "Act") by application dated May 3, 2000. The application was sponsored by Sally Kendall as real estate broker.

The Applicant submitted his broker/salesperson renewal application to the Respondent on or about May 8, 2002. On the renewal application the Applicant

indicated "yes" to the question whether there are any charges pending, have you been found guilty or pleaded guilty to or have been convicted of an offence under any law.

On the application Mr. Jessiman disclosed inter-alia that on April 22, 2002 he plead guilty to the charge of harassment and received a sentence of four months community service.

As it relates to the specific charge and sentence imposed, on April 22, 2002 the Applicant plead guilty to a charge of criminal harassment and received a conditional sentence of four months followed by probation for two years. The facts of the offence pertain to the Applicant's improper contact with a 14 year old girl from January 2001 through June 2001. The admitted facts of the offence were that the Applicant sent her six "manilla envelopes" , called her twice and spoke with her on one occasion by telephone.

The Respondent issued the proposal to revoke registration on the basis that the past conduct of the Applicant affords reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.

THE EVIDENCE

Dr. Michael Stambrook, Dr. A. Herscovitch, Sally Kendall and Robert Jessiman testified on behalf of the Applicant.

The Respondent called two witnesses, Maria Paolercio, a registration officer and Brian Schlotzhauer, assistant registrar.

Maria Paolercio

Maria Paolercio, a registration officer with the Real Estate Council of Ontario for six (6) years was the Respondent's first witness.

Maria Paolercio testified that her responsibility is to review the more complex applications for registration and/or renewal to ensure compliance with the Act and that the questions are answered correctly.

Maria Paolercio testified that her involvement with this matter stemmed from a newspaper article regarding the Applicant and a request by her employer to look into the matter. On that basis, she commenced her own investigation and reviewed the Applicant's file.

Maria Paolercio testified that when she reviewed the Applicant's file she noted that he had answered "yes" to the question of a criminal conviction and appended

to the renewal application a letter from his broker, Sally Kendall and a letter of his own. These letters disclose that the Applicant plead guilty to the charge of harassment and received a four (4) month community sentence. The renewal application and two (2) letters are contained at Tab 4 of Exhibit Number 6.

Maria Paolercio continued her testimony by stating that following disclosure of a conviction she ordered a new criminal record search "CPIC" of the Applicant which indicated that on April 22, 2002 the Applicant was convicted of criminal harassment, received a four (4) month conditional sentence and two years probation, the term of which is set to expire on August 21, 2004. The CPIC report is contained at Tab 8 of Exhibit Number 6.

Maria Paolercio testified that once she received the CPIC report she wrote to the Applicant and requested a copy of the probation order and the reasons for judgment. Once these documents were received she requested the assistance of the Registrar.

Maria Paolercio concluded her testimony by stating that although a prior CPIC on file did not disclose a criminal record, it was her opinion that based upon the criminal conviction as disclosed on the renewal application, the renewal application was approved in error and the non-disclosure of probation would have made no difference in the way the Applicant's file was handled.

On cross-examination by Mr. Gunn, Maria Paolercio acknowledged that the renewal application form does not ask for the specifics of a sentence or conviction and that when the Applicant was subsequently asked for further information he provided answers right away.

Maria Paolercio stated that each application is individualized, that she looks at the nature of the offence and the passage of time as factors in determining whether an application should be renewed and whether terms and conditions would be appropriate.

Maria Paolercio acknowledged that she does not know that harassment is criminal, what a community sentence is, whether probation for this type of offence was typical nor was she aware of the provision of the *Criminal Code of Canada* that pertains to the charge.

Maria Paolercio further acknowledged that during her conversations with the Applicant, the Applicant never hid the fact that he was on probation, never mislead her, told her about the variation to the probation order, provided a copy of the transcript, that he was a member of Alcoholics Anonymous (hereinafter "AA"), had been sober for two years, was continually involved with AA, described his counseling with Dr. Stambrook & Dr. Herscovitch and the difficulties he was encountering in the small community of Kenora as a result of his conviction.

Maria Paolercio's cross-examination continued with her acknowledgment that in discussions with her, the Applicant was up-front, honest and all requests of him were fulfilled immediately.

Maria Palerico's cross-examination concluded with her stating that there are no limits on the type of terms and conditions that can be imposed and that she has not had a situation where treatment was ongoing.

Brian Schlotzhauer

Brian Schlotzhauer, the Assistant Registrar for the Real Estate Council of Ontario (hereinafter "Reco") was the Respondent's second and final witness.

Brian Schlotzhauer testified that Reco administers approximately 40,000 real estate agents and brokers in the Province of Ontario and when reviewing applications he is concerned with Sections 3 and 6 of the *Real Estate and Business Brokers Act* (hereinafter "the Act") which pertain to the issues of financial responsibility and carrying on business in accordance with law and integrity.

Brian Schlotzhauer continued by testifying that based upon answers to questions a series of reviews are conducted.

As it relates specifically to the Applicant, Brian Schlotzhauer stated that he had two meetings with the Applicant, conducted a great deal of review in this case which involved a recent conviction, four month house arrest and two years probation.

Brian Schlotzhauer continued by stating that while the Applicant is currently low risk, it depended on the Applicant being sober and in a stable relationship. These things could not be controlled by the Registrar through terms and conditions as nothing could be put in place to ensure that terms and conditions would be met.

Brian Schlotzhauer testified that as it relates to the reference letters submitted by the Applicant, there was no question that the Applicant was hard working and good with clients and that the issue was one of consumer protection. The conviction was new, being one year old and that whereas the reports of the doctors are good, control is not with the Registrar's office.

Brian Schlotzhauer continued his testimony by referring to the medical reports which state that the Applicant is low risk provided that he maintains a number of things.

On cross-examination by Mr. Gunn, Brian Schlotzhauer stated that each case is reviewed individually and that he has never placed someone on terms and conditions for attendance at AA and that the decision of the Registrar was based

upon the fact that all of the controls are within the Applicant. In this regard, Brian Schlotzhauer specifically referred to the conclusions in the report of Dr. A. Herscovitch dated March 6, 2003. The report of Dr. Herscovitch is located at Tab 3 of Exhibit Number 4. Dr. Herscovitch's conclusions are found at pages 5 and 6 of his March 6, 2003 report and state the following:

1. Based upon Robert's psychological status in the session, his report to the writer, Robert's expressed level of insight into his illness, and collateral information, it is the writer's opinion that Robert does not currently show signs of a delusional disorder. However, for some individuals, this type of disorder may come back. Robert has indeed had episodes, although milder in nature, previous to the one in question. These are documented in the first report by the writer. In other words, the writer cannot rule out a recurrence of this disorder for Robert.
2. If Robert does experience another bout of the disorder, it is the writer's opinion based upon the information at hand, that Robert's risk of acting upon the disorder and re-offending is minimal. There are several reasons for this. First, Robert now has a high level of insight into the disorder. He has demonstrated an ability to recognize unhealthy thoughts, and he now knows not to act upon them. Second, Robert is aware that medication is available and effective, should he feel thoughts overpowering him. Third, Robert is leading a lifestyle where he has reduced stress over which he has no control. Significant stress of this nature was certainly present at the time of Robert's last and most severe bout of delusional thinking. Fourth, Robert has multiple sources of support which also act as a source of vigilance for him. Robert described how his attendance at AA meetings keep him emotionally balanced, how interacting with his sponsor is useful, and how Sally Kendall has been a source of vigilance (for unhealthy thinking by Robert) and support for him. Fifth, Robert knows that he can access counseling services on an as need be basis. Sixth, the psychological help which Robert is currently receiving appears to be strengthening Robert emotionally.

Brian Schlotzhauer's cross-examination concluded by him stating that nothing would offer the Registrar a guarantee that the behaviour of the Applicant would not recur and that while terms and conditions were considered, there did not appear to be appropriate terms and conditions.

Dr. Michael Stambrook

Dr. Michael Stambrook PhD., C. Psych, a Clinical Psychologist and Neuropsychologist was the Applicant's first witness.

Dr. Stambrook's extensive curriculum vitae is contained at Tab 2 of Exhibit Number 4. No objections were raised regarding qualifying Dr. Stambrook as an expert. The Tribunal accepted Dr. Stambrook's qualifications as an expert in Clinical Psychology and Neuropsychology and specifically as an expert for treatment and the risk of re-offending.

Dr. Stambrook testified that his first contact with the Applicant was on May 14, 2002 at the request of the Applicant's probation officer to conduct an assessment, diagnosis and lay the groundwork for relapse prevention and that he has been seeing the Applicant every six weeks since that time.

Dr. Stambrook testified that the Applicant's response to treatment was enthusiastic, he was compliant, cooperative and did not attempt to lie or mislead him.

Dr. Stambrook continued his testimony by detailing difficulties that the Applicant had with his family and living up to expectations and stated that in his view the Applicant did not suffer from an acute mental disorder at the time of his first session nor throughout the time during which he has seen the Applicant.

Dr. Stambrook continued by referring to his report dated April 21, 2003 which is found at Tab 1 of Exhibit Number 4. In the third and fourth paragraphs of page 3 of his report Dr. Stambrook writes:

He is not suffering from Delusional Disorder, Depressive Disorder, a Cognitive Disorder or any form of Psychotic Disorder. He is low risk and my recommendation is that there be a less intrusive response by his Licensing Board that mandates appropriate oversight. This man needs to remain abstinent. He needs to maintain a stable, long term relationship. He has to have good boundaries. He will need some psychological/psychiatric oversight. If these conditions prevail and he continues to have good input relationally and from mental health providers who can monitor his situation, I do not see him getting into a situation where there will be violations of interpersonal boundaries.

This man has remained compliant with his Probation Order. He is abstinent. He is focused on his work. He has reported reasonable boundaries and has exercised appropriate judgment with his family. He is stable. He is moving ahead with his life in healthy and appropriate ways with good social supports, input and reality testing influences as is appropriate.

Dr. Stambrook continued his testimony by stating that the Applicant is not a predator or a continued risk and that the Applicant's continued success depends upon him maintaining abstinence, attendance at AA a continued stable relationship and oversight by someone he works with.

Dr. Stambrook stated that he had no concerns regarding the Applicant's relationship with Sally Kendall, his broker and partner and views Ms. Kendall as a concerned and loving partner.

Dr. Stambrook concluded his testimony by stating that his opinions remain the same as in his report of April 21, 2003.

On cross-examination by Mr. Drametu, Dr. Stambrook acknowledged that his reports were based upon what was told to him by the Applicant and that his recommendations were solely in the control of the Applicant.

On re-examination by Mr. Gunn, Dr. Stambrook testified that the issue of risk is not black and white such as zero risk, however, he views the Applicant as very low risk.

Sally Kendall

The Applicant's second witness was Sally Kendall, a registered real estate broker in Kenora, Ontario.

Sally Kendall testified that she has been a registered real estate broker since 1997 and operates her own business in conjunction with the Applicant. In addition to her professional association with the Applicant, she has maintained a personal relationship with the Applicant since 1999.

As it relates to the criminal charge and guilty plea by the Applicant, Sally Kendall testified that when the Applicant advised her of the of the offence she was shocked, angry, felt that the Applicant had breached her trust and that she separated from the Applicant for a period of time.

Sally Kendall continued her testimony by reflecting candidly about her relationship with the Applicant, the time and effort expended in order to be able to trust the Applicant again, the Applicant's attendance at AA and their mutual re-connection with the local Church.

In her capacity as the Applicant's real estate broker, Sally Kendall testified that she had no concern about the Applicant interacting with the public, that she had regained her trust for the Applicant, that the Applicant is on the straight and narrow path and responds to her guidance. She continued by stating that if a duty was placed upon her by the Registrar she would monitor the Applicant and provide information about his progress.

On cross-examination by Mr. Drametu, Sally Kendall re-stated her feeling of betrayal and that the Applicant's actions at the time of the offence were unacceptable. She acknowledged that her professional relationship with the Applicant is not truly arms length, however, she stated that if she felt that the Applicant would re-offend she would not stand for it as she does not want her professional relationship reduced any further, noting that Kenora is a small town with a population of 10,000.

In response to Mr. Drametu's question about whether she could be objective, Sally Kendall stated that while she wants a relationship with the Applicant she would not be in the relationship if she thought that he would re-offend, that the Applicant has seen a number of professionals and that he is an upstanding member of society.

Sally Kendall stated that she had not seen a copy of the Probation Order and her cross-examination concluded with her stating that she was not aware as to whether the Applicant was a member of the Manitoba bar and that it was her understanding that the Applicant stopped practicing law and was looking for a life change.

In response to a question by the Tribunal, Sally Kendall stated that the Applicant's status as an independent contractor was set up due to the fact that it is more cost effective for her to do so and that in practice she has just as much control over the Applicant as if he were her employee.

Robert Jessiman

The Applicant commenced his testimony by talking about what was going through his mind at the time of the offence.

The Applicant testified that he experienced three phases of thinking over a 6 month period which phases consisted of (1) deep empathy for the victim; (2) general ideas; and (3) an obsessive component.

The Applicant stated that he did not realize the damage that he had caused until he started seeing Irene Bergman, M.S.W., R.S.W. addiction counselor at Addiction Services Kenora - Adult Services.

The Applicant continued by testifying that he has gained considerable experience with inappropriate thinking, that over the past two years he has certainly gained insight into his problems and that he describes the effect that this incident has had on his life as being "mammoth".

The Applicant expressed sincere regret and remorse about the impact that this incident has had on his family, Sally Kendall, the victim & her family and the community in Kenora.

The Applicant concluded his testimony by stating that he would comply with any conditions imposed and would consent to the release of any information and/or reports by his professionals to the Registrar as may be required.

On cross-examination by Mr. Drametu, he was asked "why the secrecy?" to which the Applicant responded that at the time he was operating in an imaginary world.

Mr. Drametu then asked the Applicant whether it is too soon from the time of the conviction to which the Applicant responded that he could not do more than continue on the present course and that he doesn't think that the Registrar has anything to be concerned about.

Mr. Drametu completed his cross-examination with the Applicant agreeing that in accordance with Dr. Herscovitch's reports, he cannot give any guarantees that he will not re-offend and that whether he continues on the present course is all within his own control.

On re-examination by Mr. Gunn, the Applicant testified that he would consent to random urinalysis and consent to reports by his sponsor at AA be delivered to the Registrar.

Dr. A. Herscovitch

Dr. A. Herscovitch, C. Psych., Clinical Psychologist was the Applicant's fourth and final witness.

Dr. Herscovitch's extensive resume is contained at Tab 3 of Exhibit Number 3 and was qualified by the Tribunal as an expert clinical psychologist with specific expertise in mental disorders and emotional problems.

Dr. Herscovitch started seeing the Applicant in September 2001 and prepared three reports dated October 4, 2001, January 28, 2002 and March 6, 2003, respectively. These reports are contained at Tabs 1 and 2 of Exhibit Number 3 and Tab 3 of Exhibit Number 4.

Dr. Herscovitch testified that he diagnosed the Applicant as having a delusional disorder and that the Applicant's interrogation by the police was highly therapeutic as this was the Applicant's first recognition that his behaviour was inappropriate.

Dr. Herscovitch testified that in his most recent report of March 6, 2003 he found no evidence of a delusional disorder and that the Applicant has been one of the

most compliant people he has ever treated. Dr. Herscovitch noted that the Applicant asked a lot of questions, which were intended to educate the Applicant.

Dr. Herscovitch continued his testimony by stating that Sally Kendall was very supportive and understood the Applicant's disorder.

In response to Mr. Gunn's question whether he could guarantee that the Applicant would not offend, Dr. Herscovitch stated that he could not provide a guarantee about anybody, but professionally, he looks at probability on a scale of low, medium or high. In this respect, Dr. Herscovitch testified that the Applicant presented a low probability of re-offending due to the following:

- (a) he is out of the environment of individuals controlling him;
- (b) his current relationship is healthy;
- (c) he has lower levels of stress;
- (d) he is an active member in AA and has a good relationship with his sponsor;
- (e) he is aware that medication can work if needed; and
- (f) he has a high level of insight into his illness.

Dr. Herscovitch completed his testimony by stating that he stands by his reports and will provide status reports to the Registrar if so required and with the consent of the Applicant.

On cross-examination by Mr. Drametu, Dr. Herscovitch was asked about the Applicant's past behaviour to which Dr. Herscovitch advised that the events were as described to him by the Applicant.

As it relates to the issue of the risk of re-offending, Dr. Herscovitch reiterated his previous testimony wherein he stated that it is a question of probability and that the risk is always reduced when the patient follows up with what is recommended.

Mr. Drametu completed his cross-examination by asking Dr. Herscovitch about the Applicant's secrecy of his behaviour. Dr. Herscovitch responded by stating that human beings are capable of thinking on many levels and it is a common process for people with this type of behaviour.

Submissions

The Respondent submits that the decision of the Registrar is reasonable based upon the evidence of criminal conviction, delusional behaviour at the time of the offence, inability to guarantee that there will not be a re-occurrence, the recent nature of the offence and that the Applicant is still on probation.

The Respondent further submits that the Registrar looked at possible terms and conditions, its role is to protect the industry and consumers, that the Applicant

cannot provide any guarantees and that it all depends on and is in the hands of the Applicant alone.

The Applicant submits that the decision of the Respondent was in error. That the Applicant did not hide anything from the Respondent, the Registrar does not have any issue with the Applicant's performance as a real estate agent; that the Registrar failed to consider terms and conditions and that all of the Registrar's concerns could be accomplished through terms and conditions and that the Applicant will consent to any terms and conditions that the Tribunal may impose.

The Applicant suggested that possible terms and conditions consist of the following: continued attendance at AA; monthly letters and reports to the Registrar from the Applicant's sponsor, Irene Bergman, Dr. Stambrook and that he only work with Sally Kendall.

ISSUES:

There is one issue to be determined.

- 1) Did the Registrar have sufficient grounds for refusing to renew the registration of the Applicant under the provisions of the Act.

THE LAW:

The relevant sections of the Act are as follows:

6. (1)(b) The past conduct of the Registrant affords reasonable grounds for belief that the Registrant will not carry on business in accordance with law and with integrity and honesty.

Evidence of the Respondent

The Respondent's first witness, Maria Paolercio testified about the process involved in reviewing applications and how the Applicant's application was dealt with. Aside from providing the Tribunal with information about the administrative process used at Reco, this witness did not provide the Tribunal with any salient evidence regarding the Applicant's application nor why terms and conditions were not appropriate.

The Respondent's second witness was Brian Schlotzhauer, the assistant Registrar. The Tribunal found the evidence of Brian Schlotzhauer to be extremely general in nature and lacked specifics about the application and proposal at hand.

Whereas the Tribunal heard testimony and submissions that terms and conditions were considered, the Tribunal did not hear any evidence from the Respondent or hear any submissions from the Respondent as to what terms and conditions were considered and why these terms and conditions were rejected.

Evidence of the Applicant

The evidence of the Applicant was clear and concise. Dr. Stambrook and Dr. Herscovitch provided written reports and gave evidence in person.

Dr. Stambrook and Dr. Herscovitch have impeccable professional credentials and neither were challenged in cross-examination. Both doctors noted that the Applicant was extremely compliant and was symptom free at the time of their last reports as well as at the hearing based upon their observations of the Applicant.

Whereas neither doctor would give a guarantee that the Applicant would not re-offend, they will not guarantee that any patient would not re-offend and view the Applicant as low risk.

The Tribunal notes that Dr. Stambrook and Dr. Herscovitch, in their reports and in their testimony viewed the Applicant positively and did not provide the Tribunal with any reason why the Applicant could not continue as a real estate agent.

In addition to Dr.'s Stambrook and Herscovitch, the Applicant gave evidence as well as his partner, Sally Kendall. The Applicant recounted with complete candour what led up to the offence, the impact of it on his life and the efforts he has undertaken since. By the same token, Sally Kendall testified before the Tribunal with candor about the incident, its impact on her life and how her and the Applicant have endured and persevered. The Tribunal found these two witnesses to be extremely candid and forthright.

Application of the Law to the Facts & Evidence

The Respondent submitted a Book of Authorities to the Tribunal and relies upon inter-alia the decision of the Divisional Court of Ontario in *Brenner v. Ontario (Registrar of Motor Vehicle Dealers and Salesmen)* which establishes that the Tribunal should only refuse to direct the Registrar to carry out its proposal if it is of the view that the Registrar was in error in concluding that the past conduct of the Applicant afforded reasonable grounds for the belief that he would not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out the proposal.

The Respondent has based its decision on a criminal conviction, that probation was ongoing, it is necessary to protect the public, that no guarantee could be provided that the Applicant would not re-offend and that all of the controls are in the hands of the Applicant. The Tribunal notes that the Applicant is already subject to and fully complying with probationary conditions, which provide the public with a measure of protection.

The Respondent acknowledges that it has no issue with respect to the conduct or ability of the Applicant as a real estate agent.

As it relates to the issue of the Applicant's competence and abilities as a real estate agent, the Applicant submitted nine (9) letters of reference which were not challenged in any way.

Mr. J. Glen McLeod writes: Please consider this letter evidence of my deep appreciation not only for the results you obtained, but also for the remarkable effort and ingenuity which you displayed in achieving those results. Mr. McLeod concludes his letter by writing: You both exhibited care, decency and ultimate professionalism and you will have my highest recommendation to my numerous old friends in Winnipeg, my hometown, should they be considering property acquisitions or sale in the Kenora/Manaki area.

Bob Oades of R.A. Oades Agencies Ltd. writes Sally Kendall and Bob Jessiman are currently working on the sale of three additional properties I own. I would recommend them as professional, honest and hard working agents. I was a real estate broker in Winnipeg for over 45 years and I've chosen to work with Sally & Bob currently.

The AG Archer Group of Companies writes: We have worked with the above mentioned (Sally Kendall and Bob Jessiman) over the past couple of years completing several real estate transactions. We have found them to be honest, forthright and hardworking in our dealings and have always worked with the highest integrity.

The Spencer/Wilson Family writes: We found both Sally and Bob hardworking, professional, open and honest in assisting us with the sale. Sandy Spencer writes a letter of thanks and states "You are a great team and would highly recommend you to others."

Mr. Ronald Aube, writes I am a very satisfied customer and I would be glad to recommend them both as a brokerage and as sales people individually. It is clear that they both enjoy their work and are both dedicated to providing a valuable service to both the people they act for and the people they deal with.

These above referenced letters are contained at Tabs 1, 2, 3, 4, 5 and 6 of Exhibit Number 5.

The Applicant also submitted a reference letter from The Cathedral Church of St. Alban, a letter of reference from his sponsor at AA and a letter of reference from a friend. These three letters are contained at Tabs 7, 8 and 9 of Exhibit Number 5.

In addition to the reports and testimony of Dr. Stambrook and Dr. Herscovitch, the Applicant obtained treatment and counseling from Irene Bergman, H.B.S.W. of Lake of the Woods Addiction Services. Irene Bergman submitted two reports which are contained at Tab 7 of Exhibit Number 3 and Tab 5 of Exhibit Number 4.

In Irene Bergman's report of March 1, 2003 located at Tab 5 of Exhibit Number 4 she states that the Applicant was seen on twenty five separate occasions and concludes in the last paragraph of her report as follows:

At this point in time, I am unable to identify any factors which would lead me to believe that Mr. Jessiman presents a risk to the community and is at risk to re-offend.

As it relates to the issue of protecting the public and the public interest in general, this issue was specifically addressed at sentencing by Mr. Justice P. Bishop of the Ontario Court of Justice of April 22, 2002. At page 3 of the Reasons for Judgment which are contained at Tab 11 of Exhibit Number 6, Mr. Justice Bishop states:

"You have taken steps to rehabilitate yourself. The reports which are here, show similar types of acts over the past. You've engaged in some counseling with this psychologist, you've also entered Alcoholics Anonymous, you're on medication, you have the care of another physician, Dr. Corner in Winnipeg and I'm confident that the steps and conditions that I'm going to put on you, not only in the conditional sentence regime but thereafter, will prevent any further occurrence."

Mr. Justice Bishop proceeded to impose a sentence of four months conditional sentence which provided for no contact with the complainant or her family; be under the care of Dr. Herscovitch or any other doctor referred by Dr. Herscovitch; sign releases and verify all attendance with Dr. Herscovitch, report to his supervisor forthwith abstain from the consumption of alcohol and non-prescription drugs; a curfew of 6 p.m. until 6 a.m. with the only exceptions being for attendance at Alcoholics Anonymous, medical or psychological treatment.

The conditional sentence was followed by a period of probation for two years.

The Tribunal notes that the Probation Order was varied on August 28, 2002 whereby the requirement to attend for counseling was added. At page 22 of the

transcript the Court which is located at Tab 13 of Exhibit Number 6, states as follows:

“with respect to the counseling, I’m of the view that there should be a variation to include that for the protection of the public and for your own rehabilitation, that you continue on with your counseling. It can be at the recommendation of the probation officer, you can be with Dr. Stambrook or Dr. Herscovitch or any counselor recommended by the probation order, so it is ordered by the Court, it is not voluntary. The concern of the Court is to ensure that you don’t have a relapse of the behaviour that brought you before the court in the first place, so and you know, I, I, recognize what you are saying with respect to the real estate board but the protection of the public is paramount in this case.

It is patently clear to the Tribunal that in sentencing the Applicant, the Ontario Court of Justice has taken all steps to protect the public and ensure that the Applicant does not re-offend.

The test in the Brenner decision has been clarified by Lane, J. in Registrar, Motor Vehicle Dealers Act and Shine Motor Cars and Omar Hassan Rahim, a decision of the Divisional Court of Ontario released February 19, 2003. The learned judge states that the test referred to in Brenner is as follows:

“The proper question at the rehearing remains, however, whether the past conduct of the applicants affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal.”

The Tribunal notes that the Applicant has complied with his sentence and probation and notes further that the reports and evidence of Dr. Stambrook and Dr. Herscovitch and the reports of Irene Bergman, report extremely favourably on the Applicant.

The Tribunal finds that Applicant has taken every measure and treatment recommended to him which is consistent with the positive reports that he has obtained from his professionals.

It is this Tribunal’s view that the Respondent must not simply rely upon a conviction and probation as determinative of Applicant’s eligibility in and of itself and that the Respondent failed to properly consider the evaluations of the Applicant contained in the reports of Dr. Stambrook, Dr. Herscovitch and Irene Bergman and its impact on the ability of the Applicant to carry on business in accordance with law and with honesty and integrity.

The Tribunal notes that in excess of two years had passed from the date of the offence to the time of the hearing before the Tribunal, a period of two years without incident. The Tribunal notes as well, the many excellent letters of reference from the Applicant's clients.

It is this Tribunal's further finding that the totality of the evidence provided by the Respondent fails to establish that the Applicant's past conduct affords reasonable grounds for the belief that that the Applicant will not carry on business in accordance with law and with integrity and honesty.

The Tribunal therefore directs the Respondent to refrain from carrying out its proposal dated December 16, 2002 to revoke the registration of the Applicant as a real estate salesperson and directs the Respondent to renew the Applicant's registration, subject to the following terms and conditions:

1. The Applicant shall only work with Sally Kendall, as his real estate broker and shall direct her to forthwith report any violations of the terms of his probation in writing to the Respondent.
2. The Applicant shall abstain from the consumption of alcohol and continue to attend Alcoholics Anonymous.
3. The Applicant shall continue with such counseling and treatment as directed by Doctors Stambrook and Herscovitch.
4. In the event that the Applicant fails to comply with any of the terms of this Order, the Respondent shall be granted leave to bring this matter back before the Tribunal on ten (10) days written notice to the Applicant.
5. These terms and conditions shall apply until August 22, 2004.

LICENCE APPEAL TRIBUNAL

Michael H. Turk, Vice-Chair

RELEASED: September 9, 2003

File: 1459.rebba.jessiman.doc.

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

Licence
Appeal
Tribunal

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d'appel en
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BRUCE HAHN

REAL ESTATE AND BUSINESS BROKERS ACT
Revised Statutes of Ontario 1990, Chapter R. 4

IN THE MATTER OF
BRUCE HAHN

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Real Estate and Business Brokers Act*
TO REFUSE REGISTRATION
- Proposal dated: October 2, 2003

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

BRUCE HAHN

Applicant

-and-

REGISTRAR, *REAL ESTATE AND BUSINESS BROKERS ACT*

Respondent

ADJOURNMENT ORDER

PURSUANT to the provisions of the *Real Estate and Business Brokers Act*, R.S.O. 1990, Chapter R.4, as amended, Bruce Hahn (the "Applicant") appealed a Proposal of the Registrar, *Real Estate and Business Brokers Act* (the "Registrar"), set out in a Notice of Proposal dated October 2, 2003;

WHEREAS, the Tribunal appointed a time and place for a pre-hearing in the above matter on December 17, 2003;

AND WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter on January 20, 2004;

AND WHEREAS, the Tribunal was advised that the parties, on consent, have agreed to adjourn the scheduled pre-hearing and hearing;

NOW THEREFORE upon consent of the parties, this Tribunal Orders:

1. that the pre-hearing in this matter is adjourned, *peremptory against all parties*, to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Tuesday, March 23, 2004;
2. that the hearing in this matter is adjourned, *peremptory against all parties*, to commence at the Tribunal's above Chambers at 9:30 a.m. on Thursday, May 6, 2004.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: November 21, 2003

FILE NAME: 1951.rebba.Hahn.adj.doc



Licence Appeal Tribunal

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

IN THE MATTER OF a CLAIM by
GLOBAL TRAVEL CENTRE ADVANTAGE

AND IN THE MATTER OF the DECISION of the
Travel Industry Council of Ontario

TO DISALLOW A CLAIM
- Decision dated: June 28, 2002

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

GLOBAL TRAVEL CENTRE ADVANTAGE

Applicant

- and -

TRAVEL INDUSTRY COUNCIL OF ONTARIO

Respondent

ADJOURNMENT

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

AND WHEREAS, upon consent of the parties, the hearing was adjourned to February 28, 2003;

AND WHEREAS, upon consent of the parties, the hearing was further adjourned to May 13, 2003.

TAKE NOTICE, upon consent of the parties, the Tribunal further adjourns the hearing to commence at the Gillespie Reporting Services, 130 Slater Street, Suite 200, Ottawa, Ontario at 9:30 a.m., on Wednesday, August 13, 2003.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: April 23, 2003

Licence
Appeal
Tribunal

Tribunal
d'appel en
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TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER OF a CLAIM by
TAHER SHAATH

AND IN THE MATTER OF the DECISION of the
Travel Industry Council of Ontario

TO DISALLOW A CLAIM
- Decision dated: December 20, 2002

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

TAHER SHAATH

Applicant

- and -

TRAVEL INDUSTRY COUNCIL OF ONTARIO

Respondent

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter on May 22, 2003;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against all the parties* to commence at the Gillespie Reporting Services, 130 Slater Street, Suite 200, Ottawa, Ontario, at 1:30 p.m., on Wednesday, August 13, 2003.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek,
Chair

Released: May 16, 2003

File name: 1471.tia.Shaath.adj

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



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

IN THE MATTER of the REGISTRATION of
GAMBOL ADVENTURES INC.
as a travel agent

AND IN THE MATTER of the PROPOSAL by the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: February 11, 2003

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

GAMBOL ADVENTURES INC.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

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

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

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

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: April 14, 2003

file name: 1534.tia.gambol.consent

LICENCE APPEAL TRIBUNAL

BETWEEN:

GAMBOL ADVENTURES INC.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

WAIVER AND CONSENT

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

AGREED STATEMENT OF FACTS

1. Gambol Adventures Inc. ("the Registrant") is registered as a travel agent (Registration number 2536368/R), and a travel wholesaler (Registration # 2450482/W).
2. On May 13, 1994, the registrant signed Terms and Conditions of registration which includes trust accounting.
3. On August 31, 1994, the registrant was requested by the Ontario Travel Industry Inspections Office to file its financial statements for the fiscal year ended August 31, 1994, by November 30, 1994.
4. By letter dated December 1, 1994, the registrant was issued a reminder letter to file its financial statements for August 31, 1994.
5. By letter dated December 12, 1994, the registrant was advised by the Ontario Travel Industry Inspections Office, that the August 31, 1994 financial statements which were due by November 30, 1994 must be filed by December 30, 1994, failing which the matter would be referred to the Registrar.
6. On January 31, 1995 the registrant filed financial statements for the year ended August 31, 1994, for RJS Travel Corp. who is not a registrant.

7. By letter dated February 3, 1995, the registrant was notified by the Ontario Travel Industry Inspections Office that RJS Travel Corp was not registered under the Act, and that failure to file financial statements for the registrant by February 20, 1995 would result in the matter being referred to the Registrar.
8. On February 20, 1995, the registrant filed its financial statements for the year ended August 31, 1994 which were due by November 30, 1994. The financial statements reflected a working capital shortfall of \$43,143, based on reported sales of \$983,905.
9. By letter dated February 27, 1995 the registrant was advised by the Ontario Travel Industry Inspections Office of its working capital shortfall of \$43,143, and given a due date of March 22, 1995 to provide evidence of correction.
10. By letter dated March 24, 1995, the registrant was issued a reminder by the Ontario Travel Industry Inspections Office, to correct its working capital shortfall of \$43,143, reflected in its August 31, 1994 financial statements.
11. By letter dated April 4, 1995, the registrant was advised that failure to correct its working capital shortfall by April 18, 1995 would result in the matter being referred to the Registrar.
12. On May 25, 1995, the Ontario Travel Industry Inspections Office conducted a site inspection. During the visit the Inspector reviewed interim financial statements for the eight months ended April 30, 1995, which revealed an increase in the working capital shortfall from \$43,143 to \$99,203, and concluded that the registrant appeared to pose a risk to the Fund.
13. By letter dated July 20, 1995 the registrant was requested by the Ontario Travel Industry Inspections Office to file its financial statements for the fiscal year ending August 31, 1995, by November 30, 1995.
14. By letter dated September 19, 1995, the Registrar issued a letter to the registrant giving a due date of October 6, 1995 to provide evidence of correction of its working capital shortfall of \$99,203, as at April 30, 1994, failing which administrative action would be taken.
15. By letter dated December 11, 1995, the registrant was issued a reminder letter by the Ontario Travel Industry Inspections Office to file its financial statements for August 31, 1995, which were due by November 30, 1995.
16. By letter dated January 5, 1996, the registrant was issued a final due date of January 25, 1996 by the Registrar, to file its financial statements for the year ended August 31, 1995 which were due by November 30, 1995, failing which administrative action would be initiated.

17. On February 22, 1996, the registrant was issued a Proposal to Revoke Registration for failure to file its financial statements for August 31, 1995 which were due by November 30, 1995.
18. By letter dated February 23, 1996, the registrant advised the Ontario Travel Industry Inspections Office that it had injected \$85,000 into the business during February 1996, and that a further \$50,000 was expected to be injected within the next six months.
19. On February 27, 1996, the registrant filed its financial statements for the year ended August 31, 1995, which were due by November 30, 1995. The statements reflected a working capital shortfall of \$102,783, based on sales of \$371,536.
20. On February 27, 1996, Mr Ron Steiner, Secretary Treasurer for the registrant, advised the Ontario Travel Industry Inspections Office that the registrant had injected \$85,000 during the month of February 1996, and proposed that the balance of \$17,783 be addressed in six months.
21. By letter dated February 27, 1996, the registrant was notified in writing by the Ontario Travel Industry Inspections Office, that evidence of the \$85,000 injection was to be submitted by March 8, 1996. In addition, the balance of the working capital shortfall of \$17,783, reflected in its August 31, 1995 financial statements, was to be addressed within the next six months provided that the registrant submitted evidence of the working capital correction within seven days of the transaction.
22. On March 1, 1996 the registrant submitted evidence of an injection totalling \$84,757.23.
23. On June 6, 1996, the Registrar withdrew the Proposal to Revoke registration dated February 22, 1996.
24. On June 27, 1996, the Ontario Travel Industry Inspections Office conducted a site inspection. It was determined during the visit that until the registrant met minimum working capital requirements, it appeared to pose a risk to the Fund.
25. By letter dated August 16, 1996, the registrant was issued a letter by the Ontario Travel Industry Inspections Office acknowledging receipt of evidence of the \$84,757 deposit, and advising that unless evidence of correction of the balance of the working capital shortfall of \$17,783 was received by September 2, 1996, the matter would be referred to the Registrar.
26. On August 23, 1996, the registrant submitted evidence of correction of the balance of the working capital shortfall reflected in the August 31, 1995 financial statements, by injecting \$20,000.
27. On December 19, 1996, the registrant submitted its financial statements for the fiscal year ended August 31, 1996, which were due by November 30, 1996. The

financial statements reflected a working capital shortfall of \$98,938, based on reported sales of \$135,644.

28. By letter dated January 2, 1997, the registrant was advised of its working capital shortfall of \$98,938, and given a due date of January 17, 1997, to provide evidence of correction.
29. On January 14, 1997, the registrant submitted evidence of injections into the company totalling \$145,000, which addressed the working capital shortfall as at August 31, 1996.
30. On February 20, 1998 the registrant submitted its financial statements for the year ended August 31, 1997 which were due by November 30, 1997. The statements reflected a working capital shortfall of \$35,671, based on reported sales of \$16,429.
31. By letter dated March 4, 1998 the registrant was advised by the Ontario Travel Industry Inspections Office of its working capital shortfall of \$35,671 reflected in its August 31, 1997 financial statements and given a due date of March 20, 1998, to provide evidence of correction.
32. On March 9, 1998, the registrant provided evidence of an injection for \$45,000 which addressed the working capital shortfall reflected in its August 31, 1997 financial statements.
33. On January 22, 1999, the registrant filed its financial statements for the fiscal year ended August 31, 1998, which were due by November 30, 1998. The statements reflected a working capital shortfall of \$77,380, based on reported sales of \$15,000.
34. By letter dated March 19, 1999. the registrant was advised by TICO of its working capital shortfall of \$77,380, and was given a due date of April 6, 1999 to provide evidence of correction, in addition to a trust reconciliation as at February 28, 1999.
35. On April 1, 1999, the registrant submitted evidence of a \$98,000 injection which addressed its working capital shortfall reflected in its August 31, 1998 financial statements, and a trust reconciliation to February 28, 1999.
36. On January 27, 2000, the registrant submitted its financial statements for the fiscal year ended August 31, 1999, which were due by November 30, 1999. It appeared that working capital requirements were met as at August 31, 1999, based on nil sales.
37. By letter dated August 10, 2000 the registrant was requested by TICO to file its financial statements for the fiscal year ended August 31, 2000 by November 30, 2000.

38. On December 8, 2000, the registrant was issued a reminder by TICO to file its financial statements for August 31, 2000 on or before December 22, 2000.
39. By letter dated December 15, 2000, the registrant advised TICO that it required additional time to December 22, 2000 to file its financial statements for the fiscal year ended August 31, 2000, which were due by November 30, 2000.
40. On December 28, 2000 the registrant filed its financial statements for the fiscal year ended August 31, 2000, which were due by November 30, 2000. The financial statements reflected a working capital shortfall of \$19,087, based on reported nil sales.
41. By letter dated January 24, 2001, the registrant was notified by TICO of its working capital shortfall of \$19,087, reflected in its August 31, 2000 financial statements and given a due date of February 9, 2001, to provide evidence of correction.
42. On February 26, 2001 the registrant provided TICO with an irrevocable letter of credit in the amount of \$10,000, due to the working capital shortfall as of August 31, 2000.
43. By letter dated July 20, 2001, the registrant was requested to file its financial statements for the fiscal year ended August 31, 2001 by November 30, 2001.
44. By letter dated December 18, 2001, the registrant was reminded to file its August 30, 2001 financial statements which were due by November 30, 2001.
45. On December 13, 2001, Ms Karen Geary telephoned TICO to advise that the financial statements were forthcoming for its fiscal year ended August 31, 2001 which were due by November 30, 2001.
46. On January 2, 2002, the registrant filed its financial statements for the fiscal year ended August 31, 2001, which were due by November 30, 2001. The statements reflected a working capital shortfall of \$34,892, based on reported sales of \$94,730.
47. By letter dated January 16, 2002, the registrant was notified by TICO of its working capital shortfall of \$34,892, and given a due date of January 31, 2002 to provide evidence of correction.
48. By letter dated August 1, 2002 the registrant was requested by TICO to file its financial statements for the fiscal year ended August 31, 2002 by November 30, 2002.

49. By letter dated December 10, 2002 the registrant was issued a reminder to file its financial statements for the fiscal year ended August 31, 2002 on or before December 17, 2002.
50. By letter dated December 30, 2002 the registrant was issued a final due date of January 9, 2003 to file its financial statements for August 31, 2002, failing which a Proposal to Revoke Registration would be issued.
51. On January 21, 2003 TICO telephoned the registrant and left a message on the answering system that unless its financial statements for August 31, 2002 were filed, a Proposal to Revoke Registration would be issued without further notice.
52. On January 21, 2003, Ms Karen Geary, who identified herself as the Manager, telephoned TICO and advised that Mr Gerald Steiner is out of the country for the winter, and that the accountant is unable to submit the financial statements due to missing bank information.
53. By February 11, 2003, the Registrant has failed to file its financial statements for the fiscal year ended August 31, 2002, which were due November 30, 2002. Accordingly, the Registrar issued a Proposal to Revoke the Registrant's registration.
54. On February 26, 2003, the Registrant submitted its financial statements for its fiscal year ended August 31, 2002, which were due by November 30, 2002.
55. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

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

1. the Registrar refrain from carrying out the Proposal to Revoke Registration dated February 11, 2003;
2. the Registrant's registration is to be subject to the following terms and conditions:
 - (a) The Registrant shall file complete financial statements, as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for its fiscal year ending August 31, 2003, no later than November 30, 2003;

- (b) The Registrant shall file complete financial statements, as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time for its fiscal year ending August 31, 2004, no later than November 30, 2004; and
 - (c) If the above-noted financial statements as filed reflect a working capital shortfall or are otherwise deficient, the Registrant will have 14 days from the date of notice of the deficiency to fully and completely address the deficiency and produce proof of such correction to the Registrar. Notice of the deficiency, if any, shall be sent by registered mail to the Registrant.
- 3. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) to (c) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.
 - 4. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

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

DATED at Mississauga this ____ day of April, 2003

Mr. Ron Steiner
Gambol Adventures Inc.
I have authority to bind the company

Mr. Michael Pepper
Registrar, *Travel Industry Act*

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

IN THE MATTER of the REGISTRATION of
REPWorld INC.
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: January 24, 2003

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

REPWorld INC.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

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

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

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

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: May 7, 2003

file name: 1518.tia.Repworld Inc.consent

SCHEDULE "A"

Between:

REPWORLD INC.

Applicant

-and-

REGISTRAR, TRAVEL INDUSTRY ACT

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to order of the Licence Appeal Tribunal under subsections 6(4) and (5) of the *Travel Industry Act* directing that:

1. the Registrar refrain from carrying out the Proposal to Revoke Registration dated January 24, 2003;
2. the Registrant's registration is to be subject to the following terms and conditions:

- (a) The Registrant shall at all times maintain sufficient funds to cover its customer obligations. Such funds shall be maintained in two accounts as follows:
 - i) a properly designated Travel Industry Act Account in accordance with the trust accounting requirements as stipulated in section 36 of the Regulation or such subsequent provision as may be in force from time to time; and
 - ii) a cash collateral account maintained as security for letters of credit issued by the Registrant in favour of various airlines for whom it acts as a general sales agent.

For the purposes of section 36 of the Regulation, the amounts held in both accounts shall be taken into account for the purposes of determining whether there are sufficient funds in the accounts;

- (b) The Registrant shall submit a monthly trust account reconciliation with corresponding bank statements to the Registrar beginning with the month of May, 2003, no later than 30 days after the end of each calendar month, for so long as the Registrar shall so require;
 - (c) The Registrant shall submit a statement of its gross Ontario sales and customer deposit reconciliation for its fiscal year ended June 30, 2002, by April 30, 2003;
 - (d) If the Registrant's gross Ontario sales for its fiscal year ended June 30, 2002 are greater than \$10 million, the Registrant shall submit its interim financial statements for its fiscal half-year ended December 31, 2003, by May 30, 2003
 - (e) The Registrant shall submit its June 30, 2003 year end financial statements with accompanying statement of gross Ontario sales and a reconciliation of customer funds and obligations by September 30, 2003, as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time;
 - (f) The Registrant shall submit its June 30, 2004 year end financial statements with accompanying statement of gross Ontario sales and a reconciliation of customer funds and obligations by September 30, 2003, as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time;
 - (g) If the above-noted financial statements, as filed, are incomplete, the Registrant will have 14 days from the date of notice of the deficiency to fully and completely address the deficiency and produce proof of such correction to the Registrar. Notice of the deficiency, if any, shall be sent by registered mail to the Registrant; and
 - (h) The Registrant shall co-operate with TICO inspections, as required by section 16 of the Act or such subsequent provision as may be in force from time to time.
3. Should the Registrant fail to comply with conditions listed in paragraphs (2)(a) to (h) inclusive during the two (2) year period immediately following this order of the Tribunal, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.

4. This order shall ensure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

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

DATED this day of May, 2003

Mr. Patrick O'Kelly
Repworld Inc.
I have authority to bind the corporation

Mr. Michael Pepper
Registrar, Travel Industry Act

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



PREHEARING

ELIZABETH A. McKAY AND BARBARA ROWLANDS

APPEAL FROM DECISIONS OF THE BOARD OF THE TRAVEL
INDUSTRY COUNCIL OF ONTARIO UNDER THE *TRAVEL
INDUSTRY ACT*

TO DISALLOW A CLAIM FOR REIMBURSEMENT

TRIBUNAL: VICTOR DREVNIG, Vice-Chair

APPEARANCES: H. ALAN L. EMERSON, Agent, representing the Applicants

TREVOR C.D. BRANION, Counsel, representing the Travel
Industry Council of Ontario

DATE OF
PRE-HEARING: March 25, 2003

Toronto
(By teleconference)

ORDER

Following a pre-hearing by teleconference on March 25, 2003 before the Licence Appeal Tribunal (the "Tribunal"), H. Alan L. Emerson, Agent, appearing on behalf of the Applicants, Elizabeth A. McKay and Barbara Rowlands, (the "Applicants") and Trevor Branion, Counsel on behalf of the Travel Industry Council of Ontario ("TICO");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Monday, June 23, 2003 at the Delta London Armouries, 325 Dundas Street, Thames Valley Room, London, Ontario.

1. The parties to the hearing are the Applicants and TICO.
2. The primary issue for adjudication at the hearing shall be on consent as follows:

Did the Applicants as a customer or registrant make a claim for reimbursement in writing to the Board of Directors within six months after the event that gave rise to the claim for reimbursement in accordance with section 53 of Regulation 806/93 enacted under the *Travel Industry Act*.

The Tribunal furthers orders, as follows:

1. TICO agrees that on or before Friday the 11th day of April 2003, it will contact the Applicants' insurer, Royal Bank Corporation Insurance Company, and provide it with all the documentation necessary for the Applicants to prove to the Royal Bank Corporation Insurance Company that it has denied coverage for both of the Applicants.
2. TICO further agrees to provide the Applicants with copies of any correspondence regarding coverage to and from Royal Bank Corporation Insurance Company.
3. The Applicants agree that TICO has made complete disclosure to the date hereto and TICO agrees to provide the Applicants with a list of the authorities that it intends to rely upon on or before the 10th day of May 2003.
4. The Applicants agree to assist TICO in obtaining a Decision of their claims from Royal Bank Corporation Insurance Company on or before April 30, 2003.
5. The parties are agreed that the trial will take a maximum of one day and that the Applicants will have from two to three witnesses and that TICO will have one witness.
6. The parties shall fully comply with the disclosure requirements set forth in Rule 6 of the Rules of Practice of the Tribunal subject to the specific provisions set out in paragraphs 2, 3, 4, 5 of the preceding paragraphs.

LICENCE APPEAL TRIBUNAL

Victor Drevnig, Vice-Chair

Released: April 7, 2003

File Name:1477.1478.tia.Mckay.Rowlands.pre.hrg.doc.

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



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

IN THE MATTER OF a CLAIM by
ELIZABETH A. McKAY

AND IN THE MATTER OF the DECISION of the
Travel Industry Council of Ontario

TO DISALLOW A CLAIM
- Decision dated: December 20, 2002

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

ELIZABETH A. McKAY

Applicant

- and -

TRAVEL INDUSTRY COUNCIL OF ONTARIO

Respondent

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter on June 23, 2003;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against all the parties* to commence at the Middlesex County Building, 399 Ridout Street, North Room, London, Ontario, at 9:30 a.m., on Thursday, June 26, 2003.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek,
Chair

Released: May 12, 2003

File name: 1477.tia.McKay.adj

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



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

IN THE MATTER OF a CLAIM by
BARBARA ROWLANDS

AND IN THE MATTER OF the DECISION of the
Travel Industry Council of Ontario

TO DISALLOW A CLAIM
- Decision dated: December 20, 2002

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

BARBARA ROWLANDS

Applicant

- and -

TRAVEL INDUSTRY COUNCIL OF ONTARIO

Respondent

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter on June 23, 2003;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against all the parties* to commence at the Middlesex County Building, 399 Ridout Street, North Room, London, Ontario, at 9:30 a.m., on Thursday, June 26, 2003.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek,
Chair

Released: May 12, 2003

File name: 1478.tia.Rowlands.adj

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

IN THE MATTER of the REGISTRATION of
ARROW TRAVEL AGENCY LTD.
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: February 7, 2003

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

ARROW TRAVEL AGENCY LTD.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

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

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

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

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: May 22, 2003

file name: 1544.tia.Arrow.consent

LICENCE APPEAL TRIBUNAL

BETWEEN:

ARROW TRAVEL AGENCY LTD.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

WAIVER AND CONSENT

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

AGREED STATEMENT OF FACTS

1. Arrow Travel Agency Ltd. ("the Registrant") was registered as a travel agent (Registration No. 1217997/R) on October 6, 1983.
2. On December 28, 1994, the Ontario Travel Industry Inspections Office conducted a site inspection. At the time of the visit, financial statements for the fiscal years ended August 31, 1993, which were due by November 30, 1993, and August 31, 1994 financial statements which were due by November 30, 1994, had not been filed. The Inspector concluded that it could not determine whether the registrant was compliant with the minimum working capital requirements.
3. On January 11, 1995, the registrant was given a final due date of January 25, 1995, by the Registrar, to file its financial statements for the fiscal year ended August 31, 1994, which were due by November 30, 1994, failing which administrative action would be initiated.
4. On April 6, 1995, the registrant filed its financial statements for the fiscal year ended August 31, 1994, which were due by November 30, 1994. It appeared that working capital requirements were met as at August 31, 1994.
5. On January 6, 1996, the registrant was issued a final due date of January 25, 1996, by the Registrar, to file its financial statements for the fiscal year ended August 31, 1995, which were due by November 30, 1995.
6. On March 28, 1996, the registrant was issued a Proposal to Revoke Registration for not filing its financial statements for the fiscal year ended August 31, 1995, which were due by November 30, 1995.
7. On April 9, 1996, the registrant filed its financial statements for the fiscal year ended August 31, 1995 which were due by November 30, 1995. The statements reflected a working capital shortfall of \$488 based on reported sales of \$1,095,874. The notes to the financial statements indicated a subsequent injection of \$15,023, which addressed the working capital shortfall.
8. On October 18, 1996, the Proposal to Revoke Registration was withdrawn by the Registrar.
9. On January 3, 1997, the registrant filed its financial statements for the fiscal year ended August 31, 1996, which were due by November 30, 1996. The financial statements reflected a working capital shortfall of \$507, based on reported sales of \$956,442.
10. By letter dated January 20, 1997, the registrant was advised of its working capital shortfall of \$507, and was given a due date of February 6, 1997, to provide evidence of correction.

11. On February 12, 1997, the registrant was issued a reminder to correct its working capital shortfall of \$507, reflected in its financial statements for the fiscal year ended August 31, 1996.
12. By letter dated February 26, 1997, the registrant was issued a further due date of March 10, 1997 to provide evidence of correction of its working capital shortfall of \$507 reflected in its August 31, 1996 financial statements.
13. On April 8, 1997, the registrant was issued a final due date of April 17, 1997, by the Registrar, to correct its working capital shortfall of \$507, reflected in its August 31, 1996 financial statements, failing which administrative action would be initiated.
14. On November 28, 1997, the registrant signed Terms and Conditions of registration which included trust accounting.
15. On December 3, 1997, the registrant filed its financial statements for the fiscal year ended August 31, 1997, which were due by November 30, 1997. It appeared that working capital requirements were met as at August 31, 1997.
16. On January 11, 1999, the registrant filed its financial statements for the fiscal year ended August 31, 1998, which were due by November 30, 1998. It appeared that working capital requirements were met as at August 31, 1998.
17. On August 9, 1999, the registrant was requested by TICO to file its financial statements for the fiscal year ended August 31, 1999, by November 30, 1999.
18. On December 1, 1999, the registrant was issued a reminder letter by TICO to file its August 31, 1999 financial statements which were due November 30, 1999.
19. On January 17, 2000, the registrant was issued a Proposal to Revoke Registration for failure to file its Form 1, and make the applicable payment, for the period ended August 31, 1999, which was due by October 15, 1999.
20. On January 28, 2000, the registrant filed its Form 1 and applicable payment.
21. On March 2, 2000, the registrant was issued a final notice of revocation of its registration, by the Registrar, for failure to appeal the Proposal to Revoke Registration dated January 17, 2000, and the registration was revoked.
22. On March 10, 2000, the registrant filed its financial statements for the fiscal year ended August 31, 1999 which were due by November 30, 1999. It appeared that working capital requirements were met as at August 31, 1999.
23. On April 17, 2000, the registrant's registration was reinstated by the Registrar.
24. By letter dated August 10, 2000, the registrant was requested to file its financial statements for the fiscal year ended August 31, 2000 by November 30, 2000.
25. By letter dated December 8, 2000, the registrant was reminded to file its financial statements for its fiscal year ended August 30, 2000 which were due November 30, 2002.
26. By letter dated January 11, 2001, the registrant was given a final reminder to file its financial statements for August 31, 2000.
27. On February 1, 2001, the registrant filed its financial statements for the fiscal year ended August 31, 2000, which were due by November 30, 2000. It appeared that working capital requirements were met as at August 31, 2000.
28. By letter dated July 20, 2001, the registrant was requested to submit its financial statements for the fiscal year ended August 31, 2001 by November 30, 2001.
29. On December 5, 2001, the registrant telephoned TICO and advised that its financial statements for the year ended August 31, 2001, which were due November 30, 2001, would be submitted by December 10, 2001.

30. By letter dated December 18, 2001, the registrant was reminded to file its financial statements for the fiscal year ended August 31, 2001. These statements were due on November 30, 2001.
31. On December 27, 2001, the registrant filed its financial statements for the fiscal year ended August 31, 2001, which were due by November 30, 2001. The financial statements reflected a working capital shortfall of \$18,369.
32. By letter dated January 16, 2002, the registrant was advised by TICO of its working capital shortfall of \$18,369, and given a due date of January 31, 2002 to provide evidence of correction.
33. By letter dated February 7, 2002 the registrant was issued a reminder letter to provide evidence of correction of its working capital shortfall of \$18,369, reflected in its August 31, 2001 financial statements.
34. By letter dated February 20, 2002, the registrant was issued a final due date of March 5, 2002, by the Registrar, to provide evidence of correction of its working capital shortfall of \$18,369, failing which a Proposal to Revoke Registration would be issued.
35. On March 5, 2002, the registrant provided evidence of correction of the working capital shortfall reflected in its August 31, 2001 financial statements.
36. By letter dated August 1, 2002, the registrant was requested by TICO to file its financial statements for the fiscal year ended August 31, 2002 by November 30, 2002.
37. By letter dated December 10, 2002, the registrant was issued a reminder to file its August 31, 2002 financial statements, which were due by November 30, 2002, on or before December 17, 2002.
38. By letter dated December 30, 2002, the registrant was issued a final due date of January 9, 2003, by the Registrar, to file its financial statements for the fiscal year ended August 31, 2002, which were due by November 30, 2002, failing which a Proposal to Revoke Registration would be issued.
39. On January 21, 2003, TICO telephoned the registrant and the voice mail box belonging to the registrant was full.
40. By February 7, 2003, the Registrant had failed to file its financial statements for the fiscal year ended August 31, 2002, which were due November 30, 2002. The Registrar therefore issued the Proposal to Revoke the Registrant's registration.
41. On March 25, 2003, the Registrant filed its 2002 financial statements, which were due by November 30, 2002.
42. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

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

1. the Registrar refrain from carrying out the Proposal to Revoke Registration dated February 7, 2003;
2. the Registrant's registration is to be subject to the following terms and conditions:
 - (a) The Registrant shall file complete financial statements, including a reconciliation of customer funds and customer obligations, as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for its fiscal year ending August 31, 2003, no later than November 30, 2003;
 - (b) The Registrant shall file complete financial statements, including a reconciliation of customer funds and customer obligations, as required by section 24 of the Regulation or such

subsequent provision as may be in force from time to time for its fiscal year ending August 31, 2004, no later than November 30, 2004; and

- (c) If the above-noted financial statements as filed reflect a working capital shortfall or are otherwise deficient, the Registrant will have 14 days from the date of notice of the deficiency to fully and completely address the deficiency and produce proof of such correction to the Registrar. Notice of the deficiency, if any, shall be sent by registered mail to the Registrant.
- 3. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) to (c) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.
- 4. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

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

DATED at Mississauga this ____ day of May, 2003

Francesca Duimovich
Arrow Travel Agency Ltd.
I have authority to bind the company

Mr. Michael Pepper
Registrar, *Travel Industry Act*

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

IN THE MATTER of the REGISTRATION of
ARIANA TRAVEL INC.
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: March 24, 2003

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

ARIANA TRAVEL INC.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

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

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

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

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: June 5, 2003

LICENCE APPEAL TRIBUNAL

BETWEEN:

ARIANA TRAVEL INC.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

WAIVER AND CONSENT

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

AGREED STATEMENT OF FACTS

1. Ariana Travel Inc. ("the Registrant") was registered as a travel agent (Registration No. 50006641/R) on August 31, 1999.
2. On October 25, 2000, the registrant's bookkeeper telephoned TICO to advise that the financial statements for the fiscal year ended July 31, 2000, would be submitted in three weeks.
3. On November 27, 2000, TICO received the financial statements for the fiscal year ended July 31, 2000, which were due October 31, 2000. The financial statements reflected a working capital shortfall of \$3,439, based on reported sales of \$579,356.
4. By letter dated December 12, 2000, the registrant was advised by TICO of its working capital shortfall of \$3,439, and given a due date of December 22, 2000 to provide evidence of correction.
5. On January 4, 2001, the registrant submitted evidence of correction of its working capital shortfall of \$3,439, reflected in its financial statements for the fiscal year ended July 31, 2000.
6. On October 29, 2001, TICO received the financial statements for the fiscal year ended July 31, 2001, which were due by October 31, 2001. It appeared that working capital requirements were met as at July 31, 2001.
7. By letter dated June 14, 2002, the registrant was requested by TICO to file its financial statements for the fiscal year ending July 31, 2002 by October 31, 2002.
8. By letter dated November 5, 2002, the registrant was issued a reminder to file its financial statements for July 31, 2002, which were due by October 31, 2002.
9. By letter dated November 22, 2002, the registrant was issued a final due date of November 30, 2002 to file its financial statements for July 31, 2002.
10. On December 3, 2002, the registrant's accountant telephoned TICO to advise that the financial statements for the registrant's fiscal year ended July 31, 2002, would be completed by December 9th or 10th, 2002.
11. On January 10, 2003, TICO telephoned the registrant's accountant for an update on the submission of the registrant's financial statements for July 31, 2002 and was advised that the statements would be submitted the week of January 13, 2003.
12. On January 13, 2003, the registrant telephoned TICO to advise that its financial statements for the fiscal year ended July 31, 2002 would be submitted by January 17, 2003.

13. On January 23, 2003, TICO received the financial statements for the fiscal year ended July 31, 2002, which were due by October 31, 2002. The financial statements reflected a working capital shortfall of \$5,484, based on reported sales of \$138,457.
14. On January 23, 2003, the registrant telephoned TICO to advise that due to personal strife, the company was dormant, and would remain dormant for at least six months.
15. By letter dated January 23, 2003, the Registrant was advised by TICO of its working capital shortfall of \$5,484, reflected in its financial statements for the fiscal year ended July 31, 2002, and given a due date of February 10, 2003 to provide TICO with evidence of correction.
16. By letter dated February 14, 2003 the registrant was issued a final due date of February 26, 2003 to provide evidence of correction of its working capital shortfall of \$5,484 reflected in its July 31, 2002 financial statements.
17. By March 24, 2003 there had been no response from the Registrant, mail had been returned from the current address, and the Registrant had failed to correct its working capital shortfall of \$5,484, reflected in its financial statements for its 2002 fiscal year end. On that date the Registrar issued a Proposal to Revoke the Registrant's registration.
18. On April 15, 2003, the Registrant faxed evidence of a \$5,900.00 shareholder advance to correct its working capital shortfall.
19. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

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

1. the Registrar refrain from carrying out the Proposal to Revoke Registration dated March 24, 2003;
2. the Registrant's registration is to be subject to the following terms and conditions:
 - (a) The Registrant shall file complete financial statements, as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for its fiscal year ending July 31, 2003, no later than October 31, 2003;
 - (b) The Registrant shall file complete financial statements, as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time for its fiscal year ending July 31, 2004, no later than October 31, 2004;
 - (c) If the above-noted financial statements as filed reflect a working capital shortfall or are otherwise deficient, the Registrant will have 30 days from the date of notice of the deficiency to fully and completely address the deficiency and produce proof of such correction to the Registrar. Notice of the deficiency, if any, shall be sent by registered mail to the Registrant; and
 - (d) The Registrant shall not sell travel services until it notifies the Registrar, in writing, of a properly designated business address, which is not a dwelling.
3. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) to (d) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.
4. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

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

DATED at Mississauga this ____ day of June, 2003

Zakia Wahab
Ariana Travel Inc.
I have authority to bind the company

Mr. Michael Pepper
Registrar, *Travel Industry Act*

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis

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

IN THE MATTER of
GLOBAL TRAVEL CENTRE ADVANTAGE

AND IN THE MATTER of a decision of the
Travel Industry Council of Ontario

TO DISALLOW A CLAIM
- Decision dated: June 28, 2002

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

GLOBAL TRAVEL CENTRE ADVANTAGE

Applicant

- and -

TRAVEL INDUSTRY COUNCIL OF ONTARIO

Respondent

ADJOURNMENT

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

AND WHEREAS, upon consent of the parties, the hearing was adjourned to February 28, 2003;

AND WHEREAS, upon consent of the parties, the hearing was further adjourned to May 13, 2003;

AND WHEREAS, upon consent of the parties, the hearing was further adjourned to August 13, 2003;

TAKE NOTICE, upon consent of the parties, the Tribunal further adjourns the hearing *peremptory against all parties* to commence at Gillespie Reporting Services, 130 Slater Street, Suite 200, Ottawa, Ontario at 9:30 p.m., on Thursday, August 14, 2003.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: July 17, 2003

file name: 1174.tif.Global Travel.adj.ord.

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



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

IN THE MATTER OF a CLAIM by
TAHER SHAATH

AND IN THE MATTER OF the DECISION of the
Travel Industry Council of Ontario

TO DISALLOW A CLAIM
- Decision dated: December 20, 2002

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

TAHER SHAATH

Applicant

- and -

TRAVEL INDUSTRY COUNCIL OF ONTARIO

Respondent

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter on May 22, 2003;

AND WHEREAS, upon consent of the parties, the hearing was further adjourned to August 13, 2003;

TAKE NOTICE, upon consent of the parties, the Tribunal further adjourns the hearing *peremptory against all the parties* to commence at the Gillespie Reporting Services, 130 Slater Street, Suite 200, Ottawa, Ontario, at 1:30 p.m., on Thursday, August 14, 2003.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek,
Chair

Released: July 17, 2003

File name: 1471.tia.Shaath.adj.ord.



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

IN THE MATTER of the REGISTRATION of
ADAMOVIC TRIVA & ADAMOVIC ZLATIJA O/A INTERNATIONAL
TOURIST TRAVEL – ITT
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: April 4, 2003

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

ADAMOVIC TRIVA & ADAMOVIC ZLATIJA O/A
INTERNATIONAL TOURIST TRAVEL – ITT

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by Adamovic Triva & Adamovic Zlatija o/a International Tourist Travel – ITT, the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

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

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

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: July 18, 2003

FILE NAME: 1645.tia.ITT.consent.doc

SCHEDULE "A"

BETWEEN:

ADAMOVIC TRIVA & ADAMOVIC ZLATIJA
O/A INTERNATIONAL TOURIST TRAVEL -ITT

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

WAIVER AND CONSENT

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

AGREED STATEMENT OF FACTS

1. Triva Adamovic and Zlatija Adamovic o/a International Tourist Travel – ITT (the Registrant) is registered as a travel agent (Registration No. 2045951).
2. By letter dated February 21, 2003, the Registrant was advised that it had failed to file its Form 1 for the period ending December 31, 2002, and to make the required payment to the Council, and was requested to submit the required filing by March 07, 2003. A final request was sent to the Registrant on March 07, 2003 providing the Registrant with a deadline to submit the required filing by March 21, 2003, failing which the Registrant was advised that a proposal to revoke its registration would be issued.
3. By April 4, 2003, the Registrant had not filed its Form 1 or made payment to the Council for the period ending December 30, 2002. Therefore, the Registrar, *Travel Industry Act* issued a Proposal to Revoke the Registrant's registration.
4. The Registrant has, at times, failed to maintain an operational telephone, making it difficult for the Travel Industry Council of Ontario ("TICO") to monitor the Registrant and ensure legislative compliance.
5. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

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

1. the Registrar refrain from carrying out the Proposal to Revoke Registration dated April 4, 2003;
2. the Registrant's registration is to be subject to the following terms and conditions:

- (a) the Registrant shall file its Form 1 with the corresponding payment to TICO, for its fiscal half-year ended June 30, 2003 by August 15, 2003;
 - (b) the Registrant shall file its Form 1 with the corresponding payment to TICO, for its fiscal year ending December 31, 2003 by February 15, 2004;
 - (c) the Registrant shall file its Form 1 with the corresponding payment to TICO, for its fiscal half-year ending June 30, 2004 by August 15, 2004; and
 - (d) the Registrant shall file its Form 1 with the corresponding payment to TICO, for its fiscal year ending December 31, 2004 by February 15, 2005; and
 - (e) the Registrant shall maintain an operational business telephone number at all times and notify the Registrar with 5 days of any changes to said business telephone number.
3. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) to (e) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.
4. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

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

DATED at Mississauga this ____ day of July, 2003

Triva Adamovic
Adamovic Triva & Adamovic Zlatija
International Tourist Travel - ITT
I have authority to bind the company

Mr. Michael Pepper
Registrar, *Travel Industry Act*

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



PREHEARING

KHALSA TRAVEL & TOURS INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
TRAVEL INDUSTRY ACT, R.S.O. 1990, CHAPTER T.17 AS
AMENDED

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: DARSHAN SINGH CHATHA, Agent, representing the Applicant

TREVOR BRANION, Counsel, representing the Registrar, *Travel
Industry Act*

DATE OF

PRE-HEARING: June 30, 2003

Toronto
(By Teleconference)

ORDER

Following a prehearing before the Licence Appeal Tribunal (the "Tribunal") by way of a teleconference at which hearing Darshan Singh Chatha, Agent, represented Khalsa Travel and Tours Inc. (the "Applicant") and Trevor Branion, Counsel, represented the Registrar, Travel Industry Act (the "Registrar");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m., on August 1, 2003 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario:

1. The parties to the hearing are the Applicant and the Registrar.
2. There was no settlement of the issues in this matter.

3. By no later than 4:30 p.m. on July 8, 2003, the Applicant shall forward a letter to the Registrar duly signed by Vinny Anand and Darlusz Dluosz in which they shall state that they authorized the Applicant's use of their credit cards in the amounts of \$ 570.00 and \$595.00 respectively in relation to travel purchased by Indepal Galati.
4. The Applicant and the Registrar shall fully comply with the requirements of disclosure of documents or things as set forth in Rule 6.3 of the Rules of Practice of the Tribunal. All parties shall also fully comply with the disclosure requirements set forth in Rule 6.4 of the Rules of Practice of the Tribunal dealing with expert witnesses.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: July 2, 2003

FILENAME: 1658.tia.Khalsa.pre

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

IN THE MATTER of the REGISTRATION of
KHALSA TRAVEL & TOURS INC.
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: April 14, 2003

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

KHALSA TRAVEL & TOURS INC.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

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

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

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

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: August 1, 2003

File name: 1658.Tia.Khalsa.Consent.Ord.

LICENCE APPEAL TRIBUNAL

BETWEEN:

KHALSA TRAVEL & TOURS INC.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

WAIVER AND CONSENT

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

AGREED STATEMENT OF FACTS

2. Khalsa Travel & Tours Inc. ("the Registrant") was registered as a travel agent (Registration No. 50008201/R) on July 17, 1995.
3. On or about August 27, 2001, a consumer, Inderpal Gulati, purchased two air tickets to Delhi, India through the Registrant and Travelpack Marketing, a former registered travel wholesaler. Ms Gulati paid the Registrant \$1,750.00 in cash and \$1,750.00 by credit card. The Registrant forwarded Ms Gulati's credit card information to Travelpack. It did not, however, forward Ms Gulati's entire cash payment. Instead, the Registrant paid the balance of the net price of \$3,217.87 using two unrelated third-party credit cards, belonging to a Mr. Darlusz Dluosz and a Mr. Vinny Anand, in the amounts of \$570.00 and \$595.00 respectively and a cheque in the amount of \$302.87.
4. Due to the failures of Travelpack and Canada 3000 in October and November 2001, Ms Gulati did not receive her flights, which were to depart on December 21, 2001 and return on January 5, 2002. On December 4, 2001, Ms Gulati made a claim against the Ontario Travel Industry Compensation Fund. By August 13, 2002 the TICO Board of Director's approved Ms Gulati's claim against the Fund.
5. Despite letters from TICO dated May 10, 2002, July 3, 2002, July 23, 2002, November 4, 2002, and January 6, 2003, the Registrant had, by April 14, 2003, failed to demonstrate that the third-party credit card transactions used to pay for Ms Gulati's transaction were authorized by the cardholders. On that date the Registrar issued the Proposal to Revoke the Registrant's registration.
6. On July 7, 2003, the Registrant provided written confirmation from Mr. Vinny Anand

that he had authorized the use of his credit card to pay \$595 for the Gulati transaction.

7. To date, the Registrant has failed to provide evidence to the satisfaction of the Registrar that Mr. Dluosz authorized the use of his credit card to be applied in the amount of \$570 towards the Gulati transaction.
8. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

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

1. the Registrar refrain from carrying out the Proposal to Revoke Registration dated April 14, 2003;
2. the Registrant's registration is to be subject to the following terms and conditions:
 - (a) the Registrant shall provide written evidence to the satisfaction of the Registrar that Mr. Dluosz authorized the use of his credit card to be applied in the amount of \$570 towards the Gulati transaction or, failing which, pay TICO \$570 to reimburse the Compensation Fund by August 15, 2003; and
 - (b) the Registrant shall obtain prior written authorization from the card-holder before using third-party credit cards to pay for travel services.
3. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) to (b) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.
4. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

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

DATED at Mississauga this ____ day of July, 2003

Darshan Singh Chatha
Khalsa Travel & Tours Inc.
I have authority to bind the company

Mr. Michael Pepper
Registrar, *Travel Industry Act*



PREHEARING

THE HOLIDAY NETWORK – MY TRAVEL CANADA HOLIDAYS INC.

APPEAL FROM A DECISION OF THE BOARD OF DIRECTORS
OF THE TRAVEL INDUSTRY COUNCIL OF ONTARIO

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: JOEL BIRNBAUM, Agent, representing the Applicant

TREVOR BRANION, Counsel representing the Travel Industry
Council of Ontario

DATE OF
PRE-HEARING: July 30, 2003

By teleconference

ORDER

Following attendances by telephone on July 30, 2003 at a prehearing before this Tribunal of Joel Birnbaum, Agent representing The Holiday Network (the "Applicant") and Trevor Branion, Counsel representing the Travel Industry Council of Ontario (the "Council");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on August 8, 2003 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario;

- 1) The Parties to the hearing are the Applicant and the Council.
- 2) The Applicant and the Council record that there is no resolution of the issues in this matter.
- 3) The sole issue for determination at the hearing of this matter shall be whether or not the Applicant made claim to the Council in writing within six months after the event that gave rise to the Applicant's claim as required by section 53 of Regulation 806/93 of the *Travel Industry Act*.

- 4) The Agent for the Applicant is, at this date, not in possession of a written document that may indicate when the Applicant gave notice to the Council of the Applicant's claim. Upon the Agent for the Applicant becoming possessed of such document he shall immediately disclose it to Counsel for the Council and shall deliver a copy of such document to Counsel who has agreed to accept the late filing of such document despite the requirements of Rule 6.3 of the Rules of Practice of this Tribunal.
- 5) The sole witness for the Council shall be Lori Furlan and the sole witness for the Applicant shall be Diane Lativo.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: July 31, 2003

File name: 1711.tia.The Holiday Network.pre.order

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



PRE-HEARING

SUNWIN TRAVELS AND TOURS INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
TRAVEL INDUSTRY ACT, R.S.O. 1990, CHAPTER T.17 AS
AMENDED

TO REVOKE REGISTRATION

TRIBUNAL: CARL F. DOMBEK, Chair
Presiding

APPEARANCES: SANJULA MAGESVARAN, Agent, representing the Applicant

TREVOR BRANION, Counsel, representing the Registrar, *Travel Industry Act*

DATE OF
PRE-HEARING: August 12, 2003 *by teleconference*

ORDER

FOLLOWING attendances by telephone at a pre-hearing before the Licence Appeal Tribunal (the "Tribunal") of Sanjula Magesvaran, Agent, representing Sunwin Travels and Tours Inc. (the "Applicant") and Trevor Branion, Counsel, representing the Registrar, *Travel Industry Act* (the "Registrar");

The Tribunal makes the following Order:

1. The parties to the hearing are the Applicant and the Registrar.
2. The parties agreed that there has been a late filing of financial statements.

3. The parties agreed to adjourn the hearing scheduled for September 12, 2003 to Friday, October 31, 2003 commencing at 9:30 a.m. at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, in order to allow sufficient time for the Registrar to investigate certain allegations raised by the Applicant.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek, Chair
Presiding

RELEASED: August 27, 2003

FILENAME: 1757.tia.Sunwin Travels and Tours Inc.pre.doc

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



GLOBAL TRAVEL CENTRE ADVANTAGE

APPEAL FROM A DECISION OF THE TRAVEL INDUSTRY
COUNCIL OF ONTARIO DENYING A CLAIM FOR
COMPENSATION UNDER THE TRAVEL INDUSTRY ACT

TRIBUNAL: DOUGLAS MACKINTOSH, Vice-Chair

APPEARANCES:

ANTONIO LICANDRO, Counsel representing the Applicant

TREVOR BRANION, Counsel representing the Travel Industry
Council of Ontario

DATE OF
HEARING August 14, 2003

Ottawa

REASON FOR DECISION AND ORDER

This is an appeal by the applicant, Global Travel Centre Advantage to the Licence Appeal Tribunal from a decision dated 28 June 2003 by the Board of the Travel Industry Council of Ontario denying a claim for compensation under the *Travel Industry Act* (the Act).

BACKGROUND

Jim and Claire Lough and their son are the sole shareholders of the Applicant Company, 157349 Canada Ltd. known as Global Travel Centre Advantage (Global). They are well educated. Jim Lough has a B.Sc. as well as an MBA, his wife has a B.Sc. and their son a BA. When they bought the company in 1986, they received training in the industry from the franchisor. Global has had a staff of around 10 employees. Claire Lough looked after 4 bookkeepers and was responsible for the accounting with a volume of business of \$10,000,000 a year, recently down to \$7,000,000.

As is required, Global is registered under the Act and pays 24¢ into the compensation fund for each \$1,000 of business.

THE ISSUE

The issue is whether Global is entitled to compensation from the compensation fund after paying for a cruise for its proprietors, which was cancelled after which it reimbursed the proprietors. Travel Industry Council of Ontario (TICO) says they are not.

THE FACTS

The Tribunal makes the following findings of fact from the documents filed and after hearing the evidence from Claire Lough who was straightforward and honest.

Jim and Claire Lough arranged for their company, Global, to buy them a cruise (known as the African Wonder World Cruise) from Renaissance Cruises. Global issued an invoice for \$11,707.80 on 21 August 2001 for the cost of the cruise charged to J.M. Lough and Claire Lough.

On 23 August 2001 Global paid Renaissance Cruises by cheque for the full cost of the cruise for Jim and Claire Lough, \$11,707.80. The cheque was for \$14,820 U.S. to include another item.

That same day, 23 August, 2001, Claire Lough made a deposit to Global for \$13,000 from her personal Waterhouse U.S. account. This she testified was to cover the cost of the cruise as well as some company expenses. Unfortunately, she made no notation in the company books of where this deposit had come from and this led to subsequent confusion as she forgot where the money had come from.

The cruise was scheduled to depart on 24 November, 2001 but by then Renaissance was in receivership and the cruise was cancelled.

Global made a claim on 18 February, 2002 to TICO to be reimbursed for the cancelled cruises. The claim, made out by Jim Lough, indicated that the method of customer payment was cash. This was not correct, but it was the only logical answer the Loughs could think of, because of the lack of recorded information about the \$13,000 deposit that Claire Lough had made. Furthermore, the form indicated that the payment had been made on 25 September, 2001, rather than 23 September, 2001.

Further confusion arose when, to comply with TICO, Claire Lough deposited into Global on 28 March, 2002 another cheque for \$11,707.80 for the cost of the cancelled cruise. She did so to satisfy TICO's request for proof of customer payment and at that time had still not recollected the deposit of \$13,000 she had previously made on 23 August 2001.

Global submitted a second claim this time indicating "customer payment" as the cheque dated 28 March, 2002.

On 25 June, 2002, the Board of TICO considered the Global claim and found that the claim was not eligible for reimbursement. TICO'S sent a letter giving notice of this decision on 28 June, 2002 and recited the requirements of the law for compensation to be made.

Some time after this decision, Claire Lough sought the help of her accountant, which brought her \$13,000 deposit to light.

THE LAW

The decision letter from TICO correctly outlines the law relating to the claim made by Global Travel as follows:

Section 51 (1) of Ontario Regulation 806/93 enacted under the *Travel Industry Act* outlines the provision for a travel agent to claim and states, in part, that a travel agent is entitled to be reimbursed for money paid by a travel agent to reimburse a customer or to provide alternate travel services to the customer if the customer paid the travel agent and if the travel agent passed all or part of the customer's money to a travel wholesaler, an airline or a cruise line. Section 51 (2) states that a travel agent is entitled to be reimbursed only for the portion of the customer's money that the travel agent passed to the travel wholesaler, airline or cruise line. Section 51 (3) states that a travel agent is entitled to be reimbursed only if the customer would otherwise have had a claim on the fund.

In addition, section 50 (3) 6 states, in part, that a customer is not entitled to be reimbursed if the customer used a voucher, certificate, coupon or other similar document to obtain the travel services or did not pay for the travel services with cash or by a cheque, credit card or other similar cash payment method.

Besides these sections, section 57 provides a maximum amount of \$5,000 that may be paid to a customer or registrant for failure to provide travel services. So the Loughs' claim cannot exceed \$10,000.

APPLICATION OF THE LAW TO THE FACTS

The facts found by the Tribunal show that Global has complied with the requirements of the Act as set out above. Specifically, the Loughs as customers paid Global, the travel agent and Global then passed the monies on to the wholesaler. And in any event, if the \$13,000 deposit by cheque had not been discovered, valid formal bona fide book entries in this situation would suffice to support the claim being made.

DIRECTION AND ORDER

Accordingly by virtue of section 6 (5) of the Travel Industry Act, the Tribunal directs the Travel Industry Council of Ontario to accept the claim of Global Travel Centre Advantage for \$10,000.

LICENCE APPEAL TRIBUNAL

Douglas Mackintosh, Vice-Chair

RELEASED: September 12, 2003

File 1174.tia.Global.doc

The period to appeal a decision to the Superior Court of Justice is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



ELIZABETH A. MCKAY and BARBARA ROWLANDS

JOINT APPEALS FROM DECISIONS OF THE BOARD OF
DIRECTORS OF THE ONTARIO TRAVEL
INDUSTRY COMPENSATION FUND CORPORATION
UNDER THE *TRAVEL INDUSTRY ACT*

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD C. DELANEY, Member

APPEARANCES:

H. ALAN EMERSON, Agent for the Applicants

TREVOR BRANION, Counsel representing the Travel Industry
Council of Ontario

DATE OF
HEARING:

June 26, 2003

London

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is a combined appeal by Elizabeth Anne McKay and Barbara Rowlands (the "Applicants") to the Licence Appeal Tribunal from written decisions each dated December 20, 2002 of the Board of Directors of the Ontario Travel Industry Compensation Fund Corporation (the "Fund") to deny each of the Applicant's claim for compensation in the amount of \$2,785.84 (CDN).

These matters were heard concurrently with the consent of the parties as the issues and facts are identical in each of the claims.

The Applicants base their claims on Section 50(1) of Regulation 806/93 (the "Regulation") made under the *Travel Industry Act* (the "Act").

THE EVIDENCE:

The evidence in this matter was presented both orally and in documentary form.

APPLICANTS' CASES**Elizabeth Anne McKay**

The Applicant McKay learned of the cruise trip from a friend. In early February 2001 she called Vellinga's Travel in Chatham to arrange for the trip. She did not use a credit card to effect payment. As a result, no reversal was possible after the trip did not occur. The trip was to occur in mid-August 2001. The witness was going to travel with the other Applicant, her friend, Barbara Rowlands.

In July 2001 the witness read in a newspaper that the cruise line, Great Lakes, was in trouble. In fact, the cruise did not occur and the witness, after calling Vellinga's, was told she would receive no compensation. She was told that there had been no bankruptcy and that the cruise line was not an Ontario company. The insurance she purchased at the time of booking did not cover the loss.

To date, the Applicant has received no compensation for the failed trip. She did receive a phone call from Mr. Vellinga sometime prior to December 2002 indicating that her claim would be honoured.

On cross-examination, the witness confirmed that all contact with TICO in the matter had been made through her travel agent. She was not advised by her travel agent that she could receive a refund from the agency. The witness did not feel it was Vellinga's responsibility to refund the lost monies.

Robert Frank Vellinga

The witness gave evidence in support of both Applicants in this matter.

The witness operates Vellinga's Worldwide Travel Service Ltd. in Chatham, Ontario. He has been in the travel industry for forty-seven years. Both Applicants had been long-standing travel clients with his agency.

He received a call from the Applicants in February 2001 to take a cruise on Great Lakes Cruises which was based out of Wisconsin in the United States. He recalled hearing in July 2001 that the ship was grounded and that Great Lakes was in some trouble.

After hearing of the problems, he began to follow up on the situation. He tried to call the cruise line but was unsuccessful. He called TICO and was advised that the cruise line was

not registered in Ontario and that there was no protection. He called the Royal Bank of Canada and was told that there was no protection as no bankruptcy had taken place. He was aware that the Applicants would need to exhaust all of their other remedies before making application for compensation to TICO.

He made inquiries of the appropriate bankruptcy authorities in Wisconsin and was told there had been no bankruptcy and nothing could be done. He continued to hope for some relief out of a bankruptcy proceeding until October 2002.

In July 2001, a TICO representative told him, in no uncertain terms, that no compensation or coverage was possible.

In October 2002, he learned that a friend of the Applicants had received compensation in respect of the same failed cruise. Her name was Ann Gitschlag and he understood she had been compensated in August 2002. He called Lori Furlan at TICO and was sent forms for completion by the Applicants. She made no other representations except to ask that the Applicant send in their claims to see what could be done.

In late December 2002, he received a letter from TICO entitled "Recall Commission Invoice". He had never seen a form of this nature from TICO. The letter indicates that the claim for each of the Applicants had been approved and that he was to refund the commission he received for arranging the trip. He cut a cheque out and sent the refunded commissions back to TICO in the amount of \$551.16 on or about December 31, 2002. This cheque was returned to him not negotiated (Exhibit 5).

Obviously happy for his clients, he called each of them upon receipt of the letter to advise that a refund from TICO was en route. Shortly thereafter, he learned that a different letter had been sent to the Applicants denying their claims.

Confused, he called Lori Furlan back at TICO and was told that the recall letter was for his eyes only and offered no further explanation.

The witness was obviously quite embarrassed at the actual state of affairs and felt that it reflected badly on his integrity.

On cross-examination, the witness stated that he was familiar with the process and rules of the compensation fund. He did not advise the Applicants of his own potential liability in the matter because he considered the file still open and was hoping for something from Wisconsin. He confirmed he had no specific contact with TICO on the matter prior to October 2002.

He stated that he had no idea of the specific details of the Anne Gitschlag claim or the basis upon which it was successful.

RESPONDENT'S CASE

The Respondent filed a book of documents marked as Exhibit 6.

Evidence for the Respondent was given by Lori Furlan. She has been a Claims Consultant with TICO for the last ten years. Her job is to send out claim forms and then process the same when they are received.

She has been personally involved in each of the Applicant's claims.

On October 15, 2002 she spoke with Mr. Vellinga and faxed out claim forms to his agency.

She stated that the recall letter dated December 20, 2002 was sent in error. She recalled a conversation she had prior to the letter being sent in which she advised Mr. Vellinga that the claims had been denied.

The reason she referred to the recall letter as for Mr. Vellinga's eyes only was out of concern for the agent to keep private the commission amounts earned by the agency.

On cross-examination the witness agreed that the recall letter dated December 20, 2002 could only be interpreted in one way. There was no dispute as to the wording of the letter.

In July 2001, airlines and cruise lines were not covered by TICO's compensation fund. This would have been known to TICO staff. They would not even be able to complete any claims forms to send out for consumers because the cruise line was not a registrant and was not covered.

An applicant must claim within six months of the event. The usual event is the bankruptcy or insolvency of the travel company. The Board makes this determination in their discretion. The legislation does not require other avenues of recovery be exhausted before filing a claim for compensation. It is required that the claim be filed within the six month period from the event that gives rise to the claim.

She stated there had been no bankruptcy of the corporate cruise line. It was simply not carrying on business.

As of July 2001, the impediments to the Applicants' claims were that cruises were not then covered and Great Lakes was not a registered Ontario business.

Subsequent legislative changes now cover airlines and cruise lines. A consumer is now covered so long as they purchase through an Ontario company. This is contained in section 50(3)(1) of the legislation.

She confirmed that these cases would be proper for compensation if they had been filed in time.

FACTS FOUND PROVEN:

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

1. The Applicants each booked a cruise vacation through Vellinga's Travel Service in Chatham, Ontario in February 2001;
2. The trip was to occur in mid-August of the same year;
3. In July 2001, it came to the attention of the Applicants that Great Lakes Cruises was in trouble;
4. The Applicants did not use a credit card to pay for their vacations so no reversal was possible through a credit card company;
5. The cruise did not occur as scheduled because the carrier failed;
6. The Applicants made all their inquiries through their travel agent and did not directly contact TICO at any time.
7. The Applicants' claims would have been suitable for compensation by the fund if they had been made within the six month period prescribed by the Regulations;
8. The Applicants' claims were not filed until October 2002.

THE ISSUE:

Do the Applicants' claims fall within the terms of Regulation 806/93 to the Act?

THE LAW:

Since it was conceded that the Applicants' claims would have been valid if made within the six-month claim period, the only relevant portion of Regulation 806/93 to the Act that is applicable to this proceeding is Section 53 which provides as follows:

53. A customer or a registrant shall make a claim for reimbursement in writing to the board of directors within six months after the event that gave rise to the claim for reimbursement.

APPLICATION OF LAW TO FACTS:

The issue in this case is whether the Applicants submitted their claims in a timely fashion and in accordance with the requirements of Section 53 of the Regulations. It was stated by the witness Lori Furlan that but for the limitation problem these two cases would have been appropriate cases for compensation from the fund.

The chronology of events in this case is very unfortunate. The Applicants had a very brief window of opportunity to file their claims for compensation and, unfortunately for them, it was missed.

It was not disputed that in August 2001 there was no access to compensation from TICO as a result of the failure of Great Lakes Cruises to provide their services. They were not a TICO registrant and offered cruises that were not eligible for the compensation fund.

In part as a result of the failure of Canada 3000, the regulations were altered and as of January 1, 2002 it was possible to claim from the fund for the failure of an end supplier cruise line. However, claims have to be made within six months of the event that gave rise to the claim. In many cases the "event" is the bankruptcy or insolvency of the end supplier.

In this case, there is no evidence of the bankruptcy of the end supplier. It appears the Board selected July 9, 2001 as the relevant date because that is when Great Lakes operations ceased. No evidence was provided to the Tribunal to establish that operations did in fact cease on that date. Therefore, the appropriate "event" is the failure of the end supplier to provide the travel services. This non-provision of contracted services is the event that gives rise to the claims of the Applicants. That occurred on August 18, 2001 when the scheduled cruise did not occur. The appropriate six-month deadline would then become February 19, 2002.

The Applicants submitted their claims on October 31, 2002. The Tribunal finds as a fact that the Applicants' claims were filed too late, some eight months later, well beyond even the later date of February 19, 2002.

The Applicants' agent submitted that the Respondent was stopped from relying on the limitation period for filing a claim because of the December 20, 2002 letter sent in error to Mr. Vellinga. Putting aside for a moment whether this Tribunal can apply the equitable concept of estoppel, the Applicants would still have to establish a promise was made by the Respondent to the Applicants and there was reliance on that promise by the Applicants. The evidence was that Mr. Vellinga, the Applicants' travel agent, received a letter which quite understandably led him to believe the claims had been approved. He called his clients with the happy news. However, as it turns out, the claim had been denied. In the meantime, there was no evidence provided that the Applicants did anything at all in reliance on this letter sent in error to Mr. Vellinga. This is not an appropriate case for promissory estoppel.

The Tribunal was also asked to apply the indoor management rule to find that the December 20, 2002 "Recall Commission Invoice" sent to Vellinga's World-Wide Travel Service served to bind TICO to the erroneous statement in that letter that the claims had been approved. It should be noted the letter was unsigned and addressed to Mr. Vellinga. The rule basically states that third parties transacting business with a corporation should be unaffected by any internal management irregularities.

The evidence of Lori Furlan was that Mr. Vellinga was told by telephone prior to receiving the December 20, 2002 letter that the claims had been denied. The Applicants were sent signed decision letters from TICO on the same date confirming the denial of the claims. The unsigned letter sent to Mr. Vellinga was sent in error according to Ms. Furlan. Indeed, Mr. Vellinga stated that he had never seen such a document in the past. The unsigned letter did not emanate from someone with "customary" or "usual" authority to the extent that the Applicants, who in fact did not receive the letter, were entitled to believe it represented the position of TICO. It would not be appropriate to find that this rule operated in respect of this case to bind TICO to the factual error contained in the letter.

DECISION:

Accordingly, pursuant to the authority vested in it by the *Travel Industry Act* and Regulations thereunder, the Tribunal upholds the decision of the Board of Trustees of the Travel Industry Council of Ontario to refuse both of the Applicants' claims.

LICENCE APPEAL TRIBUNAL

Richard C. Delaney, Member

RELEASED: September 04, 2003

File 1478.tia.McKay.Rowlands.doc

The period to appeal a decision to the Superior Court of Justice is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

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

IN THE MATTER of the REGISTRATION of
FTT TRAVEL INTERNATIONAL INC.
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: May 14, 2003

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

FTT TRAVEL INTERNATIONAL INC.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

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

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

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

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: September 4, 2003

File name: 1732.tia.FTT.Travel.Consent.Ord.

LICENCE APPEAL TRIBUNAL

BETWEEN:

FTT TRAVEL INTERNATIONAL INC.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

WAIVER AND CONSENT

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

AGREED STATEMENT OF FACTS

1. FTT Travel International Inc. ("the Registrant") was registered as a travel agent on March 5, 1999 (Registration No. 4660411/R).
2. On May 25, 2000, the Registrant filed its financial statements for the fiscal year ended November 30, 1999. The financial statements reflected a working capital shortfall of \$17,828, based on reported sales of \$1,727,173.
3. By letter dated June 8, 2000, the Registrant was advised by TICO of the working capital shortfall of \$17,828 reflected in its financial statements for the fiscal year ended November 30, 1999, and given a due date of June 30, 2000, to provide TICO with evidence of correction.
4. On July 6, 2000, TICO conducted a site inspection of the Registrant. The Inspector concluded that the Registrant did not appear to pose a risk.
5. On July 10, 2000, TICO received a letter dated June 16, 2000 from Mr Dean Jones, the Registrant's accountant, which provided evidence of correction of the Registrant's working capital shortfall as at November 30, 1999.
6. On March 6, 2001 the Registrant filed its financial statements for the fiscal year ended November 30, 2000, which were due on February 28, 2001. It appeared that working capital requirements were met as at November 30, 2000.
7. On March 11, 2002, the Registrant filed its financial statements for the fiscal year ended November 30, 2001, which were due on February 28, 2002. It appeared that working capital requirements were met as at November 30, 2001.
8. By letter dated October 21, 2002, the Registrant was requested by TICO to file its

financial statements for the fiscal year ended November 30, 2002, by February 28, 2003.

9. On February 19, 2003, the Registrant telephoned TICO to advise that it was in dispute with the previous accountant, and that the accountant would not release the books and records to the new accountant. TICO requested the Registrant to provide an explanation in writing.
10. By fax dated February 19, 2003, the Registrant advised TICO that it was encountering problems with its accountant, and requested a 30 day extension to file its financial statements for the year ended November 30, 2002.
11. By fax dated March 31, 2003, the Registrant advised TICO that it was encountering new problems, and requested a further 30 day extension.
12. By fax dated March 31, 2003, TICO advised the Registrant that it was unable to provide an extension, and could not guarantee that administrative action would not be taken against the Registrant.
13. On April 21, 2003, TICO telephoned the Registrant to inquire into the submission date of the financial statements for November 30, 2002. The Registrant stated that its financial statements would be submitted by April 30, 2003.
14. To date, the Registrant has not filed its financial statements for the fiscal year ended November 30, 2002.
15. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

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

1. the Registrar refrain from carrying out the Proposal to Revoke Registration dated May 14, 2003;
2. the Registrant's registration is to be subject to the following terms and conditions:
 - (a) The Registrant shall file complete financial statements, as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for its fiscal year ended November 30, 2002, no later than September 30, 2003;
 - (b) The Registrant shall file complete financial statements, as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time for its fiscal year ending November 30, 2003, no later than February 28, 2004; and
 - (c) The Registrant shall file complete financial statements, as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time for its fiscal year ending November 30, 2004, no later than February 28, 2005.

3. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) to (c) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.
4. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

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

DATED at Mississauga this ____ day of September, 2003

Ms Valerie Mokry
FTT Travel International Inc.
I have authority to bind the company

Mr. Michael Pepper
Registrar, *Travel Industry Act*

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

IN THE MATTER of the REGISTRATION of
1480840 ONTARIO LIMITED O/A MARLIN TRAVEL IN WAL-MART
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: June 20, 2003

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

1480840 ONTARIO LIMITED O/A MARLIN TRAVEL IN WAL-MART

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by 1480840 Ontario Limited O/A Marlin Travel In Wal-Mart the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

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

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

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: September 4, 2003

File name: 1785.tia.Marlin.Travel.Consent.Ord.

LICENCE APPEAL TRIBUNAL

BETWEEN:

1480840 ONTARIO LIMITED O/A MARLIN TRAVEL IN WAL-MART

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

WAIVER AND CONSENT

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

AGREED STATEMENT OF FACTS

1. 1480840 Ontario Limited o/a Marlin Travel in Wal-Mart ("the Registrant") was registered as a travel agent on September 21, 2001 (Registration No. 50009839/R).
2. By letter dated November 21, 2002, the Registrant was requested by TICO to file its financial statements for the fiscal year ended December 31, 2002, by March 31, 2003.
3. By facsimile dated April 2, 2003, the Registrant requested an extension to April 30, 2003 to file its financial statements for its fiscal year ended December 31, 2002.
4. By letter dated April 3, 2003, the Registrant was reminded to file its financial statements for the fiscal year ended December 31, 2002, which were due by March 31, 2003.
5. By letter dated April 22, 2003, the Registrant was given a final notice to file its financial statements for the year ended December 31, 2002, no later than April 30, 2003. The letter explained that if the Registrant failed to submit its financial statements, the Registrar would have no alternative but initiate administrative action, including a proposal to revoke the Registrant's registration.
6. By facsimile date May 6, 2003, the Registrant's accountant informed TICO that the accountant was working on the Review Engagement for the Registrant.
7. To date, the Registrant has not filed its financial statements for the fiscal year ended December 31, 2002.
8. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

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

1. the Registrar refrain from carrying out the Proposal to Revoke Registration dated June 20, 2003;
2. the Registrant's registration is to be subject to the following terms and conditions:
 - (a) The Registrant shall file complete financial statements, as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for its fiscal year ended December 31, 2002, no later than September 30, 2003;
 - (b) The Registrant shall file complete financial statements, as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time for its fiscal year ending December 31, 2003, no later than March 31, 2004; and
 - (c) The Registrant shall file complete financial statements, as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time for its fiscal year ending December 31, 2004, no later than March 31, 2005;
3. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) to (c) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.
4. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

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

DATED at Mississauga this ____ day of September, 2003

Ms Cheryl Weatherby
1480840 Ontario Limited o/a Marlin Travel
in Wal-Mart
I have authority to bind the company

Mr. Michael Pepper
Registrar, *Travel Industry Act*

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



TAHER SHAATH

APPEAL FROM A DECISION OF THE TRAVEL INDUSTRY
COUNCIL OF ONTARIO DENYING A CLAIM FOR
COMPENSATION UNDER THE TRAVEL INDUSTRY ACT

TRIBUNAL: DOUGLAS MACKINTOSH, Vice-Chair

APPEARANCES:

GLENN KOHUT, Agent, representing the Applicant

TREVOR BRANION, Counsel representing the
Travel Industry Council of Ontario

DATE OF
HEARING August 14, 2003

Ottawa

REASON FOR DECISION AND ORDER

This is an appeal by the Applicant, Dr. Taher Shaath, to the Licence Appeal Tribunal from a decision dated 10 December 2002 by the Board of the Travel Industry Council of Ontario denying a claim for compensation under the *Travel Industry Act* (the Act).

THE ISSUE

The issue is whether Dr. Shaath is entitled to be reimbursed from the Compensation Fund after claiming to have paid a travel agent for airline services he did not receive.

THE FACTS

The Tribunal heard sworn testimony from Dr. Taher Shaath and from the Travel Agent Louis Farah (now no longer registered). Dr. Shaath indicated that he received his doctorate in business administration.

In June 2002 he tried to arrange a business trip through Louis Farah for travel by air to Aman. He had been dealing with Louis Farah for 22 years.

The practice in the past had been that Louis Farah's daughter would deliver the tickets and Dr. Shaath would pay with a cheque.

But this time, 28 June 2002, Louis Farah asked for cash indicating that he was having problems with his bank with not enough cash flow. So Dr. Shaath changed the cheque he had written made payable to Farah Travel for \$1,500 to read "cash" instead.

This fact is substantiated in the documents provided by Dr. Shaath's with a copy of the cheque and his bank statement showing the cash was withdrawn from his account that day.

Dr. Shaath claims that he also paid Louis Farah another \$1,500 cash for a ticket for his wife, Fatima. But on the balance of probability I do not accept this for a number of reasons. First, there is no documentation showing another withdrawal of money from Dr. Shaath's bank in that period. The flight schedule provided by Louis Farah did not indicate two passengers. Yet all of Dr. Shaath's other records were detailed and consistent with his qualifications.

There remains the undated hand-written note signed by Louis Farah indicating that two payments of \$1,500 had been received from Taher Shaath. Louis Farah testified that he did not provide a receipt at the time because he did not know what the price of the tickets would be. He remembered that Dr. Shaath was to be travelling when airlines were heavily booked. But given the financial troubles Louis Farah was having, the lapse of time and the shoddy undated note he provided the Tribunal does not accept his evidence.

Referring to the flight schedule filed from Farah Travel, their address and telephone number is crossed out. It sets out flights starting July 11 going from Montreal to London to Aman to Abu Dhabi and return. The London to Aman leg was on a wait list. There was no year and no one's name was on the form.

Dr. Shaath cancelled this booking for personal reasons, as he did not wish to be on the wait list.

Shortly afterwards, Dr. Shaath was shocked to find the Farah Travel's shop closed. He tried unsuccessfully to find Louis Farah through Farah employees and exhausted any way of getting the tickets from Farah.

This situation obviously did not improve because on 21 August 2002 Farah Travel voluntarily terminated its registration as a travel agent.

So Dr. Shaath turned to Amro Travel to obtain the flights he wanted for himself departing on 19 July 2002 and for his wife later, all well documented. Amro Travel invoiced Dr. Shaath \$1,650 for his flight from Ottawa to London to Abu Dhabi and return. Fatima was invoiced separately for her flights.

THE LAW

Ontario Regulation 806/93 enacted under the *Travel Industry Act*

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

(a) the customer paid for the travel services and the payment or any part of it was received by a registered travel agent;

Section 50 (3) A customer is not entitled to be reimbursed for the following or in the following circumstances:

4. For a payment, including a non-refundable payment, for travel services that were available but not received if the failure to receive the travel services is due to the customer's or traveller's action or failure to act.

Section 54 (1) The claimant shall provide such evidence to the Board of Directors as it may require to prove the claim.

APPLICATION OF THE LAW TO THE FACTS

Although the procedure was unprofessional, it is clear that Dr. Shaath paid Farah Travel with a \$1,500 cheque made out to cash for travel services for himself, which he did not receive.

The Tribunal finds the cause of the failure to receive these services cannot be attributed to Dr. Shaath's cancellation of the flights with the wait list on the leg to Aman. Rather the cause is the disappearance and obvious insolvency of Louis Farah forcing Dr. Shaath to book his trip through another travel agent.

But with respect to Dr. Shaath's claim for a second payment of \$1,500 cash to Louis Farah, the Tribunal is unable to accept this for the reasons given.

DIRECTION AND ORDER

Accordingly by virtue of subsection 6 (5) of the *Travel Industry Act*, the Tribunal directs the Travel Industry Council of Ontario to pay Dr. Taher Shaath \$1,500 from the Compensation Fund.

LICENCE APPEAL TRIBUNAL

Douglas Mackintosh, Vice-Chair

RELEASED: September 16, 2003

File 1471.tia.Taher.Shaath.Final1.doc

The period to appeal a decision to the Superior Court of Justice is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



1311503 ONTARIO INC. O/A TRAVEL BUREAU, ET AL.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
TRAVEL INDUSTRY ACT, R.S.O. 1990, CHAPTER T.17 AS
AMENDED

TO REVOKE REGISTRATION

TRIBUNAL: CARL F. DOMBEK, Chair
Presiding

APPEARANCES: MARIA REIS, Agent, representing 1311503 Ontario Inc. o/a Travel
Bureau, et al. (the "Applicant")

TREVOR BRANION, Counsel, representing the Registrar, *Travel
Industry Act* (the "Respondent")

DATE OF
HEARING: September 11, 2003

Toronto

ORDER

WHEREAS the Registrar under the *Travel Industry Act* (the "Respondent") issued a Proposal dated May 30, 2003 to revoke the registration of 1311503 Ontario Inc. o/a Travel Bureau, et al. (the "Applicant") under the *Travel Industry Act*;

AND WHEREAS the Applicant has delivered to the Registrar and the Tribunal a notice in writing appealing the Proposal and requiring a hearing;

AND WHEREAS the Tribunal, by written notice dated July 3, 2003 addressed to the Applicant and the Respondent, appointed September 11, 2003 as the date for the hearing of the appeal;

AND WHEREAS when the hearing of the appeal commenced before the Tribunal on September 11, 2003, the Applicant's Agent moved that the hearing be adjourned to another date;

AND WHEREAS Counsel for the Respondent consented to the hearing being adjourned to another date;

NOW THEREFORE, this Tribunal Orders that:

1. The hearing is adjourned until Friday, December 5, 2003, at 9:30 a.m. at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, upon the following conditions:
 - a) the Applicant agrees not to act or hold itself out as a travel agent until a decision has been rendered by this Tribunal.
 - b) the Applicant shall hire a lawyer to represent it at the hearing and advise the Respondent and the Tribunal of the name, address, fax and telephone numbers of the lawyer, and the retained lawyer must be available for the new hearing date.
 - c) the hearing is *peremptory* on all parties (i.e. no further delays or adjournments).
2. In the event that the matter is resolved between the Parties, the Applicant shall notify the Tribunal, in writing, immediately.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek, Chair
Presiding

RELEASED: September 19, 2003

FILENAME: 1742.tia.1311503 Ontario Inc.order.doc



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

IN THE MATTER of the REGISTRATION of
TRANSWORLD TRAVEL & TOURS INC.
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: June 23, 2003

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

TRANSWORLD TRAVEL & TOURS INC.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

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

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

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

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: September 26, 2003

File name: 1806.tia.Transworld.Consent.Ord.

SCHEDULE "A"

BETWEEN:

TRANSWORLD TRAVEL & TOURS INC.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

WAIVER AND CONSENT

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

AGREED STATEMENT OF FACTS

1. Transworld Travel & Tours Inc. ("the Registrant") was registered as a travel agent (Registration No. 4290904/R) on July 7, 1994.
2. On December 3, 1997, TICO issued a Proposal to Revoke registration for non filing of financial statements for the fiscal year ended May 31, 1997, which were due August 31, 1997.
3. On January 6, 1998, the Registrant filed its financial statements for the fiscal year ended May 31, 1997, in addition to six month interims to November 30, 1997. It appeared that working capital requirements were met as at November 30, 1997.
4. On January 28, 1998, TICO withdrew the Proposal to Revoke the registration of the Registrant.
5. In March 1998, a change in control occurred, and the Registrant's year end was changed to December 31.
6. On September 23, 1999, the Registrant was issued a Proposal to Revoke registration by TICO, for non filing of its December 31, 1998 financial statements which were due March 31, 1999.
7. On September 28, 1999, the Registrant filed its financial statements for the fiscal year ended December 31, 1998, which were due March 31, 1999. The statements reflected a working capital shortfall of \$2,006, based on reported sales of \$287,168.
8. By letter dated September 29, 1999, the Registrant was advised by TICO, of its working capital shortfall of \$2,006 reflected in its December 1998 financial statements and given a due date of October 12, 1999, to provide evidence of correction.
9. On October 1, 1999, TICO received evidence of an injection of \$2,006, which corrected the Registrants working capital shortfall reflected in its December 1998 financial statements.
10. On January 11, 2000, TICO withdrew the Proposal to Revoke the registration of the Registrant.
11. On March 27, 2000, the Registrant filed its financial statements for the fiscal year ended December 31, 1999, which were due March 31, 2000. It appeared that working capital requirements were met as at December 31, 1999.

12. On May 15, 2001, the Registrant filed its financial statements for the fiscal year ended December 31, 2000, which were due by March 31, 2001. It appeared that working capital requirements were met as at December 31, 2000.
13. On May 1, 2002, the Registrant filed its financial statements for the fiscal year ended December 31, 2001, which were due March 31, 2002. It appeared that working capital requirements were met as at December 31, 2001.
14. By letter dated November 31, 2002, the Registrant was requested by TICO to file its financial statements for the fiscal year ending December 31, 2002, by March 31, 2003.
15. By letter dated April 3, 2003, the Registrant was issued a reminder to file its December 31, 2002 financial statements, which were due March 31, 2003, on or before April 21, 2003.
16. By letter dated April 10, 2003, Padgett Business Services requested an extension to May 9, 2003 to complete the financial statements.
17. By letter dated April 22, 2003, the Registrant was issued a final due date of April 30, 2003, to file its December 31, 2002 financial statements which were due by March 31, 2003, failing which a Proposal to Revoke registration would be issued.
18. By June 23, 2003, the Registrant had failed to file its financial statements for the fiscal year ended December 31, 2002, which were due March 31, 2003. Accordingly, the Registrar issued the Proposal to Revoke the Registrant's registration.
19. On June 30, 2003, the Registrant filed its financial statements for the fiscal year ended December 31, 2002, which were due March 31, 2003.
20. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

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

1. the Registrar refrain from carrying out the Proposal to Revoke Registration dated June 23, 2003;
2. the Registrant's registration is to be subject to the following terms and conditions:
 - (a) The Registrant shall file complete financial statements, as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for its fiscal year ending December 31, 2003, no later than March 31, 2004;
 - (b) The Registrant shall file complete financial statements, as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time for its fiscal year ending December 31, 2004, no later than March 31, 2005; and
 - (c) If the above-noted financial statements as filed reflect a working capital shortfall or are otherwise deficient, the Registrant will have 30 days from the date of notice of the deficiency to fully and completely address the deficiency and produce proof of such correction to the Registrar. Notice of the deficiency, if any, shall be sent by registered mail to the Registrant.
3. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) to (c) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.
4. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

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

DATED at Mississauga this ____ day of September, 2003

Mr. Tarek Nour
Transworld Travel & Tours Inc.
I have authority to bind the company

Mr. Michael Pepper
Registrar, *Travel Industry Act*



ELHADRA INC. & NARESH ABROL CONSULTING LTD. O/A DIAMOND TRAVEL

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

IN THE MATTER of the REGISTRATION of
ELHADRA INC. & NARESH ABROL CONSULTING LTD. O/A DIAMOND
TRAVEL
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: June 23, 2003

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

ELHADRA INC. & NARESH ABROL CONSULTING LTD. O/A DIAMOND
TRAVEL

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

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

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

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

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: September 25, 2003

SCHEDULE "A"

BETWEEN:

ELHADRA INC. & NARESH ABROL CONSULTING LTD. O/A DIAMOND TRAVEL

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

WAIVER AND CONSENT

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

AGREED STATEMENT OF FACTS

1. Elhadra Inc. & Naresh Abrol Consulting Ltd. o/a Diamond Travel ("the Registrant") was registered as a travel agent (Registration No. 4671624/R) on June 4, 1999.
2. The Registrant was required to file its financial statements for the fiscal year ended June 30, 2000, by September 30, 2000.
3. On November 1, 2000, TICO conducted a site inspection of the Registrant. The Registrant provided the Inspector with its June 30, 2000 financial statements during the visit, which were unacceptable in that the Review Engagement was not signed by a Licensed Public Accountant. The Inspector advised the Registrant that the financial statements were to be prepared by a Licensed Public Accountant, and submitted to TICO by November 30, 2000.
4. The Registrant changed its fiscal year end to December 31st and provided its December 31, 2000 financial statements on January 25, 2001. The statements, as filed, were not acceptable, as the accountant who signed the Review Engagement Report was not licensed at the time.
5. On February 27, 2001, TICO conducted a site inspection to follow up on the unacceptable financial statements submitted by the Registrant. During that inspection it was revealed that the accountant was in the process of obtaining his license.
6. The Registrant's December 31, 2000 financial statements revealed a working capital shortfall of \$2,185, which was subsequently corrected by a shareholder injection on February 15, 2001.
7. On June 17, 2002, the Registrant filed its December 31, 2001 financial statements. These financial statements were due by March 31, 2002. The financial statements revealed a working capital shortfall of \$3,905.00. The Registrant subsequently addressed the working capital shortfall and provided evidence of correction to TICO.
8. By letter dated November 21, 2002, the Registrant was requested by TICO to file its financial statements for the fiscal year ended December 31, 2002, by March 31, 2003.
9. By letter dated April 3, 2003, the Registrant was reminder to file its financial statements for December 31, 2002, which were due by March 31, 2003, on or before April 21, 2003.
10. By letter dated April 22, 2003, the Registrant was issued a final due date of April 30, 2003, by TICO, failing which a Proposal to Revoke registration would be issued.
11. On May 5, 2003, the Registrant's accountant telephoned to request additional time due to the complexity of the agency. TICO asked the accountant to send a letter with the estimated submission date. The accountant was advised by TICO that if the financial statements were not filed, TICO would

take administrative action, including a Proposal to Revoke the registration of the Registrant.

12. By June 23, 2003, the Registrant had not submitted its December 31, 2002 financial statements which were due March 31, 2003. Accordingly, the Registrar issued a Proposal to Revoke the Registrant's Registration.
13. On July 28, 2003, the Registrant filed its financial statements for the fiscal year ended December 31, 2002, which were due March 31, 2003.
14. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

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

1. the Registrar refrain from carrying out the Proposal to Revoke Registration dated June 23, 2003;
2. the Registrant's registration is to be subject to the following terms and conditions:
 - (a) The Registrant shall file complete financial statements, as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for its fiscal year ending December 31, 2003, no later than March 31, 2004;
 - (b) The Registrant shall file complete financial statements, as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time for its fiscal year ending December 31, 2004, no later than March 31, 2005; and
 - (c) If the above-noted financial statements as filed reflect a working capital shortfall or are otherwise deficient, the Registrant will have 30 days from the date of notice of the deficiency to fully and completely address the deficiency and produce proof of such correction to the Registrar. Notice of the deficiency, if any, shall be sent by registered mail to the Registrant.
3. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) to (c) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.
4. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

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

DATED at Mississauga this ____ day of September, 2003

Mr. Naresh Abrol
Elhadra inc. & Naresh Abrol
Consulting Ltd. o/a Diamond Travel
I have authority to bind the company

Mr. Michael Pepper
Registrar, *Travel Industry Act*

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



SUNWIN TRAVELS AND TOURS INC.

IN THE MATTER OF

AN APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *TRAVEL INDUSTRY ACT*, R.S.O. 1990,
CHAPTER T.19 AS AMENDED

AND IN THE MATTER OF

A MOTION TO DISMISS THE APPEAL OF
SUNWIN TRAVELS AND TOURS INC.

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: There was no appearance on behalf of the Applicant

TREVOR BRANION, Counsel, appeared for the Registrar, *Travel Industry Act* (the "Registrar")

DATE OF

HEARING: October 20, 2003

by teleconference

REASONS FOR RULING

By written Notice of Proposal (the "Proposal") dated May 23, 2003 the Registrar, under the *Travel Industry Act* (the "Registrar") proposed to revoke the registration of Sunwin Travels and Tours Inc. (the "Applicant") as travel agent and travel wholesaler. The Registrar's Proposal is based upon the allegation that the Applicant, despite demands from the Registrar, has failed and/or refused to file its financial statements for the fiscal year ended December 31, 2002. The Registrar accordingly contended that the Applicant was disentitled to continued registration under the *Travel Industry Act* (the "Act") and proposed revocation of the Applicant's registration.

Pursuant to the service of the Proposal the Applicant notified the Tribunal that it required a hearing before the Tribunal in order to appeal the Proposal. Subsequent to the Applicant's filing of its appeal with the Tribunal, the Registrar advised the Tribunal that he required a pre-hearing and upon the consent of the Applicant an electronic pre-hearing took place on the 12th day of August 2003.

The Applicant was represented at that pre-hearing by its President Sanjula Magesvaran and the Registrar was represented by its Counsel, Trevor Branion. At the conclusion of the pre-hearing, the hearing was by consent of the Applicant's President and the Registrar's Counsel set down for hearing before the Tribunal on October 31, 2003 and an Order to that effect was released by the Tribunal on the 27th day of August 2003.

By Notice of Motion dated October 1, 2003, the Registrar brought a motion to this Tribunal for:

An order dismissing the proceedings, which are set for hearing to be heard on October 31, 2003 at 9:30 a.m. at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, on the basis that the application is frivolous, vexatious, or commenced in bad faith.

The motion supported by affidavit evidence alleged that:

- the Registrar had been advised on August 25, 2003 that two cheques, written on the Applicant's trust account in favour of a travel wholesaler in the amounts of \$1,616.00 and \$18,211.49 and dated July 25, 2003 and August 15, 2003, respectively had been returned unpaid and marked NSF.
- during the period August 28, 2003 through October 1, 2003 the Registrar had tried to communicate with the Applicant by various means but had not been successful in doing so; and that,
- telephone messages left on the Applicant's voicemail had received no response, an attempt to conduct an inspection of the Applicant was not successful as the premises were locked and unattended, and attempts to transmit facsimile messages to the Applicant were not successful as both the telephone and fax number of the Applicant were out of service.

When the electronic hearing of the motion was heard on October 20, 2003, there was no attendance by telephone of the Applicant's President although Counsel for the Registrar was in electronic communication with the Tribunal. When the Tribunal attempted to communicate with the Applicant's President at her residential telephone number there was no answer.

Unable to communicate with the Applicant at its business address, as it was no longer occupied by the Applicant and also unable to communicate with the Applicant's President, the Tribunal nevertheless proceeded to hear the Registrar's motion.

The Tribunal noted that the motion itself was not served upon the Applicant at its business address and when the motion was attempted to be served on the Applicant's President at the latter's residence, it was not served on the President but on one "Nirnala" whose function and position with the Applicant were not revealed.

The Tribunal also noted that when the Tribunal attempted to serve the Notice of Hearing of the motion for October 20, 2003, the attempted service was made upon the Applicant's President at her residence. The individual who was served was once again one "Nirnala". Nirnala was not shown to be an employee of the Applicant or in any way associated with the Applicant nor was she shown to be known to the Applicant's President or a relation of the latter.

The Registrar's Counsel was not able to offer any information or clarification to the Tribunal in order to satisfy the Tribunal that service of the Notice of Motion and service of the Notice of Hearing of the motion had been effectively delivered to the Applicant or its President.

In the absence of clear and convincing evidence that there has been proper notice given to the Applicant or its President, the Tribunal is of the opinion that the motion proceedings should not continue until proper notice has been given to and received by the Applicant or its President. The facts deposed to in the affidavit in support of the Respondent's motion constitute a totally different and new cause of action to the cause of action contained in the Notice of Proposal and the Tribunal is far from satisfied that the new cause of action has effectively been brought to the Applicant's notice. To allow the Respondent's motion in the absence of satisfactory and convincing evidence of service would be a breach of natural justice resulting in serious prejudice to the Applicant. Upon satisfactory and convincing proof of service of the motion upon the Applicant, the Registrar, if he wishes to persist with the motion, may be able to move the Motion for Dismissal as a preliminary matter to be spoken to at the commencement of the hearing on October 31, 2003.

ORDER:

Accordingly, the Respondent's Motion to Dismiss is hereby refused.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: October 24, 2003

FILENAME: 1757.tia.Sunwin Travels and Tours Inc.Ruling.doc

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice or Divisional Court is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.



MARIA AGUAS AND LYDIA VALERIO O/A
FLIGHT ZONE TRAVEL AND TOURS

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

IN THE MATTER of the REGISTRATION of
MARIA AGUAS AND LYDIA VALERIO O/A
FLIGHT ZONE TRAVEL AND TOURS
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: June 20, 2003

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

MARIA AGUAS AND LYDIA VALERIO O/A
FLIGHT ZONE TRAVEL AND TOURS

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Applicant

Respondent

CONSENT ORDER

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

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

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

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: October 14, 2003

LICENCE APPEAL TRIBUNAL

BETWEEN:

MARIA AGUAS AND LYDIA VALERIO O/A FLIGHT ZONE TRAVEL AND TOURS

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

WAIVER AND CONSENT

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

AGREED STATEMENT OF FACTS

1. Maria Aguas and Lydia Valerio o/a Flight Zone Travel and Torus ("the Registrant") was registered as a travel agent on December 31, 2001 (Registration No. 50010088/R).
2. By letter dated November 21, 2002, the Registrant was requested by TICO to file its financial statements for the fiscal year ended December 31, 2002, by March 31, 2003.
3. By letter dated April 3, 2003, the Registrant was reminded to file its financial statements for the fiscal year ended December 31, 2002, which were due by March 31, 2003.
4. By fax dated April 16, 2003, the Registrant asked TICO for an extension to file its December 31, 2002 financial statements.
5. By facsimile dated April 17, 2003 TICO advised the Registrant that it could not provide an extension to file the financial statements.
6. By letter dated May 2, 2003, TICO again advised the Registrant to file its financial statements and provided a May 16, 2003 deadline.
7. On May 16, 2003, the Registrant filed a sales report, which was unacceptable to TICO.
8. On July 8, 2003, the Registrant filed a balance sheet and profit and loss statement, which was unacceptable to TICO.
9. To date, the Registrant has not filed acceptable financial statements for the fiscal year ended December 31, 2002.

10. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

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

1. the Registrar refrain from carrying out the Proposal to Revoke Registration dated June 20, 2003;
2. the Registrant's registration is to be subject to the following terms and conditions:
 - (a) The Registrant shall file complete financial statements, as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for its fiscal year ended December 31, 2002, no later than October 31, 2003;
 - (b) The Registrant shall file complete financial statements, as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time for its fiscal year ending December 31, 2003, no later than March 31, 2004; and
 - (c) The Registrant shall file complete financial statements, as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time for its fiscal year ending December 31, 2004, no later than March 31, 2005.
3. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) to (c) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.
4. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

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

DATED at Mississauga this ____ day of October, 2003

Ms Maria Aguas

Mr. Michael Pepper

Maria Aguas and Lydia Valerio
o/a Flight Zone Travel and Tours
I have authority to bind the company

Registrar, *Travel Industry Act*

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



PREHEARING

FABIAN QUIROGA

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

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

FABIAN QUIROGA, representing himself
TREVOR BRANION, Counsel, representing the Travel Industry
Council of Ontario

DATE OF

PREHEARING: October 1, 2003

by teleconference

ORDER

Following a prehearing before this Tribunal by way of teleconference at which prehearing Fabian Quiroga (the "Applicant") represented himself, and Trevor Branion, Counsel, represented the Board of Directors of the Travel Industry Compensation Fund (the "Fund") under the *Travel Industry Act*;

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Tuesday, November 4, 2003 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto, Ontario;

- 1) The hearing scheduled for November 4, 2003 is, by consent of the Parties, adjourned to November 5, 2003 on which date the hearing shall commence at 9:30 a.m. at the Tribunal's above Chambers;

- 2) The Parties to the hearing are the Fund and the Applicant;
- 3) No facts, evidence or issues were agreed upon by the Parties;
- 4) There were no issues that were settled by the Parties;
- 5) The Applicant intends to call as a witness to testify on his behalf one Jani, an ex employee of Amazonas Travel Agency Inc. who presently is employed by CWT Travel Best of Concord, Ontario with telephone number (905) 660-7005 ext. 245;
- 6) The Applicant also intends to call as a witness to testify on his behalf, his wife, Silvana Quiroga;
- 7) The Board intends to call as its witnesses to testify on its behalf Lori Furlan and Tina Shewchuk;
- 8) If the Applicant intends to retain an interpreter for the hearing, the cost of and incidental to the interpreter's attendance at the hearing shall be for the sole account of the Applicant;
- 9) Any interpreter retained by the Applicant shall not be a relative, friend or associate of the Applicant;
- 10) The Parties shall fully comply with the requirements of disclosure of documents or things as set forth in Rule 6.3 of the Rules of Practice of the Tribunal.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: October 7, 2003

File name: 1838.ticf.Quiroga.prehrg

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



PRE-HEARING

ORLEANS INTERNATIONAL TRAVEL SERVICES INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
TRAVEL INDUSTRY ACT, R.S.O. 1990, CHAPTER T.19 AS
AMENDED

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair
Presiding

APPEARANCES: AKHTER P. MUFTI, Agent, representing Orleans International Travel
Services Inc.

TREVOR BRANION, Counsel, representing the Registrar, *Travel
Industry Act*

DATE OF
PRE-HEARING: October 15, 2003 *by teleconference*

ORDER

FOLLOWING attendances by teleconference on October 15, 2003 at a pre-hearing before the Licence Appeal Tribunal (the "Tribunal") of Akhter P. Mufti, Agent, on behalf of Orleans International Travel Services Inc. (the "Applicant") and Trevor Branion, Counsel, representing the Registrar, *Travel Industry Act* (the "Registrar");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 1:00 p.m. on Tuesday, November 18, 2003, at Gillespie Reporting Services, 130 Slater Street, Suite 200, Ottawa Ontario:

1. The Parties to the hearing are the Applicant and the Registrar.

2. The Parties confirmed that there was no resolution of the issues in this matter.
3. The Applicant conceded the correctness of the allegations and facts contained in the Proposal to Revoke dated July 25, 2003 under the heading "Particulars" and enumerated in paragraphs 1 through 13 and agreed that all such allegations and facts shall not be an issue at the hearing of this matter.
4. The Agent for the Applicant and Counsel for the Registrar agreed that they shall continue to be in communication with each other with a view to arriving at a mutually acceptable resolution of this matter. Counsel for the Registrar shall advise the Tribunal's Registrar by no later than 14 days prior to the hearing whether this matter has been resolved.
5. Notwithstanding what is stated in paragraph 4 above both the Applicant and the Registrar shall fully and timeously comply with Rule 6 of the Tribunal's Rules of Practice.
6. The Applicant and the Registrar shall, not less than 14 days before the hearing, provide each other with the names of all witnesses they intend to call to testify on their behalf at the hearing.
7. Both the Applicant and the Registrar shall not less than 10 days before the hearing serve on the other and file with the Tribunal, a Book of Documents upon which each intends to refer to or rely upon at the hearing.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair
Presiding

RELEASED: October 22, 2003

FILENAME: 1897.tia.Orleans International Travel.pre.doc



1311503 ONTARIO INC. O/A TRAVEL BUREAU

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

IN THE MATTER of the REGISTRATION of
1311503 ONTARIO INC. O/A TRAVEL BUREAU
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: May 30, 2003

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

1311503 ONTARIO INC. O/A TRAVEL BUREAU

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by 1311503 Ontario Inc. o/a Travel Bureau, the Applicant, and the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

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

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

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

SCHEDULE 'A'

BETWEEN:

1311503 ONTARIO INC. O/A TRAVEL BUREAU, ET AL

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

WAIVER AND CONSENT

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

AGREED STATEMENT OF FACTS

1. 1311503 Ontario Inc. o/a Travel Bureau, et al ("the Registrant") was registered as a travel agent (Registration No. 4631644/R) on October 21, 1998.
2. By letter dated July 20, 2001, the Registrant was requested to file financial statements for its year ended August 31, 2001 by November 30, 2001.
3. On November 1, 2001, the Registrant telephoned TICO and advised that there had been an attempted break in at its business premises, on the evening of October 31, 2001. The police were called to investigate. The Registrant also stated that it had changed its year end from August 31 to December 31. The Registrant was advised by TICO that it must have the approval of Revenue Canada to change its year end and to fax the approval to TICO.
4. By fax dated November 28, 2001, the Registrant advised TICO that it had changed its year end from August 31, to December 31.
5. By letter dated December 5, 2001, TICO advised the Registrant that it required a copy of Revenue Canada's approval for the year end change from August 31, to December 31.
6. On December 18, 2001, the Registrant was issued a reminder letter by TICO to file its financial statements for August 31, 2001, which were due by November 30, 2001, no later than December 31, 2001.
7. By fax dated December 18, 2001, the Registrant advised TICO that it would retrieve a copy of Revenue Canada's approval of its year end change from August 31, to December 31, and forward a copy to TICO.
8. On January 11, 2002, the Registrant was issued a final due date of January 21, 2002 by TICO to file its financial statements for the fiscal year ended August 31, 2001, which were due by November 30, 2001. The registrant was informed that failure to do so would result in a Proposal to Revoke its registration.
9. On February 5, 2002, the Registrant faxed TICO a copy of Revenue Canada's approval for the year end change from August 31 to December 31. The letter from Revenue Canada was dated November 28, 2001.
10. On February 5, 2002, TICO requested the Registrant to file its financial statements for the year ended

December 31, 2001 by March 31, 2002.

11. On or about February 24, 2002, the Registrant informed TICO of a break-in at their premises and the police had been called to investigate. TICO also received a letter from legal counsel for Handa Travel Bureau indicating that there was a dispute between over the location of the business premises with the Registrant. .
12. On March 14, 2002, the Registrant met with TICO, wherein it was discussed that the Registrant could not access its books and records at 75 Nipissing Road, Milton. The Registrant was in dispute over the business location. The Registrant advised that there were no outstanding consumer bookings and the Registrant was not taking any new bookings. The Registrant indicated that they do not wish to terminate their registration at this time. The Registrant was advised by TICO that in order for the registration to remain active, the Registrant must submit the December 31, 2001 financial statements by March 31, 2002 and advise TICO of their address for service. The discussion was confirmed in writing by TICO to the Registrant on March 14, 2002.
13. By fax dated March 29, 2002, the Registrant's accountant advised that all the records of the company were not available for review.
14. On April 3, 2002, the Registrant's accountant filed financial statements for the previous fiscal year ended August 31, 2001, which TICO was unable to analyze, due to a qualified Review Engagement report.
15. On April 4, 2002, the Registrant's accountant filed financial statements for the Registrant for the fiscal year ended December 31, 2001, which were due March 31, 2002 under a qualified Review Engagement Report. The statements revealed a working capital shortfall of \$2,205.
16. By letter dated April 22, 2002 the Registrant was advised by TICO that the financial statements submitted for the year ended December 31, 2001, under a qualified Review Engagement were acceptable given the Registrant's circumstances and that the company was dormant. In addition TICO was holding \$30,000 in security in lieu of working capital.
17. In July 2002, TICO returned \$20,000 of the security which it held to the Registrant.
18. By letter dated November 21, 2002, TICO requested that the Registrant file its financial statements for the year ended December 31, 2002 by March 31, 2003.
19. On February 19, 2003, the Registrant telephoned TICO and advised that its accountant was having difficulty given the circumstances and continued to prepare the year end financial statements.
20. By letter dated April 3, 2003, the Registrant was issued a reminder letter to file its financial statements for the fiscal year ended December 31, 2002, which were due by March 31, 2003 no later than April 21, 2003.
21. By letter dated April 22, 2003 the Registrar issued a final due date of April 30, 2003 to the Registrant to file its financial statements for the year ended December 31, 2002.
22. On May 30, 2003, the Registrar issued a Proposal to Revoke registration to the Registrant for failure to file its financial statements for the year ended December 31, 2002.
23. On November 18, 2003, the Registrant filed financial statements for the year ended December 31, 2002 with a qualified Review Engagement Report. The financial statements reflected sales of Nil for the year and a working capital deficiency of \$11,076.
24. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

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

1. The Registrar refrain from carrying out the Proposal to Revoke Registration dated May 30, 2003;

2. The Registrant's registration is to be subject to the following terms and conditions:
- (a) The Registrant shall file unqualified financial statements, as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time for its fiscal year ending December 31, 2003 no later than March 31, 2004;
 - (b) If the above-noted financial statements as filed are incomplete or reflect a working capital deficiency, the Registrant will have 15 days from the date of notice of the deficiency to fully and completely address the deficiency and produce proof of such correction to the Registrar. Notice of the deficiency, if any, shall be sent by registered mail to the Registrant.
 - (c) The Registrant shall file financial statements, as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time for its fiscal year ending December 31, 2004, no later than March 31, 2005;
 - (d) If the above-noted financial statements as filed are incomplete or reflect a working capital deficiency, the Registrant will have 15 days from the date of notice of the deficiency to fully and completely address the deficiency and produce proof of such correction to the Registrar. Notice of the deficiency, if any, shall be sent by registered mail to the Registrant.
 - (e) The Registrant shall notify the Registrar in writing no later than January 31, 2004 that it is open to the public for business, that it is carrying on business as a travel agent and the location of its business operation.
3. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a), (b), (c) (d) or (e), the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.
4. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

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

DATED at Mississauga this ____ day of November, 2003

Mr. Jan Reis
1311503 Ontario Inc. o/a Travel Bureau, et al
I have authority to bind the company

Mr. Michael Pepper
Registrar, *Travel Industry Act*

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



SUNWIN TRAVELS AND TOURS INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *TRAVEL INDUSTRY ACT*, R.S.O. 1990, CHAPTER T.19, AS
AMENDED

TO REVOKE REGISTRATION

TRIBUNAL: G. MAURICE POWER, Member

APPEARANCES: SANJULA MAGESVARAN, Agent, representing the Applicant

TREVOR BRANION, Counsel for the Registrar, *Travel Industry Act*

DATE OF
HEARING: October 31, 2003 Toronto

ORDER

At the time set for the commencement of the hearing, only the Counsel for the Respondent and his witness for the hearing, Rachel Palozzi, were present.

Mr. Branion advised the Tribunal that he had been unsuccessful in his attempt to serve a Notice of Further and Other Particulars on the Applicant by courier. The Tribunal ruled that as Mr. Branion had not been able to effect service upon the Applicant, he could not proceed with a renewal of his Motion to Dismiss the appeal in this matter, as provided for in the Order of Tribunal Vice-Chair Derek Israel, made on Mr. Branion's original Motion to Dismiss. The Tribunal also found that service of the Tribunal's Notice of Hearing had been made in accordance with the Tribunal Rules, so the hearing could proceed. Before proceeding, however, the Tribunal attempted to contact Sanjula Magesvaran, a principal of the Applicant who had represented the Applicant at the pre-hearing in this appeal. As Ms. Magesvaran, when contacted by telephone, indicated a desire to make representations on behalf of the Applicant by telephone, the Tribunal held an electronic hearing in which she participated.

Ms. Magesvaran indicated that she had been traveling outside the country due to an illness and death in the family, and had just returned to Canada. She had forgotten the date of the hearing. She initially wanted the hearing adjourned so that she could participate in person.

The Tribunal offered to hold the hearing until the afternoon to permit her to attend, but she indicated that this was not practical for her, and that the hearing would have to be adjourned to another date.

As she was also scheduled for impending surgery herself, a substantial adjournment would be required. She was advised that Mr. Branion would seek costs of such adjournment, which the Tribunal would be inclined to grant in an amount of approximately \$400 since Mr. Branion had attended and brought a witness. She then consented on behalf of the Applicant to a dismissal of the appeal. Mr. Branion requested costs, but the Tribunal decided that in view of the co-operation of Ms. Magesvaran in avoiding a further hearing in this matter, and her personal difficulties in connection with the appeal as set out in this decision, an order for costs was not appropriate, and refused the request.

Mr. Branion indicated that the Respondent would proceed immediately after the hearing to carry out the proposal and revoke the registration of the Applicant. As Ms. Magesvaran had indicated that she was in the process of working with her accountant to complete the late filing on behalf of the Applicant, failure to complete which was in part the reason for the proposal, Mr. Branion advised that she should still complete the filing as this would be considered, along with her participation in the Applicant corporation, should she or a corporation in which she was a principal applied for registration under the Act in the future.

The Tribunal therefore orders that the appeal is dismissed on consent, and the Respondent's request for costs of the appeal is dismissed.

LICENCE APPEAL TRIBUNAL

G. Maurice Power
Member

RELEASED: December 8, 2003

FILE NAME: 1757.tia.Sunwin Travels and Tours Inc.doc

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice or Divisional Court is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



FABIAN QUIROGA

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

TO DISALLOW A CLAIM

TRIBUNAL: JOHN ORT, Member

APPEARANCES: FABIAN QUIROGA, Applicant, representing himself

TREVOR BRANION, Counsel, representing the Travel
Industry Council of Ontario

DATE OF
HEARING: November 5, 2003 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") by Fabian Quiroga (the "Applicant") pursuant to Section 62 of Regulation 806/93, as amended by Regulation 428/01 (the "Regulation") made under the *Travel Industry Act*, R.S.O. 1990, Chapter T.19, as amended (the "Act"). The Applicant appeals the Decision of the Travel Industry Council of Ontario (the "Respondent") dated July 02, 2003 (the "Decision") denying his claim.

The Decision, Exhibit #1, states:

The Board found that since neither you or your travel agent could provide an explanation as to why your receipt was altered and marked "VOID" it was unable to establish pursuant to Section 50 (1) and (2) that payment was made to Amazonas Travel for travel services, which were not provided due to the bankruptcy or insolvency of Amazonas Travel.

ISSUE:

Should the Tribunal allow the Applicant's claim, in whole or in part or refuse to allow the claim, in whole or in part?

EXHIBITS:

Exhibit #1 - Decision of the Board of the Travel Industry Council of Ontario dated July 02, 2003, denying the Applicant's claim;

Exhibit #2 - Notice of Appeal form received at the Tribunal on July 17, 2003, filed by the Applicant;

Exhibit #3 - Pre-Hearing Order released by the Tribunal on October 7, 2003;

Exhibit #4 - Respondent's Book of Documents;

Exhibit #5 - Cash receipt, provided by the Applicant to the Respondent, and filed by the Respondent;

Exhibit #6 - Receipt book, filed by the Respondent;

Exhibit #7 - Sample signatures of Yanisbel Monteagudo, filed by the Respondent;

Exhibit #8 - December 19, 2002, letter from the Respondent to the Applicant, filed by the Applicant; and

Exhibit #9 - January 07, 2003, letter from the Respondent to the Applicant, filed by the Applicant.

EVIDENCE:

Fabian Quiroga and Yanisbel Monteagudo testified on behalf of the Applicant. Lori Furlan testified for the Respondent.

Applicant's EvidenceTestimony of Fabian Quiroga

The Applicant's testimony was translated from Spanish to English by an interpreter. The Applicant understands English and does speak English at work, but he speaks Spanish better than English.

On May 7, 2002, the Applicant and his wife went to Amazonas Travel Agency Inc. ("Amazonas Travel"). They had not dealt with that travel agency before. The Applicant went there because of the price.

The Applicant paid \$5,120.00 in cash to Ms. Yanisbel Monteagudo and received from her a receipt. That receipt, Exhibit #5, sets out the date, the amount paid, the balance due of zero, the agent's name, the customer's signature, the signature of the person who received the money, and other particulars. Neither the date of travel nor the name of the airline is set out. Under reservation details, the receipt states, "*4 TKTS FROM TORONTO TO CORDOBA. Departure on December (DATE TO BE ADVISED).*"

The Applicant wanted to travel with his family to Argentina in June or July, but did not know whether he could get away because of his work. He knew that he would get time off in December and could travel then at the latest. The Applicant left the money with Amazonas Travel and did not attempt to get it back before December 2002.

The receipt is filled in with blue ink. Across it appears "VOID" written in a light black line. When the Applicant received the receipt, he checked the amount, but he does not recall whether the receipt was marked void.

In November 2002, the Applicant's wife made the reservation for the trip. She received a printout of the reservation dated November 19, 2002, from Amazonas Travel. See tab 1 of Exhibit #4. She was advised that the tickets would be ready in three or four days. When she called back, she was told that the travel agency needed a few more days.

The Applicant and his wife kept calling Amazonas Travel, but could only reach an answering machine. When the Applicant went to the travel agency, he found the office closed. A sign on the door advised calling the Respondent for information. The Applicant visited the Respondent's office twice, delivered documents, and made a claim for compensation. The claim was marked by the Respondent received on December 19, 2002. See tab 1 of Exhibit #4.

The Applicant's wife was told that many of the people who had worked at Amazonas Travel now work at CWT Travelbest. On December 13, 2002, the Applicant and his wife paid \$4,750.00 to CWT Travelbest for alternate travel arrangements for their family for a trip to Cordoba, Argentina. They received tickets and made the trip. Again, see tab 1 of Exhibit #4.

Testimony of Yanisbel Monteagudo

The Applicant's wife paid Yanisbel Monteagudo \$5,120.00 at Amazonas Travel in the first week of May 2002. The Applicant was also present. Ms. Monteagudo filled out the receipt, Exhibit #5, in its entirety and her signature appears at the bottom of it. The form of her signature changes when she is busy. At the request of the Respondent's Counsel, she provided sample signatures. See Exhibit #7.

An invoice was issued to a customer only when a ticket was provided. The yellow and pink copies of receipts in the cash receipt book, Exhibit #6, were the manager's responsibility. Cash payments went to a person at the back of the office. Ms. Monteagudo did not do the banking for Amazonas Travel.

Ms. Monteagudo explained how the Applicant's receipt was marked void. She put some other customer's invoice on top of the cash receipt book and marked the invoice void. The writing came through the carbon of the invoice onto the receipt.

In May, the Applicant was not sure when he would travel. The price was calculated for a trip by the Applicant, his wife, a child, and an infant. The Applicant did not take part in a travel now and pay later arrangement.

On November 19, 2002, Ms. Monteagudo made the reservation for the Applicant at Amazonas Travel.

In the middle of December 2002, the Applicant came to her at CWT Travelbest to make alternate travel arrangements.

Testimony of Lori Furlan

Ms. Furlan has been a claims co-ordinator for the Respondent for eleven years. She receives documents and processes claims.

Ms. Furlan spoke to the Applicant in English for a few minutes on December 19, 2002. She received documents from the Applicant, but does not recall whether the cash receipt was marked void.

Amazonas Travel was registered under the Act. The Respondent examined the records of Amazonas Travel after it closed. Bank deposits of cash made by Amazonas Travel were not itemized with the names of customers who provided the cash. They were done as bulk deposits and within no particular time period. See page 2 of tab 4 of Exhibit #4. The principal of Amazonas Travel admitted that he took cash received from customers and used it to pay company expenses. Amazonas Travel allowed its registration under the Act to lapse on December 4, 2002.

Before today, Ms. Furlan did not hear the explanation given by Yanisbel Monteagudo of how the receipt was marked void. When she spoke to Yanisbel on April 17, 2003, Yanisbel could not explain how "void" had come to be written on the receipt. Although Ms. Furlan made a note about that conversation with Yanisbel, no mention of a discussion of the void marking on the receipt appears in the note. See tab 3 of Exhibit #4.

Ms. Furlan argued that non-provision of travel services to the Applicant was not due to the closure of Amazonas Travel in December 2002 and its bankruptcy or insolvency.

The Applicant paid in May 2002, and he was to travel in June. He did not travel because he could not get time off from work in June.

The possible eligible amount of the Applicant's claim is \$4,707.12, being the amount paid less taxes.

LAW:

Regulation 806/93, as amended by Regulation 428/01, made under the *Travel Industry Act*, R.S.O. 1990, Chapter T.19, as amended, states the following:

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

(a) the customer made payment for the travel services directly to or through a registered travel agent;

(b) the customer has made a demand for payment from the registered travel agent or the appropriate registered wholesaler; and

(c) the customer has not been reimbursed by,

(i) the registrant because the registrant is unable to pay by reason of bankruptcy or insolvency...

(2) A reimbursement under subsection (1) is limited to the amount paid by the customer to the travel agent for those travel services that were not provided.

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

...

4. For a payment, including a non-refundable payment, for travel services that were available but not received if the failure to receive the travel services is due to the customer's or the traveller's action or failure to act.

...

7. For any taxes, fees or levies imposed by a government or a government body.

62. (6) The Tribunal may,

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

(b) refuse to allow the claim in whole or in part.

FACTS FOUND PROVEN:

The Tribunal has carefully reviewed the evidence and finds as a fact:

- 1) The receipt from Amazonas Travel, Exhibit #5, is signed by Yanisbel Monteagudo at the bottom next to the notation "received by".
- 2) The receipt, Exhibit #5, is a valid receipt. It was marked "void" accidentally.
- 3) Travel services paid for by the Applicant were unavailable due to the bankruptcy or insolvency of Amazonas Travel, not due to action or failure to act of the Applicant.

APPLICATION OF LAW TO FACTS:

The Applicant made payment for travel services directly to or through Amazonas Travel, a registered travel agent. He received a valid receipt for \$5,120.00. The Applicant attempted to obtain airline tickets from Amazonas Travel. Later he made a claim for return of his payment.

The Applicant has not been reimbursed by Amazonas Travel because it is unable to pay by reason of bankruptcy or insolvency. The travel services were unavailable due to the bankruptcy or insolvency of Amazonas Travel, not due to delay of the departure by the Applicant.

As a result, the Applicant is entitled to reimbursement by the Respondent of \$4,707.12, being the amount paid less taxes, pursuant to Section 50 of Regulation 806/93 made under the Act and as calculated at tab 4 of Exhibit #4.

ORDER:

Accordingly, by virtue of the authority vested in it under Section 62 of Regulation 806/93 made under the *Travel Industry Act*, the Tribunal directs the Travel Industry Council of Ontario to allow the Applicant's claim in part and directs it to pay \$4,707.12 to the Applicant within 30 days of this date, in satisfaction of his claim.

LICENCE APPEAL TRIBUNAL

John Ort, Member

RELEASED: December 12, 2003

FILE NAME: 1838.tia.Quiroga.doc

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice or Divisional Court is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

1350287 ONTARIO LTD. O/A DESTINATIONS UNLIMITED

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

IN THE MATTER of the REGISTRATION of
1350287 ONTARIO LTD. O/A DESTINATIONS UNLIMITED
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: September 23, 2003

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

1350287 ONTARIO LTD. O/A DESTINATIONS UNLIMITED

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by 1350287 Ontario Ltd. o/a Destinations Unlimited, the Applicant, and the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

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

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

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

File name: 1983.tia.DestinationsU.Consent.Ord.

SCHEDULE "A"

BETWEEN:

1350287 ONTARIO LTD. O/A DESTINATIONS UNLIMITED

Applicant

- and -

REGISTRAR, TRAVEL INDUSTRY ACT

Respondent

WAIVER AND CONSENT

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

AGREED STATEMENT OF FACTS

1. The Registrant was registered as a travel agent (Registration No. 5000010/R) on July 15, 1999.
2. On October 26, 2000, the Registrant filed its financial statements for the fiscal year ended April 30, 2000, which were due by July 31, 2000. It appeared that working capital requirements were met as at April 30, 2000.
3. On October 19, 2001, the Registrant filed its financial statements for the fiscal year ended April 30, 2001, which were due by July 31, 2001. It appeared that working capital requirements were met as at April 30, 2001.
4. On November 8, 2002, the Registrant filed its financial statements for the fiscal year ended April 30, 2002, which were due by July 31, 2002. It appeared that working capital requirements were met as at April 30, 2002.
5. By letter dated March 11, 2003, the Registrant was requested by TICO to file its financial statements for the fiscal year ending April 30, 2003, by July 31, 2003.
6. By letter dated August 12, 2003, the Registrant was issued a reminder to file its April 30, 2003 financial statements which were due by July 31, 2003, on or before August 31, 2003.
7. On August 18, 2003, the Registrant telephoned TICO and advised that the books and records were not up to date, but that they would be given to the bookkeeper within a week. The Registrant was advised that TICO may initiate administrative action including a Proposal to Revoke registration.
8. On August 29, 2003 the Registrant telephone TICO and advised that the books and records were at the bookkeeper's office, but that the bookkeeper was on vacation until September 2, 2003.
9. On September 11, 2003, Mr Steve Beaumont telephoned TICO and advised that he required additional time as he did not have all the books and records of the Registrant, and that once he received all the information, he would then have the licensed public accountant finalize the financial statements. Mr Beaumont was advised that TICO was unable to give an extension and that a Proposal to Revoke registration may be issued.
10. On September 23, 2003 a Proposal to Revoke the Registrant's registration was issued.

11. On October 7, 2003, the Registrant filed its financial statements for the fiscal year ended April 30, 2003. The financial statements reflected sufficient working capital as of April 30, 2003.
12. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

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

1. The Registrar refrain from carrying out the Proposal to Revoke Registration dated September 23, 2003;
2. The Registrant's registration is to be subject to the following terms and conditions:
 - (a) The Registrant shall file financial statements, as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time for its fiscal year ending April 30, 2004, no later than July 31, 2004;
 - (b) The Registrant shall file financial statements, as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time for its fiscal year ending April 30, 2005, no later than July 31, 2005;
3. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) or (b), the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.
4. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

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

DATED at Mississauga this ____ day of December, 2003

Ms. Helen M. Billings
1350287 Ontario Ltd. o/a Destinations
Unlimited
I have authority to bind the company

Mr. Michael Pepper
Registrar, *Travel Industry Act*

1359253 ONTARIO LTD. O/A SANTO DOMINGO TRAVEL SERVICES

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

IN THE MATTER of the REGISTRATION of
1359253 ONTARIO LTD. o/a SANTO DOMINGO TRAVEL SERVICES
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: October 16, 2003

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

1359253 ONTARIO LTD. o/a SANTO DOMINGO TRAVEL SERVICES

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a pre-hearing by teleconference in the above matter on January 6, 2004;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against all parties* to commence, by teleconference, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Friday, January 23, 2004.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: December 29, 2003

file name: 2017.tia.Santo Domingo Travel.adj



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There has been no decision released under this Act, yet, as there was no appeal filed with the Tribunal.

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